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THE KĀREWAREWA URUPĀ REPORT

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THE KĀREWAREWA URUPĀ REPORT

Pre-publication Version

WAI 2200

WAITANGI TRIBUNAL REPORT 2020

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ISBN 978-0-908810-94-9 (PDF)

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Typeset by the Waitangi Tribunal
Published 2020 by the Waitangi Tribunal, Wellington, New Zealand
24 23 22 21 20 5 4 3 2 1
Set in Adobe Minion Pro and Cronos Pro Opticals

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Waitangi Tribunal
Te Rōpū Whakamana i te Tiriti o Waitangi
Kia puta ki te whai ao, ki te mārama

The Honourable Nanaia Mahuta
Minister for Māori Development

The Right Honourable Jacinda Ardern
Minister for Arts, Culture and Heritage

The Honourable Kelvin Davis
Minister for Crown–Māori Relations

The Honourable Andrew Little
Minister for Treaty of Waitangi Negotiations

Parliament Buildings
WELLINGTON

25 May 2020

E ngā Minita,

Tēnā koutou i roto i ēnei rā taumaha. He maha ngā whenua e pāngia ana e te mate Korona, a tini noa iho ngā kaumātua me ngā tamariki e riro ana i te mate i roto i ngā marama e hia ake nei. Tēnei te tangi atu ki a rātou katoa te hunga kua kapohia e te ringa kaha o aitua.

Tēnā anō hoki koutou i tā koutou mahi e hoehoe haere nā ki tēna wāhi, ki tēna wāhi, ki te kawe i ia utanga, i ia utanga, ki te iti, ki te rahi. Tēnei tā mātou kete nei, e hiahiatia ana e mātou o te Rōpū Whakamana i te Tiriti o Waitangi kia utaina ki tō

Ministers,

We extend our sincere greetings to you in these challenging times. Many countries continue to be in the grip of the Covid-19 pandemic, which has taken incredible numbers of both young and old over these past few months. We respectfully acknowledge all of those who have succumbed to this tragic illness.

You have steered our nation's waka throughout this difficult period and ensured that assistance has been provided to those most in need. The Waitangi Tribunal now has a small contribution to make in support of

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MINISTRY OF JUSTICE
Tāhū o te Ture

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koutou waka. Mā koutou e pai kia kawea atu ki te tauihu, ki te taurapa rānei, nā te mea, he pai kia pūkai atu ngā taonga matarahi ki te taurapa. Kāti ēnā, me hori pū tā mātou kupu.

Tērā tētahi whenua ko te Kārewarewa te ingoa, kua oti kē atu anō e mātou te pūrongo atu hei titiro mā koutou ngā Minita me te ao whānui. Kāore rawa te whenua i rohea atu hei urupā, ēngari he urupā rongonui ki Waikanae i ngā tau maha kua hori nei. E hia kē ngā tau ka nui kē te mahi takeo i ngā mahi ake a Te Ātiawa / Ngāti Awa ki te whakapai ngātahi i tēnei kaupapa, e rahua haere tonutia ana hoki e te ture whenua me ngā kaupapa here. Tērā pea he rite tonu rātou ki te pūngawerewere i piki noa kia eke ia ki te patu o te whare, a kāore ia i eke; heoi, tohe pūnoke tonu ana, kātahi ka eketia tana wāhi i tohe ai.

Kei roto i te pūrongo nei ngā hua o ngā hui i whakahaeretia, ngā take i āta wānangahia, ā ko tōna whakatutukitanga ko ngā tohutohu me ngā tūmanako hei whiriwhiri mā koutou, hei whakatinana hoki mā te Kāwanatanga.

Kia tau ki a koutou katoa te rangimarie, me te aroha noa, me te rongomau.

your efforts to improve outcomes for our nation. You can determine if it has a place in the bow or the stern of your waka, because we recognise that the most important cargo should take precedence in the stern. Let us now turn to the purpose of this report.

This report now presented to you and the general public concerns a parcel of land named Kārewarewa. Despite being a historically significant burial site in Waikanae for many years, it has not been formally set aside as a cemetery. Over many years, Te Ātiawa / Ngāti Awa have made efforts to have this matter addressed but were continually thwarted by contemporary land laws and policies. Hopefully now they will, like the spider that tried many times to scale the wall of a house, eventually succeed by perseverance.

The report reflects the outcomes of our hearings, the matters that were raised, the aspirations presented, and guidance for you and the Government to consider in your deliberations on how to deal with this matter.

May harmony, love, and peace be upon you all.

Claims about Kārewarewa urupā were lodged by Te Ātiawa / Ngāti Awa ki Kapiti and heard in 2018–19 as part of our Porirua ki Manawatū inquiry. We agreed to prepare an early report on the urupā, in advance of our iwi volume for Te Ātiawa / Ngāti Awa, because the urupā requires urgent protection from further residential development. The report is presented now in pre-publication form but our findings and recommendations will not change in the final publication.

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In 1839, the historically important battle of Kuititanga occurred in the Waikanae district, ending a period of conflict between Te Ātiawa / Ngāti Awa and Ngāti Raukawa. Many of those who died were buried on land at the eastern confluence of the Waikanae and Waimeha Rivers. Other prominent ancestors were also buried there. These included Metapere Te Waipunahau (a senior rangatira and the mother of Wi Parata and Hemi Matenga) and the famed Kahe Te Rauoterangi. This urupā is known as Kārewarewa. After the introduction of the native land laws, the people tried repeatedly to set about 20-acres aside as an urupā between 1896 and 1919. The Kārewarewa urupā block was finally granted its own separate title as Ngārara West A14B1 in 1919 but was not formally set apart as a native (later Māori) reservation.

In 1968, a meeting of assembled owners was called under the Māori Affairs Act 1953 to vote on a resolution to sell this block to a development company, the Waikanae Land Company. Having been advised that this was not the urupā block at the meeting, the owners voted to vest the land in the Māori Trustee for sale. Only 13 of the 77 owners were present (in person or by proxy). We found that the statutory regime allowed small minorities of owners (as in this case) to sell the land of the majority without their knowledge or consent. The Māori Affairs legislation authorised a very low quorum for such meetings, and then provided for the Māori Trustee to act as agent to execute the deed (circumventing the non-consent of the majority of owners). There were no checks and balances in this system because the Māori Land Court's confirmation of a sale was confined by statute to matters of price.

We found that this statutory regime deprived owner groups of their tino rangatiratanga over their land and breached the Treaty principles of partnership and active protection. The prejudice in this case was the loss of ownership and control of this significant urupā, leaving it protected only by its cemetery designation in the district plan.

In 1969, the Waikanae Land Company purchased the urupā block from the Māori Trustee. It then applied to the Horowhenua County Council for a district plan change under the Town and Country Planning Act 1953, in order to remove the 'Māori Cemetery' designation and develop the land for housing. In our inquiry, the Crown conceded that it failed to 'adequately investigate' whether the block was an urupā when it became aware of this application. The Crown also conceded that it failed to file an objection with the council or intervene to protect the urupā, which 'led to the desecration of the urupā and was a breach of Te Tiriti o Waitangi / the Treaty of Waitangi and its principles'. We agreed that this concession was apt.

The Horowhenua County Council decided to revoke the cemetery designation in 1970, despite objections from tribal leaders. The council reached this decision partly because the information provided at the committee hearing was incorrect or ill-informed. This included the failure to uncover

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historical evidence about the urupā, which resulted in a belief that the land had been set aside in 1919 to be used in the future as a new 'cemetery'. There was also a mistaken belief that the owners had unanimously sold the block (when only a small minority had voted to do so). But the council was also influenced by the good town planning principles in the Town and Country Planning Act 1953. We found that this Act was inconsistent with Treaty principles. It was a monocultural piece of legislation which took no account of Māori values or interests, and which accorded iwi and hapū no statutory role – in either consultation or decision-making – in district plan processes.

Further, we found that the Burial and Cremation Act 1964 gave little or no protection to Māori burial grounds, and did not protect Kārewarewa in this instance.

The former owners and the wider iwi were prejudiced by the desecration of the urupā in the 1970s. About 350,000 cubic metres of dredged material from the adjacent wetland was dumped on top of it, followed by further modification and the construction of streets and houses on more than half of the urupā block. This was very serious for the kaitiaki, especially for those whose ancestors were buried there.

The remaining part of Kārewarewa was spared development because the company went into receivership in the late 1970s. In 1990–2000, however, work resumed in the company's name on behalf of unpaid security holders. During preparatory work for further development, kōiwi were exposed on two occasions, which resulted in an unsuccessful Historic Places Trust prosecution. The protection given the urupā by the Historic Places Act 1993 – once kōiwi were uncovered – does seem to have deterred the company's developers from further action at the time. In 2014–18, the developers resumed their attempts. They began with an archaeological investigation aimed at delineating the exact location and limits of burials on the undeveloped part of Kārewarewa. In 2016, Heritage New Zealand Pouhere Taonga granted an application for an exploratory authority to dig a test pit. The application process under section 56 of the Heritage New Zealand Pouhere Taonga Act 2014, and the degree of protection provided for Kārewarewa by this Act, were strongly debated between the Crown and claimants.

We found that there are systemic Treaty breaches in the processes for exploratory authorities and the requirements of section 56, especially as compared to the requirements for other kinds of archaeological authorities under the Act. The statutory timeframe for processing and deciding section 56 applications is inadequate. There is no requirement for applicants to provide an assessment of Māori values or the impact of an invasive exploratory investigation on those values, even though wāhi tapu (in this case an urupā) may be involved. Further, section 56 does not require decision-makers to consider Māori values or the impact on those values, again despite the use of

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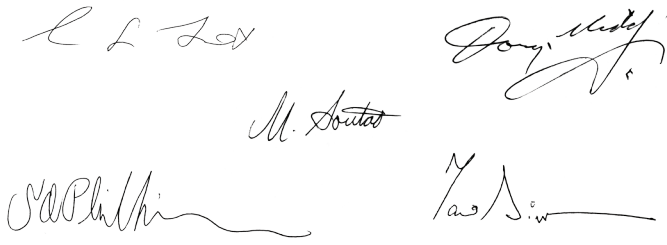
'invasive' techniques on an urupā. These flaws reflect an imbalance in section 56. Although invasive investigations may have little or no archaeological effects, they may still have profound spiritual and cultural effects in the case of wāhi tapu. Also, the appeal rights in the Act are (and will remain) inadequate so long as iwi organisations are inadequately resourced. We found that the claimants were prejudiced by the granting of the application under section 56 of the Act.

At the end of our report, we made a number of recommendations to prevent the recurrence of such prejudice if future applications are made relating to Kārewarewa or other urupā. We recommended that the Māori Heritage Council lead a review of the statutory timeframes for section 56 applications, following which Heritage New Zealand would recommend any necessary changes to the Minister. We also recommended the amendment of section 56 to require an assessment of Māori values in the case of wāhi tapu (including urupā), and an assessment of the impact of the invasive exploratory investigation on those values. Also, section 56 should be amended so that the decision-makers must take Māori values (and impacts on those values) into account for wāhi tapu.

Under section 4A of the Treaty of Waitangi Act 1975, the Tribunal may not make any recommendations about 'the return to Māori ownership of any private land' or 'the acquisition by the Crown of any private land'.

We hope that this matter may be resolved by both statutory amendment (to prevent future prejudice) and dialogue between parties, so that the Crown's Treaty obligation to protect Kārewarewa urupā will be given proper effect.

Nāku noa, nā



Deputy Chief Judge Caren Fox, the Honourable Sir Douglas Lorimer Kidd KNZM, Dr Grant Phillipson, Tania Te Rangingangana Simpson, Dr Monty Soutar

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PREFACE

This is a pre-publication version of the Waitangi Tribunal's *Kārewarewa Urupā Report – Pre-publication Version*. As such, all parties should expect that, in the published version, headings and formatting may be adjusted and typographical errors rectified. Additional maps, photographs, and illustrative material may be inserted. A select record of inquiry may be appended. However, the Tribunal's findings and recommendations will not change.

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ABBREVIATIONS

app	appendix
CA	Court of Appeal
CE	chief engineer
ch	chapter
cl	clause
doc	document
ed	edition, editor
ltd	limited
m	metre
MCB	Manawatū Catchment Board
memo	memorandum
n	note
no	number
NZ	New Zealand
NZLR	*New Zealand Law Reports*
NZPD	*New Zealand Parliamentary Debates*
NZTA	New Zealand Transport Agency
p, pp	page, pages
para	paragraph
PC	Privy Council
pt	part
RMA	Resource Management Act 1991
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
TAKW	Te Ātiawa ki Whakarongotai
v	and
vol	volume
Wai	Waitangi Tribunal claim
WLC	Waikanae Land Company

Unless otherwise stated, footnote references to briefs, claims, documents, memoranda, papers, submissions, and transcripts are to the Wai 2200 record of inquiry. A full copy of the index to the record is available on request from the Waitangi Tribunal.

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CHAPTER 1

INTRODUCTION

1.1 Introduction

1.1.1 What this report is about

This report is an exception to the series of volumes being prepared for the iwi phases of the Porirua ki Manawatū inquiry. One volume has been released so far on Muaūpoko claims.[1] The present report addresses claims about Kārewarewa urupā, which was raised with us as an urgent matter during the Te Ātiawa / Ngāti Awa hearings in 2018–19. Closing and reply submissions were filed in late 2019 and early 2020. The release of the report has been delayed slightly by the Covid-19 outbreak and lockdown. We are releasing it early in pre-publication format in order to assist the parties to resolve this important matter as soon as possible.

Our first introduction to this urupā was during a site visit at Waikanae Beach on 20 August 2018, the first day of hearings for Te Ātiawa / Ngāti Awa. To us, it looked the same as any other suburban neighbourhood, with houses and a grassed area next to them, which the claimants referred to as the urupā at Tamati Place (see figure 2). This piece of land is owned by the Waikanae Land Company. Claimant Ben Ngaia explained: 'Kārewarewa today contains housing development but also an area of open space which has not been developed. We continue to have no meaningful way to express our kaitiakitanga to that whenua.'[2] Manu Parata told the Tribunal that the alienation and inappropriate development of Kārewarewa urupā was a major grievance for the iwi. He wanted the land protected from further development.[3]

The late Paora Ropata filed the Wai 1945 claim about the urupā in 2008.[4] Mr Ropata provided evidence on behalf of the Kaunihera Kaumātua (Kaumātua Council) at our second hearing. He explained that the urupā was located on a 20-acre block at Waikanae Beach, Ngārara West A14B1, which the Native Land Court had made inalienable in 1896. At a meeting of assembled owners in 1968, those present voted to vest the land in the Māori Trustee for sale. According to Mr Ropata, they did so because of incorrect 'legal advice' that the piece of land being sold was not the urupā block. The Māori Trustee sold the land to the Waikanae Land Company in 1969. The company applied to the county council to have the

1. Waitangi Tribunal, *Horowhenua: The Muaūpoko Priority Report: Pre-Publication version* (Wellington: Waitangi Tribunal, 2017)
2. Benjamin Ngaia, answers to written questions, 11 October 2018 (doc E3(d)), p 3
3. Manu Parata, brief of evidence, 30 July 2018 (doc E6), pp 2, 4–5
4. Wai 1945 statement of claim, 25 August 2008 (paper 1.1.60)

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Map 1: The Kārewarewa urupā block in relation to current streets, Waikanae Beach
Source: Mary O'Keeffe, 'Tamati Place – Archaeological Issues: Report to Neil Carr, PropertyPathways Ltd', August 2014, p 19 (O'Keeffe, papers in support of brief of evidence (doc G6(e)), p 21).

cemetery designation removed so that the land could be developed. Despite opposition from kaumātua and kuia, the council agreed to lift the cemetery designation.[5] Streets and residential housing were then constructed on the urupā block in the 1970s.

Mahina-a-rangi Baker, Pou Takawaenga Taiao for Te Ātiawa ki Whakarongotai Charitable Trust, explained that the Waikanae Land Company still owned the land on which the urupā is located. The company attempted to develop the remaining grassed land for housing in 1999–2000. This attempt was stymied by the unearthing of kōiwi (human remains). In 2014–18, however, the company resumed its efforts, starting with a geomagnetic survey and test pit aimed – according to Ms Baker – at showing that kōiwi are limited to a particular part of the site, allowing

5. Paora Tuhari Ropata, brief of evidence, 17 January 2019 (doc F1), pp 14–21. The late Mr Ropata was unwell at the time of the hearing and his evidence was presented by Te Kahu Ropata on 9 February 2019.

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the remainder to be developed.[6] She told us the claimants' perspective on that work:

> The analogy I've used to describe the offence that this rationale presents, is if someone was to propose entering into an old battle ground where people have fallen, such as Gallipoli, or to enter into any of the cemeteries in Aotearoa, and dig around in an attempt to find a 0.5 metre squared area that doesn't appear to contain human remains, as a basis for proceeding to develop houses on those sites.[7]

Although no further development work ensued after the archaeological investigation carried out in 2016–17, the claimants are deeply concerned at the prospect of further disturbance to the burial ground. Ms Baker explained that new archaeological testing or development proposals could come at any time:

> And this is not 100 years ago, it's not 50 years ago, it's today. In 2018, it can still be acceptable for developers to suggest that they might exhume the kōiwi of our ancestors. And we have to sit with the knowledge that there is no guarantee that the Crown will prevent this from happening. This is the reality of what we live with as Māori every day. It's honestly quite exhausting to have to be hyper vigilant that at any time, the attempts to exhume could be initiated again. For all I know I could have an email sitting in my inbox right now that relates to this *take*.[8]

In response to the deep concern expressed by Paora Ropata, Manu Parata, Mahina-a-rangi Baker, and other claimants, the Tribunal decided that this matter should be reported upon early, in advance of our reporting on the Te Ātiawa/Ngāti Awa phase.[9]

1.1.2 What this chapter is about

In this introductory chapter, we begin by setting out the evidence that the Ngārara West A14B1 block contained a nineteenth-century urupā. The Crown did not question this point in the present inquiry but the existence of the urupā was denied in the proceedings to lift the cemetery designation in 1969–70 (discussed in chapter 3). The issue has also been debated more recently in attempts to complete the Tamati Place housing development (see chapter 4). For those reasons, it is important to explore the evidence about the urupā. We then summarise the parties' arguments and the issues for consideration in this report. After that, we provide a brief explanation of the relevant Treaty principles for the report. The chapter concludes with a short outline of the structure and contents of the remaining chapters.

6. Mahina-a-rangi Baker, brief of evidence, 22 January 2019 (doc F11), pp 51–54
7. Mahina-a-rangi Baker, brief of evidence (doc F11), p 52
8. Transcript 4.1.18, p 129
9. Waitangi Tribunal, memorandum, 18 April 2019 (paper 2.6.52), p [4]

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1.2 Kārewarewa Urupā

We received claimant traditional evidence about the urupā in two forms: tangata whenua witnesses provided oral evidence and research at our hearings; and technical witnesses provided some traditional evidence that had been recorded in writing at various times since 1840. We have drawn upon both forms of evidence for our discussion of the urupā here.

Mahina-a-rangi Baker stated:

> Te Kārewarewa Urupā is located within an old dune belt at the confluence of the Waikanae River and the old course of the Waimeha Stream (or Waimea depending on dialect), north of the Waikanae River and estuary, and east of the Waimeha Stream, in the coastal settlement of current day Waikanae Beach.[10]

Kuititanga pā, Waimeha pā, and Kārewarewa kainga were located close together in this area, within a large cultivation ground stretching from the present El Rancho Christian park to the mouth of the Waikanae River. Waimeha pā was a 'small outpost of the main Āti Awa pa at Kenakena'. According to some sources, there was only one pā – Waimeha and Kuititanga being the same pā.[11] In an 1890 Native Land Court hearing, Wi Parata described Kārewarewa as having been a 'village'. According to W Carkeek in his 1966 book, the exact location of Kārewarewa is unknown, but Mere Pomare stated that it was on the north side of the Waikanae River. Mere Pomare's evidence to the court (also in 1890) was that Kārewarewa was a 'burial ground' where her mother, 'the famous chieftainess Te Rauoterangi', was buried. Others were buried there, she said, including 'some of Wi Parata's ancestors', and the place was 'very tapu'. There were 'restrictions on the taking of flax or other plants from the area'.[12] W Carkeek also identified Waimeha pā as located at the junction of the Waimeha stream and Waikanae River, and as a burial ground following its abandonment after the battle of Kuititanga. Metapere Te Waipunahau, Wi Parata's mother, was buried there, as was the mother of Eruini Te Marau. The latter described it as a burial ground in the 1890 hearings, as did Hira Maika.[13]

Mahina-a-rangi Baker's cultural impact assessment report, prepared in 2015, views the Waimeha and Kārewarewa burial grounds referred to in 1890 as essentially in the same place. She explained that 'the name Te Kārewarewa is that which is used by the descendants of Te Ātiawa today to refer to the site at the eastern

10. Mahina-a-rangi Baker for Te Ātiawa ki Whakarongotai Charitable Trust, 'Cultural Impact Assessment: Te Kārewarewa Urupā', November 2015, p 5 (Mahina-a-rangi Baker, papers in support of brief of evidence (doc F11(a)), p 580)

11. Mahina-a-rangi Baker, 'Cultural Impact Assessment: Te Kārewarewa Urupā', pp 5–8 (Baker, papers in support of brief of evidence (doc F11(a)), pp 580–583); W C Carkeek, *The Kapiti Coast: Maori History and Place Names* (Wellington: AH and AW Reed, 1966) (doc A114), p 58; Hemi Sundgren, brief of evidence, 29 January 2019 (doc F19) pp 14–17; Lou Chase, 'Ngātiawa / Te Āti Awa Oral and Traditional History Report', February 2018 (doc A195), p 57

12. Carkeek, *The Kapiti Coast* (doc A114), p 116

13. Carkeek, *The Kapiti Coast* (doc A114), p 152

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confluence of the Waikanae and Waimeha.'[14] There does seem to have been uncertainty at times about the name of the urupā located at Tamati Place. But there has always been certainty within the iwi of the existence of an urupā at the confluence of the rivers. The 20-acre block we are concerned with in this report has been consistently identified as a 'Māori cemetery' or 'urupā' in records since 1896.

The battle of Kuititanga will be described more fully in the Te Ātiawa / Ngāti Awa volume of our report. In brief, this 1839 battle marked the culmination of a period of uneasy relations between Te Ātiawa / Ngāti Awa and Ngāti Raukawa in the Waikanae and Otaki districts. The historical evidence is that the first people buried at the site known as Kārewarewa were some of those who fell at Kuititanga. The custom of Christian burial was followed but grave sites were not marked.[15] Ms Baker explained:

> The area was then no longer appropriate for occupation or food cultivation and was thus abandoned and deemed waahi tapu. From the mid 19th century the site has been used as an urupā. Several very significant tūpuna of Te Ātiawa are recorded as being buried there, as well as Pākehā that had some connection to Te Ātiawa. Te Kārewarewa is still regarded as an urupā and waahi tapu.[16]

The urupā block was partitioned out of Ngārara West A14 in 1919. The owners persistently tried to set this land aside over a quarter decade (in 1896, 1905, and 1919). The 20-acre Ngārara West A14B1 was located on the northern side of the Waikanae River and adjacent to the Waimeha stream. It was recorded variously by the court minute-takers at these sittings as a 'cemetery', an 'urupā', and a 'graveyard' (this is discussed further in chapter 2). Unfortunately, the extremely brief court minutes do not include any details about the urupā or its name.

In 1970, when the Waikanae Land Company sought to lift the cemetery designation from this land, Te Aputa Kauri objected. Mrs Kauri was the daughter of Tohuroa Parata and great-granddaughter of Wi Parata. She stated that she had ancestors buried in the block, which she described as 'tapu land'. It was, she said, 'the resting place of many persons connected with the early history of Waikanae.'[17] Sylvia Tamati also objected, stating that this land was the 'burial ground of my Tribal ancestors of "Te Atiawa"'.[18] Johnson Te Puni Tamati Thomas, a descendant of Unaiki Parata, filed an objection stating: 'My ancestors fought, died and

14. Mahina-a-rangi Baker 'Cultural Impact Assessment: Te Kārewarewa Urupā', p 9 (Baker, papers in support of brief of evidence (doc F11(a)), p 584)

15. Mahina-a-rangi Baker 'Cultural Impact Assessment: Te Kārewarewa Urupā', pp 5, 8 (Baker, papers in support of brief of evidence (doc F11(a)), pp 580, 583); Hemi Sundgren, brief of evidence (doc F19), p 17

16. Mahina-a-rangi Baker 'Cultural Impact Assessment: Te Kārewarewa Urupā', p 13 (Baker, papers in support of brief of evidence (doc F11(a)), p 588). See also Hemi Sundgren, brief of evidence (doc F19), p 17.

17. Te Aputa Kauri, statement of objections, 2 April 1970 (Suzanne Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), p 98)

18. Sylvia Tamati, statement of objections, 2 April 1970 (Woodley, 'Local Government Issues' (doc A193(c)(viii), p 94)

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are buried in this cemetery and Tapu ground'.[19] Finally, Jillian Simmonds also objected, stating that the land was tapu and she had 'ancestors and relatives buried in [this] Maori Cemetery'.[20]

In 2015, Mahina-a-rangi Baker consulted kaumātua about what they had known about the site when growing up:

> Some recalled the path they would take as children and adults to reach the river mouth, which would cross Te Kārewarewa. They had been told as children that it had been a battleground, that there were people buried there, and that it was waahi tapu and they knew to not take anything from that site. Several iwi members gave accounts of kōiwi being occasionally exposed and visible in the area of interest in their youth. They were instructed to leave them where they found them. One kaumatua however, recalled that her brother had the responsibility of occasionally collect[ing] any kōiwi that were highly exposed to take back to another urupā, Takamore, for interment.[21]

At our hearings, Manu Parata explained his understanding that Kārewarewa was a burial place for 'many of the chiefs, kuia and sick children who never returned to Taranaki in the 1848 heke'.[22]

Kaumātua Paora Ropata, who filed the Wai 1945 claim about this urupā, was born at Waikanae in 1938. He told us:

> I cannot recall this urupa being used during my childhood. What I do remember was our elders stressing the need for us children not to go anywhere near the area. Whenever we got injured or sick our parents would ask where we had been, what we had touched. We didn't ask why we couldn't go there, we just knew it was out of bounds and we honoured the word.
>
> It transpires the area identified above had been declared wāhi tapu long before our time and this tikanga had been passed down to those elders who declared their Te Āti Awa iwi and whānau should continue to respect the area as wāhi tapu.
>
> . . . . .
>
> I did not know of this urupa being used when I was a child. I recall the Ngārara Road Public Cemetery, the Ruakohatu and Takamore Cemeteries being the main Urupa in use in the days of my youth. However, the illegal exhumation of eleven bodies from the Kārewarewa urupa is clear evidence this urupa was in use during the mid-1800's and not intended for future use as postulated by the Waikanae Land Company and Horowhenua County Council.[23]

19. Johnson Te Puni Tamati Thomas, statement of objections, 3 April 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), p 92)
20. Jillian Simmons, statement of objections, 2 April 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), p 93)
21. Mahina-a-rangi Baker 'Cultural Impact Assessment: Te Kārewarewa Urupā', p 13 (Baker, papers in support of brief of evidence (doc F11(a)), p 588)
22. Manu Parata, 'Wai Claims 2006–2018 – Te Ati Awa no Runga i te Rangi, Te Ati Awa ki Kapiti: Manuscript of Facts', no date (doc E13(a)), p 38
23. Paora Ropata, brief of evidence (doc F1), pp 15, 20

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In our view, the traditional, historical, and archaeological evidence is clear that this block was an urupā. We have no doubts on that point. Although we have only provided a brief summary here, further historical and archaeological evidence is discussed in the following chapters. For the claimants, this urupā has great significance in cultural and spiritual terms.

Te Kenehi Teira of Heritage New Zealand Pouhere Taonga, in his evidence for the Crown, noted the Historic Places Trust's view in 2001 that 'the area then proposed for development "is part of a known Maori cemetery" and that "invasive testing of this area is inappropriate"'. 'I can confirm', he said, 'that Heritage New Zealand maintains this view.'[24]

1.3 The Parties' Arguments

1.3.1 The claimants' case

The claimants filed two closing submissions which referred to Kārewarewa urupā. They argued that, according to the historical evidence, the Native Land Court and the county council 'recognised Ngārara West A14B1 as a cemetery or urupā through at least the first half of the twentieth century'.[25] In 1968, however, the Crown's Māori land laws allowed a 'meeting of less then 20% of the owners' to vest the land in the Māori Trustee for sale. This resolution was passed by owners 'who only represented 11.5%' of the total shares in the block. According to the claimants, the Māori Trustee then sold the land to the Waikanae Land Company despite objections 'by Te Ātiawa who made it clear that the land was an urupā and was to be inalienable'.[26] Further, the Cemeteries Act 1908 and its successor, the Burial and Cremation Act 1964, ought to have protected the urupā regardless of its underlying ownership.[27] In the claimants' view, the Crown has not in fact provided 'equal levels of protections' to Māori and non-Māori cemeteries.[28]

The Waikanae Land Company applied to the county council for removal of the cemetery designation in 1969. The company argued that there were no proven burials on the site and that the court had set the land aside for a future cemetery in 1919, a position which the Native Land Court had confirmed. The claimants argued that this was clearly incorrect. There was 'indisputable evidence', they said, that the burial ground had been in use long before then, and 'there should therefore have been more attention paid' by officials to 'investigating the nineteenth-century situation'.[29] Despite objections from tribal leaders, the council removed the designation in 1970, thus permitting the desecration of the urupā. The claimants submitted that the Crown did not carry out its Treaty obligations to actively

24. Te Kenehi Teira, brief of evidence, 5 July 2019 (doc G4), p 14
25. Claimant counsel (Wai 1945), closing submissions, 25 October 2019 (paper 3.3.50), p 10
26. Claimant counsel (Wai 1945), closing submissions (paper 3.3.50), p 10
27. Claimant counsel (Wai 1945), closing submissions (paper 3.3.50), p 10
28. Claimant counsel (Wai 1945), closing submissions (paper 3.3.50), p 17
29. Claimant counsel (Wai 1945), closing submissions (paper 3.3.50), p 11

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protect either the urupā or the claimants' tino rangatiratanga in respect of this wāhi tapu.[30]

Further, the claimants argued that the Crown failed to protect the urupā after kōiwi were uncovered in 2000. In their view, Heritage New Zealand failed in its role as 'the main defence of sacred tangata whenua sites'.[31] This was because of 'the inability of Heritage NZ to identify and ensure the implementation of clear and appropriate processes in relation to consultation, and the provision of information to inform the determination of archaeological authority processes'. In the claimants' view, this constituted a 'breach of Heritage's obligation to provide active protection to Māori, their sacred sites and their taonga'.[32] The claimants did not accept the Crown's argument that there were still a number of protection mechanisms available to safeguard the urupā, such as heritage protection orders. In their view, all of the proposed mechanisms would be difficult and costly to seek.[33] Their approach to remedies is discussed further in chapter 4.

1.3.2 The Crown's case

The Crown conceded that three Government departments were made aware of the proposal to change the 'Māori cemetery' designation in 1970, and that 'a reasonable Crown' should have investigated 'whether or not there was a burial site' in 'compliance with its Treaty duties'. The Crown should then have 'used its power to halt the development process', since 'evidence to support the existence of a burial site would have been relatively easy to come by'. The Crown further conceded that its failure to investigate and lodge an objection 'led to the desecration of the urupā and was a breach of Te Tiriti o Waitangi / the Treaty of Waitangi and its principles'.[34]

In respect of the sale of the block in 1969, the Crown submitted that there was no evidence of any opposition to the Māori Trustee's sale. Crown counsel agreed that only 13 owners voted on the resolution to vest the land for sale, but submitted that there is no evidence that there were some 'owners who did not know about the proposed sale and may have objected to its sale had they known about it'.[35]

Most of the Crown's closing submissions related to the period of recent activity (2014–18), the actions of Heritage New Zealand, and the sufficiency of protections for the urupā in the Heritage New Zealand Pouhere Taonga Act 2014. Crown counsel observed that the Historic Places Trust prosecuted the developers after the unearthing of kōiwi in 2000. The Crown also submitted that the digging of a small test pit in 2017 is the only work that Heritage New Zealand has permitted since 2000. The purpose of the test pit was to show whether the 'anomalies' identified by a geomagnetic survey were within the original soil, and therefore supported the

30. Claimant counsel (Wai 1945), closing submissions (paper 3.3.50), pp 12–13
31. Claimant counsel (Wai 1945), closing submissions (paper 3.3.50), pp 13–16
32. Claimant counsel (Wai 1945), closing submissions (paper 3.3.50), p 16
33. Claimant counsel (Wai 1945), closing submissions (paper 3.3.50), pp 16–17
34. Crown counsel, closing submissions: Kārewarewa Urupā, 16 December 2019 (paper 3.3.59), pp 16–17
35. Crown counsel, closing submissions: Kārewarewa Urupā (paper 3.3.59), pp 12–13

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hypothesis that there were more burials on the site and that no further development should take place.[36]

In terms of consultation about the application to dig the pit, the Crown submitted that there was genuine confusion about the roles of various individuals and institutions within the iwi, and denied that the only consultation that occurred was with the Takamore trustees. Nonetheless, the Crown argued that a good faith process may have resulted in a mistake as to the consultees' iwi organisation, and that the legislation provided an appeal process which was an appropriate and sufficient remedy. The Crown further submitted that no authority from Heritage New Zealand was legally required in any case, since the test pit was located well away from any 'anomalies' (possible burial pits), and therefore did not fit within the definitions of an archaeological site in the Act.[37] After a detailed assessment of the relevant facts, the Crown submitted that the granting of permission for the test pit was not done in bad faith and was 'not a breach of its duties under the Treaty of Waitangi'.[38]

In terms of current protections, the Crown submitted that the provisions for granting archaeological authorities, including the role and functions of the Māori Heritage Council (Te Kaunihera Māori o te Pouhere Taonga), protect Kārewarewa urupā from further development. In addition, the Crown pointed to a number of specific protection mechanisms (which are discussed later in the report). In its submission, the Heritage New Zealand Pouhere Taonga Act is consistent with Treaty principles.[39]

1.4 Issues for Determination

The parties' arguments and the evidence before us indicates the following key issues for determination:

- What protection did the Crown's native/Māori land laws provide for the urupā block? (Addressed in chapter 2.)
- What was the legislative scheme under which the urupā block was alienated in 1968–69, and how and why was the block sold? (Addressed in chapter 2.)
- What protections did the Town and Country Planning Act 1953 and the Burial and Cremation Act 1964 provide for the urupā after it was sold? What opportunity did this legislation give the Crown to protect the urupā, and did the Crown act upon that opportunity? (Addressed in chapter 3.)
- What protection have the Historic Places Act 1993 and the Heritage New Zealand Pouhere Taonga Act 2014 afforded the urupā? (Addressed in chapter 4.)

These are the key issues that underlie our discussion and analysis in this report.

36. Crown counsel, closing submissions: Kārewarewa Urupā (paper 3.3.59), pp 20–21, 24–28
37. Crown counsel, closing submissions: Kārewarewa Urupā (paper 3.3.59), pp 28–36, 41–44, 46, 50–52, 54–56
38. Crown counsel, closing submissions: Kārewarewa Urupā (paper 3.3.59), pp 55, 56
39. Crown counsel, closing submissions: Kārewarewa Urupā (paper 3.3.59), pp 56–64

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1.5 Treaty Principles

In this report, the relevant principles of the Treaty of Waitangi are partnership and active protection. We provide a fuller analysis of the signing of the Treaty in the Waikanae area and of the principles of the Treaty in the forthcoming Te Ātiawa / Ngāti Awa volume. Here we give a brief explanation of the partnership and active protection guaranteed to Māori by the Treaty of Waitangi

1.5.1 Partnership

The Treaty forged a partnership between Māori and the Crown. This is one of the fundamental principles of the Treaty. The nature and characteristics of the partnership principle have been described in many Tribunal reports and court decisions. The Treaty partners are required to act towards each other in the utmost good faith. This entails reasonableness, cooperation, trust, and respect for each partner's sphere of operation and authority: the kāwanatanga of the Crown and the tino rangatiratanga of Māori.[40] This arises from articles 1 and 2 of the Treaty, which 'guaranteed Māori their tino rangatiratanga over their land, resources, and people, in return for Māori recognition of the Crown's right to govern and its right of pre-emption'.[41] The Wai 262 Tribunal defined kāwanatanga as 'the right to enact laws and make policies'. The same Tribunal defined tino rangatiratanga as the 'greatest or highest chieftainship', in which 'the rights of authority and control then exercised by the tribal leaders will be protected'. In 'the Treaty context', this meant 'a right to autonomy or self-government'.[42]

Māori autonomy must therefore be respected and protected by the Crown. As the Tribunal has said, 'the Crown does not have an unqualified right to govern' or to determine matters of core interest to the Māori Treaty partner. Rather, overlaps between the respective spheres of kāwantanga and tino rangatiratanta should be resolved by 'negotiation and agreement', which may require collaboration and even consent depending on the matter at issue and its centrality to the Māori interest.[43] In particular, partnership obligations required the Crown to ensure the 'full, free, prior, and informed consent' of Māori 'to anything which altered their possession of the land, resources, and taonga guaranteed to them in article 2'.[44] More generally, the Crown must be properly informed of its Treaty partner's views when its makes a decision within its own sphere that affects Māori interests. This often (but not always) requires consultation.[45]

40. Waitangi Tribunal, *Whaia te Mana Motuhake: In Pursuit of Mana Motuhake: Report on the Māori Community Development Claim* (Wellington: Legislation Direct, 2015), pp 28–29
41. Waitangi Tribunal, *Whaia Te Mana Motuhake*, p 26
42. Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, *Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 1, pp 14, 15, 79, 91
43. Waitangi Tribunal, *Whaia Te Mana Motuhake*, pp 29, 41–42
44. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims*, 4 vols (Wellington: Legislation Direct, 2008), vol 1, p 173
45. Waitangi Tribunal, *The Tarawera Forest Report* (Wellington: Legislation Direct, 2003) pp 26–27

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1.5.2 Active protection

The Te Tau Ihu Tribunal defined the principle of active protection in this way:

> The Crown's duty to protect Māori rights and interests arises from the plain meaning of the Treaty, the promises that were made at the time (and since) to secure the Treaty's acceptance, and the principles of partnership and reciprocity. The duty is, in the view of the Court of Appeal, 'not merely passive but extends to active protection of Māori people in the use of their lands and waters to the fullest extent practicable', and the Crown's responsibilities are 'analogous to fiduciary duties'. Active protection requires honourable conduct by, and fair processes from, the Crown, and full consultation with – and, where appropriate, decision-making by – those whose interests are to be protected.[46]

A number of Tribunal reports have quoted the Privy Council decision in *Broadcasting Assets* in respect of active protection, which stated:

> It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time. For example in times of recession the Crown may be regarded as acting reasonably in not becoming involved in heavy expenditure in order to fulfil its obligations although this would not be acceptable at a time when the economy was buoyant. Again, if as is the case with the Māori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action. Indeed any previous default of the Crown could, far from reducing, increase the Crown's responsibility.[47]

Urupā and other wāhi tapu are among the taonga which the Crown must actively protect.[48] The Māori Heritage Council, a leadership body within Heritage

46. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, p 4

47. *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 517 (Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims – Pre-publication* (Wellington: Waitangi Tribunal, 2019), p 19)

48. Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 2, pp 629, 677

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New Zealand Pouhere Taonga, stated in a recent policy paper that 'Māori heritage places', including wāhi tapu, are '"taonga" as expressed in Te Tiriti o Waitangi'.[49]

1.6 The Structure of this Report

In chapter 2 of this report, we address issues relating to the degree of protection given Kārewarewa urupā by the Crown's native / Māori land laws. This includes an examination of the Māori owners' attempts to cut out and protect the urupā block from sale in 1896–1919. We also consider the form of title available to protect urupā in the decades prior to its sale in 1969, which ranged from restrictions on alienation in the 1890s to the ability to set urupā aside as Māori Reservations in the 1960s. Chapter 2 then considers the statutory regime for meetings of assembled owners in the 1960s, by which a minority of owners voted to appoint the Māori Trustee as agent to sell the urupā block in 1968. We conclude with our Treaty findings on the matters addressed in chapter 2.

In chapter 3, we address issues relating to the degree of protection given Kārewarewa urupā by the Town and Country Planning Act 1953 and the Burial and Cremation Act 1964, once title to the block had passed out of Māori ownership in 1969. This includes an examination of how and why the designation of 'Māori cemetery' was revoked by the Horowhenua County Council in 1970 and the Crown's role in that process. Following the lifting of the designation, the urupā block was partially developed for residential housing. This chapter ends with a section on Treaty findings and a brief examination of the prejudice caused by the development of the block in the 1970s.

Chapter 4 addresses the degree of protection given Kārewarewa urupā by the modern heritage regime. This includes an examination of how the Historic Places Act 1993 prevented further development in the early 2000s, once kōiwi were exposed by new development work in 2000. We then examine the relevant features of the Heritage New Zealand Pouhere Taonga Act 2014, and the role of Heritage New Zealand in the archaeological investigations which took place in 2015–16. We conclude this chapter with our findings and recommendations.

49. Heritage New Zealand Pouhere Taonga, *Tapuwae: Nā Te Kaunihera Māori Mō Te Pouhere Taonga Māori: The Māori Heritage Council Statement on Māori Heritage* (Wellington: Heritage New Zealand Pouhere Taonga, 2017), p 9

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CHAPTER 2

PROTECTING THE URUPĀ UNDER THE CROWN'S NATIVE / MĀORI LAND LAWS

2.1 Introduction

In 1919, Ngārara West A14B1 was partitioned out of the A14 block. It was awarded to all the owners of A14 as Māori freehold land. It remained under this form of title until 1969. A meeting of assembled owners was called in December 1968, which voted to appoint the Māori Trustee as their agent to sell the land. The Māori Trustee duly sold the urupā block to the Waikanae Land Company in 1969. These events raise issues about what forms of protection the Crown's native / Māori land laws[1] gave to urupā in the nineteenth and early twentieth centuries, and why and how the owners agreed to sell the urupā block in 1968. In particular, the statutory scheme for the sale of Māori land in the 1960s is a crucial matter. We address these issues in this chapter.

2.2 Making the Urupā Inalienable, 1896–1909

The Ngārara block consisted of about 45,000 acres in the Waikanae district. After the award of title to Te Ātiawa / Ngāti Awa in 1873, Ngārara was partitioned in the late 1880s and early 1890s during a bitter internal contest between various elements within the iwi.[2] Those matters will be covered in the iwi volume of our main report. The Ngārara West A14 block was partitioned out in 1891 and awarded to 13 individual owners. It consisted of 260 acres.[3] The surveyor's field book in 1891 noted that there were 'graves' on this block.[4] Ngārara West A14 was then subject to contradictory and overlapping partitions as follows:

- 1896: A14A partitioned out for 'cemetery'; residue is A14.
- 1896: one owner's interest awarded to C B Morrison. (But not partitioned?)
- 1905: owners again try to partition out 'urupā' – application dismissed because 1896 orders already made but not complete (due to lack of survey).
- 1906: 75 acres partitioned in satisfaction of survey lien as A14C.

1. In 1947 the Māori Purposes Act changed the term 'native' in all legislation to 'Māori': Māori Purposes Act 1947, s 2(2)
2. See Tony Walzl, 'Ngatiawa: land and political engagement issues, c 1819–1900', December 2017 (doc A194).
3. Suzanne Woodley, 'Porirua ki Manawatū Inquiry District: Local Government Issues Report', June 2017 (doc A193), p 623
4. Mary O'Keeffe, brief of evidence, 8 July 2019 (doc G6), p 9

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- 1915: application to partition C B Morrison's purchase – partitioned as A14A; residue is A14B.
- 1919: application to partition 'cemetery' – partitioned as A14B1; residue is A14B2.

In November 1896, Raniera Erihana and others applied to partition Ngārara A14 so as to 'set apart a portion of it for a Cemetery to include the part to the westward of [Ngārara West A15] between that boundary and the River Waimea'. At that point, Judge Alexander Mackay understood the piece of land to contain about 10 acres but the area had not been surveyed. The judge therefore made orders cutting out an area named Ngārara West A14A, to consist of 'such quantity as may be found there whether more or less [than 10 acres]'.[5] We note that no particular weight need be put on the use of the term 'cemetery' instead of 'urupā' by the court's minute taker. The minutes were recorded in English, not Māori.

As at 1896, the native land laws included two options for the protection of the urupā. The Native Trusts and Claims Definition and Registration Act 1893 allowed the court to order a piece of land to be inalienable and vested in trustees for 'religious, educational, or other purposes of general or public utility as shall be specified'.[6] As we discussed in our report on Muaūpoko claims, this section of the 1893 Act was used to vest Lake Horowhenua in trustees in 1897.[7] The other option was for the judge to make the land inalienable under section 14(6) of the Native Land Court Act 1894. The 1893 provision required the agreement of a majority of owners in writing before it could be exercised – it is possible that this condition of the Act could not be met. In any case, the court imposed a restriction under the 1894 Act, ordering that the land should be 'absolutely inalienable'.[8] The 1894 legislation allowed judges to vary or lift these kinds of restrictions, but no attempt was made to do so prior to new legislation in 1909.

We note, however, that there was no provision for this burial ground, which was of significance to the whole tribe, to be put into some form of tribal title. Ownership of this Te Ātiawa/Ngāti Awa urupā was vested in 13 individuals. According to Mahina-a-rangi Baker, kaumātua had identified the owners of A14 as 'descendants of those that were buried at Te Kārewarewa'.[9]

In 1905, the Māori owners were concerned that the title to the urupā might not be protected and again applied to have it partitioned. The application was made on their behalf by Raniera Erihana (who had also filed the application back in 1896). The court minutes stated that 'what is desired by the owners is a part[ition]

5. Otaki Native Land Court, minute book 31, 10 November 1896, fols 147–148 (Paora Ropata, papers in support of brief of evidence (doc F1(a)), pp 6–7)
6. Native Trusts and Claims Definition and Registration Act 1893, s 7
7. Waitangi Tribunal, *Horowhenua: The Muaūpoko Priority Report* (Wellington: Waitangi Tribunal, 2017), pp 346, 348
8. Otaki Native Land Court, minute book 31, 10 November 1896, fol 148 (Ropata, papers in support of brief of evidence (doc F1(a)), p 7)
9. Mahina-a-rangi Baker for Te Ātiawa ki Whakarongotai Charitable Trust, 'Cultural Impact Assessment: Te Kārewarewa Urupā', November 2015 (Mahina-a-rangi Baker, papers in support of brief of evidence (doc F11(a)), pp 588–589)

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to cut off a certain "urupa"'. The court's response was 'that Judge Mackay made part[ition] cutting out "urupa"', and that 'what is wanted is a survey to enable those Orders to be completed'. The judge therefore dismissed the application as unnecessary.[10] Claimant counsel submitted that the use of the word 'urupā' in this minute book confirmed that the purpose of the applications in 1896 and 1905 was to 'cut out an existing urupā'.[11]

We have no evidence as to why the partition had not been surveyed between 1896 and 1905. Despite the court's dismissal of the new application, the urupā block (A14A) had still not been surveyed when Ngārara A14 came back before the court in 1915. Evald Subasic, who wrote a brief report on historical matters for Mary O'Keeffe, suggested:

> The probable reason for the lack of survey was the fact that at the time there was an outstanding survey lien on the Ngārara West A14 block dating back from the original partition of the block out of Ngārara West [in 1891]. Either the owners themselves were unwilling to incur a further survey lien by surveying the cemetery section, or the surveyors were unwilling to survey the section until the outstanding debt to them was paid. The evidence consulted is silent on this matter . . .[12]

The 1905 application may have been driven by pressure from the surveyors, who wanted to have a piece of land cut out in satisfaction of the survey lien. The following year, the court partitioned out Ngārara West A14C in payment to the surveyor. This block consisted of 75 acres, located at the northern end of A14.

2.3 The Urupā becomes Vulnerable to Alienation, 1909–69

Ngārara West A14 came back before the court in 1915. This time, the applicants were E D and H Barber, who wanted to partition the interest purchased by C B Morison. As noted above, this purchase had been confirmed by the court back in 1896. The court now awarded 13½ acres with the name 'A14A', which was the appellation that Judge Mackay had given the urupā block in 1896. It appears that the court was unaware of the details of Mackay's original order, which had still not been surveyed and completed. Following the 1915 partition, the residue of the block became A14B and was vested in 35 individual owners (the number having grown through successions). It was then realised that the survey lien had reduced the size of the original A14, which reduced A14A to about nine acres in area. Suzanne Woodley noted that '[n]o owners appeared to be at the hearing (or are not recorded as such)'.[13]

10. Wellington Native Land Court, minute book 7, 6 February 1905, fol 286 (Ropata, papers in support of brief of evidence (doc F1(a)), p 9); Woodley, 'Local Government Issues' (doc A193), p 624
11. Claimant counsel (Wai 1945), closing submissions, 25 October 2019 (paper 3.3.50), p 8
12. Evald Subasic, 'Research Notes on Ngarara West A14 – Urupa / Cemetery', June 2001 (Mary O'Keeffe, papers in support of brief of evidence (doc G6(a)), pp 10–11)
13. Woodley, 'Local Government Issues' (doc A193), p 625

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In 1919, the Māori owners attempted to partition out the urupā block for a third time. This time, the purpose was described in the minutes as cutting out a 'grave yard' (first mention) and 'cemetery' (second mention). Natanahira Parata gave evidence that 'all the people' had agreed to the application, and that the land had originally been set aside by Judge Mackay but not surveyed. In June 1919, the court ordered this partition of 20 acres as Ngārara West A14B1, with boundaries to be pointed out (on the ground) by Hira Parata.[14] Ms Baker observed that the survey for this partition had been completed by 1920, and that A14B1 was located in the original site described in 1896 as 'between the Western boundary for block [Ngārara West A] 15 and the Waimeha'.[15] Evald Subasic's report agreed on this point.[16]

In the meantime, the Native Land Act 1909 had cancelled all existing restrictions on alienation. This meant that, even if Judge Mackay's original orders had been completed before 1915, his requirement that the land be 'absolutely inalienable' would no longer have had any 'force or effect' from 1909 onwards.[17]

The 1919 partition treated the urupā block as native freehold land owned by 34 individuals. The Native Land Act 1909 did enable the court or a land board to recommend reserving it as a burial ground. The Governor in Council would make the final decision. Native Reservations were inalienable. This provision (and its equivalent in successive Acts) applied to native freehold land with more than 10 owners.[18] It is important in this inquiry for two reasons: first, because it would have protected the block from sale and provided trustees to take care of the urupā; and, secondly, because the failure to reserve the land in this way was later taken as evidence that the block had been cut out for a *future* cemetery, not an existing one. This in turn facilitated the removal of the official cemetery designation in the district plan (see chapter 3).

The Māori owners of Ngārara A14B1 were probably unaware of the provision for Native Reservations in 1919, but the 1909 Act would have allowed the court to take the initiative on this matter. Section 15 stated:

> In the course of the proceedings on any application the Court may, subject to Rules of Court, without further application, and upon such terms as to notice to parties and otherwise as the Court thinks fit, proceed to exercise any other part of its jurisdiction the exercise of which in that proceeding the Court deems necessary or advisable.

The Native Land Act 1909 was repealed in 1931. The new Native Land Act of that year continued the provision for Native Reservations, as did the Māori Affairs Act

14. Wellington Native Land Court, minute book 21, 18 June 1919, fol 386 (Ropata, papers in support of brief of evidence (doc F1(a)), p 22); Woodley, 'Local Government Issues' (doc A193), pp 625–626
15. Mahina-a-rangi Baker 'Cultural Impact Assessment: Te Kārewarewa Urupā', p 16 (Baker, papers in support of brief of evidence (doc F11(a)), pp 591)
16. Evald Subasic, 'Research Notes on Ngarara West A14 – Urupa / Cemetery' (O'Keeffe, papers in support of brief of evidence (doc G6(a)), p 12)
17. Native Land Act 1909, s 207(1)
18. Native Land Act 1909, s 232

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1953 when it in turn replaced the Native Land Act of 1931.[19] The new provisions in 1953 allowed the court to recommend that any Māori freehold land be set aside as a Māori Reservation for a number of purposes, including burial grounds, and that the reservation could be made for the benefit not just of the owners but for 'Maoris of the class or classes specified'.[20]

It appears that the Te Ātiawa / Ngāti Awa owners were still unaware of the necessity to protect their urupā under this new legislation. In 1970, Sylvia Rangiauahi Tamati Thomas explained that none of the tribal urupā had been made reservations with trustees. Once the urgent need to do so became clear due to the alienation of Kārewarewa in 1968–69, tribal leaders hastened to establish a trust and get trustees appointed for Takamore Urupā in late 1969. Takamore was then made a Māori Reservation in 1973.[21]

Apart from the native land legislation (and the Māori Affairs Acts that succeeded it in 1953 and 1967), there was supposed to be protection from general legislation dealing with cemeteries and burial grounds. We consider that point further in the next chapter.

2.4 The Legislative Framework for Alienations in the 1960s

In the Te Ātiawa / Ngāti Awa phase of our inquiry, the Crown made an early concession of Treaty breach that is relevant to the alienation of Ngārara West A14B1:

> The Crown accepts that the individualisation of Māori land tenure provided for by the native land laws made the lands of Te Ātiawa / Ngāti Awa ki Kāpiti more susceptible to fragmentation, alienation and partition and contributed to the undermining of the traditional tribal structures of Te Ātiawa / Ngāti Awa ki Kāpiti. The Crown concedes that its failure to protect these structures was a breach of Te Tiriti o Waitangi / the Treaty of Waitangi and its principles[.][22]

By the late 1960s, individualisation of title and generations of succession had produced fragmented land blocks and 'crowded' titles. Many blocks had numerous owners, some of whom had no idea about their small, fractionated interests in various pieces of land. Some owners' interests had not been succeeded to, others owned extremely small and scattered interests, and migration for work had scattered owners all around the country. The whole situation made it very difficult for Māori to keep their remaining land or to use it effectively. The Central North Island Tribunal explained how this situation arose from the native land laws established

19. Native Land Act 1931, s 298; Māori Affairs Act 1953, s 439
20. Māori Affairs Act 1953, s 439
21. Woodley, 'Local Government Issues' (doc A193), pp 636–637; Sylvia Tamati, statement of objections, 3 April 1970 (Woodley, 'Local Government Issues' (doc A193(c)(viii)), p 94); Benjamin Ngaia, brief of evidence, 30 July 2018 (doc E3), p 5
22. Crown counsel, 'Te Tauāki Karauna: Crown Statement of Position and Concessions', August 2018 (paper 1.3.1), pp 6–7. This concession was repeated in the Crown's general closing submissions: Crown counsel, closing submissions, 18 December 2019 (paper 3.3.60), pp 21, 29.

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by the Crown in the nineteenth century, and the various measures taken to try to ameliorate the situation. These included consolidation schemes, the compulsory acquisition of small shares, and the belated establishment of trust mechanisms to restore a form of communal land management. Following the well-known Hunn report of 1960, the Māori Affairs Amendment Act 1967 was aimed at the 'integration' of an increasingly urbanised Māori population and the simplification of titles in the countryside so that Māori land could more easily be farmed or sold.[23] This is the context in which the alienation of Ngārara A14B1 should be understood.

For Māori land with more than 10 owners, part 23 of the Māori Affairs Act 1953 prescribed a three-step process for alienations.

The first step was for the court registrar to call a 'meeting of assembled owners', which was designed to prevent the piecemeal acquisition of individual interests (as had been common in the nineteenth century). Back in 1909, when the meeting of owners system was introduced, Native Minister James Carroll described it as 'practically a resuscitation of the old runanga system, under which from time immemorial the Māori communities transacted their business'.[24] The meetings of assembled owners were intended to allow the majority of owners to make decisions about their lands collectively.[25] The legislative provisions, however, fell well short of enabling this intention to be achieved. Under the 1909 Act, the quorum was set at just five owners (regardless of the number in a block), and a resolution could be carried at such a meeting 'if owners voting in favour owned a larger aggregate share of the land than those voting against'. Successors could not vote unless they had gone through the process of obtaining succession orders from the court.[26]

The Māori Affairs Act 1953 continued the meeting of assembled owners' system. It set the quorum for a meeting of assembled owners even lower than in 1909. Only three owners had to be present, no matter how many owners there were in a block. Owners could also be represented by proxy so long as a minimum of three were present in person. As under previous legislation, this very small minority of owners could resolve to alienate land if the owners who voted in favour 'own[ed] a larger aggregate share of the land' than the owners who voted against the resolution.[27]

In 1967, the Māori Purposes Act amended the quorum requirements so that the court could set a quorum. If the court did not set a quorum, then meetings would now have to have either 10 owners or one-quarter of the owners (whichever was lower) either in person or by proxy. Regardless of whether the quorum was 10 owners or a quarter of owners, those present or represented at the meeting had to hold at least one-quarter of the 'beneficial freehold interest' (the shares) in the

23. See Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), chapter 11.
24. J Carroll, 15 Dec 1909, NZPD, vol 148, p 1102 (Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 426)
25. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 426
26. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 686
27. Māori Affairs Act 1953, ss 309(1)–(2), 311(1)

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block.[28] This significant reform took effect on 1 April 1968, eight months before the meeting of assembled owners for Ngārara West A14B1.[29] It was certainly an improvement but still allowed those representing only a quarter of the ownership to sell the land. Six years later, the Māori Affairs Act 1974 raised the quorum for sales much higher to owners holding at least 75 per cent of the 'beneficial freehold interest' in the land, but this was too late for the urupā block.[30]

Owners' rights to object after a meeting of assembled owners were very limited, even if they were in the majority. Only those who were present at the meeting could sign a memorial of dissent.[31] This might lead to their interests being cut out of the land before the sale or lease was approved.[32]

The second step in the alienation process required the Māori Land Court to confirm the resolution passed at a meeting of owners. Evidently, this was intended as a safeguard in a system which allowed tiny minorities to alienate the interests of other owners. Under the Māori Affairs Act 1953:

> No alienation could be confirmed unless the court was satisfied (among other things) that the alienation was not 'contrary to equity or good faith, or to the interests of the Maori alienating', that the alienation was not in breach of any trust, and that the 'consideration (if any) for the alienation is adequate' (section 227). . . . On hearing the application for confirmation, the court could make any modification whatsoever to any aspect of the alienation, if it seemed that 'some modification in favour of the Maori owners should in justice be made'.[33]

These protections could have been significant for the Kārewarewa urupā block but the Māori Affairs Amendment Act 1967 removed almost all of the court's power to vet resolutions; court confirmation was automatic unless the price was considered too low or the alienation might lead to 'undue aggregation of farmland' in the hands of a purchaser.[34] As a result, there were no real checks or balances in the system.

The third step of the process transferred responsibility for executing the transaction to the Māori Trustee. Once the court had confirmed a resolution to sell or lease, the the Māori Trustee became the statutory agent for the owners.[35] Again, this was necessary to get around the fact that not all owners had necessarily agreed, and therefore a deed of sale or contract could not be completed by the owners themselves. Instead, the Māori Affairs Act 1953 stated that '[e]very instrument

28. Māori Purposes Act 1967, s 4(4), inserting a new s 309(6A), (6B), and (6C) into the Māori Affairs Act 1953.
29. Māori Purposes Act 1967, s 4(5)
30. Māori Affairs Amendment Act 1974, s 36, inserting a new s 309(6B) into the Māori Affairs Act 1953.
31. Māori Affairs Act 1953, s 313(2)
32. Māori Affairs Act 1953, s 320
33. Waitangi Tribunal, *Te Urewera*, 8 vols (Wellington: Legislation Direct, 2017), vol 6, p 2998
34. Waitangi Tribunal, *Te Urewera*, vol 6, pp 2998–2999
35. Māori Affairs Act 1953, s 323(1)

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of alienation executed by the Māori Trustee', acting as statutory agent for a block owned by more than 10 owners, would have 'the same force and effect, and may be registered in like manner, as if it had been lawfully executed by all of the owners'.[36]

As an alternative to a resolution to sell or lease, the 1953 Act empowered the meeting of owners to appoint the Māori Trustee directly as their agent to negotiate a sale or lease on their behalf, subject to any restrictions in the resolution passed at the meeting.[37] A resolution of this kind still had to be confirmed by the court, but the Māori Trustee had to agree first to undertake the responsibility.[38] Following the court's confirmation, the owners would have no further say in the alienation of their land by the Māori Trustee, except that a duly convened meeting of assembled owners could revoke the original resolution appointing him as their agent.[39]

This was the statutory scheme under which Ngārara West A14B1 was sold to the Waikanae Land Company in 1969.

2.5 The Sale of Ngārara West A14B1 in 1968–69

2.5.1 The meeting of assembled owners, December 1968

In the late 1960s, the Waikanae Land Company proposed to develop the Waikanae beach area. It wanted to 'create a marina and residential subdivision in the area that Te Kārewarewa was located; their intention was to cut through [and] excavate the area around the lagoon and open it right up to tidal inundation, so that it became a marina, and subdivide surrounding properties'.[40] The company purchased about 96 acres of Māori land at the mouth of the Waikanae River in 1967. This was a subdivision of the original Ngārara West A14 block (Ngārara West A14B2B3).[41] Following this purchase, the company applied to the court in 1968 to call a meeting of assembled owners for the purchase of Ngārara West A14B1. In November 1968, the court ordered the registrar to convene a meeting and fixed a quorum of six owners who had to be present in person (rather than by proxy).[42] In doing so, the court acted under the recent provisions introduced by the Māori Purposes Act 1967, which allowed the court to fix a quorum upon application.[43]

The court set a very low quorum of just six owners. At the time, there were 77 owners in the urupā block. Many of them were deceased, which meant that the number of owners would have been larger if successions had occurred, or their addresses were unknown. This situation was quite common for the Māori land titles system at the time. Suzanne Woodley commented that the advertisement of the meeting gave only three weeks' notice, which was likely insufficient time for

36. Māori Affairs Act 1953, s 323(2)
37. Māori Affairs Act 1953, s 315(1)(e)
38. Māori Affairs Act 1953, s 315(3)
39. Māori Affairs Act 1953, s 324
40. Mahina-a-rangi Baker, brief of evidence, 22 January 2019 (doc F11), p 48
41. Ross Webb, 'Te Atiawa/Ngāti Awa ki Kapiti – Inland Waterways: Ownership and Control', September 2018 (doc A205), p 60
42. Woodley, 'Local Government Issues' (doc A193), p 627
43. Māori Purposes Act 1967, s 4(4)

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'any of these succession orders to have been made'. A form letter was sent to the 39 owners whose addresses were known, informing them of the proposed meeting, the resolution to sell, and the possibility of appointing the Māori Trustee as agent to sell or lease the land if the resolution failed.[44] A notice would have been inserted in the court pānui as well, although that had a limited circulation.

Crown counsel submitted: 'Whilst it may be that there were owners of the land who did not know about the proposed sale and may have objected to its sale had they known about it, there is no evidence on the record of the inquiry that this was the case.'[45] We do not accept this submission, given the lack of successions and the fact that only 39 of 77 addresses were known. It is not certain, of course, that all of those addresses were correct.

Three owners appointed proxies to attend on their behalf. An owner living in Greymouth, Te Aupiki Gould, could not appoint a proxy and stated: 'As we are scattered all over NZ & Australia, I cannot see how we can hold a meeting to decide anything.' In those circumstances, voting for a sale seemed to him to be the only solution, but he may not have been aware of the 1953 provisions to establish a trust or a Māori Reservation.[46] Of the remaining owners, 10 attended the meeting in person. These owners represented 17 per cent of the interests in the block. Together with the three proxies, the owners represented at the meeting held about 20 per cent of the total shares in Ngārara West A14B1.[47] If the court did not set a quorum, then the new 1967 provisions required that those present or represented at the meeting hold at least a quarter of the shares – a minimum that would not have been reached at this meeting.[48]

The meeting of assembled owners was held at the Waikanae Memorial Hall on 18 December 1968. One of the key features of this meeting was that the owners present did not appear to be aware that 'A14B1' was the urupā block. The minutes of the meeting are obviously very abbreviated. From what was recorded, the urupā was not mentioned by anyone until after the purchasers had retired from the meeting to allow the owners free discussion of the proposal. One of the proxies was held by N Simpson, a solicitor of Morison, Taylor and Company. He is recorded in the minutes as follows:

> Mr Simpson said that it was very important for these people to buy this piece of land, which would assist greatly in the subdivision of the area already bought. The valuations quoted meant nothing, the land was worth $30,000. At first it was thought that the cemetery was in this block but he had since learnt that it was not.[49]

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44. Woodley, 'Local Government Issues' (doc A193), pp 627–629
45. Crown counsel, closing submissions: Kārewarewa Urupā, 16 December 2019 (paper 3.3.59), p 13
46. T Gould to Māori Land Court, 13 December 1968 (Woodley, 'Local Government Issues' (doc A193), p 629)
47. Woodley, 'Local Government Issues' (doc A193), p 629
48. Māori Purposes Act 1967, s 4(4), inserting s 309(6B) into the Māori Affairs Act 1953.
49. 'Statement of Proceedings of Meeting of Assembled Owners', 18 December 1968 (Ropata, papers in support of brief of evidence (doc F1(a)), p 25)

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Kaumātua Paora Ropata considered that this would have had the weight of 'legal advice', but noted: 'I don't know how they arrived at that conclusion.'[50] In any case, it appears that Mr Simpson's advice to the meeting was accepted. The resolution to sell the 20-acre block was considered solely on the merits of the price offered by the company, which was $20,000. The majority of those present or represented (by both number and shares) voted against the resolution to sell the land to the company. They considered the price to be too low. Mr Simpson then proposed that the Māori Trustee be appointed the owners' agent to 'sell the land by public tender to the highest bidder'. This resolution was passed by a majority of 88.125 shares, with eight owners voting for and five against it.[51]

Claimant counsel submitted that a meeting of less than 20% of the owners' resulted in this resolution, and that it was 'passed with support of owners who represented only 11.5% of the total shares voting in favour'.[52] A system which allowed such a minority of owners to sell the land was of great concern to the claimants in our inquiry.

2.5.2 The sale of Ngārara West A14B1 in 1969

Following the meeting, the Māori Land Court confirmed the resolution. This occurred in February 1969. Ms Woodley noted that Mr Simpson attended this hearing, and he advised the court that the Māori Trustee had agreed to accept appointment as agent for the owners. Mr Simpson also told the court that the owners wanted a higher price and so had decided that the land should be put up for tender.[53]

Following a tender process, the Māori Trustee sold Ngārara West A14B1 to the Waikanae Land Company on 15 October 1969 for $31,555.[54] Some claimants have criticised the Māori Trustee for selling this land but, in our view, the real problem lay with the assembled owners' system. The Māori Trustee was obligated by law to carry out the resolution passed at a duly convened meeting of owners and confirmed by the court, no matter how small the minority of owners present at the meeting. We address this point further below when we make our findings of Treaty breach.

In the next chapter, we consider the legal protections afforded the urupā after its purchase by the company in 1969, but first we make our Treaty findings in respect of the matters covered in this chapter.

2.6 Treaty Findings

By the 1960s, the cancellation of all restrictions on alienation in 1909 was no longer relevant to the urupā block because an alternative mechanism – the Native /

50. Paora Ropata, brief of evidence (doc F1), pp 18–19
51. 'Statement of Proceedings of Meeting of Assembled Owners', 18 December 1968 (Ropata, papers in support of brief of evidence (doc F1(a)), pp 25–26)
52. Claimant counsel (Wai 1945), closing submissions (paper 3.3.50), p 10
53. Woodley, 'Local Government Issues' (doc A193), p 632
54. Woodley, 'Local Government Issues' (doc A193), p 633

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Māori Reservation – allowed for the protection of urupā under successive Acts. The court did not take the initiative and propose a reservation at the 1919 hearing, which it could have done under section 15 of the Native Land Act 1909, and which we think would have been an appropriate solution. Te Ātiawa / Ngāti Awa tribal leaders were unaware of the need to protect the urupā in their district by establishing Reservations. They only became aware of the need for this in 1969 as a result of what happened to Kārewarewa (as explained in section 2.3). We do not find any breach of Treaty principles here since an adequate protection mechanism had existed since the urupā was partitioned out in 1919.

By the time the urupā block was sold in 1968–69, the individualisation of title imposed on Māori in the nineteenth century had resulted in fractionated titles, with multiple owners scattered around the country. Many were unable to form a trust or incorporation to manage their land and some were unaware that they had interests in particular blocks or that they ought to have succeeded to a deceased relative's interests. It was in this context that the 1953 statutory scheme for alienations, described in section 2.4, operated to allow the sale of Māori land by tiny minorities of owners. Despite the higher quorum introduced in the Māori Purposes Act 1967, the quorum requirements for meetings of assembled owners remained low and were particulary unjust. It was not until 1974 that a fairer quorum level was set by the Māori Affairs Amendment Act of that year.

In the case of Ngārara West A14B1, addresses could only be found for 39 of the 77 owners. Also, some owners had died but the timeframe for the meeting did not allow for successions to be arranged. Partly as a result, only 13 owners were involved in the meeting (three of them by proxy). This small minority owned about one-fifth of the shares in the block, yet the law allowed them to pass a resolution authorising the Māori Trustee to sell the land to the highest bidder. They thereby alienated not only their own interests in the land but also those of the 63 other owners. There were no checks and balances in the system as the court's confirmation process was pro forma (concerned only with price). The result was deeply unfair and prejudicial not just to the owners of Ngārara West A14B1 but also to the wider iwi members whose tūpuna were buried in the urupā.

We find that the meeting of assembled owners' system deprived owner groups of their tino rangatiratanga over their land and breached the Treaty principles of partnership and active protection (which were explained in chapter 1).

The prejudice in this case was the loss of ownership and control of this significant urupā, leaving it protected only by its cemetery designation in the district plan. We turn to that issue in the next chapter.

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Summary of Findings

In this chapter, our findings may be summarised as follows:

- The incomplete title for Ngārara West A14B1 was restricted from alienation in 1896. Although all such restrictions were cancelled by statute in 1909, there were alternative forms of protection for urupā by that time. In the 1960s, this included the possibility to set the land aside as a Māori Reservation. But tribal leaders were not aware of the necessity to do so for any of the Te Ātiawa / Ngāti Awa urupā until too late and the block had been sold. No finding of Treaty breach was made on this issue.
- The statutory framework for the sale or lease of Māori land in the 1960s was designed to facilitate alienation. In particular, the meeting of assembled owners system allowed tiny minorities to sell the land interests of all owners in a block, using the Māori Trustee as a statutory agent to circumvent the lack of consent. Although the quorum requirements were improved in 1967, they were still too low. A minority of the urupā block owners, possessing only one-fifth of the shares in the land, were present and voted at the meeting of assembled owners for Ngārara West A14B1. There were no checks or balances in the system to prevent this minority selling the whole block. The meeting of assembled owners' system and its use to alienate Kārewarewa urupā was a breach of the Treaty principles of partnership and active protection. The owners (and the wider iwi) were prejudiced by this breach, which rendered their taonga vulnerable to inappropriate development.
- We note also that those owners present at the meeting were advised that this piece of land was *not* the urupā block.

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CHAPTER 3

LEGAL PROTECTIONS FOR THE URUPĀ AFTER SALE

3.1 Introduction

In this chapter, we address the legal protections for the urupā after its sale to the Waikanae Land Company. It is important to note that the company was not the Crown nor an agent of the Crown. Its actions are discussed only so far as necessary to examine the statutory protections for Māori burial grounds and the acts or inaction of the Crown in protecting Kārewarewa urupā. In terms of statutory protections, Ngārara West A14B1 had been exempt from rating in the decades before its sale, listed as an 'urupā' in the valuation roll. It had also been designated a 'Māori cemetery' in the district scheme, which had been promulgated by the Horowhenua County Council under the Town and Country Planning Act 1953 (see figure 1). More general protection was available for cemeteries under the Burial and Cremation Act 1964. These two statutes – and the extent to which they protected Kārewarewa in 1970 – are the primary issue for consideration in this chapter.

In respect of Crown actions or inaction, the main opportunity for Crown intervention after the sale of the block arose when the company applied to lift the cemetery designation in 1969–70. This was an essential step before the land could be developed for residential housing. The Crown had an opportunity to lodge an objection and could have 'used its power to halt the development process' but declined to do so. Crown officials failed to identify the existence of the urupā, even though 'evidence to support the existence of a burial site would have been relatively easy to come by'.[1] Crown counsel conceded that the Crown's failure led to the desecration of Kārewarewa urupā and was a breach of Treaty principles. We explore this concession further below.

The application to lift the cemetery designation was heard by a committee of the Horowhenua County Council in 1970. Tribal leaders objected but only one was heard due to the late filing of the other objections. One of the late objections was filed on behalf of the marae trustees. During the committee hearing, some of the issues explored in the previous chapter were raised. These included the fact that the block had not been made a Māori reservation and the supposed 'unanimous' sale of the land by a meeting of its Māori owners. Further, the Māori Affairs Department district officer and Māori Land Court registrar failed to identify the minutes of the 1896 and 1905 hearings. These three points allowed the company to put forward a scenario that the owners of Ngārara West A14B1 had cut the block

1. Crown counsel, closing submissions: Kārewarewa Urupā, 16 December 2019 (paper 3.3.59), p 17

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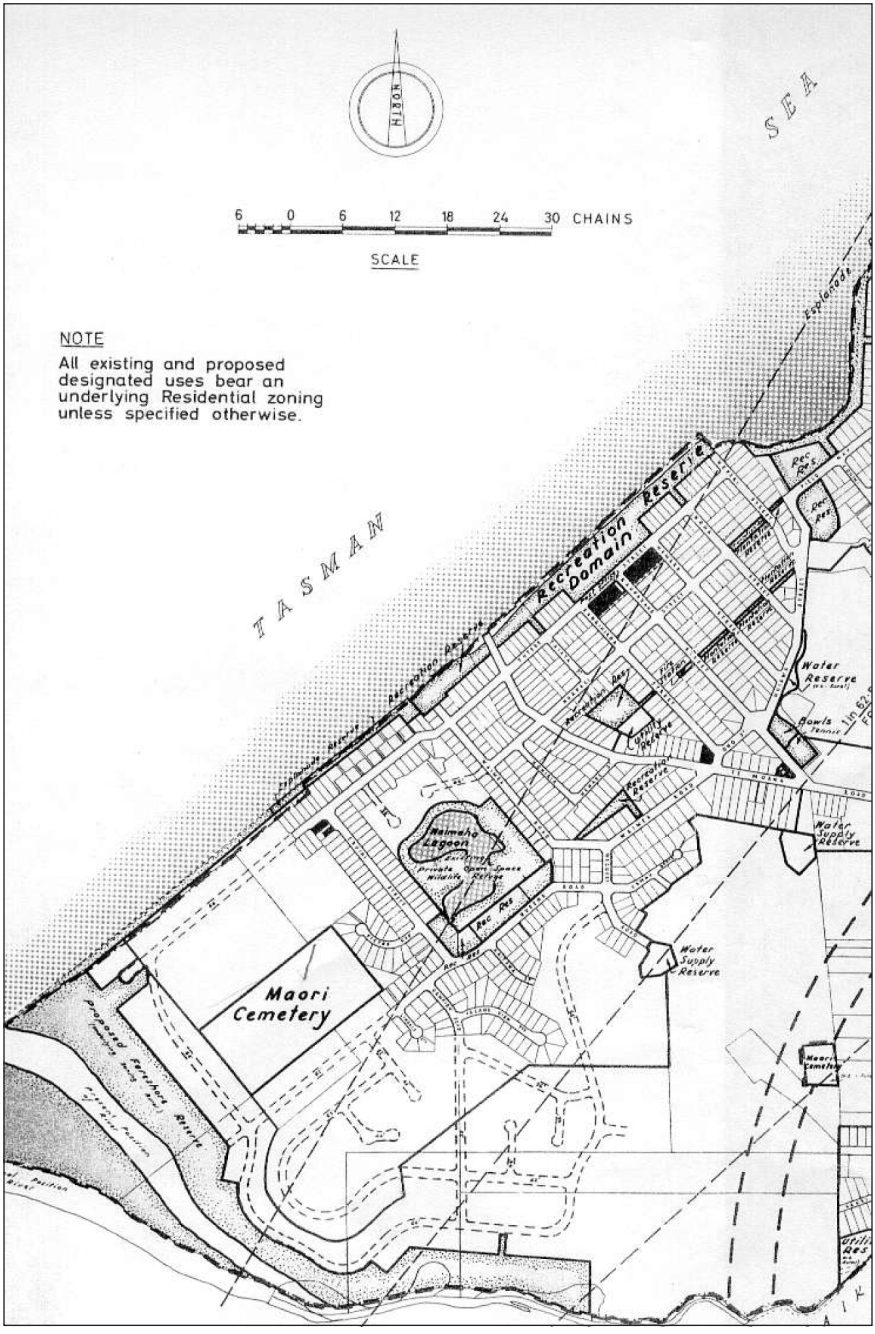

Figure 1: Horowhenua County district scheme map showing the 'Maori Cemetery' block

Source: Mary O'Keeffe, 'Tamati Place – Archaeological Issues: Report to Neil Carr, PropertyPathways Ltd', August 2014, p 18 (O'Keeffe, papers in support of brief of evidence (doc G6(e)), p 20).

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out for a future cemetery (not an existing one), a crucial argument in the committee hearing. Another crucial argument was the question of what constituted good town planning under the 1953 Act, and whether the existence of a possible urupā should prevent commercial development. Ultimately, the council agreed to cancel the cemetery designation in 1970.

After exploring these issues, we make our findings and identify the prejudice suffered by the claimants.

3.2 Official Recognition of Ngārara West A14B1 as a 'Māori Cemetery' or 'Urupā'

In their evidence to the Tribunal, Ms Woodley and Ms Baker noted various records that acknowledged the status of Ngārara West A14B1 as a 'cemetery', 'urupā', or 'burial ground'. Ms Woodley observed that the Horowhenua County Council valuation roll from 1939 described the owner and occupier as 'Natives (cemetery)'. In the 1950s, the valuation roll specified that this block was an 'urupā' and therefore non-rateable. Ngārara West A14B1 was still described in the valuation roll as an 'urupā' in 1968.[2] This was clearly related to the block's designation as a 'Māori cemetery' in the Horowhenua county district scheme.[3] The district scheme had been prepared under the Town and Country Planning Act 1953. The block had an 'underlying' zoning as 'residential'.[4] Ms Woodley was unable to say exactly when the cemetery designation had been inserted in the district scheme.[5]

Mahina-a-rangi Baker also noted an exchange between the Crown and the Manawatū Catchment Board in 1957 over proposals to lower the Waimeha Lagoon for drainage purposes. The lagoon was on the western boundary of the urupā block.[6] Ms Baker quoted the following summary of a file entry in the Waikanae River Archive, dated 23 December 1957:

> Letter explaining proposal and seeking objections from affected residents and from 'Maoris' through the Dept of Maori Affairs. Dept advised M[anwatu] C[atchment] B[oard] that the Maori owners would probably wish to object as part of the land was a cemetery and provided the addresses of the principal owners. File note from MCB CE to Area Engineer 'doubtful if you need do much more'. No record of the individual Maori owners being contacted.[7]

2. Suzanne Woodley, 'Porirua ki Manawatū Inquiry District: Local Government Issues Report', June 2017 (doc A193), pp 626–627
3. Mahina-a-rangi Baker for Te Ātiawa ki Whakarongotai Charitable Trust, 'Cultural Impact Assessment: Te Kārewarewa Urupā', November 2015, pp 17–18 (Mahina-a-rangi Baker, papers in support of brief of evidence (doc F11(a)), pp 592–593)
4. Public notice of plan change 3, February 1970 (Paora Ropata, papers in support of brief of evidence (doc F1(a)), p 34)
5. Woodley, 'Local Government Issues' (doc A193), p 634
6. Mahina-a-rangi Baker, brief of evidence, 22 January 2019 (doc F11), pp 47–48
7. Waikanae River Archive, Archive 14: Waimeha and Waimanu Lagoons, summary of file entry, 23 December 1957 (Mahina-a-rangi Baker, brief of evidence (doc F11), p 48)

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Ultimately, no action was taken to lower the lagoon but, as Mahina-a-rangi Baker stated, this shows that 'the Crown was aware and made the Manawatū Catchment Board aware in 1957 that there was a cemetery at Kārewarewa, adjacent to the "Waimeha Lagoon"'.[8]

3.3 Amending the District Scheme to Remove the Designation of 'Māori Cemetery'

3.3.1 The company applies for a change to the district scheme

It appears that the Waikanae Land Company was fully aware of the cemetery designation at the time it purchased the land from the Māori Trustee on 15 October 1969. The company applied for the designation to be removed on 26 August, almost two months before the purchase was completed. The company's solicitors informed the council on 26 August 1969 that their clients were 'negotiating for the purchase of this block'. They said that their enquiries 'indicated that the land had never been used as a burial ground', and so they asked the council to remove the designation and allow the land to be developed.[9]

On 17 October 1969, the application was discussed at the Waikanae County Town Committee, just two days after the sale. This committee was a standing committee of the county council, formed to give Waikanae 'more say in its own affairs'.[10] At the meeting, the county clerk explained that the company had supplied information from the Māori Land Court to the effect that the land had 'not been set apart as a Maori burial ground'. The county council had therefore agreed to propose a change to the district scheme, lifting the cemetery designation from the block. Te Aputa Kauri and Sylvia Tamati had already sent written objections, stating that 'several of their ancestors were buried at Ngārara West A14B1'.[11] The committee recommended to the council that the change process should go ahead, with opportunity for Mrs Kauri, Mrs Tamati, and anyone else to file objections.[12]

Mary O'Keeffe's evidence referred to an *Evening Post* article of 28 October 1969, published about a fortnight after the company's purchase of Kārewarewa from the Māori Trustee.[13] It stated:

> **Development Plan For Maori Cemetery Causes Uneasy Problem**
>
> An uneasy problem faces the local authorities for Waikanae. It is whether or not to change the District Scheme zoning of an old-time Maori burial ground to subdivisional residential land. The solution is likely to cause either sentimental or economic grievances.

8. Mahina-a-rangi Baker, brief of evidence (doc F11), p 48
9. County engineer, report, 25 May 1970 (Suzanne Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii), p 91); Woodley, 'Local Government Issues' (doc A193), p 639
10. Woodley, 'Local Government Issues' (doc A193), pp 453, 634
11. Woodley, 'Local Government Issues' (doc A193), p 634
12. Woodley, 'Local Government Issues' (doc A193), p 634
13. Mary O'Keeffe, 'Tamati Drive Subdivision: Archaeological Assessment', May 2001 (Mary O'Keeffe, papers in support of brief of evidence (doc G6(a)), p 57)

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> The Waikanae Land Company some time ago purchased 96 acres [Ngārara West A14B2B3] of coastal land at Waikanae, most of this lying northward from the Waikanae River. . . . The company now wishes to purchase an additional 20 acres designated 'Maori Cemetery' on the district scheme. The figure of $31,000 is available for this purpose in an agreement with the Maori Trustee acting for numerous shareholders of the cemetery land, many of whom are apparently willing to sell. . . . Through its Palmerston North solicitors [the company] has applied for a rezoning of the cemetery block . . .
>
> Supporting its application, the company states that 'from inquiries made the land "cemetery" has never been used as a Maori burial ground'. Indeed, it is said only two sailors of old are buried there.
>
> However, in the Waikanae area rich in Maori history there are three recognised Maori burial grounds excluding the Parata family private cemetery near the Memorial Hall.
>
> Oldest of these is Karewarewa, the 20-acre land in question. Two are considered filled, the burial ground in present use being Takamore, inland from Puriri Street.
>
> On learning of the proposals for Karewarewa cemetery some though not all of the Maori people took umbrage. At least two of them, highly respected and influential with genealogies running back at least 10 generations, are lodging objections.
>
> These claim that the 'searched records' referred to are mere Pakeha ones of recent origin. They cite their family knowledge and ancestral lore and, authoritatively, the late Mr W C Carkeek who had access to national archives and the records of the Maori Land Courts of early times for his now standard work to prove otherwise regarding Karewarewa interments.[14]

After describing Carkeek's information about the ancestors buried at Kārewarewa and those who had fallen at Kuititanga, the article concluded:

> Such, then, are the factors around which a decision will have to be made following advertising of the proposed re-designation of what is said to be the Karewarewa burial ground. The land is doubtless ideal for the purpose of the company concerned and its loss to them could be a district loss but, on the other hand, a hahunga or disinterment would be virtually impossible.
>
> And, says a local descendant of the interred, 'We don't want the bones of our ancestors wrapped up in bank notes.'[15]

3.3.2 The Crown's decision not to object to the proposed change

After receipt of the town committee's approval, the Horowhenua County Council decided to proceed with public notification of the proposed district scheme change.[16] In addition to public notification in the *Evening Post*, the council also

14. *Evening Post*, 28 October 1969
15. *Evening Post*, 28 October 1969
16. Woodley, 'Local Government Issues' (doc A193), p 634

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notified the Ikaroa Māori Land Court[17] and the Ministry of Works. A ministry official contacted the Māori Affairs Department to confirm whether the department was 'agreeable to the rezoning of the Māori cemetery'.[18] The Internal Affairs Department also contacted the Māori Affairs Department about 'excavating near the Waikanae River which may be encroaching on a Māori burial ground'.[19]

The Māori Affairs Department district officer at Palmerston North, M G McKellar, advised head office of the proposed change to the district scheme, and of the deadline for objections (6 April 1970). McKellar also advised that the land had been sold after a meeting of assembled owners, and enclosed a copy of the Māori Land Court registrar's letter of 23 September (discussed below). His view was that the owners had not set up a Māori Reservation and had chosen to sell the land, and had therefore given up their rights to its use:

> We enclose a copy of a letter written on 23 September 1969 [to the company's solicitors] on the status of this land. It was never set aside as a Maori Reservation, and at the meeting of owners it was stated by Mr Simpson, of Morison, Taylor & Co., Wellington, that the cemetery was not situated on this block. The land is now European Land, and the former Maori owners have, by virtue of their own meeting of owners, given up their rights to use the land.[20]

Presumably this advice was passed on to the Ministry of Works. Following the ministry's approach to the Māori Affairs Department, a ministry official noted that a meeting of the owners had agreed to sell the land, and that this sale had occurred in October 1969 before the proposal to change the land's designation.[21] As Crown counsel submitted, the Minister of Works had the right to file an objection to the proposed change under the provisions of the Town and Country Planning Act 1953 but did not do so.[22] Once advised that the land was no longer in Māori ownership, the Ministry of Works took no further action.[23]

3.3.3 The Crown's concession of Treaty breach

In response to the evidence discussed in the preceding sections, Crown counsel made the following concession of Treaty breach:

17. County clerk to the registrar, Ikaroa Māori Land Court, 17 February 1970 (Paora Ropata, papers in support of brief of evidence (doc F1(a)), p 33)
18. Minute, no date, on county clerk to district commissioner of Works, 17 February 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(v)), p 177)
19. District officer to head office, Māori Affairs Department, 9 March 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), p 180)
20. District officer to head office, Māori Affairs Department, 9 March 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), p 180)
21. Second minute, no date, on the reverse of county clerk to district commissioner of Works, 17 February 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(v)), p 178)
22. Crown counsel, closing submissions: Kārewarewa urupā, 16 December 2019 (paper 3.3.59), p 17
23. Woodley, 'Local Government Issues' (doc A193), p 635

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The evidence confirms that Crown officials in three departments were made aware in February and early March 1970 of the proposed change to the designation of the land. All were aware that the land was (then) currently designated as a 'Māori cemetery' by the council, and one had had the issue brought to his attention as 'encroach[ment] on a Māori burial ground'. This official knew that the 1919 partition in the Native Land Court had been for 'cutting out a graveyard', and knew that the graveyard had nevertheless never been reserved.

At the point when the Crown was made aware of the proposal to remove the designation, two people had already protested that their tūpuna were buried on the site and objected to its development, and more came forward shortly afterward. It was known locally that the site contained gravestones, and the mere fact that the land was designated a cemetery by the council suggested that it could contain burials. Records of the two attempted partitions of the land for a cemetery which pre-dated 1919 were also available at the Māori Land Court.

The Crown considers that a reasonable Crown, in compliance with its Treaty duties and faced with this situation, should have made further enquiries into whether or not there was a burial site on the land in question and, if so convinced, should have used its power to halt the development process. The evidence presented to the Tribunal indicates that if Crown officials had made these enquiries, evidence to support the existence of a burial site would have been relatively easy to come by.

As such, the Crown makes the following concession of Treaty breach:

The Crown concedes that in 1970 it failed to adequately investigate whether Kārewarewa urupā was located on Ngārara West A14B1 after being informed that this land was to be developed. The Crown further concedes its failure to object to the removal of the cemetery designation over Kārewarewa urupā led to the desecration of the urupā and was a breach of Te Tiriti o Waitangi / the Treaty of Waitangi and its principles.[24]

In our view, this Crown concession is entirely apt but it falls short of acknowledging the flaws in the meeting of assembled owners' system, which empowered 13 of the 77 owners to sell Ngārara West A14B1. We have already made a finding of Treaty breach on that point (see chapter 2).

3.3.4 The company tries to clarify the status of the land, 1969

As noted in chapter 2, Mr Simpson had raised the issue of the 'Māori cemetery' at the meeting of assembled owners in December 1968: 'At first it was thought that the cemetery was in this block but he had since learnt that it was not.'[25] From the evidence available to us, the Waikanae Land Company became concerned about this issue in August 1969, prior to purchasing the land from the Māori Trustee. The

24. Crown counsel, closing submissions: Kārewarewa urupā (paper 3.3.59), pp 16–17
25. 'Statement of Proceedings of Meeting of Assembled Owners', 18 December 1968 (Ropata, papers in support of brief of evidence (doc F1(a)), p 25)

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company's solicitors wrote to the Māori Land Court on 26 August 1969, inquiring about whether the block had been used as a 'Māori burial ground'.[26]

The deputy registrar responded on 11 September 1969, enclosing the court minutes from the 1919 partition hearing. He noted that the minutes described the purpose of the partition as 'cutting out a graveyard'. The land had not, however, been 'set apart as a Māori reservation for the purposes of a cemetery, nor have trustees been appointed at any time'. As a result, the block remained 'ordinary Māori freehold land'. The deputy registrar also referred to Mr Simpson's statement at the meeting of assembled owners (quoted in section 2.5.1). The company's solicitors were referred to Mr Simpson in case he might be able to 'enlarge on this statement'. The deputy registrar advised that the court's records 'do not disclose anything further about the actual use of this block as a Māori burial ground'.[27]

At the company's request, the deputy registrar sent an abbreviated letter on 23 September 1969. This second letter stated only that the minutes had referred to a 'graveyard' but that no action had been taken to set it aside as a Māori reservation. The land was simply 'ordinary Māori freehold land'.[28] This more limited statement was later used in support of the company's case to change the Horowhenua district scheme (discussed later below).

Suzanne Woodley commented that the court officials failed to refer to the earlier minutes from 1896 and 1905. Nor did they 'suggest speaking to local Māori about the matter' or engage themselves with the owners or with Waikanae kaumātua and kuia.[29] We agree that these were very important points.

In February 1970, however, the court deputy registrar responded to further requests for information and did inform the company of the 1896 partition request to cut off a 'cemetery', to be named A14A. The deputy registrar explained that this partition order was never completed because there was no survey. He did not mention the proceedings in 1905 to cut out the same land as an 'urupa', which the court had dismissed because the original orders simply needed to be completed.[30] It appears that the company did not pass the information about the 1896 partition on, and there was no mention of it in the proceedings to change the district scheme (see below).

Ms Woodley added: 'There was also no record of any attempt to check valuation rolls or district planning maps which as noted above, recorded that the block was a

26. Deputy Registrar to Rowe and O'Sullivan, 11 September 1969 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), p 181)

27. Deputy Registrar to Rowe and O'Sullivan, 11 September 1969 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), p 181)

28. Deputy Registrar to Rowe and O'Sullivan, 23 September 1969 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), p 182)

29. Woodley, 'Local Government Issues' (doc A193), pp 632–633, 657

30. Mary O'Keeffe, 'Tamati Place – Archaeological Issues: Report to Neil Carr, PropertyPathways Ltd', August 2014 (O'Keeffe, papers in support of brief of evidence (doc G6(e)), pp 10–11). The letter was from the deputy registrar to Rowe and O'Sullivan, dated 19 February 1970. This letter is held by Fitzherbert Rowe Lawyers and was made available to Ms O'Keeffe in 2014 but the Tribunal has not had the opportunity to see it.

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cemetery'.[31] This brings us to a crucial point: the company's attempt to remove the protection offered to the urupā block by its designation as 'Māori cemetery' in the district scheme.

3.3.5 Te Ātiawa / Ngāti Awa objections to removing the cemetery designation

The council received four written objections from Te Ātiawa / Ngāti Awa:

- Te Aputa Kauri, the great-granddaughter of Wi Parata, stated in her objection form that the land was tapu, that she had ancestors buried in the 'cemetery', and that it was 'the resting place of many persons connected with the early history of Waikanae'. Mrs Kauri said that her objection would only be met by the land remaining a 'Māori Cemetery'.[32]
- Sylvia Tamati lodged her objection on behalf of the marae trustees, stating that the block was the 'burial ground of my Tribal ancestors of "Te Ātiawa", Taranaki'. Mrs Tamati also said that her objection was lodged on behalf of her mother, Ngawati Morehu, the 'beneficiaries' (that is, the former owners), and others who had relations buried in the 'cemetery'. She asked that a block of land be set aside for the 'interment of human remains unearthed on this block' in a casket. Further, Mrs Tamati noted that none of the other tribal burial grounds had been made reservations either or had had trustees appointed, and that action had only just been taken (in November 1969) to appoint trustees for Takamore.[33]
- Jillian Simmonds objected that the block was 'tapu land' and that she had ancestors and relations buried there. She asked that the 'Burial Ground' be left as it was.[34]
- Johnson Te Puni Tamati Thomas objected, stating: 'My ancestors fought, died and are buried in this cemetery and Tapu ground'. He added: 'Although this block of land was never registered as a cemetery reserve [meaning a Māori reservation], it was connected with the early history of Waikanae and the resting place of my ancestors'. Mr Thomas asked for land to be set aside for reburial. He also wanted to be notified of all arrangements so that a special church service could take place.[35] Paora Ropata told us that Mr Thomas and other objectors were 'descendants of Unaiki Parata (my Great Great Grandmother)'.[36]

31. Woodley, 'Local Government Issues' (doc A193), pp 632–633
32. Te Aputa Kauri, statement of objections, 2 April 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), p 98)
33. Sylvia Tamati, statement of objections, 2 April 1970; Sylvia Tamaki to county clerk, 5 April 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii), pp 94–95); (Woodley, 'Local Government Issues' (doc A193), pp 636–637)
34. Jillian Simmons, statement of objections, 2 April 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), p 93)
35. Johnson Te Puni Tamati Thomas, statement of objections, 3 April 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), p 92)
36. Paora Ropata, brief of evidence, 17 January 2019 (doc F1), p 20

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Although all of these objections were signed before the cut-off date of 6 April 1970, only Te Aputa Kauri's objection was received by the council in time. Because one valid objection had been received, the council then had to advertise for the filing of statements in support or opposition to the objection, and set a date to hear the objection. The objectors who filed too late were advised that they could support Mrs Kauri's objection if they chose.[37]

The objection form included a category for how the objection could be met, and this had revealed a significant difference of views: two had sought for the urupā to retain its designation as a Māori cemetery; and the other two had said that their objection could be met by the council setting aside a new piece of land for the reinterment of any human remains disturbed by the developers. Mrs Tamati felt strongly enough about that to file a statement in opposition to Te Aputa Kauri. In that statement, she argued that the development of the land represented progress and would benefit the whole of Waikanae. At present, however, the land was covered with gorse and other 'noxious weeds', and it had proven impossible to obtain funding or the cooperation of all the (former) owners to deal with that problem.[38]

The Waikanae Land Company also registered its opposition to Mrs Kauri's objection. The company's position included three possible grounds:

- the land could not be *shown* to be 'the burial place of any of the ancestors of the objector or of Maoris connected with the early history of Waikanae'; and / or
- the land *was not* a 'traditional Maori burial ground'; and / or
- it was in 'the public interest and the interests of good town planning that the designation be removed'.[39]

Following the receipt of these statements in opposition, Te Aputa Kauri's objection was heard by a special committee of three councillors on 25 May 1970. Mrs Kauri appeared in person at the hearing but was not represented by counsel. The company had the benefit of legal submissions on its behalf, in addition to which one of the directors gave evidence opposing Mrs Kauri's objection. Sylvia Tamati did not appear in person but her objection was read out (noting that this was confined to what should be done with the land now and was not an objection to the rest of Mrs Kauri's evidence).[40]

Te Aputa Kauri told the committee that her opposition was driven by 'the deep feelings of emotion and sentiment which I have concerning our Maori heritage – feelings of respect and veneration which were first instilled in me as a child' by

37. Woodley, 'Local Government Issues' (doc A193), pp 636–638; Horowhenua County Council, minute, 7 April 1970 (and note on that minute) (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), pp 96–97)

38. Sylvia Tamati, statement in opposition to objection, 12 May 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), p 100)

39. Waikanae Land Company, statement of opposition to objection, 1 May 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), p 101)

40. Special committee report, 'Horowhenua District County Scheme: Change No 3', 7 July 1970; S Tamati, statement of opposition, 12 May 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), pp 105–108, 111)

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her parents and elders. She was not, however, optimistic that her objection would be successful, being aware that 'sentiment for the past will not stop progress', and that the committee was obliged to consider the public interest and 'good town planning'. Nonetheless, Mrs Kauri stated that her objection stood. If the council disallowed it then at 'the very least' she sought the reinterment of any human remains in 'a common grave on an adjacent piece of reserve land', and for a commemorative plaque to be erected.[41]

William Lawrence, director of the Waikanae Land Company, gave evidence stating that:

- he had inspected the ground and found two headstones as the only evidence that any burials had ever occurred;
- the Māori Land Court had advised that there was 'no Court record nor any knowledge on the part of the Court which would indicate that this block was a traditional Māori burial ground';
- the 1919 minutes indicated that the partition was to set aside land for a new graveyard, not an existing one, and the 23 September 1969 letter from the registrar confirmed this point and indicated that no attempt had been made to appoint trustees or establish a Māori reservation;
- the objector's belief that the block was the Kārewarewa burial ground was wrong, because Carkeek's book stated that the location of this burial ground was unknown;
- a meeting of assembled owners had unanimously resolved to have the land sold by the Māori Trustee; and
- there was nothing visible that suggested the land had any historic significance or should be left in its current state for that reason.[42]

The company's solicitors repeated all of these points but accepted that, if the land was a traditional burial ground, it could only be Kārewarewa. Nonetheless, the solicitors argued that the company's case did not turn on whether the land had been used for burials or not. Rather, even if it could be proven that there was a cemetery on the land, the key issue was whether leaving the block in its present state was an appropriate way of dealing with the land. In the company's submissions, its plans for development of the land were 'in the public interest' and in 'the interest of good town planning'.[43] The company did give an assurance that it would 'honour and respect any remains which may be uncovered and arrange for them to be dealt with in the manner suggested by Mrs Kauri'. The company would not object if the council chose to make this a formal condition on their development of the land.[44]

41. Te Aputa Wairau Kauri, statement of evidence to the special committee, no date (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), p 109)
42. Woodley, 'Local Government Issues' (doc A193), pp 640–641
43. Special committee report, 'Horowhenua District County Scheme: Change No 3', 7 July 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), pp 106–107)
44. Special committee report, 'Horowhenua District County Scheme: Change No 3', 7 July 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), p 106)

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It is clear that a number of important matters were either not presented to the committee or not given sufficient weight:

- No weight whatsoever was accorded to the traditional knowledge of local Māori.
- No reference was made to the minutes of 1896 or 1905, which made it clear that the owners had been trying to set the urupā block apart for a number of years, and had not decided in 1919 to cut out land for a *new* cemetery.
- The company director's search of the overgrown land for headstones was not a valid method for determining the site of a traditional urupā, although it demonstrated that some burials had occurred.
- Significant weight was placed on the point that the urupā had not been made a Māori Reservation since the 1919 partition. The Māori land titles system, however, made it difficult for a large number of owners, with many absent or owning tiny fractions, to deal with their land collectively (such as by agreeing to appoint trustees, establish a Māori Reservation, or clear a 20-acre block of 'noxious weeds').
- Significant weight was placed on the point that the owners had 'unanimously' voted to sell their land at a meeting of assembled owners. This was correct as far as it went – the 13 owners had voted either to sell directly or to appoint the Māori Trustee as agent to sell – and it is obvious why the owners' sale of the land for development was a crucial aspect of the case. But this argument took no account of the fact that, as the law allowed, only a small minority of owners had actually attended the meeting in 1969. Owners representing about 11 per cent of interests in the land had voted in favour of the resolution to vest it for sale. All other owners were disenfranchised and lost their land. Over and above the 77 legal owners, there were more tribal members who had interests under custom, as their tūpuna were buried in that land. We have already found that the statutory scheme that allowed the land to be sold in this way was in breach of the Treaty (see chapter 2).

The committee reported back to the council in July 1970, recommending that the cemetery designation be lifted. Two reasons were given. First, the Māori owners had sold the land to a development company. Secondly, there was 'no certain evidence that it is an historical Maori Burial Ground', or that any burials had taken place since it was 'set apart for a future Maori Cemetery in 1919'. Undermining this reasoning, the committee added that there was nevertheless 'the possibility that human remains may be uncovered as development of the land proceeds'.[45] This indicates that the committee accepted the company's main argument: even if the urupā existed, it was not in the public interest or the interests of good town planning to leave the land in its present state if it could be developed and turned into residential sections.

45. Special committee report, 'Horowhenua District County Scheme: Change No 3', 7 July 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), pp 107–108)

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The committee's decision reflects the monocultural nature of the Town and Country Planning Act 1953. Suzanne Woodley commented in respect of the committee's decision:

> It is of note that the legislation at the time did not provide for a role for tangata whenua in respect to the decision-making process concerning the change of designation. There was also no requirement at the time for local authorities to recognise, when preparing their district plans, 'the relationship of the Maori people and their culture and traditions with their ancestral land'. This was not introduced until 1977 as per section 3 of the Town and Country Planning Act.[46]

Claimant counsel submitted:

> The failure to protect the Urupā from desecration is a number of errors documented by Suzanne Woodley. However, those errors have a single underlying cause: the failure of public bodies established by the Crown to respect the tino rangatiratanga of Te Ātiawa. This is the thread that runs through the failure of Māori Land Court officials to properly advise on the designation of Ngārara West A14 as an urupā, the failure of the Horowhenua County Council or Kāpiti District Council to give weight to the evidence of Te Aputa Kauri, to the failure to consider the objections of other Māori.[47]

The claimants accepted that the Crown was not directly responsible for the committee's decision to prioritise residential development. But claimant counsel submitted that the Crown's legislative framework had not provided for partnerships in local government. As a result, iwi lacked 'real power in relation to decisions affecting their land'.[48]

3.4 The Application of the Burial and Cremation Act 1964

At the time of the sale of the urupā block in 1969, a new law in respect of cemeteries and burial grounds had only recently replaced the Cemeteries Act 1908. After multiple amendments over the years, the Cemeteries Act 1908 was repealed by the Burial and Cremation Act 1964. The parties disagreed as to whether this Act provided Ngārara West A14B1 with any legal protection.

Claimant counsel submitted in respect of the Cemeteries Act 1908:

> The evidence clearly shows that the tangata whenua land owners, the Native Land Court, and the Horowhenua County Council recognised Ngārara West A14B1 as a cemetery or urupa through at least the first half of the twentieth century. Further to

46. Suzanne Woodley, 'Local Government Issues' (doc A193), p 644
47. Claimant counsel (Wai 88 & 89), closing submissions, 24 October 2019 (paper 3.3.49), p 23
48. Claimant counsel (Wai 88 & 89), closing submissions (paper 3.3.49), pp 23–24

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> that, the enactment of the New Zealand Cemeteries Act 1908 defined, 'every place of burial not being a cemetery' as a burial-ground and a cemetery as 'any place set apart for the burial of the dead'. The Act made all such burial-grounds subject to all regulations and protections available under the Act.[49]

According to claimant counsel, the same protections still applied to Kārewarewa under the new 1964 Act:

> The Burial and Cremation Act 1964 was in effect upon the sale of the land and kept the same definitions as the 1908 Act. Section 21 of the 1964 Act restricted the alienation of land defined as a cemetery or burial ground to specific circumstances, none of which in our submission were applicable.[50]

The Crown submitted that the 1964 Act did not apply because it 'specifically excluded Māori burial sites'. For that reason, the only relevant legislation was the Māori Affairs Act 1953 and its provision to set aside burial grounds as Māori Reservations.[51]

On the face of it, the Crown is correct. Section 3 of the Burial and Cremation Act 1964 stated: '*Except as is expressly provided in this Act*, this Act shall not apply to Māori burial grounds or to the burial of bodies therein' (emphasis added). In section 2, the Act defined Māori burial grounds as land set apart for that purpose as a Māori Reservation under section 439 of the Māori Affairs Act or a 'corresponding former provision' (which would have covered native reservations prior to the 1953 Act). On our reading of the 1964 Act, urupā that had not been set aside as section 439 reservations do not appear to have been included at all because, in addition to being *expressly excluded*, they did not appear to come under the Act's definitions of 'cemeteries', 'private burial grounds', or 'Māori burial grounds'. The *express provision* referred to in section 3 of the Burial and Cremation Act 1964 included matters in the Act which applied to every cemetery and burial ground (including Māori Reservations), such as the removal of bodies and animal trespass.

In our view, the terms of the 1964 Act meant that the Crown provided minimal or no protection for Māori burial grounds outside any reservations made under section 439 of the Māori Affairs Act 1953.

Nonetheless, Kārewarewa urupā had been designated a 'Māori cemetery' (a term that does not appear in the Burial and Cremation Act) in the local authority's district scheme. This *did* restrict development of the land no matter whether it was still in Māori ownership or not. In our view, the crucial point is not the application of the 1964 Act but the removal of the cemetery designation, which has been discussed in the preceding section.

49. Claimant counsel (Wai 1945), closing submissions, 25 October 2019 (paper 3.3.50), p 10
50. Claimant counsel (Wai 1945), closing submissions (paper 3.3.50), p 10
51. Crown counsel, closing submissions: Kārewarewa urupā (paper 3.3.59), p 17, n 63

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Urupā and the Burial and Cremation Act 1964

Under section 2 of the Burial and Cremation Act 1964:

- 'burial ground' means a denominational or private burial ground 'but does not include a Māori burial ground';
- 'cemetery' means land 'held, taken, purchased, acquired, set apart, dedicated, or reserved' under any Act or before the 1964 Act for the 'burial of the dead generally';
- 'denominational burial ground' means any land outside of a cemetery that has been 'held, purchased, acquired, set apart, or dedicated' under any Act or before the 1964 Act for burials belonging to a religious denomination;
- 'Māori burial ground' means 'any land set apart for the purposes of a burial ground' under section 439 of the Māori Affairs Act 1953 or 'any corresponding former provision'; and
- 'private burial ground' means any land declared a private burial ground under the Cemeteries Amendment Act 1912.

Section 3 of the Burial and Cremation Act 1964 states: 'Except as is expressly provided in this Act, this Act shall not apply to Māori burial grounds or to the burial of bodies therein'. Under section 6, 'cemeteries' were further defined as places that shall be 'open for the interment of all deceased persons'. Cemeteries or burial grounds (but not Māori burial grounds) that were no longer in use could be 'closed' by order of the Governor-General, and could not then be sold or alienated in any way. Cumulatively, it is clear that urupā which had not been set aside as Māori reservations did not come under the definitions of 'cemeteries', 'private burial grounds', 'Māori burial grounds', or 'denominational burial grounds'. They were either not protected or provided very minimal protection by the provisions of the Burial and Cremation Act 1964.

3.5 Treaty Findings

As set out in section 3.3.3, the Crown has conceded that its acts or omissions have breached Treaty principles:

> The Crown concedes that in 1970 it failed to adequately investigate whether Kārewarewa urupā was located on Ngārara West A14B1 after being informed that this land was to be developed. The Crown further concedes its failure to object to the removal of the cemetery designation over Kārewarewa urupā led to the desecration of the urupā and was a breach of Te Tiriti o Waitangi / the Treaty of Waitangi and its principles.[52]

52. Crown counsel, closing submissions: Kārewarewa urupā (paper 3.3.59), p 17

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Based on our analysis in section 3.3, the Crown's concession is entirely apt and we agree that the Crown's omissions were in breach of the principles of the Treaty. Specifically, it failed to investigate whether or not Ngārara A14B1 was an urupā, including by failing to consult tribal leaders on this point, which was a breach of the principles of partnership and active protection. Further, the Crown failed to lodge an objection or to intervene in some other way, which was a breach of its active protection obligations. The prejudice was, as the Crown stated, that these Crown omissions 'led to the desecration of the urupā', as we set out below in section 3.6.

In our view, there were additional Treaty breaches in the legislative scheme for local government and town planning at that time. First, as we noted in section 3.3.5, the Town and Country Planning Act 1953 was monocultural legislation. It took no account whatsoever of Māori interests and values. The county council committee's decision was based on the fundamental concept that commercial development was in the best interests of the public and of good town planning, even though it accepted the 'possibility that human remains may be uncovered as development of the land proceeds'.[53] The requirement for decision-makers to take account of the 'relationship of the Māori people and their culture and traditions with their ancestral land' in amending district plans was not introduced until 1977.[54] Secondly, hapū and iwi had no statutory role in the planning process. There was no requirement in the Town and Country Planning Act 1953 for local Māori to be consulted or involved in decision-making processes on matters of importance to them. For these two reasons, we find the Town and Country Planning Act 1953, as it applied to the amendment of the Horowhenua county district scheme to remove the 'Māori Cemetery' designation, was inconsistent with the principles of partnership and active protection. The prejudicial effects will be set out in the next section.

Finally, we observe that, on the face of it, the Burial and Cremation Act 1964 excluded all urupā that were not Māori Reservations from the protections given to cemeteries and private burial grounds. This left the Kārewarewa urupā outside the protections of that Act. But we make no finding of breach on this point as further research would be needed into how the Act worked and was interpreted in practice.

3.6 Prejudice: Desecration of the Urupā

The prejudicial effects of the Treaty breaches set out in section 3.5 were soon evident. After the cemetery designation was removed in 1970, the Waikanae Land Company proceeded with the development of the urupā block and the surrounding area. The development generated a lot of protest and controversy, mostly due to the company's plans for the Waikanae River mouth and estuary. The Wildlife

53. Special committee report, 'Horowhenua District County Scheme: Change No 3', 7 July 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(viii)), pp 107–108)
54. Town and Country Planning Act 1977, s 3(1)(g)

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Map 2: The Waikanae Land Company's original lands, including the urupā block
Source: Mary O'Keeffe, 'Tamati Place – Archaeological Issues: Report to Neil Carr, PropertyPathways Ltd', August 2014, p 3 (O'Keeffe, papers in support of brief of evidence (doc G6(e)), p 5).

Division of Internal Affairs was among those concerned about the proposed commercial development of the estuary, and the effect it would have on the native bird population.[55] The company owned about 100 acres on the northern side of the river (see map 2), where it bulldozed the sandhills for residential sections and also began dredging the Waimeha wetlands (the old stream bed). By the end of 1971, a special dredge had 'moved 350,000 cubic metres of sand and created the new Waimanu Lagoon.'[56] This dredged material was compacted and re-deposited on top of the urupā.[57]

55. Ross Webb, 'Te Atiawa / Ngāti Awa ki Kapiti – Inland Waterways: Ownership and Control', September 2018 (doc A205), pp 60–67
56. Chris Maclean and Joan Maclean, *Waikanae*, second ed (Waikanae: Whitcome Press, 2010), p 194
57. Mary O'Keeffe, brief of evidence, 8 July 2019 (doc G6), p 13

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Map 3: Residential and undeveloped areas of the urupā block

Source: Mary O'Keeffe, 'Tamati Place – Archaeological Issues: Report to Neil Carr, PropertyPathways Ltd', August 2014, p 4 (O'Keeffe, papers in support of brief of evidence (doc G6(e)), p 6).

Several headstones were uncovered during the company's work.[58] Three have survived, two of which (dated 1848 and 1852) were moved nearby during the development work. The date on the third is illegible; this stone was for a child of George Ashdown, an early whaler, and Maata Pekamu of Ngāti Mutunga and Ngāti Kura, and was 'relocated to the urupā currently used by Te Ātiawa ki Whakarongotai, Te Ruakōhatu.'[59] Rawhiti Higgott advised that this headstone 'dated back to the 1860s.'[60]

Mahina-a-rangi Baker explained that the flattening of the sandhills and the removal of such a large quantity of the sand also affected kōiwi. She cited an earlier 'Kārewarewa Urupā Waahi Tapu' report, prepared by Pataka Moore, stating:

58. Maclean and Maclean, *Waikanae*, p 221; Mary O'Keeffe, brief of evidence (doc G6), p 7
59. Mahina-a-rangi Baker, 'Cultural Impact Assessment', pp 9–13 (Baker, papers in support of brief of evidence (doc F11(a)), pp 584–588); Mary O'Keeffe, brief of evidence (doc G6), p 14. Ruakōhatu Urupā is located across from Whakarongotai Marae, separated by the main road.
60. Rawhiti Higgott, brief of evidence, no date (doc A129), p [4]

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> Author of Te Kārewarewa Urupā Waahi Tapu report interviewed various members of Te Ātiawa in his research, who also gave accounts of bulldozers and dredges finding koiwi at this time. They describe this work as 'abhorrent' and having great effect on certain people. Kaumatua Tony Thomas explained that whilst he seldom speaks of the events, it is something that needs to be remembered by the community. These local accounts recalled that many koiwi remained buried, and others were moved within the slurry by trucks to other areas where fill was needed. It is not possible to ascertain specifically which parts of the urupā were affected by the changes as the natural dune system was highly modified during this initial dredging period. . . . Much of Te Kārewarewa urupā has now had residential properties built on it. This is a substantive grievance for Te Ātiawa.[61]

Residential sections were created on the block around part of Barrett Drive, Te Ropata Place, and Marewa Place (see map 3).[62] The company, however, got into financial difficulties and went into receivership in 1979.[63] Ms Baker commented: 'This seems to have a put a hold on development works, however by this time over half of Te Kārewarewa urupā had been developed with housing put on top of the burial sites of our tupuna.'[64] This was the prejudicial effect of the Treaty breaches outlined in sections 2.6 and 3.5.

The desecration of the urupā did not end with the company going into receivership in the 1970s. Development efforts were later revived in 1999–2000 and in 2014–18. They resulted in the exposure of kōiwi in 2000, which led to a temporary halt to the development of Tamati Place, followed by various archaeological works to investigate the nature and extent of burials. These issues are addressed in the next chapter.

61. Mahina-a-rangi Baker, 'Cultural Impact Assessment', p 20 (Baker, papers in support of brief of evidence (doc F11(a)), p 595)
62. Mary O'Keeffe, 'Tamati Place – Archaeological Issues', p 19 (O'Keeffe, papers in support of brief of evidence (doc G6(e)), p 21). Figure 11 shows current streets laid out on Ngarara West A14B1.
63. Ross Webb, 'Te Atiawa / Ngāti Awa ki Kapiti – Inland Waterways' (doc A205), p 64
64. Mahina-a-rangi Baker, brief of evidence (doc F11), p 50

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Summary of Findings

In this chapter, we summarise our findings as follows:

- The Crown conceded that it failed to 'adequately investigate whether Kārewarewa urupā was located on Ngārara West A14B1, after being informed that this land was to be developed'. The Crown also conceded that its 'failure to object to the removal of the cemetery designation' led to the 'desecration of the urupā' and was a breach of Treaty principles. We consider that this was an appropriate concession and that the Crown's omissions, including its failure to consult tribal leaders, breached the principle of active protection of taonga.
- In addition, the Town and Country Planning Act 1953 was monocultural legislation, which did not provide for consultation with Māori or any input for tangata whenua in decision-making on matters that affected them. The Act also did not provide for Māori values and interests to be taken into account in local government decision-making. These aspects of the Act, particularly as they applied to the removal of the 'Māori cemetery' designation in 1970, were inconsistent with the principles of partnership and active protection.
- On our reading of it, the Burial and Cremation Act 1964 provided little or no protection to Māori burial grounds (limited in the Act to those that had been set aside as Māori Reservations), but we made no finding of breach because further research is needed on how the Act worked in practice.
- The former Māori owners and the wider iwi were prejudiced by these breaches when the urupā was desecrated by the dumping of 350,000 cubic metres of dredged material on top of it and the development of over half of it for residential housing.

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CHAPTER 4

PROTECTION OF THE URUPĀ UNDER MODERN HERITAGE LAWS

4.1 Introduction

4.1.1 What this chapter is about

In this chapter, the primary issue is the extent to which the modern heritage regime has protected Kārewarewa urupā. There are two main statutes: the Historic Places Act 1993 and the Heritage New Zealand Pouhere Taonga Act 2014.

The Historic Places Act 1993 overhauled heritage management and protection in New Zealand. It established the Māori Heritage Council within the Historic Places Trust structure. The council had many functions and powers. These included a leadership role in Māori heritage preservation, determining whether wāhi tapu should be registered, recommending (or deciding upon delegation) the granting of archaeological authorities to modify or destroy a site, and consulting Māori about such applications.[1] The 1993 Act also placed a much greater weight on Māori heritage in general, and on Māori values in respect of sites of interest to tangata whenua, than the previous statutory regime. It required applicants for an archaeological authority to consult tangata whenua on sites of interest to them or explain why the applicant had not done so. It also required applicants to provide an assessment of how the proposed modification or destruction of a site would affect Māori values.[2]

Alongside the emphasis on consultation (by the applicant) and assessment of Māori values in decision-making, the Act retained some of the dominance of archaeological protection that had marked earlier legislation. Te Kenehi Teira, a Crown witness in our inquiry, explained that the 'non-tangible . . . quite often gets relegated to a seconday consideration'. He pointed to the Australian Northern Territories legislation for an alternative approach.[3]

In 2000, the status of the Historic Places Trust was changed from that of an NGO (non-governmental organisation) to a Crown entity. Responsibility for the Act also shifted from the Conservation Department to the Ministry for Culture and Heritage.[4]

In 1999–2000, the Waikanae Land Company resumed attempts to development the remaining parts of Ngārara West A14B1 for the Tamati Place housing development (see figure 2, showing the undeveloped area, including Tamati Place and Wi

1. Historic Places Act 1993, ss 14(3), 84–86
2. Historic Places Act 1993, ss 11–12
3. Transcript 4.1.21, p 165; Northern Territory of Australia Heritage Act 2011
4. Archives, Culture, and Heritage Reform Act 2000

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Figure 2: The undeveloped part of Kārewarewa urupā
Source: Paora Ropata, papers in support of brief of evidence (doc F1(a)), p 72

Kingi Place). At the time, given the removal of the 'Māori cemetery' designation and the decision that the block had been set aside for a *new* cemetery, work to prepare the site was carried out without any application for an authority from the trust. In 2000, however, preliminary work exposed kōiwi on the site. This brought in the Historic Places Trust and the need for an archaeological authority to continue any further development of the site. The degree of protection which this afforded is the first issue examined in this chapter.

The heritage management regime was reformed in 2014 but not in such a ground-breaking way as in 1993. Under the Heritage New Zealand Pouhere Taonga Act 2014, the trust was renamed Heritage New Zealand Pouhere Taonga. It remained a Crown entity but the trust's branch committees were abolished. The 2014 Act continued the Māori Heritage Council and its various powers and functions. The Act was designed to streamline processes and align them with the RMA, partly with the intention of giving greater weight to landowners' views and interests in heritage decision-making.[5] Importantly for this report, the 2014 Act introduced a new form of archaeological authority called an 'exploratory authority', which provided for an invasive investigation of a site. These authorities were treated in a different manner than those to modify or destroy a site.[6]

5. Ministry for Culture and Heritage, 'Heritage New Zealand Pouhere Taonga Bill: Departmental Report', May 2013, pp 5, 12: www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws
6. Heritage New Zealand Pouhere Taonga Act 2014, s 56

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In 2014, the Waikanae Land Company resumed efforts towards developing Tamati Place but now with the clear proof that the site was an urupā. The question then became for the developers: was the whole site an urupā and could development continue if there were parts of the site with no evidence of burials? The result was the use of the new exploratory authorities established in 2014. The legislative regime for these authorities, and the processes used by Heritage New Zealand Pouhere Taonga to grant an authority to dig a test pit in 2016, comprise the second set of issues addressed in this chapter. The Crown's submissions were focused mostly on these issues, and we received evidence from three Heritage New Zealand witnesses: Te Kenehi Teira, Dean Whiting, and Kathryn Hurren. We have therefore considered the evidence and analysis at some length in the section dealing with these matters. The archaeologist concerned, Mary O'Keeffe, also presented evidence as a Crown witness, but Crown counsel noted that Ms O'Keeffe was an independent witness and her views were 'hers alone and not the Crown's'.[7]

Following our discussion and analysis of these issues, we make our Treaty findings. We then proceed to discuss the potential remedies raised by claimant and Crown witnesses before making our recommendations. As our recommendations all relate to the issues discussed in this chapter, the recommendations are included at the end of this chapter rather than made the subject of a new chapter.

4.1.2 The Tribunal's jurisdiction

Under section 6 of the Treaty of Waitangi Act 1975, the Waitangi Tribunal has jurisdiction to consider (among other things) acts or omissions 'by or on behalf of the Crown'. Heritage New Zealand Pouhere Taonga is a Crown entity. The question as to whether or not the Tribunal has jurisdiction to make findings about the acts or omissions of Heritage New Zealand was not considered by the parties' submissions in this inquiry. All parties assumed that the Tribunal does have such jurisdiction.

The Crown Entities Act 2004 classifies Heritage New Zealand as an 'autonomous Crown entity', which 'must have regard to government policy when directed by the responsible Minister'. Autonomous Crown entities are distinguished in that statute from Crown entities that are classified as 'Crown agents'.[8] The Historic Places Trust was also an autonomous Crown entity but subject to a Treaty clause inserted in 2000 into the Historic Places Act 1993, which stated:

> (2) This Act must continue to be interpreted and administered to give effect to the principles of the Treaty of Waitangi, unless the context otherwise requires, even though this Act is no longer—
>
> (a) administered by the Department of Conservation; or
>
> (b) included in Schedule 1 of the Conservation Act 1987.[9]

7. Crown counsel, closing submissions: Kārewarewa urupā, 16 December 2019 (paper 3.3.59), pp 21–22
8. Crown Entities Act 2004, s 7; sch 1, pt 2
9. Historic Places Act 1993, s 115(2); Archives, Culture, and Heritage Reform Act 2000, s 12

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The Heritage New Zealand Pouhere Taonga Bill was introduced in 2013. The Ministry of Culture and Heritage advised the select committee that the Historic Places Act's 'general requirement "to give effect to the principles of the Treaty"' was 'unclear'. Therefore, the Ministry advised, 'consistent with modern drafting practice, the Bill identifies specifically which provisions of the Bill give effect to the Treaty'.[10]

Section 7 of the Heritage New Zealand Pouhere Taonga Act 2014 states that, '[i]n order to recognise and respect the Crown's responsibility to give effect to the Treaty of Waitangi', the Act contains specific provisions. These provisions relate to the 'functions, powers and delegations of the Māori Heritage Council and processes relating to the archaeological authority process'.[11] Section 7 specifies the various provisions of the Act as:

- Section 10 provides for the appointment of three board members with knowledge of 'te ao Māori and tikanga Māori'.
- Under sections 13–14, Heritage New Zealand has functions relating to wāhi tūpuna, wāhi tapu, and 'wāhi tapu areas', and can be a Heritage Protection Authority for these under the RMA.
- In sections 22 and 26, the Heritage New Zealand board has the power to delegate functions and powers to the Māori Heritage Council.
- In sections 27–28, the Māori Heritage Council has functions and powers to 'ensure the appropriate protection of wāhi tūpuna, wāhi tapu, wāhi tapu areas, historic places, and historic areas of interest to Māori'.
- In section 39, Heritage New Zealand has power to enter into heritage covenants for 'wāhi tūpuna, wāhi tapu, and wāhi tapu areas'.
- In sections 46, 49, 51, 56, 57, 62, and 64 (all relating to archaeological authorities) and section 67 (applications to go on the New Zealand Heritage List), there are 'measures that are appropriate to support processes and decisions relating to sites that are of interest to Māori or to places on Māori land'.
- In sections 66, 68, 69, 70, 72, and 78 (all relating to the New Zealand Heritage List), the Māori Heritage Council has power to enter, or to determine applications to enter, various sites on the New Zealand Heritage List. These powers relate to registering 'wāhi tūpuna, wāhi tapu, and wāhi tapu areas' on the list.
- In section 74, the Māori Heritage Council has power to make recommendations to local authorities about wāhi tapu areas entered on the list, to which local authorities must have particular regard.
- In sections 75 and 82, there are requirements to consult the Māori Heritage Council 'in certain circumstances' relating to the New Zealand Heritage List and the National Historic Landmarks list. In section 82, the Minister for

10. Ministry for Culture and Heritage, 'Heritage New Zealand Pouhere Taonga Bill: Departmental Report', p 11

11. Heritage New Zealand Pouhere Taonga, *Statement of General Policy: The administration of the archaeological provisions under the Heritage New Zealand Pouhere Taonga Act 2014*, 29 October 2015, p 4 (Crown counsel, documents filed in response to Tribunal questions (doc G1(d)), p 5)

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> Māori Development must be consulted in certain cirumstances about the National Historic Landmarks list.[12]

Section 7 thus means that the Crown's responsibility to give effect to the Treaty is 'recognised and respected' in these 25 provisions of the Act. Our understanding is that, when Heritage New Zealand exercises or carries out these functions, powers, and processes, the Crown's Treaty 'responsibility' must be met. Crown counsel certainly considered that Heritage New Zealand has Treaty obligations and that its actions were matters for which we have jurisdiction. She submitted, for example, that Heritage New Zealand's decision to grant the authority for a test pit in 2016 was 'not in breach of its duties under the Treaty of Waitangi'.[13]

Te Kenehi Teira, deputy chief executive at Heritage New Zealand, told us that the organisation's 'philosophy and practice' approached and complied with Treaty obligations 'in additional ways' to those specified in section 7 of the Act. He also referred us to the Māori Heritage Council's policy statement.[14] Entitled *Tapuwae*, it stated that 'Heritage New Zealand Pouhere Taonga has a responsibility to give effect to the Treaty of Waitangi'.[15] The council's policy statement added:

> The Treaty of Waitangi provides the foundation for Heritage New Zealand engagement with Māori communities in respect of their heritage places. As a Crown entity, Heritage New Zealand exercises its functions and powers on the basis of Treaty-based relationships with whānau, hapū and iwi. Heritage New Zealand, through the presence of the Council and the standing and involvement of Council members amongst Māori communities, has successfully forged strong relationships with whānau, hapū and iwi. This permits the activities and statutory functions of Heritage New Zealand relating to Māori heritage places to be undertaken within a relationship that is essentially a Treaty partnership.
>
> Relationships between Heritage New Zealand and whānau, hapū and iwi are underpinned by the principles of partnership – incorporating a duty to act reasonably, honourably and in good faith, and a duty to make informed decisions – active protection, and where applicable, redress.[16]

We conclude, therefore, that section 7 of the 2014 Act delegates 'the Crown's responsibility to give effect to the Treaty' to Heritage New Zealand for the provisions referred to in that section. The Māori Heritage Council has instituted a policy, which states that Heritage New Zealand's activities and functions in respect of Māori heritage must be carried out within a Treaty relationship underpinned

12. Heritage New Zealand Pouhere Taonga Act 2014, s 7
13. Crown counsel, closing submissions: Kārewarewa urupā (paper 3.3.59), pp 4, 56
14. Te Kenehi Teira, answers to written questions, not dated (30 September 2019) (doc G4(d)), pp [4]-[5]
15. Heritage New Zealand Pouhere Taonga, *Tapuwae: Nā Te Kaunihera Māori Mō Te Pouhere Taonga Māori: The Māori Heritage Council Statement on Māori Heritage* (Wellington: Heritage New Zealand Pouhere Taonga, 2017), p 7
16. Heritage New Zealand Pouhere Taonga, *Tapuwae*, p 8

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by the principles of partnership, active protection, and (where applicable) redress. In this chapter, our analysis in respect of Heritage New Zealand is focused on the processes and powers exercised under section 56 of the Act, which is a provision included in the Treaty clause (section 7). We therefore have jurisdiction to consider the acts or omissions of Heritage New Zealand for the purpose of this report. Our findings and recommendations are mostly focused on section 56 itself (see sections 4.3.9 and 4.5 below).

4.2 Kārewarewa and the Historic Places Act 1993

4.2.1 Resumption of development work, 1990–2000

According to Chris and Joan Maclean, who wrote a history of Waikanae, the main focus of residential development turned to the south of the Waikanae River in the 1980s and 1990s.[17] In the 1990s, however, the Waikanae Land Company resumed work on the urupā block. Although the company was in receivership, 'further stages of subdivision of the Company's land were undertaken in the name of the Company on behalf of unpaid security holders'.[18] Archaeologist Mary O'Keeffe explained:

> In 1990 and 1999 the ground surface of the [Tamati Place] subdivision was recontoured. In 1990 the ground to the west of Wi Kingi Place was cut to a maximum depth of slightly more than 3 m on the dune ridge, and slightly more than 0.5m west of the intersection between Tamati Place and Wi Kingi Place. Fill was deposited on the eastern part of the subdivision to a maximum depth of 4 m. In addition, small pockets in the western part were filled to a depth of less than 1m.[19]

By the time of the work done in 1999–2000, the Resource Management Act 1991 (RMA) and the Historic Places Act 1993 were in place. This was a significant change in the legislative framework for town planning. According to Paora Ropata's evidence, resource consents were granted in 1997–99 'to build 29 houses on the site'.[20] We have no further evidence about these consents or the processes followed to grant them, so we are unable to determine how or why further development was permitted. The High Court noted in 2002 that no 'archaeological conditions or restrictions were attached to the consent which had been granted to the developer for the [Tamati Place] subdivision'. Nor was there any 'notation on the District Plan indicating that the site had any archaeological significance'.[21] Section 99 of

17. Chris Maclean and Joan Maclean, *Waikanae*, second ed (Waikanae: Whitcome Press, 2010), p 196
18. Mary O'Keeffe, 'Tamati Place – Archaeological Issues', p 2 (Mary O'Keeffe, papers in support of brief of evidence (doc G6(e)), p 4)
19. Mary O'Keeffe, brief of evidence, 8 July 2019 (doc G6), pp 14–15
20. Paora Ropata, brief of evidence, 17 January 2019 (doc F1), p 21
21. *Higgins Contractor Ltd v Historic Places Trust* High Court Wellington AP 10/02, 30 April 2002 at [6] (Suzanne Woodley, papers in support of 'Local Government Issues' (doc A193(c)(iii)), pp 97–98)

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the Historic Places Act, however, made it an offence to destroy, damage or modify an archaeological site without an authorisation from the Historic Places Trust. Archaeological sites were defined in the Act as places associated with pre-1900 human activity which might – through archaeological methods – provide evidence about New Zealand history.[22]

Work began in 2000 to 'prepare the site and construct service trenches'.[23] The trenches were dug along the centre of the two proposed roads, which were named Tamati Place and Wi Kingi Place (a short offshoot from Tamati Place).[24] During the course of this work, kōiwi were exposed on two separate occasions. The remains of at least nine individuals were found (some evidence says 11).[25]

In brief, based on the accounts in the District Court and High Court cases about this incident, kōiwi were uncovered on 5 July 2000 as a result of the earthworks. Historic Places Trust staff decided that the situation should be dealt with on an emergency basis. This meant that the site would not be treated as an 'archaeological site' for the purposes of the Historic Places Act, so that the kōiwi could be disturbed further by removing them for reinterment. Those working at the site were advised, however, that further work would need an authority from the trust and would also need to be monitored. A contentious point, however, was that some limited work was allowed to be completed but without enough specificity as to *where*. Susan Forbes, the archaeologist called to the site on 5 July 2000, advised contractors at that time of the existence of what appeared to be middens, which she said indicated the whole area was potentially an archaeological site. On 19 July 2000, a driver contacted Ms Forbes because further kōiwi had been found, at least 10 metres away from the original site of exposure. According to the contractors, the work underway at the time was necessary because pipe testing had showed leaks, and so – for safety purposes and to protect their materials – they had to complete some of the drainage work.[26]

Paora Ropata told us that the people only found out what was going on from Susan Forbes through 'word of mouth', not from the developers, and 'there was a sense of anger and betrayal once the Iwi learned of the continuation of diggings'.[27] In 2001, the Historic Places Trust prosecuted Payne Sewell Ltd and Higgins

22. Historic Places Act 1993, s 2. There was also a second definition relating to shipwrecks which is not relevant here.

23. Mary O'Keeffe, 'Tamati Drive Subdivision, Waikanae: Archaeological Assessment', May 2001 (O'Keeffe, papers in support of brief of evidence (doc G6(a)), p 50)

24. Mary O'Keeffe, 'Tamati Place – Archaeological Issues' (O'Keeffe, papers in support of brief of evidence (doc G6(e)), p 6)

25. Mahina-a-rangi Baker, 'Cultural Impact Assessment' (Mahina-a-rangi Baker, papers in support of brief of evidence (doc F11(a)), p 595); Paora Ropata, brief of evidence (doc F1), p 21; *Higgins Contractor Ltd v Historic Places Trust* High Court Wellington AP 10/02, 30 April 2002 at [15] (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(iii)), p 99)

26. *Historic Places Trust v Higgings Contractor Ltd* District Court Porirua CRN 0091014593, 13 September 2001; *Higgins Contractor Ltd v Historic Places Trust* High Court Wellington AP 10/02, 30 April 2002 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(iii)), pp 80–109)

27. Paora Ropata, brief of evidence (doc F1), pp 21–22

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Contractors Ltd for a breach of section 99 of the Historic Places Act 1993. The Kaunihera Kaumātua, a council of tribal elders, 'actively supported' the prosecution.[28] The District Court convicted the defendants for continuing to work on the site after 5 July 2000 because they had been 'put on notice by archaeologist Susan Forbes'.[29] Higgins Contractors were fined $15,000 and Payne Sewell Ltd were fined $20,000.[30]

The High Court overturned this conviction on appeal, however, on the basis that the information laid against the contractors had failed to specify the correct date and place. The information laid against Payne Sewell and Higgins Contractors had specified Tamati Place, whereas the kōiwi had been exposed on Wi Kingi Place. The Historic Places Trust had argued that 'Tamati Place' was a single archaeological site but the court did not accept that argument. Also, the work which uncovered the kōiwi had occurred on 17–19 July, whereas the information charged that the offence occurred on 20 July (the day Ms Forbes was contacted and work was carried out with her to complete uncovering the kōiwi so that they could be removed). Further, the trust had allowed some work to continue without the need for an authority. The judge therefore found that the District Court had been mistaken in finding that the 'lack of authority from the Trust was made out'. For these two reasons, the High Court overturned the conviction.[31]

4.2.2 The Waikanae Land Company seeks authority from the Historic Places Trust, 2000–04

Claimant counsel submitted that the appeal succeeded on 'what was understood to be a technicality'.[32] There was no doubt, however, that an authority would now be needed from the Historic Places Trust to continue with any further development work on the Tamati Place subdivision. In November 2000, the Waikanae Land Company applied for an authority from the Historic Places Trust under section 11 of the Historic Places Act.[33] This section of the Act enabled applicants to seek an authority to destroy, damage, or modify an archaeological site. Applicants were required to file an assessment of any 'archaeological, Māori, or other relevant values and the effect of the proposal on those values'. They also had to state whether

28. Paora Ropata, brief of evidence (doc F1), p 22

29. *Historic Places Trust v Higgings Contractor Ltd* District Court Porirua CRN 0091014593, 13 September 2001 at [55] (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(iii)), p 95)

30. *Higgins Contractor Ltd v Historic Places Trust* High Court Wellington AP 10/02, 30 April 2002 at [2] (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(iii)), p 96)

31. *Higgins Contractor Ltd v Historic Places Trust* High Court Wellington AP 10/02, 30 April 2002 at [35]-[48] (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(iii)), pp 104–108)

32. Claimant counsel (Wai 1945), closing submissions, 25 October 2019 (paper 3.3.50), p 14

33. 'Application to Destroy, Damage or Modify Archaeological Site(s)', not dated (November 2000); Manager Māori Heritage to Manahi Baker, Kapakapanui, 23 January 2001 (Paora Ropata, papers in support of brief of evidence (doc F1(a)), pp 73, 82). The application form cites section 12 (an application for a general authority) but the Historic Places Trust treated it as an application under section 11 of the Act.

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they had consulted with tangata whenua, and to relay any views expressed by tangata whenua. If they had not consulted with Māori, then the applicants had to provide an explanation as to why they had not done so.[34]

The company sought authority to complete the residential subdivision by removing excess sand, building roads, re-levelling part of the site, and connecting the water supply. The eventual building of houses, however, was 'unlikely to penetrate original ground levels'. The company also offered to avoid construction 'over the find of koiwi', but this would require modifying the subdivision plan and obtaining the council's approval for a consent variation.[35]

Local Māori leaders found out about the application in early 2001. At that point, they were supporting the prosecution (which was still underway), and were deeply concerned about the prospect of further damage to the urupā. They were adamant that no further work be done.[36] Manahi Baker of Kapakapanui, the iwi's environment and heritage unit, wrote to the Historic Places Trust in January 2001, pointing out that no consultation had occurred with tangata whenua. There was also concern that archaeological investigations might further disturb the site. It was their preference that any further work await the outcome of the prosecution, after which the iwi would 'be happy to assist the landowner with plans to isolate and protect the cemetery from development'.[37]

The manager of the Māori Heritage Unit responded that the company believed there was no 'intact archaeological evidence' on the site. This was apparently because of the amount of material that had been deposited on the site as a result of the dredging. Hence, the company now wanted to carry out an archaeological investigation to determine whether an authority was in fact needed. The trust, however, had already told the company that an authority *was* required. He reassured Mr Baker that consultation was also required and the application could not proceed further until 'the views and comments of Te Runanga o Te Ati Awa Ki Whakarongotai are received'.[38] In May 2001, the Historic Places Trust advised Mary O'Keeffe that no investigative digging would be allowed because the 'area where you wish to excavate is part of a known Maori cemetery'.[39]

The Waikanae Land Company had engaged Ms O'Keeffe to carry out an archaeological assessement (a requirement of section 11 of the Historic Places Act 1993). She explained: 'An assessment investigates the nature, location, context, significance and value of known and potential archaeology that could be adversely

34. Historic Places Act 1993, s 11(2)(c)-(d)

35. 'Application to Destroy, Damage or Modify Archaeological Site(s)', not dated (November 2000) (Paora Ropata, papers in support of brief of evidence (doc F1(a)), pp 78–79)

36. Paora Ropata, brief of evidence (doc F1), pp 23–24

37. Manahi Baker, Kapakapanui, to Māori Heritage Unit, Historic Places Trust, 16 January 2001 (Paora Ropata, papers in support of brief of evidence (doc F1(a)), p 81)

38. Manager Māori Heritage to Manahi Baker, Kapakapanui, 23 January 2001 (Paora Ropata, papers in support of brief of evidence (doc F1(a)), pp 82–83)

39. Regional Archaeologist to Mary O'Keeffe, 3 May 2001 (Paora Ropata, papers in support of brief of evidence (doc F1(a)), p 87)

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impacted by proposed work, so as to determine whether granting an authority is appropriate.'[40] In brief, Ms O'Keeffe's report in 2001 found that the shell material (initially supposed by Susan Forbes to be evidence of middens and ovens on the site) originated from the material dredged from the Waimeha wetlands in the 1970s. But she recommended against the company continuing with its application:

> It is inferred from traditional and contemporary sources that the area including the proposed subdivision is a Maori burial ground, probably in use from 1839.
>
> Burials recorded on an 1898 plan makes the area an archaeological site in terms of the definition in the Historic Places Act.
>
> Archaeological values are considered to be such that further development is considered inappropriate.
>
> *It is recommended* that the client does not apply for an authority under the Historic Places Act, as the archaeological values are considered sufficiently high to preclude further work. It is considered very unlikely that Historic Places Trust would grant an authority with strong evidence of the presence of a burial ground. [Emphasis in original.][41]

The Waikanae Land Company did not accept this recommendation. Instead, it proceeded with a ground penetrating radar survey in March 2002, hoping to find proof of whether or not there were further burials in the undeveloped area. With the technology available at that time, the radar found nine 'anomalies' near to where the kōiwi were exposed in July 2000. There were another three at the northern end of the site. Ms O'Keeffe explained that, in archaeological terms, the 12 'anomalies' located in 2002 could conceivably be evidence of further burials. She also noted that technology has 'improved markedly' since then, and a later geomagnetic survey in 2016 found many more such 'anomalies'.[42] An 'anomaly' is 'where a hole has been dug and has been filled in because that filled in soil gives back a different magnetic signature'.[43]

Following the archaeological assessment and the results of the radar survey, the company reported to the Historic Places Trust in January 2003 'stating that information is still being collated for the archaeological authority application submitted to the Trust in November 2000'.[44] By February 2004, when the company had still not filed the information necessary for its application to proceed, the trust decided that the application had lapsed. The trust advised the company that their

40. Mary O'Keeffe, brief of evidence (doc G6), p 6
41. Mary O'Keeffe, 'Tamati Drive Subdivision, Waikanae: Archaeological Assessment', May 2001, p 2 (O'Keeffe, papers in support of brief of evidence (doc G6(a)), p 49)
42. Mary O'Keeffe, brief of evidence (doc G6), pp 19–20
43. Transcript 4.1.21, p 188
44. Senior Archaeologist to Waikanae Land Company, 4 February 2004 (Paora Ropata, papers in support of brief of evidence (doc F1(a)), p 88)

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application was considered withdrawn and a fresh application would be required 'at a later date if / when plans are finalised for the property'.[45]

The Historic Places Act 1993 thus protected Kārewarewa urupā from further desecration at this point. Although the trust's prosecution ultimately failed on appeal in the High Court, the company could not proceed to further damage or modify the urupā without an authorisation from the Historic Places Trust. The company clearly struggled to find archaeological evidence that would support its application. The archaeological assessment recommended against proceeding because the area was a burial ground, and the ground penetrating radar survey suggested the presence of further burials over and above those already disturbed in 2000 (and back in the 1970s). As far as we are aware, the Waikanae Land Company let the matter lie for a decade or so. It was not until 2014 that the company tried again to seek authorisation to carry out archaeological investigation so that development could resume. We address this latest development below in section 4.3.

4.2.3 Reburial of the kōiwi

In the meantime, while the company's application was still extant, Te Ātiawa / Ngāti Awa leaders also needed to apply to the Historic Places Trust for authorisation to disturb the site so that the kōiwi could be reburied in the urupā.[46] The trust granted the authority in mid-2001, on two conditions:

> That prior to the re-interment, the location of the area to be re-excavated is accurately determined by survey so as to ensure no further disturbance to the remaining burials occurs.
>
> That any excavations are monitored by an approved archaeologist so as to ensure that any further disturbance to the site is kept to a minimum.[47]

Paora Ropata told us: 'We then took the kōiwi back to Kārewarewa and reinterred in accordance with our tikanga at Tamati Place – the name which had been applied to the Kārewarewa Urupā'.[48] The burial took place close to the site where the kōiwi had been found in July 2000.[49] By choosing to reinter the kōiwi at Kārewarewa, the Kaunihera Kaumātua sent a clear signal that the undeveloped part of the urupā must continue to be protected from further development.[50]

45. Senior Archaeologist to Waikanae Land Company, 4 February 2004 (Paora Ropata, papers in support of brief of evidence (doc F1(a)), p 88)

46. Paora Ropata, brief of evidence (doc F1), p 23

47. Te Kenehi Teira, Kaihautu Māori, to Kaumātua Council, Te Ati Awa ki Whakarongotai Inc, 19 July 2001 (Paora Ropata, papers in support of brief of evidence (doc F1(a)), p 70)

48. Paora Ropata, brief of evidence (doc F1), p 23

49. See 'Kārewarewa Urupa Site', photograph, not dated (Paora Ropata, papers in support of brief of evidence (doc F1(a)), p 72); Archaeology Solutions Ltd, 'Archaeological Geomagnetic Report: Tamati Place, Waikanae, Kapiti Coast', April 2018 (O'Keeffe, papers in support of brief of evidence (doc G6(a)), p 16)

50. Manu Parata, brief of evidence, 30 July 2018 (doc E6), p 5

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4.3 Heritage New Zealand Pouhere Taonga Act 2014

4.3.1 The Takamore trustees attempt to protect Kārewarewa urupā

Following the lapse of its application to the Historic Places Trust in 2004, the company's representatives did not try to proceed with development work for a decade. By the time the company resumed its efforts in 2014, a new heritage statute had been passed and the Takamore trustees had attempted to get the Crown to buy back the land for the iwi.

The Takamore urupā was the subject of evidence from Ben Ngaia and others during our hearings. This urupā was made a Māori Reservation in 1973 (as discussed in chapter 2). We will address the claims in respect of Takamore in the volume of our report dealing with the Te Ātiawa / Ngāti Awa phase. Here, we note simply that Takamore was the subject of a long struggle between the trustees, the New Zealand Transport Agency (NZTA), and the Kapiti Coast District Council over the route of the Kapiti expressway. At the end of that struggle, the Takamore trustees reached a reluctant accommodation with the NZTA in 2013. Ben Ngaia explained that, as part of the mitigation, there was to be a monetary component which the trustees 'stipulated we wanted used to purchase land in Waikanae Beach held in private ownership, but which was an Urupā [Kārewarewa]'.[51]

Mr Ngaia further explained:

> During our negotiations with Kapiti Coast District Council and then later with New Zealand Transport Agency, the Takamore Trustees took the position that one way to try and mitigate the adverse impacts on our kaitiakitanga in relation to the Takamore waahi tapu would be to provide us an opportunity to manage and exercise kaitiakitanga to the Tamati Place urupa (an area we regard as part of our wider responsibilities, but with which we have been unable to have a meaningful relationship). NZTA made an effort in good faith to try and purchase the Tamati Place undeveloped land from the private owner, but this has not been successful.[52]

This attempt to protect Kārewarewa reflected the Takamore trust's wider role in caring for wāhi tapu. As Ms Baker noted, her cultural impact assessment report for Kārewarewa in 2015 was 'peer reviewed and approved by the [Te Ātiawa ki Whakarongotai] Trust Board, Paora Ropata as lead Claimant for Wai 1945 and Ben Ngaia as Chair of Takamore Trustees, responsible for waahi tapu in our rohe'.[53] This was later to cause some confusion for archaeologist Mary O'Keeffe and Heritage New Zealand, as we discuss below.

51. Benjamin Ngaia, brief of evidence, 30 July 2018 (doc E3), p 17
52. Benjamin Ngaia, answers to written questions, 11 October 2018 (doc E3(d)), p 3
53. Mahina-a-rangi Baker, brief of evidence, 22 January 2019 (doc F11), p 51

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4.3.2 The Waikanae Land Company resumes attempts to develop Kārewarewa

After the NZTA tried to purchase the remaining undeveloped land, the Waikanae Land Company renewed its attempts to proceed with the Tamati Place housing project. Mary O'Keeffe suggested that 'the developer was determined to continue with the development, and the presence of koiwi was not seen by him as a problem or an obstruction to development'.[54] The company approached Te Ātiawa ki Whakarongotai Charitable Trust in August 2014, asking the iwi for a cultural impact assessment report, which could be used for either a Resource Management Act process or a new application for an archaeological authority. The cultural impact assessment was prepared by Mahina-a-rangi Baker in 2015.[55] This was the first step in the company's plan to complete the stalled housing subdivision.

Following the completion of the cultural impact assessment in November 2015, the company re-engaged Mary O'Keeffe as an archaeologist. This time, Ms O'Keeffe was not prepared to make the kind of recommendations against development that she had made back in 2001 (see above):

> Initially in 2000–2001, when I thought this situation may have an immediate resolution, I wrote an archaeological assessment which contained recommendations, as required by Historic Places Trust's authority application process. As it became apparent over ensuing years that this situation would not be resolved quickly or easily, and as the developer's determination became more apparent, I changed the scope of my written reports to serve the purpose of informing a discussion between the developer and iwi, by setting out verified facts, hypotheses based on known data, and not setting out any recommendations.[56]

A key factor for the company was that the 'extent and intensity of burials has yet to be confirmed'.[57] The 'landowner would like to confirm whether the site was used for extensive burials other than the remains currently known' – hence, in the company's view, the need for further archaeological investigation.[58] Also, the company wanted to 'verify' the information in the iwi cultural impact assessment that the site was an urupā.[59]

54. Mary O'Keeffe, brief of evidence (doc G6), p 2
55. Mahina-a-rangi Baker, 'Cultural Impact Assessment: Te Kārewarewa Urupā', p 5 (Baker, papers in support of brief of evidence (doc F11(a)), pp 580)
56. Mary O'Keeffe, brief of evidence (doc G6), p 2
57. Mary O'Keeffe to Heritage New Zealand, 16 September 2016 (Kathryn Hurren, papers in support of brief of evidence (doc G3(a)), p 9)
58. Archaeology Solutions Ltd, 'Archaeological Geomagnetic Report: Tamati Place, Waikanae, Kapiti Coast', report prepared for Fitzherbert Rowe Lawyers, April 2018, p 4 (O'Keeffe, papers in support of brief of evidence (doc G6(a)), p 16)
59. Archaeology Solutions Ltd, 'Archaeological Geomagnetic Report: Tamati Place', p 5 (O'Keeffe, papers in support of brief of evidence (doc G6(a)), p 17)

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As a result, the company's lawyers commissioned a geomagnetic survey, which was non-intrusive (in the physical sense) and so did not require an authority from Heritage New Zealand. Dr Hans Bader carried out the survey in July 2016. Les Mullens, a Te Ātiawa / Ngāti Awa kaumātua, was onsite during the survey and was later briefed on its results. According to Ms O'Keeffe, Les Mullens was 'present on site at the request of Ben Ngaia, of the Takamore Trustees'.[60] Dr Bader recorded 'a large number of anomalies across the site; more than in the 2000 [ground penetrating radar] survey'.[61] He observed that some of the 'anomalies' were close to those previously recorded in 2000, but 'there are a good number more of similar "anomalies" towards the north and northwest of the area of the previously recorded anomalies, tentatively identified as possible burial pits'.[62] Before Dr Bader's results could be interpreted, however, he required a test pit to show the depth of the dredged material deposited on the site back in 1969–71, to determine whether the 'anomalies' were in the fill or below the original surface of the ground.[63]

The company decided to proceed with a test pit to determine the depth of the fill. According to Mary O'Keeffe, such a pit – dug well away from any known 'anomalies' – would not have required an authority from Heritage New Zealand. She stated:

> In discussion with Heritage New Zealand, we agreed that the selected location was deliberately well away from any possible koiwi, and thus did not technically trigger the requirement for an authority (Heritage New Zealand confirmed this). However, due to the high sensitivity of this entire site, the desire to keep iwi fully informed and involved through their role in the authority process, and my desire to act with transparency and integrity, I decided to seek an authority. Heritage New Zealand supported this action and the research motives underlying it.[64]

We turn next to the issue of archaeological authorities, the particular test pit application in 2016, and the claimants' response to the digging of an archaeological trench in their urupā.

4.3.3 Archaeological authorities under the 2014 Act

The Historic Places Trust Act 1993 was replaced by the Heritage New Zealand Pouhere Taonga Act in 2014. According to Te Kenehi Teira, a deputy director (Kaihautu) at Heritage New Zealand, the Act's 'archaeological provisions offer some of the strongest protection for heritage in the western world'. Heritage New Zealand, he said, 'promotes, to iwi / hapū, the use of the archaeological policies /

60. Mary O'Keeffe, brief of evidence (doc G6), p 22; Ben Ngaia to Mary O'Keeffe, email, 8 July 2016 (O'Keeffe, papers in support of brief of evidence (doc G6(a)), p 35)
61. Mary O'Keeffe, brief of evidence (doc G6), p 19
62. Archaeology Solutions Ltd, 'Archaeological Geomagnetic Report: Tamati Place', p 16 (O'Keeffe, papers in support of brief of evidence (doc G6(a)), p 28)
63. Mary O'Keeffe to Heritage New Zealand, 16 September 2016 (Hurren, papers in support of brief of evidence (doc G3(a)), p 10)
64. Mary O'Keeffe, brief of evidence (doc G6), p 23

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provisions in the Heritage New Zealand Act, as a tool to assist Māori in their kaitiaki role'.[65]

Anyone seeking to modify or destroy an archaeological site (or part of a site) must first obtain an authority from Heritage New Zealand.[66] It is compulsory for applicants to consult with 'all iwi / hapū that might have an interest in a site', although consultation does not give local Māori a 'veto right'. Mr Teira noted that consultation meant applicants sharing information with Māori and giving them 'the opportunity to meet face to face on the site, having a meaningful discussion, considering each other's concerns and recording the views expressed by all parties'.[67] Heritage New Zealand relied on this kind of consultation by the applicant as one means of ascertaining Māori values in relation to the site. The Māori Heritage team had the task of checking that 'the appropriate iwi / hapū have been satisfactorily consulted'.[68]

In addition to consultation, the Act required the applicants to provide an assessment of Māori values and the effect that the applicant's proposal would have on those values. According to Te Kenehi Teira, this 'may take the form of a signature or an email from iwi / hapū for a simple application to a fully researched Cultural Impact Assessment involving a more complex ancestral landscape'.[69]

Once the applicant provided all the necessary information and the application was considered complete, the Māori Heritage team summarised the details of the consultation, the assessment of Māori values, and an assessment of the effects on those values.[70] This included an 'internal assessment' of Māori values by the Māori Heritage Adviser.[71] The Heritage New Zealand archaeologist then incorporated this advice into a broader report (including an archaeological component) to the Māori Heritage Council.[72] Dean Whiting advised that the Māori Heritage Adviser and the archaeologist would make a recommendation as to whether the application should be approved.[73]

According to Te Kenehi Teira's evidence, the Heritage New Zealand board has delegated power to the council to decide *all* applications relating to sites of interest to Māori.[74] The council's task was to 'weigh up the archaeological and Māori values of the site and the recommendations from staff', after which it would decide whether or not to grant the application.[75] Following the decision, the Act provided a right of appeal to the Environment Court, to be filed within 15 working days.[76]

65. Te Kenehi Teira, brief of evidence, 5 July 2019 (doc G4), p 5
66. Heritage New Zealand Pouhere Taonga Act 2014, s 44
67. Te Kenehi Teira, brief of evidence (doc G4), p 6
68. Te Kenehi Teira, brief of evidence (doc G4), p 6
69. Te Kenehi Teira, brief of evidence (doc G4), p 6
70. Te Kenehi Teira, brief of evidence (doc G4), p 6
71. Dean Whiting, brief of evidence, 8 July 2019 (doc G1), p 2
72. Te Kenehi Teira, brief of evidence (doc G4), p 6
73. Dean Whiting, brief of evidence (doc G1), p 2
74. Te Kenehi Teira, brief of evidence (doc G4), p 6; New Zealand Heritage Pouhere Taonga Act 2014, s 22
75. Te Kenehi Teira, brief of evidence (doc G4), p 6
76. Heritage New Zealand Pouhere Taonga Act 2014, s 58

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This was the process to be followed when developers like the Waikanae Land Company applied for an authority. In practice, however, the Māori Heritage Council had delegated some decision-making powers to 'the Senior Management'. The decision was ultimately made in this case by Te Kenehi Teira as deputy director, Kaihautu, as discussed further below.[77] Under the Act, the council was empowered to delegate its functions to any committee of the council or to the chief excutive, who presumably could further delegate the decision-making role.[78]

Mr Whiting explained that there were three categories of decision-making, and the Kaihautu decided which level of decision-making was appropriate in each case:

- Category C – there was no risk of appeal, which involved an application being 'very positive in terms of the relationship of tangata whenua and the applicant', a 'level of engagement in sharing information', and an expectation that the good relationship would carry on. In such cases, the decision was made by the Kaihautu.
- Category B – there was a risk of appeal and an issue requiring a 'higher level of scrutiny in terms of decision-making'. In those cases, the decision was made by the Māori Heritage Council's archaeology committee.
- Category A – in 'higher risk' cases which might involve 'some sort of national precedents in terms of the outcome', the decision was made by the full Māori Heritage Council.[79]

Mr Teira observed that it was difficult for the council, a body composed essentially of 'volunteers', to decide up to 800 applications, which had occurred in the past. Thus, there was a need for some delegation of responsibility to staff in the first instance, and to the council's archaeology committee in the second instance.[80] The council was empowered to appoint committees with 'members who may be, but are not necessarily, members of the Council'.[81]

4.3.4 The application, September 2016

The company's application in September 2016 was for an exploratory archaeological authority to dig a test pit, a metre long and half a metre wide (and probably about half a metre deep). An exploratory investigation is defined in the Act as 'a physically invasive investigation of any site or locality for exploratory purposes so as to determine whether the site or locality is an archaeological site, and, if so, the nature and extent of the archaeological site'.[82]

In terms of consultation, the application stated that the company had been 'engaging on and off with various members of Te Atiawa ki Whakarongotai (TAKW) over the life of development of the land'. In this particular instance, the company specified that its engagement had been with Te Ātiawa ki Whakarongotai

77. Transcript 4.1.21, pp 106–107, 111, 120
78. Heritage New Zealand Pouhere Taonga Act 2014, s 28(2)(b)
79. Transcript 4.1.21, pp 119–121; Dean Whiting, brief of evidence (doc G1), p 2
80. Transcript 4.1.21, pp 149–150
81. Heritage New Zealand Pouhere Taonga Act 2014, s 28(2)(a)
82. Heritage New Zealand Pouhere Taonga Act 2014, s 6

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Charitable Trust. Les Mullens, 'representing TAKW', attended the geomagnetic survey in July 2016 and agreed to take the test pit proposal 'back to the iwi'. Then, 'Ben Ngaia of TAKW provided approval on 9 August 2016 via email'.[83] The attached email from Ben Ngaia was in response to Mary O'Keeffe, who sought the agreement of the 'trustees' to a 'small hand dug test pit in a "quiet" area of the site, that is, an area that Hans' results indicate no subsurface "anomalies"'.[84] Mr Ngaia replied by email on the same day: 'I am happy to support this small hand dug test pit taking place.'[85] According to Te Kenehi Teira, it was 'very usual' for the archaeologist to conduct the applicants' consultation with iwi in this way.[86]

The application was accompanied by a covering letter from Mary O'Keeffe, which described the geomagnetic survey and the reasons for digging a test pit. Ms O'Keeffe noted that the archaeological values of the site were less significant than the cultural values, and stated that 'Iwi do not support further development of the area' but did support the test pit.[87] From all of the evidence available to us, it does not appear that the company provided Heritage New Zealand with the cultural impact assessment report as part of its application. Ms O'Keeffe provided her 2012 report on the site.

It is important to note here that 'exploratory' authorities were a subset covered by section 56 of the Act,[88] and contained some exceptions to the regime outlined in section 4.3.3 above. Section 56 allowed Heritage New Zealand to authorise an 'exploratory investigation' of a site rather than an application to modify or destroy a site. Any application involving a 'site of interest to Māori' still had to be referred to the Māori Heritage Council for a recommendation (or be decided by the council if the board had delegated the requisite authority). Importantly, the council was empowered to conduct its own consultation about such applications 'as it thinks approriate'. The application had to show that the site would be returned 'as nearly as possible to its former state'. Perhaps for this reason, applicants for an exploratory authority only had to show evidence of consultation with iwi and did not have to include an assessment of Māori values or the impact of the work on those values.[89]

4.3.5 Heritage New Zealand's assessment of the application

Dean Whiting (acting Māori Heritage adviser and manager at the time) and Kathryn Hurren (regional archaeologist) evaluated the application in October 2016. The assessment of consultation was as follows:

83. 'Application for an Exploratory Archaeological Authority', 23 September 2016 (Baker, papers in support of brief of evidence (doc F11(a)), p 712)

84. Mary O'Keeffe to Ben Ngaia, email, 9 August 2016 (Hurren, papers in support of brief of evidence (doc G3(a)), p 13); transcript 4.1.21, pp 191

85. Ben Ngaia to Mary O'Keeffe, email, 9 August 2016 (Hurren, papers in support of brief of evidence (doc G3(a)), p 13)

86. Transcript 4.1.21, p 166

87. Mary O'Keeffe to Heritage New Zealand, 16 September 2016 (Hurren, papers in support of brief of evidence (doc G3(a)), p 9)

88. Crown counsel, closing submissions: Kārewarewa urupā (paper 3.3.59), pp 39–41

89. Heritage New Zealand Pouhere Taonga Act 2014, s 56. Under s 56(2), applicants did not need to include the information required in ss 46(f)-46(g).

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> The applicant has met with Les Mullens as a representative of Te Atiawa ki Whakarongotai Charitable Trust on 13–14 July as part of initial geophysical survey of the site and the views were in support as expressed in the email provided by Ben Ngaia on 9 August 2016 [to Mary O'Keeffe].
>
> Consultation is considered adequate for this application.[90]

In terms of a reference to the heritage council, Mr Whiting stated that the application fell under 'Level C: Delegated to Kaihautu'. The reasons were given as:

> Consultation has been adequate
> All views expressed have been considered
> An appeal is not expected.[91]

Te Kenehi Teira defended this recommendation, stating:

> The Tamati Place Test Pit exploratory authority wasn't referred to the Maori Heritage Council as it was deemed exploratory only, on a very small scale and would not be a major disturbance to the original ground material. The council had been advised of the issues relating to the place when the Environment Court was involved. At that time the council was happy to leave this matter to staff.[92]

The evidence of Mary O'Keeffe (for the Crown) and Mahina-a-rangi Baker (for the claimants) is in agreement that Te Ātiawa ki Whakarongotai Charitable Trust were never in fact involved or consulted. Although the applicant claimed to have consulted that trust, Ms O'Keeffe noted that Les Mullens was involved at the request of the Takamore trustees, and that her email to Mr Ngaia was intended for those trustees. Mr Ngaia and the Takamore trustees were, as Ms Baker acknowledged, rightly involved in their role as the 'kaitiaki of our waahi tapu'.[93] The Te Ātiawa ki Whakarongotai charitable trust (formerly the runanga) also had a crucial role. It had processed many such applications previously.[94] Heritage New Zealand staff were under the mistaken belief that both Mr Mullens and Mr Ngaia had been involved as official representatives of the charitable trust (as claimed in the application). Mr Whiting told us: 'It was my understanding that Ben Ngaia was organisationally part of TAKW at the time and the question put to him [in Mary O'Keeffe's email] was on the basis of an organisational response.'[95]

90. 'Form for the assessment of section 56 applications', section C, filled in 11 October 2016 (Hurren, papers in support of brief of evidence (doc G3(a)), p 17)
91. 'Form for the assessment of section 56 applications', section C, filled in 11 October 2016 (Hurren, papers in support of brief of evidence (doc G3(a)), p 17)
92. Te Kenehi Teira, answers to written questions, 29 July 2019 (doc G4(b)), p 1
93. Mahina-a-rangi Baker to Kathryn Hurren, email, 19 October 2016 (Baker, papers in support of brief of evidence (doc F11(a)), p 704). See also Mahina-a-rangi Baker, brief of evidence (doc F11), p 51.
94. Transcript 4.1.18, p 144
95. Dean Whiting, brief of evidence (doc G1), pp 2–3

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In response to questions from Crown counsel at the hearing, Mr Whiting reiterated this point:

> there was an understanding that those that were represented in terms of that application had a strong association in terms of Te Āti Awa ki Whakarongotai, whether that was in the role of being involved in a lot of the monitoring work, all that sort of onsite negotiations or engagements as one role [Les Mullens], and the other of course is someone who is involved organisationally as a part of the Te Ati Awa ki Whakarongotai Trust [Ben Ngaia].[96]

Heritage New Zealand staff did not consider it necessary to consult the charitable trust to confirm the information in the application, or seek further information from the developer.

4.3.6 Issues of concern in the application process

4.3.6.1 *The timeframe for processing and determination*

The first issue of concern is the requirement that an application for an exploratory authority had to be *determined* within 10 working days.[97] This was a different timeframe than for applications to modify or destroy a site, which had to be assessed and either accepted or sent back for more information within five working days. Following that initial processing, however, applications to modify or destroy had to be determined within 20, 30, or 40 days of receipt, depending on certain criteria.[98] Mr Teira noted that the period for evaluation had been three months under the previous Act.[99]

Crown counsel advised that Heritage New Zealand interpreted the 10 days for determination as a second step, following the usual five days for processing and accepting an application as suitable to proceed for determination.[100] Dean Whiting underlined the point that the staff only had five days, which obviously gave them little time to consult or check with Māori organisations or to confirm facts.[101] As a result, the responsible staff relied mainly on their own knowledge of representation within iwi on particular issues at any one time, combined with their judgement as to whether the application would be controversial and result in an appeal.

There are obvious weaknesses in this approach, as demonstrated in the present case. In particular, the time constraint is unfair to all involved. On the one hand, iwi workers are often volunteers with heavy workloads and may take time to reply to phone calls or emails or requests to meet. It may also take time for an iwi organisation to decide a collective view if the developers have consulted one or two members (as sometimes happens). Heritage New Zealand staff, on the other hand, have a tight statutory deadline of five days to assess an application and

96. Transcript 4.1.21, p 105
97. Heritage New Zealand Pouhere Taonga Act 2014, s 56(5)
98. Heritage New Zealand Pouhere Taonga Act 2014, ss 47, 50
99. Transcript 4.1.21, p 154
100. Crown counsel, closing submissions: Kārewarewa urupā (paper 3.3.59), pp 40–41
101. Transcript 4.1.21, p 122

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decide whether the information provided is sufficient for it to proceed to the next stage. They also deal with multiple applications at the same time.

In this particular case, however, the question of consultation could have been resolved quickly and easily. Mahina-a-rangi Baker noted:

> In practice, Heritage was in contact occasionally with us at the Trust to check information provided by applicants for any applications for authorities, and all they would have had to do in processing this application . . . was to follow this standard practice and confirm if we had been contacted and given consent.[102]

4.3.6.2 *Archaeological vis-à-vis cultural values*

It is clear to us that all the Heritage New Zealand staff involved considered this a minor matter that would have little or no effect on the site. This reflects the archaeological situation, in which digging and re-filling a small trench would have little effect on the the site's archaeological values. In our view, this underestimates the cultural and spiritual effects of digging in an urupā that is tapu to its kaitiaki. From the claimants' perspective, Ms Baker likened it to digging around in Gallipoli or any of New Zealand's cemeteries 'in an attempt to find a 0.5 metre squared area that doesn't appear to contain human remains, as a basis for proceeding to develop houses on those sites'.[103] Paora Ropata told us that the kaumatua were strongly opposed to any further tampering with the urupā.[104]

More broadly, this issue reflects an imbalance between archaeological and cultural values in section 56 of the Heritage New Zealand Pouhere Taonga Act. For an exploratory investigation, whatever that may consist of, consultation with Māori is required but not assessment of cultural values or the effects of the investigation on those values. We accept that a small pit dug for archaeological purposes might have little or no effect on kaitiaki and their values, depending on the nature of the site involved, but that cannot simply be assumed as the statute appears to do.

The absence of cultural values in section 56 exacerbates the disjunct between what may be protected in some parts of the Act, such as entering a wāhi tapu in the New Zealand Heritage list, and what may be protected when an archaeological authority is sought. The Act defines an archaeological site as a site associated with pre-1900 human activity or that may provide evidence about New Zealand history.[105] Te Kenehi Teira explained that the archaeological provisions of the Act only pertained to 'tangible places – pa, midden, pits, rock art, koiwi, hangi'.[106] In this particular case, it was only kōiwi that were considered to be of archaeological importance and not the urupā, hence a small pit was permitted away from known 'anomalies' without considering what impact that might have on cultural and spiritual values.

102. Mahina-a-rangi Baker, brief of evidence (doc F11), pp 54–55
103. Mahina-a-rangi Baker, brief of evidence (doc F11), p 52
104. Paora Ropata, brief of evidence (doc F1), p 24
105. Heritage New Zealand Pouhere Taonga Act 2014, s 6
106. Te Kenehi Teira, brief of evidence (doc G4), p 5

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Mary O'Keeffe explained that an authority was not technically needed at all for the test pit: 'In discussion with Heritage New Zealand, we agreed that the selected location was deliberately well away from any possible koiwi, and thus did not technically trigger the requirement for an authority (Heritage New Zealand confirmed this).'[107] Crown counsel confirmed this point:

> As a matter of law, there was no strict requirement for the WLC to have lodged an authority application in order to undertake this test pit as the area where the test pit was to be dug (and was dug) does not fall within the definition of an 'archaeological site'. Section 6 of the Act defines 'archaeological site'. The location of the test pit was sufficiently far away from where the previous burial had been located as well as some distance from both the 'anomalies' identified by Dr Bader's 2016 geomagnetic survey and the 'dredged spoil heap' on the eastern corner of the site such that the area did not show 'evidence of pre 1900 human activity' nor does it 'provide, through investigation by archaeological methods, evidence relating to the history of NZ.'[108]

We are concerned that this does not protect an urupā in the absence of some countervailing requirement to consider cultural values.

In that context, we note that decision-makers for exploratory authorities (which are by definition 'invasive') do not have to consider the same criteria as for authorities to modify or destroy. In the latter case, decision-makers must 'have regard to':

- historical and cultural heritage values (and any other factors 'justifying the protection of the site');
- the purpose and principles of the Act;
- the extent to which protecting a site would restrict either the existing or the 'reasonable future use' of the site for lawful purposes;
- the interests of any person directly affected;
- statutory acknowledgements (from Treaty settlements); and
- 'the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tūpuna, wāhi tapu, and other taonga.'[109]

For section 56 applications, however, decision-makers only had to 'take into account' the 'nature and purpose of the proposed exploratory investigation' and the skills and suitability of the person to carry out the work. In addition, they must 'have regard to' any statutory acknowledgements made by the Crown in Treaty settlements.[110]

In the particular application we are considering here, of course, the applicants claimed that the iwi (specifically the charitable trust) had *agreed* to the test pit. The process by which Heritage New Zealand assessed the consultation was therefore a crucial issue, which we consider next.

107. Mary O'Keeffe, brief of evidence (doc G6), p 23
108. Crown counsel, closing submissions: Kārewarewa urupā (paper 3.3.59), p 46
109. Heritage New Zealand Pouhere Taonga Act 2014, ss 49(2), 59(1)
110. Heritage New Zealand Pouhere Taonga Act 2014, s 56(3)(b)-(c)

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4.3.6.3 *Consultation processes and decision-making*

The third issue of concern is the role of iwi (or hapū) in the archaeological authorities process and the question of what constitutes adequate consultation. The Wairarapa Tribunal recommended in 2010 that the RMA and Historic Places Act be amended to '*require* Māori involvement in decision-making about consent applications that involve Māori heritage, and also in decisions about heritage orders. Māori need to be involved from the outset, and need to be properly funded to do so' (emphasis added).[111]

In respect of this recommendation, Crown counsel submitted:

> the provisions of the Heritage New Zealand Pouhere Taonga Act 2014 have strengthened the role of Māori in decision-making in relation to consent applications that involve Māori heritage and decisions about heritage orders. The views of tangata whenua are balanced alongside the archaeological considerations during the decision-making processes and consultation is required for all archaeological authority applications.[112]

In essence, then, the Māori role in decision-making about archaeological authorities is seen as their statutory right to be consulted by applicants, and the conveyance of their views by applicants to Heritage New Zealand. Māori must be consulted in all sites of interest to them. Their values (and the impact on those values) must be considered in some but not all such applications. Tikanga experts in the form of the Māori Heritage Council or their delegates will make the decision.

In this case, a lot of weight was put on the brief email from Mr Ngaia, which was not sent on any official email system for either the Takamore trustees or the charitable trust. We noted above that the Takamore trustees had an important role within the various representative bodies of the iwi, caring for wāhi tapu beyond the Takamore urupā itself. This was acknowledged by Ms Baker. But the Waikanae Land Company claimed to have consulted with the charitable trust, and specifically identified the two iwi members involved as representatives of that body. Clearly, the email from Mr Ngaia did not purport to have been on behalf of that body but Heritage New Zealand staff assumed that Mr Ngaia's response was an 'organisational' response on behalf of the charitable trust. Again, we think the nature of the application was a consideration here; it is doubtful that Heritage New Zealand would have accepted this as sufficient consultation for an application to modify or destroy the site.

We note, too, Ms O'Keeffe's statement that she had preliminary conversations with Heritage New Zealand staff about the application before it was made and had agreed with them on the appropriate course of action. This does appear to have

111. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, 3 vols (Wellington: Legislation Direct, 2010), vol 3, p 1064

112. Crown counsel, closing submissions: Kārewarewa urupā (paper 3.3.59), p 66

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influenced the treatment of the application. In her covering letter as archaeologist, Ms O'Keeffe stated that the 'iwi' had agreed to the digging of the test pit, again on the basis of the email she provided to Heritage New Zealand.

In sum:

- this application and its effects were seen as very minor (in archaeological terms);
- section 56 does not require Māori values to be taken into account in the case of exploratory authorities, even though the Act defines 'exploratory investigations' as 'invasive';
- the applicant's information about consultation was incorrect; and
- Heritage New Zealand accepted the applicant's information on face value and made no checks of its own, partly because of the tight timeframe in which applications must be processed, and partly because the application was seen as non-controversial and unlikely to attract an appeal.

Although it is not possible to generalise too far on the basis of a single case, these facts highlight some concerns for us about the process and its legislative foundations.

4.3.7 The right of appeal and the 'consulted' body's reaction to the granting of the application

On 18 October 2016, Te Ātiawa ki Whakarongotai Charitable Trust was notified that the authority had been granted, and that an appeal could be lodged within 15 working days. Ms Baker commented that this came as a 'shock', since the trust had not been aware of the application at all.[113] The trust immediately notified Heritage New Zealand of its intention to appeal the decision, and requested information as to 'who from TAKW was consulted on this authority and when?'[114] Ms Baker's email to Kathryn Hurren on this matter was copied to Ben Ngaia, chair of the Takamore trust 'who are kaitiaki of our waahi tapu', and kaumātua Paora Ropata, who had filed a claim with the Tribunal.[115]

In response, Mr Ngaia explained that his original email to Ms O'Keeffe had been 'on the assumption' that Te Ātiawa ki Whakarongotai Charitable Trust had already approved the test pit. He asked Kathryn Hurren:

> I too am very interested to know who on behalf of our charitable trust (if that at all occurred) has given authority for this to take place.
>
> My primary concern is that the appropriate transparent processes have been undertaken and agreed to by our charitable trust. However, if the chairperson [Andre

113. Mahina-a-rangi Baker, brief of evidence (doc F11), p 53

114. Mahina-a-rangi Baker to Kathryn Hurren, email, 19 October 2016 (Baker, papers in support of brief of evidence (doc F11(a)), p 687)

115. Mahina-a-rangi Baker to Kathryn Hurren, email, 19 October 2016 (Baker, papers in support of brief of evidence (doc F11(a)), p 688)

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> Baker] is unaware of this, then this raises alarm bells regarding how authority has been granted.[116]

After reviewing the application form, Mr Ngaia clarified to Heritage New Zealand that he was not a representative of the charitable trust (despite what was claimed in the application), nor had he described himself as such. He also clarified that the archaeologist had contacted him in his capacity as chairperson of the Takamore trustees, and added: 'I am happy to support this test pit taking place, but just as long as proper authority and permission has been given.'[117]

Ben Ngaia's response to Heritage New Zealand immediately undermined the basis on which the exploratory authority had been granted. Nonetheless, the charitable trust did not proceed with an appeal to the Environment Court. Mahina-a-rangi Baker explained that the trust simply could not afford the significant costs involved in prosecuting such an appeal. 'This meant', she told us, 'that the test-pit went ahead, and yet again the whenua at Te Kārewarewa was opened up to pursue interests of development, causing further offence and pain to our people.'[118]

Heritage New Zealand, despite the information from Mr Ngaia on 19 October 2016 and the objections of the charitable trust, relied on the formal appeal process as the only avenue to resolve the matter. It is puzzling to us why this was the case, since it must have been clear immediately that mistakes had been made in both the information provided in the application and the assessment of the consultation. There may have been no choice in the matter. Kathryn Hurren observed: 'Once an archaeological authority is granted it cannot be revoked unless withdrawn by the applicant. For all of these reasons, Heritage New Zealand takes its responsibilities to grant archaeological authorities extremely seriously and cautiously.'[119] This statement does not fit well with the extremely tight statutory deadline for the processing and determination of applications.

Ms Baker noted two key points arising from Heritage New Zealand's assessment of consultation and the trust's inability to afford an appeal:

> This presents another example of how the Crown and its processes fail to recognise the rangatiratanga of iwi by not requiring appropriate consultation with the right people. It also sets out [and] highlights the lack of accessible recourse for iwi with regards to decisions made by Heritage NZ.[120]

Crown counsel emphasised that the proper recourse for any mistake made by Heritage New Zealand was to file an appeal:

116. Ben Ngaia to Mahina-a-rangi Baker and Kathryn Hurren, email, 19 October 2016 (Baker, papers in support of brief of evidence (doc F11(a)), p 700). Mr Ngaia's request for an explanation was made to Ms Hurren.

117. Ben Ngaia to Kathryn Hurren, second email, 19 October 2016 (Baker, papers in support of brief of evidence (doc F11(a)), p 693)

118. Mahina-a-rangi Baker, brief of evidence (doc F11), p 54

119. Kathryn Hurren, brief of evidence, 5 July 2019 (doc G3), pp 5–6

120. Mahina-a-rangi Baker, summary of brief of evidence, 8 February 2019 (doc F11(b)), p 8

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> The Crown does not accept that the statutory remedy available under the Heritage New Zealand Pouhere Taonga Act 2014 is not a sufficient safeguard against errors such as that made in this case. Moreover, if an appeal had been lodged in this instance, given the nature of the mistake that had been made (in identifying who were the appropriate people to have consulted in regards the proposed test pit dig), the matter may have been resolved through mediation.[121]

A number of Tribunal reports have found that costs are a serious problem for under-resourced iwi organisations, including deterring iwi from exercising their legal rights of appeal to the Environment Court.[122] Most recently, the Freshwater Tribunal noted in respect of resource management processes and appeals to that court:

> most RMA decisions do not reach the Environment Court, and such litigation is still beyond the means of many Māori groups. As at 2009, before the multiple Treaty settlements of the last decade, even fewer groups could afford to engage technical experts or lawyers – or to run the risk of an award of costs against them in either the Environment Court or the High Court. The inadequate resourcing of Māori to participate in RMA processes has been noted in many Crown documents over the past 15 years, and has been admitted by the Crown in this inquiry.[123]

These comments are also applicable to heritage appeals. Although there is a central fund that can assist with some of the litigation costs in appeals to the court (the Environmental Legal Assistance Fund), it is devoted to environment and resource management appeals. We are not aware of any Crown resourcing to assist hapū or iwi organisations with the costs of heritage appeals, but we have not received evidence on that point.

4.3.8 The test pit and further developments, 2017–18

Following the granting of approval in October 2016, the test pit was dug in April 2017. According to Ms O'Keeffe, kaumātua Les Mullens was present at the request of Ben Ngaia, but this may be an error (the email provided as evidence of this point was dated July 2016 and therefore related to the geomagnetic survey).[124] The Waikanae Land Company contacted the charitable trust in early April 2017 to 'observe the work and to undertake any tikanga protocols that may be required',

121. Crown counsel, closing submissions: Kārewarewa urupā (paper 3.3.59), p 52

122. See, for example, Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 3, pp 1181–1184, 1222–1223; Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 2, pp 585–586, 588; Waitangi Tribunal, *The Report on the Management of the Petroleum Resource* (Wellington: Legislation Direct, 2011), pp 153–154, 158, 160, 179–180

123. Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims: Pre-Publication version* (Wellington: Waitangi Tribunal, 2019), p 65. See also pp 94–98.

124. Mary O'Keeffe, brief of evidence (doc G6), p 22; Ben Ngaia to Mary O'Keeffe, email, 8 July 2016 (O'Keeffe, papers in support of brief of evidence (doc G6(a)), p 35)

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but this invitation was declined. Kathryn Hurren reported: 'I am not aware that any representatives of Te Ātiawa ki Whakarongotai Charitable Trust observed the work or undertook any tikanga protocols.'[125] The claimants provided no evidence on this point. Although Heritage New Zealand does monitor compliance with tikanga protocols by 'following up with tāngata whenua', speaking with the archaeologists, and sometimes monitoring in person,[126] Kārewarewa appears to have been an exception.

The test pit was excavated by Dr Hans Bader. His results showed that the 'anomalies' were not located in the material dumped on the site by the dredging in 1969–71, and 'therefore the anomalies can be understood as small pits cut into the original topsoil'.[127] Mary O'Keeffe explained:

- Dredged material is only located over part of the subdivision. Therefore anomalies shown by a geophysical survey are not being interpreted through a thick layer of deposited material, and are likely to be reasonably close (less than 2m) below the ground surface; and
- The topsoil build-up is substantial and sufficiently different to the lower sand layer to express a different magnetic signature. This validates the results of the geophysical survey and the credibility of the anomalies recorded.[128]

At the hearing, Ms O'Keeffe told us that the test pit 'confirmed that the layer of fill across the site was so thin that the anomalies he [Dr Bader] was recording were almost certainly human made pits'. The 'data supports the hypothesis that the anomalies are burial pits', because '(a) we know that there were burials there and (b) they are of the right size that typically burial pits are'.[129] In Ms O'Keeffe's opinion, the test pit supported the view that no further archaeological authorities should be granted.[130]

But, in archaeological terms, it was not possible to 'say 100 percent that they are burial pits' on the basis of the investigation done to date.[131] In April 2018, Dr Bader wrote a report for the developer. In his view, the next step would be to conduct 'ground testing of the results . . . from the fringes to the centre until the extent of burial locations becomes clear'. He argued that burials could have been 'much wider spread over the property than the previous work and the accidental discovery locations suggest'. But Dr Bader acknowledged, however, that 'ground testing possible burial pits' was obviously a 'culturally sensitive' matter.[132]

125. Kathryn Hurren, brief of evidence (doc G3), p 6
126. Kathryn Hurren, brief of evidence (doc G3), p 5
127. Mary O'Keeffe, brief of evidence (doc G6), p 23
128. Mary O'Keeffe, brief of evidence (doc G6), p 23
129. Transcript 4.1.21, pp 187, 188
130. Transcript 4.1.21, p 188
131. Transcript 4.1.21, p 189
132. Archaeology Solutions Ltd, 'Archaeological Geomagnetic Report: Tamati Place', p 21 (O'Keeffe, papers in support of brief of evidence (doc G6(a)), p 33). Although the author's name is not mentioned in the text, Kathryn Hurren identified the author as Dr Bader. See Kathryn Hurren, brief of evidence (doc G3), p 6.

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This proposal would entail some further excavation of the undeveloped part of the urupā 'from the fringes to the centre' to confirm whether the 'anomalies' were in fact burial pits. Mahina-a-rangi Baker explained:

> In 2018 the WLC's planner contacted the Trust twice with requests to meet and discuss their desire to conduct further test samples to 'physically investigate and confirm what the anomalies are.' This is a euphemistic way of saying they wish to exhume the urupā yet again, recognising that they are likely to encounter human remains.[133]

The company's developer contacted Heritage New Zealand and the charitable trust in July and August 2018, with requests to meet and discuss what was called a 'small test sample.'[134] The trust refused to meet with the developer, citing their 'total opposition' to any development or 'further archaeological testing' of the urupā, and noting that the 'desecration of Kārewarewa Urupā by previous and current landowners is under active inquiry by the Waitangi Tribunal.'[135]

As far as we are aware, there have been no further developments since then, although Ms Baker observed: 'It's honestly quite exhausting to have to be hyper vigilant that at any time, the attempts to exhume could be initiated again. For all I know I could have an email sitting in my inbox right now that relates to this *take*.'[136] She added: 'The developer continues today with their plans to develop the site, with no assurance that Heritage or the District Council will be able to prevent this from occurring, even if they wished to.'[137]

Some issue was taken with Ms Baker's use of the word 'exhume' as an exaggeration.[138] In our view, the claimants are correct to be concerned about the underlying archaeological proposal – to ground test the 'anomalies' – since it involves testing of likely burial pits. Any kaitiaki of an urupā would be deeply concerned about such a proposal, and the Te Ātiawa / Ngāti Awa claimants are no exception.

4.3.9 Treaty findings

In our view, it is not possible or appropriate to make general findings about the Heritage New Zealand Pouhere Taonga Act or Heritage New Zealand's processes on the basis of a single application. For that reason, we are making limited findings that are specific to section 56 of the Act.

In the case of the Waikanae Land Company's application in 2016, incorrect information was provided about the consultees, and this information was accepted without checking the facts. The Crown submitted that everyone makes mistakes and that the statutory regime provides a remedy in the event of a mistake

133. Mahina-a-rangi Baker, brief of evidence (doc F11), p 55
134. Steven Kerr to Kathryn Hurren and Kristie Parata, email, 19 July 2018; Steven Kerr to Kristie Parata, 23 August 2018 (Baker, papers in support of brief of evidence (doc F11(a)), pp 721–722)
135. Mahina-a-rangi Baker to Steven Kerr, email, 27 August 2018 (Baker, papers in support of brief of evidence (doc F11(a)), p 721)
136. Transcript 4.1.18, p 129
137. Mahina-a-rangi Baker, summary of brief of evidence (doc F11(b)), p 8
138. Crown counsel, closing submissions: Kārewarewa urupā (paper 3.3.59), pp 27–28

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having been made; the right of appeal to the Environment Court.[139] We agree with the Crown that honest mistakes do not constitute bad faith or breaches of Treaty principles.

There are, however, some specific concerns about the process followed for exploratory authorities and the requirements of section 56 of the Act that we consider to be systemic issues in breach of the Treaty. These are:

- The timeframe prescribed for the determination of section 56 applications (10 days). This timeframe has been imposed by statute although it is interpreted to mean that an extra five days may be allowed for the initial evaluation of the application. In our view, the statutory prescription is unfair to the Crown's Māori Treaty partner. It can result in inadequate time for Heritage New Zealand to consult and to confirm facts in respect of applications relating to wāhi tapu, which are of particular importance to Māori due to their cultural and spiritual significance. We accept that the Crown's goal is efficient bureaucracy and the speedy determination of applications, which is important, but the time allowed in section 56 does not accord with Kathryn Hurren's statement that 'Heritage New Zealand takes its responsibilities to grant archaeological authorities extremely seriously and cautiously'.[140]
- Section 56 does not require applicants to provide an assessment of Māori values or the impact of the proposed work on those values, even though exploratory investigations are defined in the Act as 'invasive', and authority may be sought for invasive work on a wāhi tapu (including, in this case, an urupā).
- Section 56 does not require decision-makers to consider Māori values or the impact of the proposed invasive work on those values, even in the case of urupā and of wāhi tapu more generally. Invasive techniques may be considered minor in archaeological terms and yet cause harm and great cultural and spiritual offence to the kaitiaki of those places.

In addition, we consider that enough is known to say that iwi and hapū organisations are under-resourced to participate in many processes (most notably RMA processes), and that recourse to the Environment Court is often beyond the means of those organisations. While the right of appeal is a crucial remedy, the issue of under-resourcing needs to be addressed if it is to be an effective one.

Broader issues, including consultation requirements and the role of iwi and hapū in decision-making, must await a more general consideration of the Act and how it functions in our inquiry district.

In our view, the claimants have been prejudiced by the Treaty breaches found in this section. Although the geomagnetic survey was not invasive and the archaeological effects of the test pit were considered negligible, the negative effects of interference with this sacred site, the burial place of their ancestors, were felt by the tangata whenua who brought claims in this inquiry. The ongoing threat of further housing development remains a constant concern and burden for the kaitiaki.

139. Crown counsel, closing submissions: Kārewarewa urupā (paper 3.3.59), p 51
140. Kathryn Hurren, brief of evidence (doc G3), pp 5–6

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4.4 Protection Mechanisms under Current Laws

The Crown provided evidence and submissions about a number of mechanisms under the current laws which could protect Kārewarewa urupā. These included:

- *New Zealand Heritage List/Rārangi Kōrero:* This list was formerly the Historic Places Register under the previous legislation. The Māori Heritage Council has the power to 'enter, or to determine applications to enter, wāhi tūpuna, wāhi tapu, and wāhi tapu areas' on the list.[141] Entry on the list notifies landowners and the public that these sites have heritage value, including traditional and cultural significance. Mr Teira told us that the protection of sites entered on the list comes mainly from the RMA, which requires local authorities to have regard to the sites on the list when preparing or amending their district plans.[142] Mr Teira stressed that there is 'no cost involved in getting a site listed'.[143]
- *National Historic Landmarks/Ngā Manawhenua o Aotearoa me ōna Kōrero Tūturu List:* The purpose of this list is to promote the conservation of the 'places of greatest heritage value to the people of New Zealand'. The place has to be of 'outstanding national heritage' value. The landowner must consent and there must be 'strong evidence of broad national and community support for its inclusion'. After a public submissions process, Heritage New Zealand makes a recommendation to the Minister to decide.[144] According to Te Kenehi Teira, entry on this list provides 'absolute protection' from development. On the question of whether a landowner could be compensated for setting aside their land in this way, Mr Teira responded: 'It's never been tested, it's brand new.' The only site listed so far is the Waitangi National Trust area.[145]
- *Heritage Convenants:* A heritage convenant is a 'voluntary agreement with the landowner' for the 'protection, conservation and maintenance' of a wāhi tapu (or some other site). Such sites are 'included in protected sites listed in district plans' under the RMA. Convenants are usually 'registered on the legal title to land and run in perpetuity'. Mr Teira noted that it is difficult to get owners to agree to a convenant because of the impact on their property value, which limits the applicability of this mechanism in many cases.[146]
- *Taonga Tuturu Protocols:* These protocols are part of the Treaty settlement process. Originally developed for 'newly found taonga tūturu' and their export under the Protected Objects Act 1975, they have expanded to include 'historic graves and memorials in a protocol area'. The protocols establish a 'working relationship' between the post-settlement governance entity and

141. Te Kenehi Teira, brief of evidence (doc G4), p 4
142. Te Kenehi Teira, brief of evidence (doc G4), pp 8–9; Heritage New Zealand Pouhere Taonga Act 2014, s 66(1)
143. Te Kenehi Teira, brief of evidence (doc G4), p 9
144. Te Kenehi Teira, answers to written questions (doc G4(d)), p [3]; Heritage New Zealand Pouhere Taonga Act 2014, ss 81–82
145. Transcript 4.1.21, p 162
146. Te Kenehi Teira, brief of evidence (doc G4), p 17; Te Kenehi Teira, answers to questions in writing (doc G4(d)), p [4]; Heritage New Zealand Pouhere Taonga Act 2014, s 39

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the Ministy for Culture and Heritage, 'consistent with' Treaty principles, and provide for iwi 'input' to decision-making processes.[147]

- *Heritage Protection Authorities:* This mechanism was not put forward by Mr Teira because it is part of the RMA, not the Heritage New Zealand Pouhere Taonga Act, although he did note that Heritage New Zealand can act as a heritage protection authority.[148] Any body corporate (including the charitable trust) with an 'interest in the protection of any place' can apply to the Minister for the Environment to become a protection authority. If the Minister agrees, the authority can apply to the district council for a heritage protection order, which prevents any use or alteration of the land in question without the authority's permission. Such applications are treated the same as consents, requiring a submissions and hearing process before a council decides whether or not to grant a protection order.[149] Due to a law change in 2017, however, body corporates can no longer be heritage protection authorities for private land.[150] Ministers and local councils can act as protection authorities for any land (including private), and the Minister for Māori Development may do so on the recommendation of an iwi authority.[151]

Of all of these mechanisms, entry on the New Zealand Heritage List / Rārangi Kōrero is the easiest (and cheapest) to obtain in the absence of a Treaty settlement. But the degree of protection it affords is dependent on how effectively the Kapiti Coast district plan protects wāhi tapu. Although we are not dealing with the district plan and its recent amendment here, we note that the Crown and claimant evidence agreed there are too few wāhi tapu listed or protected in the district plan. Heritage New Zealand appealed the plan for that reason.[152] According to Mr Teira's evidence, Heritage New Zealand has already promoted the entry of Kārewarewa on the New Zealand Heritage list in 'joint meetings with representatives of Te Atiawa ki Whakarongotai', but the iwi has not put forward a nomination.[153] He told us that Heritage New Zealand needed to go and help the iwi with this and other heritage protection mechanisms.[154]

The Crown and claimant evidence also agreed that the battle of Kuititanga was of national historical significance,[155] which would make Kārewarewa a possible site for the National Historic Landmarks list. But this list and heritage covenants are difficult mechanisms to access, as Mr Teira acknowledged. The option for a recommendation to the Minister for Māori Development to become a Heritage

147. Te Kenehi Teira, brief of evidence (doc G4), pp 17–18
148. Te Kenehi Teira, brief of evidence (doc G4), p 4
149. Resource Management Act 1991, ss 187–193. See also Waitangi Tribunal, *Freshwater*, pp 71–73
150. Resource Legislation Amendment Act 2017, s 98(1)
151. Resource Management Act 1991, s 187
152. Mahina-a-rangi Baker, brief of evidence (doc F11), p 27; Te Kenehi Teira, answers to written questions (doc G4(b)), p 1; transcript 4.1.21, p 146
153. Te Kenehi Teira, answers to written questions (doc G4(b)), p 1
154. Transcript 4.1.21, p 161
155. Mahina-a-rangi Baker 'Cultural Impact Assessment: Te Kārewarewa Urupā', p 8 (Baker, papers in support of brief of evidence (doc F11(a)), p 583); Te Kenehi Teira, brief of evidence (doc G4), p 17

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Protection Authority remains open, although decisions about heritage protection orders remain with the Kapiti Coast district council.

In his evidence, Te Kenehi Teira stressed that the archaeological authorities process should protect Kārewarewa in any case:

> I would like to re-emphasise that the Heritage New Zealand Pouhere Taonga Act 2014 does effectively provide protection to all archaeological sites in New Zealand, whether those sites are formally recorded or not. That is because it is an offence to modify or destroy an archaeological site without an authority to do so. Kārewarewa has clearly been identified as an archaeological site and thus there cannot be any legal disturbance to that site without an authority to do so. Given the nature of that site and the history of it since the koiwi were uncovered in 2000, should there be a further authority application lodged which proposes any earthworks which will affect this significant site (ie, not merely a test pit dig located well away from where the koiwi have been reinterred), that authority application would undoubtedly be classified a Category A which would be referred to the Māori Heritage Council for determination.[156]

For the reasons given in our findings above, we do not accept that section 56 of the Act gives sufficient protection in the case of exploratory authorities.

4.5 Recommendations

Under section 4A of the Treaty of Waitangi Act 1975, the Tribunal may not make any recommendations about 'the return to Māori ownership of any private land' or 'the acquisition by the Crown of any private land'.[157]

In the case of the undeveloped part of the urupā block, the claimants welcomed the Crown's concession (see chapter 3) and responded that 'the claimant roopu regard the failing in 1970 to be at the base of the problems that arose later as a result of the development that was allowed to proceed from 1970'.[158] They have therefore sought to work with the Crown on specific remedies.[159] We leave that matter to the parties.

On the issue of meetings of assembled owners, and the loss of authority and land through that mechanism, any recommendations will be made later in the inquiry.

We make the following recommendations to the Crown in respect to section 56 of the Heritage New Zealand Pouhere Taonga Act 2014, in order to prevent the recurrence of prejudice in the event of future applications relating to Kārewarewa urupā or to other wāhi tapu:

156. Te Kenehi Teira, answers to written questions (doc G4(d)), p [4]
157. Treaty of Waitangi Act 1975, s 4A. This section was inserted in 1993 following the Te Roroa Tribunal's recommendations about the Titford farm.
158. Claimant counsel (Wai 1945), submissions by way of reply, 11 February 2020 (paper 3.3.64), p 2
159. Claimant counsel (Wai 1945), submissions by way of reply (paper 3.3.64), pp 2–3

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- Heritage New Zealand Pouhere Taonga should undertake a review, led by the Māori Heritage Council (Te Kaunihera Māori o te Pouhere Taonga), of the assessment process for section 56 applications concerning sites of interest to Māori. The Māori Heritage Council should then recommend a more Treaty-consistent timeframe for the evaluation and determination of those applications, so that the Crown's Treaty obligation of active protection of taonga can be met. Heritage New Zealand should then make the recommendation to the Minister for Arts, Culture and Heritage.
- The Minister for Arts, Culture and Heritage should introduce legislation as soon as possible to amend the timeframe in section 56 of the Act, in accordance with any recommendations from the Māori Heritage Council and Heritage New Zealand.
- In the case of applications relating to wāhi tapu (including urupā), section 56 should be amended to require applicants to provide an assessment of cultural values and the impact of proposed work on those values, in the same manner as for section 44 applications.
- In the case of applications relating to wāhi tapu (including urupā), section 56 should be amended to require decision-makers to have particular regard to Māori cultural values and to 'the relationship of Māori and their culture and traditions' with their wāhi tapu.

In our view, these statutory amendments are essential to remove the assumption inherent in section 56 that invasive techniques with little or no archaeological impacts will have little or no impact on wāhi tapu and on 'the relationship of Māori and their culture and traditions' with their wāhi tapu. As we have seen in the present case, this assumption is not correct and section 56 is inconsistent with Treaty principles.

We make no recommendations here about general matters of consultation and the operations of Heritage New Zealand, which would be more appropriately considered later in our inquiry.

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Summary of Findings

In this chapter, we summarise our findings as follows:

- The Historic Places Act 1993 protected Kārewarewa urupā after further desecration occurred in 2000, which had exposed kōiwi. Although the Historic Places Trust's prosecution failed, the Act's provisions and the trust's advice do seem to have deterred further destruction of the urupā for the time being.
- Mistakes made by Heritage New Zealand staff in 2016 do not justify a finding of 'bad faith' or Treaty breach.
- There are systemic breaches in the processes for exploratory authorities and the requirements of section 56 of the Heritage New Zealand Pouhere Taonga Act 2014. The statutory timeframe for processing and deciding section 56 applications is inadequate. There is no requirement for applicants to provide an assessment of Māori values or the impact of an invasive exploratory investigation on those values, even though wāhi tapu (in this case an urupā) may be involved. Further, section 56 does not require decision-makers to consider Māori values or the impact on those values, again despite the use of 'invasive' techniques on an urupā. These flaws reflect an imbalance in section 56. Although invasive investigations may have little or no archaeological effects, they may still have profound spiritual and cultural effects in the case of wāhi tapu.
- The appeal rights provided in the Act do not necessarily constitute an effective remedy, given the under-resourcing that has prevented many Māori organisations from taking appeals to the Environment Court.
- The archaeological effects of the geomagnetic survey and the test pit were negligible but the claimants were still prejudiced in cultural terms, especially because the ongoing threat of further development continues to hang over them.
- We recommended that Heritage New Zealand should undertake a review, led by the Māori Heritage Council, of the timeframe required to process and decide section 56 applications in a manner consistent with the principle of active protection. Heritage New Zealand should then make a recommendation to the Minister, following which section 56 should be amended. We also recommended that section 56 should be amended to require applicants to provide an assessment of Māori values in the case of wāhi tapu (including urupā), and an assessment of the impact of any invasive exploratory investigation on those values. Finally, we recommended that section 56 should be amended to require decision-makers to take Māori values (and impacts on those values) into account for wāhi tapu.

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Dated at Wellington this 25th day of May 2020

Deputy Chief Judge Caren Fox, presiding officer

The Honourable Sir Douglas Lorimer Kidd KNZM, member

Dr Grant Phillipson, member

Tania Te Rangingangana Simpson, member

Dr Monty Soutar, member

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