

CONCLUDING COMMENTS AND RECOMMENDATIONS

As our findings have been itemised in previous chapters, our concluding remarks, as follows, will focus on the broad points of principle that need to be addressed. We emphasise first the legal basis of Atihaunui ownership.

11.1 THE LEGAL BASIS OF ATIHAUNUI OWNERSHIP

The Atihaunui right of ownership is based not on the Treaty of Waitangi alone but also derived from recognised law. This adds force to the Treaty's principles.

Contrary to some popular opinions, New Zealand was not colonised on the basis that rivers were publicly owned. From the beginning of colonial rule, English law was applied, and by that law, private ownership was the norm. By that law too, the territorial possessions of the indigenous people were recognised as giving rise to lawful property rights. The English Laws Act 1858 affirmed that English law had applied in New Zealand from 14 January 1840.

Under the law that the settlers brought with them from England, it was presumed that, from the tidal reaches to the source, riverbeds were privately owned by the riparian owners to the centre line. Only that part from the sea to the end of the tidal reach was said to be owned by the Crown. The ownership as so settled determined rights of access and use. The private property right was subject to such rights of public navigation as existed by immemorial use or dedication.

Following the establishment of responsible government, successive New Zealand parliaments enacted a number of statutes affecting rivers. These did not vest all rivers in the Crown or even seek to secure public access. They focused on authorising particular commercial uses of specific rivers (such as log floating or gold mining) or particular works affecting rivers generally (such as river control or sewage disposal). None of these departed from the common law norm of private ownership, but they placed a gloss on the owners' rights of control.

It may be that settlers expected the Crown to retain rivers for public benefit, the more so since, unlike Maori, settler land rights all emanated from a Crown grant of land. In fact, it appears that public river rights were not reserved in the Crown grants. The reservations in them were mainly in respect of minerals. Public rights, therefore, depended on particular statutory provisions. As we have seen, particular

provisions were made for commercial or local body purposes from time to time, but it was not until 1903 that the Government enacted a general provision affecting river ownership.

The 1903 provision vested the bed of all navigable rivers in the Crown. All non-navigable rivers remained privately owned by the riparian owners, as they do to this day, unless a particular statute applies.

The legal recognition of the prior property interests of the indigenous peoples of colonies, or the 'native title' as it was called, was also a long-standing principle of European and English law.¹ This principle was recognised by the Supreme Court in New Zealand as early as 1847.²

Later, the courts would determine, as a matter of law, that the prior ownership of the Maori people extended to rivers. This was first determined with regard to the Waikato River, which was held to have been lawfully owned by Maori at 1840. However, it was also held that the river was taken from them with the Waikato land confiscation by proclamation in 1864. Similarly, in litigation from 1938 to 1962, the bed of the Whanganui River was judicially found to have been owned by the Whanganui tribes at 1840. That finding was made by no less than four courts: the Native Land Court, the Native Appellate Court, the Supreme Court, and the Court of Appeal. It was also the opinion of a royal commission of inquiry under a Supreme Court judge.

Further, it was found that the 1903 legislation vesting the bed of navigable rivers in the Crown had taken the ownership from Maori. The Court of Appeal, following the advice of the Maori Appellate Court, was also of the view that ownership of various sections of the river passed with the alienation of riparian lands, but as we have described, that is unsustainable in Maori customary terms.

By the legislation of 1903, the Maori interest was expropriated without consultation or compensation. The matter simply slipped through the House, without debate, in the form of the Coal-mines Act Amendment Act. In 24 years of litigation, starting in 1938, Atihaunui opposed the assumption of ownership by the Crown and claimed that the river was theirs.

In the courts, the matter was decided in terms of the bed of the river because of the way the case was brought. The proceedings began in the Native Land Court, which had jurisdiction only in respect of land, so only an order as to land could have been sought. The Court of Appeal has since opined that a different conclusion might have been reached had the claim been made to the river as a whole.³ At English law, it is generally only the bed of a river that is owned, and rivers are divided according to the boundaries of adjoining lands, centre lines, and beds. However, it is also a principle of English law that native title is to be rendered conceptually in its own terms, and not in terms of systems that have grown up in England.

1. Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi*, Auckland, Oxford University Press, 1991, pp 31–2, 83–96, 171, 376

2. *R v Symonds* (1847) NZPCC 387

3. *Te Rungānui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, 26–27

In Maori terms, the Whanganui River is a water resource, a single and indivisible entity comprised of water, banks, and bed. There is nothing unexpected in that. It is obvious that a river exists as a water regime and not as a dry bed. The conceptual understanding of the river as a tupuna or ancestor emphasises the Maori thought that the river exists as a single and undivided entity or essence. Rendering the native title in its own terms, then, what Atihaunui owned was a river, not a bed, and a river entire, not dissected into parts.

As mentioned earlier in this report, it does not matter that Maori did not think in terms of ownership in the same way as Europeans. What they possessed is equated with ownership for the purposes of English or New Zealand law. Similarly, it does not matter that they thought in terms of territory rather than property. What they possessed, even rivers, is deemed to be a property interest for the purposes of law, and it has been treated that way by the courts.

Ordinarily, water in free-flowing form cannot be owned or possessed, but that is not the point. The issue is not about the ownership of water as such but about the right to access the water while it is in the river. We will refer to that again in the context of the Treaty, though the principles there referred to appear to us to have equal application in law.

11.2 THE TREATY BASIS

It may therefore be seen that, in affirming Maori property rights, the Treaty of Waitangi added no more to established law than that the full, exclusive, and undisturbed possession of traditional properties was guaranteed Maori for so long as they wished to retain them. The English text of the Treaty provides:

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession . . .

That rivers come within 'other properties' follows from the court decisions already referred to. The courts accepted that the bed of the Whanganui River was the lawful property of Atihaunui at the time of annexation. The Maori text uses the more compendious term 'taonga', and so guarantees to Maori all those things that they treasured. The river they treasured too, but whichever text is used, the result is the same.

Likewise, in terms of both law and the Treaty, Maori are entitled to more than the bed. The Treaty guaranteed what Maori possessed, and that must be measured in terms of what they possessed in fact, according to their own constructs. It was not put to Maori that what they might lawfully possess was what they might own in terms of English law. In any event, Maori did not know of English law at the time, so the application of English law could not have even been an implied term.

What Atihaunui possessed in fact was a river, not a dry bed. Likewise, what they conceptually possessed was a water resource. It was the water that gave the river its purpose, life, and form. It also supported 'their fisheries', which the Treaty specifically mentions and guarantees as well. Likewise, what they possessed in terms of their own traditions and beliefs was a river that was seen as an ancestral, living being. What made the river a resource, a fishery, and a living being was the water. It was none of these things without water. As a living being, it was also a single and indivisible entity, though local usages applied at particular parts.

As mentioned, water in free-flowing form cannot be owned or possessed in terms of English law, but the issue is not about the ownership of water. It is about the right to access water while it is in the river. The Treaty guaranteed to Atihaunui the 'full exclusive and undisturbed possession of their . . . properties'. As earlier seen, that includes the river and that must include as well the property right of access to the river water.

Though the claimants seek to constrain the use of the water in order to protect the river's health, they did not pursue compensation for the use of the water by others, as with the abstraction of water by ECNZ. None the less, their exclusive right of access to the river and the water in it is a valuable, tradable commodity. In our view, their just rights and property in the river must include the right to license others to use the river water. The right to develop and exploit a water resource is conceptually no different from a right to develop and exploit the resources on dry land.

If one owns a resource, it is only natural to assume that one can profit from that ownership. That is the way with property. In illustration, following a natural bent, Mangonui Maori charged a 'watering fee' to early visiting boats.⁴ The expectation can only be more if the recipient expects to profit from the water's use.

Having said that, we repeat that the claimants did not seek to profit from water abstraction. Nor did they seek to maintain exclusive possession. That is their choice as we see it. Our concern is with their legal and Treaty rights.

Finally, as we think is now well known, in the Maori text of the Treaty rangatiratanga, or authority, was guaranteed. In this case, the point need not be laboured. The 'full exclusive and undisturbed' possession of properties connotes all rights of authority, management, and control.

11.3 THE TREATY BREACH

The several respects in which the Treaty has been breached have been set out at various parts of this report. Broadly, however, the finding of the Tribunal is that the acts of the Crown in removing from Atihaunui the possession and control of the Whanganui River and its tributaries, and its omission to protect the Atihaunui rangatiratanga in and over the river, were and are contrary to the principles of the

4. Waitangi Tribunal, *Muriwhenua Land Report*, Wellington, GP Publications, 1997, secs 2.6, 5.2, 6.3.5, 7.3.3

Treaty of Waitangi, and Atihaunui have been and continue to be prejudiced as a result.

Acts contrary to the principles of the Treaty of Waitangi include the Coal-mines Act Amendment Act 1903 in expropriating the riverbed. To the extent that the Resource Management Act 1991 vests authority or control in respect of the river in other than Atihaunui, without Atihaunui consent, that Act too is inconsistent with Treaty principles. The Act in fact vests control of rivers in regional authorities, with certain rights of hearing and appeal being given to the public, including Atihaunui. 'Management' is the word used for the powers exercised in relation to the Act, but on our analysis of the statute, the powers given to regional authorities in respect of rivers are more akin to ownership. However viewed, and no matter how often it is said that the Resource Management Act concerns management and not ownership, in reality the authority or rangatiratanga that was guaranteed to Atihaunui has been taken away. Moreover, the Act perpetuates the vesting of the Whanganui riverbed in the Crown.

As we have said, Atihaunui possessed and controlled the river. We have also found that possession and control was not taken from them in any way that was consistent with the Treaty of Waitangi. It follows that such use rights as are consistent with the Treaty are only those that Atihaunui have freely and willingly allowed.

11.4 THE PRINCIPLE INVOLVED

It is important to appreciate the principle involved. Far from it being the fact that New Zealand was settled on the basis that rivers were publicly owned, the country was settled on the basis of the Treaty of Waitangi and established principles of law. These provided that the pre-existing rights of Maori would be respected.

The principle is that the lawful interests of all people, Maori included and not just those from England, are respected under the Queen's law according to what those interests are in fact and the manner in which they were derived. The principle as applied to Maori is set out clearly in the Treaty of Waitangi, on which the modern State was founded. All persons who were here at that time and those who have since arrived must be taken to have known of it.

Accordingly, we set aside any suggestion that the Atihaunui entitlement confers a privilege based on race. It is neither a privilege nor racist that a people should be able to retain what they have possessed. Property rights go to the heart of any just legal system. It is not a privilege that the claimants should be able to retain their property, even though the public may use parts of that property for recreational purposes. It would not be a privilege even were it the law that other New Zealanders were liable to lose property simply because the public desired it. The origin of Atihaunui's title, unlike that of the general population, is not based on fealty to the Crown, for it predated the Crown. In any event, it was a condition precedent to

settlement in New Zealand that their properties were guaranteed to them by the Crown.

Far from being founded on race or privilege, the Maori right to retain the properties that they possess is founded on universally accepted principles, from the doctrine of native title, as recognised in law, to the Treaty of Waitangi, which contains the promises of the Crown, to the emerging principles of international human rights.

The issue is not only about law but also about order. Order requires that Maori must respect the law and the property rights of others. There can be no compromise of that, and offenders must bear the full punishment of the law. But by the same token, the property rights of Maori must be respected as well. They cannot be a ready prey for convenience or public desire.

11.5 THE ESSENTIAL FACTS

We review the essential facts as we have found them to be.

At 1840, the hapu of Atihaunui, collectively as to the whole and individually as to parts, possessed the Whanganui River. It maintained a practical control of that area and held in respect of it an authority or rangatiratanga. Hapu of other tribal groups had an interest in the river as well, but at the hearings, Atihaunui acknowledged the interests of these other groups and they in turn acknowledged the primacy of the Atihaunui possession.

What Atihaunui possessed was the river inclusive of the water and all those things that gave the river its essential life. Particular use rights applied throughout the river, but the Atihaunui people held the river as a whole.

The Treaty of Waitangi guaranteed to the Atihaunui people their possession of the river and their authority over it – or rangatiratanga to use the word in the Maori text. It was guaranteed to them for so long as they wished to retain the same. The guarantee was not limited to land; it extended to what was possessed.

The Atihaunui possession of, and authority over, the river was never ceded or taken in a manner that the Treaty contemplated – that is, by a free and willing disposal. It is clear from the historical record that Atihaunui were willing to have Europeans in their territory, and to let them use the river, provided that their traditional authority, as represented in their rangatira, was respected. In this, the Atihaunui position has been constant.

Since the Treaty signing, a large number of other people have come to live in the Whanganui River catchment area and use the river. The river is now widely used for a number of commercial and income-generating purposes, including the abstraction of water for power generation. It is now widely regarded by the public as both a local and a national treasure. There are strong public feelings that this river, and others, should be held in public ownership and control.

Through most of last century and all of this, Atihaunui have consistently resisted such views, maintaining for that purpose one of the longest running cases in New

Zealand legal history, and pursuing recognition of their ownership rights in subsequent litigation and negotiations.

Today, a number of uses, including especially the abstraction of water for power purposes, deleteriously impact on the spiritual and physical enjoyment of the river by the Atihaunui customary proprietors.

11.6 CONFLICT AND RESOLUTION

Clearly, there is room for conflict. For more than a century, the rights of Atihaunui have been ignored, and now others have expectations about access to the river and the water's use. It would be naive not to acknowledge the importance of rivers to all and the importance of water as essential to life. On the other hand, fundamental principles about property rights and the rights of indigenous people are involved. None the less, the potential for conflict should not outweigh the potential for solutions.

First, the problem may not be as large as it appears. The Whanganui River situation is special, not a prototype case for river claims. Elsewhere, large areas were acquired by the Crown and it would appear that, in many of those cases, river rights were acquired with them. It would be unduly pretentious to assume that, when those lands were sold, Maori expected that their 'full exclusive and undisturbed' possession of the associated rivers would be maintained. What makes this case unique is that the Whanganui River, from its source to the sea, was central to the lives and identity of the river people. Geography made it that way, and in no alienation can it be said or implied that the river people intended to alienate their river interest.

History evidences their view that the river was not sold. At all material times, Atihaunui insisted that the control of the river was still vested in them. There is no other tribal group that we know of that has gone to the same lengths to keep that position to the fore.

In brief, Atihaunui deserve exceptional consideration, and the unique should not be taken as the norm.

Secondly, Atihaunui in fact share the public's concern for access. This, too, is evident from their history, from their current submissions, and from their claim. Although this history has been described, it is helpful to be reminded of its import. From the time that lands were sold for the fledgling settlement of what is now the city of Wanganui, Atihaunui accepted, as a matter of course, that the Europeans coming into their territory should have access to the river and the water, provided that the status and authority of their leaders were respected. Atihaunui raised no objections until their status and authority were effectively challenged. Only then were restrictions imposed on the use of the river away from European settlements. Later, when those restrictions could not in practice be maintained, particular river uses by Europeans were challenged.

In more recent times, Atihaunui have objected not to the use of the river as such, but to its abuse. Throughout all this, however, Atihaunui have insisted that their interest in the river be respected and acknowledged.

This report has described the Maori custom and practice. Consistently, there has been room for others for so long as there are sound working relationships based upon respect. Indeed, in Maori tradition, property rights, while important, are not as important as the way in which people relate. Others may use the river for so long as the mana of the ancestral inheritors is maintained. This is pivotal to understanding Maori matters.

Despite all that has happened since Atihaunui first accepted Europeans to their lower river reaches – war, protest, and litigation – it is still the Atihaunui position that a working relationship is sought. In written pleadings and oral submissions, the point was made repeatedly that Atihaunui do not seek to exclude the public from the river, they do not seek to take away existing user rights, and they do not seek compensation for past water uses. They would negotiate on protocols for the use of the river in future. But, first and foremost, they seek recognition of their status and their legitimate rights.

In brief, there is room for a river treaty to be made and for solutions to be sought. The primary concerns of various parties – of Atihaunui for recognition, of the public for access, and of industry not to be unduly constrained – may all be reconcilable. Atihaunui seek dialogue and discussions, and that is the course that we urge. However, we have some proposals for them to consider.

11.7 PROPOSALS

In making proposals, we emphasise that they are directed to the Whanganui River, and not to rivers generally. Each case must be looked at according to its own circumstances. Relevant criteria may include, by way of illustration, the intensity of the Maori association with the river over time, the number of marae involved, the alienation of riparian lands, the extent to which this was voluntary and may be taken to have included river rights, and the evidence of the expectations of all concerned over time. Again, we are reminded of the uniqueness of the Whanganui River case. Conversely, other arrangements already made to give Maori a say in river management may not go far enough to suit the Atihaunui case.

In considering proposals, we have had regard to the significance of the Resource Management Act 1991 in repealing a plethora of laws and in seeking to bring about a coherent and uniform national strategy. In the end, however, we considered that the desirability of national uniformity cannot prevail over the need to do justice to the particular case. Nevertheless, we first looked for a solution within the scheme of that Act. We could find none that could do justice to the issues involved. The authority to transfer powers to various bodies, including iwi authorities, is discretionary and limited in scope. Water conservation orders do not give iwi a meaningful decision making role, and heritage protection orders are of doubtful

application and utility in this instance. There is no process within the Act that does not leave ultimate power and control in the hands of a regional or territorial authority.

On the other hand, within the authorities are a competence and an experience in management that are needed for today's more complex world and on which we ought to capitalise. We consider that there is a need for collaboration in modern river management.

We propose first that, whatever is done, the authority of Atihaunui in the Whanganui River should be recognised in appropriate legislation. It should include recognition of the Atihaunui right of ownership of the Whanganui River, as an entity and as a resource, without reference to the English legal conception of river ownership in terms of riverbeds.

We further propose that any settlement should protect existing use rights for their current terms and provide for continuing public access. Broad parameters for the terms of access will, however, need to be agreed. It should be clear that the public right is theirs not as of right but by permission. The settlement may require joint management of the Whanganui River on a regular basis, and in that event, it should allow for the deployment of Atihaunui people. It would be necessary to provide funding for the functioning of the Whanganui River Maori Trust Board, and, if need be, this might be built into local authority levies.

In addition, the current application for a water conservation order would need to be further deferred until settlement is reached, since there may be matters that the Minister needs to address.

Subject to the above, we propose two options for consideration in negotiations:

- (a) *Owner approval*: The first option is that the river in its entirety be vested in an ancestor or ancestors representative of Atihaunui, with the Whanganui River Maori Trust Board as trustee. Any resource consent application in respect of the river would require the approval of the trust board. This would give greater effect to Atihaunui's rangatiratanga and would maintain the 'management' regime of the Resource Management Act 1991. A resource consent would still have to be sought if the owner's approval is given. An amendment to the regional plan relating to the river would be needed, setting out that the board's consent is required before a resource consent is applied for.
- (b) *Consent authority*: The second option is that the Whanganui River Maori Trust Board be added as a 'consent authority' in terms of the Resource Management Act 1991, where the Whanganui River is involved, to act severally and jointly with the current consenting authority for any particular case, and that both must consent to an application for the consent to be exercised. In terms of section 2 of the Act, consent authorities are currently the Minister of Conservation, a regional council, a territorial authority, or a local authority that is both a regional council and a territorial authority. Rights of appeal under the Act would be preserved.

At present, the board has only the same right to make submissions to others as ordinary members of the public. This proposal provides a positive role but may be seen to fall short of effective recognition of the authority of Atihaunui. The final decision regarding an application would still rest with the courts.

The Resource Management Act would need further amendment, first and foremost because it does not reflect the Crown's Treaty obligations. It needs to provide that, in achieving the purpose of the Act, all persons exercising functions and powers under it in relation to managing the use, development, and protection of natural and physical resources, shall act in a manner that is consistent with, and gives effect to, the principles of the Treaty of Waitangi.

The Act currently provides for joint hearings to reduce the costs to applicants where there is more than one consent authority. This could be applied in this instance. Separate decisions may be given, but the conditions applied by each authority must be consistent. A difficulty arises where the consent authorities come to different decisions in respect of the application. However, each decision is subject to appeal, and under the current provisions of the Act, the hearing before the Environment Court takes place as if the earlier hearing had not occurred, and the matter is determined afresh.

Under this option, the most important issue concerns the drafting of a plan specific to the Whanganui River. In terms of the Act, both consent authorities could draft a plan, although a joint approach would be preferable. The Act refers specifically to regional councils and regional plans, and an amendment would be necessary to reflect that the plan is to be prepared by the relevant consent authorities. The plan would set out the matters relevant to the use of the Whanganui River, providing certainty and guidelines for applicants. The plan would also form the basis for an appeal to the Environment Court.

To increase recognition of Atihaunui's authority, we propose that this joint consent structure be reviewed after five years with a view to elevating the trust board to the sole consent authority or to making other recommendations considered necessary. This would also allow time to draft a new plan for the river setting out the necessary criteria for future river use. The review should be conducted by independent representatives appointed by Parliament and Atihaunui.

11.8 RECOMMENDATIONS

Our primary recommendation is that the Crown now negotiate with Atihaunui through the Whanganui River Maori Trust Board, having regard to the above proposals. Leave is given to either party to seek more specific recommendations if an agreement cannot be reached. In addition:

- (a) Compensation for the taking of water for the Tongariro power scheme was not sought in these proceedings because the focus was on returning the water to the river. But we consider that compensation is due. The question

of the ownership of water in an abstract sense does not arise. The issue concerns the presumptive use of a resource that properly belongs to the Atihaunui people. Compensation, then, is due under two headings: as exemplary damages for the use of a private resource without consent and as compensation for the deleterious impact of a large water abstraction.

We recommend that this also form part of the negotiations and that the compensation provide the funding base for the trust board's continuing operations.

- (b) It was recognised by a royal commission in the 1950s that Atihaunui were entitled to compensation for gravel extraction. The Government has recognised that compensation is due but Atihaunui have still to be fully compensated. It is recommended that gravel compensation be dealt with separately, with provision for arbitration. It should not depend on the settlement of future management but be seen as a separate issue. Nor should it be seen as furnishing a fund for the board's future operations, because the compensation is due to the people. It should be held by the board for projects for the benefit of Atihaunui as a whole, but with a power of distribution to marae at the board's discretion.
- (c) Costs should be covered by the Crown – compensation for past litigation costs, costs in this claim, and legal costs in negotiating the settlement.

11.9 DISSENTING OPINION

As provided for in clause 5(7) of the second schedule to the Treaty of Waitangi Act 1975, the foregoing of this report represents the Tribunal's decision. Tribunal member John Kneebone dissents to the extent given in his opinion, which now follows.

I am unable to support any proposal that Atihaunui should own natural water or be designated as a consent authority under the Resource Management Act 1991, but I would urge the many people with a keen interest in the issue of Treaty rights and obligations, and rivers, to read this report in depth and in its entirety.

While readers should remember that this report is focused only on the Whanganui River, and much of the evidence is unique to it, this is a river story and is about the people who have lived in its valley for hundreds of years. The report is a faithful portrait of the comprehensive evidence presented to the Tribunal. It recounts in an eloquent and lucid manner the people's story and provides non-Maori readers with a privileged insight into the lives of an extended family of Maori who lived in intimate association with this ancient river. I diverge from my colleagues only on the issue of remedy arising from my interpretation and vision of the river. These divergences must colour my view on its management and control.

There are two very distinct components in a river. The moving body of water and the trench that the water has scoured out as it gravitates to the sea. The water has its own energy and will, and flows as part of nature's cycle. The trench on the

other hand is benign, passive, and part of the land. It is forever being altered as the flow fluctuates, meanders, and responds to natural forces.

River management must extend well beyond a river's banks, and it is necessary to recognise the complexity and physical characteristics of its component parts. There has been a legal evolution of laws governing rivers since 1840, and this evolution continues with the review of the Resource Management Act. It is only after coming to an understanding of those changes that one can see why a riverbed is separated from the water above it. The dramatic increase in human population densities, the industrialisation of our landscape, and the very special role that water plays in contemporary society have forced these governmental interventions into the aquatic ecosystem that we recognise as a river.

Humanity has never commanded authority over natural water as it evaporates, precipitates, freezes, melts, and flows. No New Zealand government, nor government elsewhere, has laid a general claim to ownership of water. Humankind and all other life is dependent on water. It is borrowed from nature, made use of, then returned to be cleansed and refurbished. The general privatisation of natural water is not a practical political option.

I accept that as a matter of fact Atihaunui controlled human activity in the Whanganui River catchment area at 1840. I acknowledge that they controlled access to, travel upon, and activity in, the Whanganui River. Atihaunui were resident managers of their estate, and this was interpreted to mean that they owned the riverbed in a series of legal decisions leading up to the 1962 Court of Appeal case that overturned this interpretation.

To suggest that a river as an entity should be alienated and legally transferred to a particular and specific descent group is not in my view a viable option. Such an action could not escape the interpretation that naturally occurring, free-flowing water, and access to it, will become subject to private control, which must then lead to the potential for private exploitation of an essential natural resource. All life depends on water. Rivers also transport naturally occurring and man-created waste to the sea and are a traditional energy resource.

The trench or riverbed is a different issue. Rivers form themselves, and their dominant function is drainage. Precipitation surplus to the land's ability to absorb gravitates to the sea. All significant interventions by man into river systems are to manage this drainage function, whether they make it more accommodating to navigation or mitigate damage to adjacent property or river structures. The rapacious nature of an industrial society requires community intervention to protect water quality and to ration abstraction.

Defining a river is more complex than casual observation. Its point of discharge is obvious, its origin much less so. In a modern river management regime, a river begins at the apex of a watershed, so that all the land within a catchment area is a practical and integral part of a river. The land use within the catchment area dictates the flow and the quality of water within the system. Effective river management is not possible without the ability to influence, often to the point of

prohibiting, any particular land use, be it a commercial building complex, a forest, or a farm.

It is stretching public tolerance to expect citizens to accept restrictions without right of redress. The right to restrict land use is currently legitimised via the transparent democratic process, which provides for a free choice of candidates, who then are responsible for the river management process.

While settler development and consequent river management and control regimes have developed incrementally, they have relentlessly wrested control and management from Atihaunui. The authority and financial responsibility for this now resides with the wider community, and is exercised by the application of the Resource Management Act 1991.

It is an unfortunate reality that the Whanganui River is both the tangible focus of Atihaunui spiritual and physical wellbeing and the main arterial trench of a very large drainage system in industrialised contemporary society. This is my honest appraisal, brutal though it may appear, of the dilemma we face in seeking a universally acceptable compromise.

Atihaunui describe their relationship to the river as like a plaited flaxen rope that extends for the length of the river. It has three distinctive strands, which represent descent groups from an ancestor. This flaxen rope is strong, flexible, and accommodates differing tensions between the strands. To carry the analogy further, there is another rope that also stretches along the river. It has many colours and strands. The strands of this synthetic rope represent modern man's interventions and constructions, which now intrude upon this ancient river. As we enter the new millennium, we need to recognise that this other rope has wound its way up the river.

11.10 REMEDY

New Zealand society has changed since 1840, but the Treaty principles do not change. The Crown is obliged now to act honourably with Atihaunui, who have experienced misery and anguish, as well as spiritual and economic loss, at the hands of past governments. The Crown has to atone for past Government actions.

I recommend that the Crown give serious consideration to sharing equally the ownership of the Whanganui riverbed – that is, the watercourse – with Atihaunui.

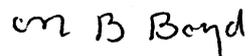
The Crown should create a body jointly with Atihaunui to exercise all the rights and responsibilities of legal ownership of the bed, and that body should be bound, as are other landowners, by the laws and regulations that apply. This body would consist of six appointees: three appointed by Atihaunui and three by the Crown. The Crown appointees should be the Ministers whose portfolios reflect aspects of the special values of the Whanganui River. The constitution should allow the body to elect one of their number as chair, and it should be obliged to meet at least once a year. All meeting costs should be born by the Crown.

Recognition by the Crown as a full and equal partner in the bed of the river, and an honourable settlement for gravel extraction, is a small concession for the Crown to make, when balanced against 100 years of struggle by Atihaunui to defend their heritage and rights.

Dated at Wellington this *8th* day of *June* 1999



E T Durie, presiding officer



M B Boyd, member



J T Kneebone, member



G S Orr, member



K W Walker, member

