Maori Legal Forum

LAND AND FORESTRY

Landcorp's land sale policies and the sale of Crown assets -what do these mean for Māori?

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1 INTRODUCTION

High profile land occupations in Northland and the Coromandel at the beginning of the year resulted in a renewed focus on Landcorp's land sale policies and, more generally, the sale of Crown assets. The occupations were in protest against Landcorp's intention to sell land that can be ordered to be returned to Māori as part of a Treaty of Waitangi settlement. Those occupations led the Government to announce a review of not only Landcorp's policies, but the land sale policies of State-Owned Enterprises (**SOEs**), Crown entities, and other Crown bodies.

Much has been said about the occupations, Landcorp's policies and, from a legal perspective, the legal framework upon which the land being sold by Landcorp is able to be returned to Māori.

In this paper, I address:

- the origins of the legal framework pursuant to which land is able to be returned to Māori;
- in particular, the memorials and resumption mechanisms under the State-Owned Enterprises Act 1986 (the **SOE** Act) and the Crown Forest Assets Act 1989 (the **Forest Assets Act**);
- whether the resumption mechanisms are effective;
- the impact of the Crown's settlement policies on these mechanisms; and
- recent case law and Waitangi Tribunal jurisprudence.

I also consider some of the issues surrounding the actual implementation of the resumption mechanisms and the timing considerations that arise.

2 THE ORIGINS OF THE LEGAL FRAMEWORK

2.1 The famous "Lands" case

The genesis of this issue could be said to be the creation of SOEs in the 1980s. The SOE Act was enacted in 1986 to allow the government to create SOEs. An important section of that Act, section 9, provided that nothing in the Act permits the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi. That section remains in force today.

The establishment of SOEs was a contentious topic. Many will remember vividly the issues that were debated and discussed at the time. One of the issues was the fear by Māori that land owned by the Crown, but transferred to SOEs, would no longer be available to use for future Treaty settlements. The transfer of assets out of Crown ownership without protecting those assets so that they could be used to settle future Treaty claims was considered to be inconsistent with the principles of the Treaty, and therefore in breach of section 9 of the SOE Act.

The Court of Appeal, in what is commonly known as the *Lands* case[1] agreed and held that the Crown was obliged to administer the SOE Act so that Māori Treaty claims to land transferred to SOEs were protected. In what is now famous dicta of Cooke P, the Court found:

> "…we have all reached two major conclusions. First that the principles of the Treaty of Waitangi override everything else in the State Enterprises Act. Second that those principles require the Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost good faith. That duty is no light one. It is infinitely more than a formality. If a breach of the duty is demonstrated at an time, the duty of the Court will be to insist that it be honoured…
>
> The effect of our present decision, built on the Treaty of Waitangi Act and the State-Owned Enterprises Act, is that in relation to land now held by the Crown it should never again be possible to put aside a Maori grievance in that way. The Crown now has to work out a system to safeguard Maori claims regarding land covered by the 1986 Act before any land can be transferred to a State enterprise. The Maori Council can come back to the Court if not satisfied with the proposed system. In the meantime no outright transfers can be made.
>
> In short the present decision together with the two Acts means that there will now be an effective legal remedy by which

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[1] *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641.

> grievous wrongs suffered by one of the Treaty partners in breach of the principles of the Treaty can be righted."[2]

Following the Court of Appeal decision in the *Lands* case, the Crown and Māori entered into negotiations to consider how land could be transferred to SOEs while at the same time remain available for the Crown to use in future Treaty settlements. As a result of those negotiations, the Crown and Māori agreed to a mechanism that would involve a "memorial" being placed on the certificate of title of any such land, stating that it could be compulsorily repurchased by the Crown if the Waitangi Tribunal recommended its return to Māori. Those memorials would be supported by a legislative process that governed the circumstances and manner in which the land could be compulsorily repurchased by the Crown.

2.2 What are these "memorials"?

The titles for land transferred by the Crown to SOEs include a notation that advises that the land is subject to section 27B of the SOE Act. As required by section 27A of the SOE Act, that notation reads:

> "Subject to section 27B State-Owned Enterprises Act 1986 (which provides for the resumption of land on the recommendation of the Waitangi Tribunal and which does not provide for third parties, such as the owner of the land, to be heard in relation to the making of any such recommendation)."

Section 27B of the SOE Act was enacted in 1988[3] to reflect the agreement reached between Māori and the Crown following the *Lands* case. It provides that all land transferred to SOEs under the SOE Act must be compulsorily acquired by the Crown and returned to claimants in the event that the Waitangi Tribunal makes a binding recommendation to that effect under section 8A of the Treaty of Waitangi Act 1975. The Tribunal is able to make such a recommendation if it finds that:

a) a claim is well founded; and

b) in all the circumstances of the case, the compensation to the claimant should include the return to Māori ownership of the whole or part of that land, or interest in land.4

In deciding whether to recommend the return of land, the Tribunal will not have regard to any changes that have taken place since the land was transferred to the SOE in:

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[2] *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641, 667-668.

[3] By s 10(1) Treaty of Waitangi (State Enterprises) Act 1988.

[4] Section 8A(2)(a) of the Treaty of Waitangi Act 1975.

a) the condition of the land in which the interest exists, or any improvements to it; or

b) the ownership or possession of any other interests in that land.[5]

The Tribunal is able to make a binding recommendation for the resumption regardless of whether the land is still owned by the SOE, or has been on-sold to a third party.[6]

2.3 What about the Forest Asset Act?

Shortly after the judgment in the *Lands* case, the Crown sought to dispose of certain Crown forestry assets.

In response the New Zealand Māori Council (**NZMC**) filed a statement of claim in the Court of Appeal seeking a declaration that the Crown's proposal to dispose of Crown forestry assets in the manner proposed was inconsistent with the judgment of the Court of Appeal in the *Lands* case and the agreement and legislation that resulted from the *Lands* case. The Crown sought the Court of Appeal's direction as to whether the NZMC's motion was within the scope of the leave reserved in the *Lands* case. The Court of Appeal heard the claims and released a decision that has commonly become know as the *Forests*[7] case.

The Court of Appeal held that there was no procedural bar to the NZMC's application, and again considered the legal framework surrounding the transfer of lands out of Crown ownership (in this case, in the context of the Crown's extensive forestry estate) and said:

> "We think it right to say that the good faith owed to each other by the parties to the Treaty must extend to consultation on truly major issues. That is really clear beyond argument… Partnership certainly does not mean that every asset or resource in which Maori have some justifiable claim to share must be divided equally. There may be national assets or resources as regards which, even if Maori have some fair claim, other initiatives have still made the greater contribution. For example – and it is only an example – that might well be true of some pine forests. Moreover, the common interest may point to the sale of forestry rights, or some of them, to the best commercial advantage. But, as the Forestry Working Group recognised, it would be inconsistent with the principles of the

[5] Section 8A(3) of the Treaty of Waitangi Act 1975.

[6] Section 8A(1) of the Treaty of Waitangi Act 1975.

[7] *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142.

> Treaty to reach a decision as to whether there should be a general sale without consultation."[8]

Representatives of the NZMC and the Federation of Māori Authorities (**FOMA**) reached agreement with the Crown shortly after this judgment, recorded in a Deed of Settlement dated 20 July 1989. This deed provided that the Crown would sell its forestry rights (the right to mill and forest trees on Crown-owned forest land), and the purchaser of those forest rights would be charged an annual market rental for the relevant Crown Forest Licence. The Crown could not sell the freehold in the Crown forest land until the Waitangi Tribunal had recommended that the land was no longer liable to resumption.

Further, the accumulated rentals received pursuant to each Crown Forest Licence were to be held on trust and paid to either the Māori interests where the Tribunal recommended that the land underlying the Crown Forest Licence be returned to Māori interests, or to the Crown if the Tribunal made a recommendation that the land underlying the relevant Crown Forest Licence be no longer subject to resumption.

A Deed Poll was proclaimed on 17 October 1989, and legislation, the Forest Assets Act was enacted approximately one year after the amendments to the SOE Act were enacted in 1988.

2.4 How does the Forest Asset Act differ from the SOE Act?

The SOE Act and the Forest Assets Act are similar in intent and design. They both seek to ensure land that is transferred out of Crown ownership, or otherwise utilised, remains available for future Treaty settlements.

One material respect in which the Forest Assets Act differs from the SOE Act is in relation to the compensation regime. The Forest Assets Act provides that, where land underlying a Crown Forest Licence is returned to Māori, compensation shall also be payable to recognise that the land is being transferred subject to an encumbrance (in the form of a Crown Forest Licence). The SOE Act does not provide for compensation to be paid to Māori claimants where land is compulsorily acquired by the Crown and returned to those claimants.

Under the Forest Assets Act, the Waitangi Tribunal must award compensation to claimants if it recommends the return of Crown forest land to Māori. The level of compensation is determined in accordance with one of the different formulae set out in the

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[8] *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142, p 152.

Forest Assets Act (the formula to be used is determined by the claimants). The Tribunal must award 5% of that level as compensation to the claimants. The Tribunal has discretion to award the remaining 95%.

2.5 Summary

The resumption mechanisms affect land transferred to SOEs and derive from important court decisions concerning the principles of the Treaty of Waitangi.[9] They represent the outcome of negotiations between Māori and the Crown. They were designed to allow the establishment of SOEs, while also ensuring that Crown land remained available to settle Treaty of Waitangi grievances.

The resumption mechanisms have, therefore, been on the statute books for almost 20 years. On that basis, one would expect a significant amount of jurisprudence regarding them.

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[9] It is interesting to note that the Justice and Electoral Select Committee is currently considering the Deletion of the Principles of the Treaty of Waitangi Bill, which would effectively remove from the statute books the sections upon which the landmark decisions cited above were based.

3 ARE THE RESUMPTION MECHANISMS EFFECTIVE?

Effectiveness can be measured in a number of ways. For example, effectiveness could be measured by the regularity with which the resumption mechanisms have been invoked. Alternatively, effectiveness could be measured by the likelihood of the mechanisms being invoked (that is, by comparing the number of Waitangi Tribunal hearings in which the Tribunal has formally considered invoking these mechanisms to the number of times the mechanisms have in fact been invoked). Effectiveness could also be assessed by measuring (to the extent it is measurable) the effect the mechanisms have had in the context of Treaty settlement negotiations to date. There are a range of measurements available, and I wish to focus on a few only.

3.1 Have the resumption mechanisms been involved yet?

To date, the Waitangi Tribunal has only exercised its power to make binding recommendations in one instance, and in that instance the Crown and the claimants agreed a negotiated settlement before the Tribunal's interim findings became binding.

In the Turangi Township Remedies Report[10] released in 1998, the Tribunal made recommendations for the return of several memorialised properties to Ngati Turangitukua. As a result of those recommendations, the Crown and Ngati Turangitukua negotiated an agreed redress package, which included the return of certain memorialised properties.

The Crown argued that the Tribunal was obliged to adopt a higher standard of proof when considering whether or not to make a binding recommendation. However, the Tribunal ruled that a higher standard of proof was not required, and that the Tribunal will follow a common sense principle that greater care should be taken in considering more serious issues, stating that:

> "When the Tribunal is considering whether or not, as part of its recommendation under s 6, [of the Treaty of Waitangi Act 1975] to make a binding recommendation for the return to Maori of memorialised land, it will be concerned with 'a whole range of circumstances' which it will need to weigh. Clearly, the

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[10] *The Turangi Township Remedies Report-Wai 84*, GP Publications, Wellington, 1998.

consequences of such a recommendation would need to be given serious consideration given its effect on the Crown."[11]

Although the Tribunal made binding recommendations for the return of certain memorialised properties, it declined to make binding recommendations for the return of memorialised residential properties, as there were sufficient properties available in the possession of Crown agencies that could be returned.[12]

3.2 Likelihood of success

As far as I am aware, the Tribunal has only once exercised its formal binding recommendation power. In that one instance, it recommended the return of a number of memorialised properties. On that basis, it could be said that the likelihood of a successful binding recommendation, following a Tribunal hearing on the matter, is 100%.

That is not to say, of course, that there has only been one application for a binding recommendation from the Tribunal. To the contrary, there have been (and are extant) numerous applications to the Tribunal for binding recommendations. As far as I am aware, however, only one of those applications has progressed to a formal hearing and recommendation report. All other binding recommendation applications (which are often termed as applications for "remedies hearings") are awaiting hearing by the Waitangi Tribunal. The Tribunal is currently considering how to prioritise those extant binding recommendation applications. The manner in which those applications may be dealt with is addressed below.

3.3 Leverage in negotiations

Of course, assessing the effectiveness of the resumption mechanisms by reference to the number of binding recommendations issued by the Tribunal ignores the leverage that claimants achieve from those mechanisms in direct negotiations with the Crown. The threat of invoking the Tribunal's binding recommendation power, in many respects, hangs like the Sword of Damocles over the Crown in the context of Treaty settlement negotiations. That can create leverage for claimants in the negotiations, and acts as a form of BATNA (Best Alternative to a Negotiated Agreement). If the claimant groups believe that the Crown is not offering fair settlement redress, such that the claimants are more likely to secure additional redress through the Tribunal exercising its binding recommendation powers, then the threat of seeking

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[11] *Directions of the Presiding Officer in re Ngati Turangitukua-Wai 84* (25 March 1997), cited in The Turangi Township Remedies Report - Wai 84, GP Publications, Wellington, 1998, p 5.

[12] *The Turangi Township Remedies Report-Wai 84*, GP Publications, Wellington, 1998, p 88.

redress through the Tribunal can be used as leverage by the claimants.

It is difficult, however, to assess precisely the amount of leverage that is obtained by claimant groups in negotiations through the threat of invoking the Tribunal's binding recommendation powers. That difficulty derives in part from the uncertainty regarding how those powers might be exercised, as they have only been exercised once. Claimants are therefore required to make a rather difficult assessment of how a Crown settlement offer might compare to what the Tribunal may recommend through the binding recommendation process, without knowing precisely how the Tribunal might exercise its jurisdiction in that regard.

3.4 Summary

Whether the resumption mechanisms can be considered effective depends largely on the criteria against which they are measured. There are, however, some key facts that are material to any such assessment.

a) The Tribunal has only exercised its binding recommendation power once in almost 20 years.

b) The Tribunal appears to have completed one remedies hearing, from which it made binding recommendations. There are numerous other remedies applications in the hearing process or awaiting a hearing.

c) Land subject to the resumption mechanisms can be included as redress in a Treaty settlement negotiated with the Crown.

d) As far as I am aware, apart from forest land subject to the Forest Assets Act that has been returned to Māori claimants through a "deemed" Tribunal binding recommendation, the Crown has not agreed to resume memorialised land as part of a negotiated Treaty settlement. If it has agreed to do so, that is the exception rather than the norm.

Because it is open to claimant groups to negotiate directly with the Crown for the settlement of Treaty claims (in fact, this is a course of action usually encouraged by the Tribunal following its generic district reports), the Crown's Treaty settlement policies have a major influence on the extent to which the resumption mechanisms are utilised. I now address those policies.

4 THE CROWN'S SETTLEMENT POLICIES

4.1 What properties are offered to claimants?

Claimants are usually first offered land that is within the OTS "land bank".

The Crown's Land Protection Mechanism requires surplus Crown, Crown departmental, Crown Research Institute, Public Health Sector and certain other Crown entity land to first be offered for sale to OTS, before it can be sold on the open market. If OTS decides to purchase that land, it will be placed in a "land bank" and made available to claimants in future Treaty settlements.

Once it receives notification that a surplus Crown property is available, OTS must advertise the availability of that property, and Māori with Treaty claims lodged in the Waitangi Tribunal may make submissions as to why that property should be land banked. If the property meets certain criteria for land banking, it will be protected. If not, it will be sold on the open market.

However, the Land Protection Mechanism does not apply to land subject to other forms of protection, such as statutory memorials. When SOE land becomes available for sale, OTS is not obliged to consider purchasing that land in accordance with its Land Protection Mechanism policy. Therefore, somewhat ironically, land that was originally protected in the 1980s to be used for future Treaty settlements is now arguably afforded less protection than other Crown land.

4.2 Are memorialised properties being used in Treaty settlements?

Treaty settlements are being reached through direct negotiation between the Crown and Māori claimant groups. In that context, it is theoretically possible for the Crown to agree to resume memorialised properties. There are, however, a number of reasons why the Crown would be, and has been, unwilling to do so.

First, the Crown (itself, as opposed to SOEs) retains ownership of a significant number of properties that are theoretically available for use in Treaty settlements. The Crown's preference is to use those properties as priority, rather than having to resume memorialised properties, many of which are now in private ownership.

Second, there are obvious political consequences if the Crown were to resume memorialised properties owned by private individuals.

Third, and perhaps most importantly, most commercial redress properties offered by the Crown must be purchased by the particular claimant group using cash that the Crown provides in settlement of Treaty claims. Ordinarily, claimant groups are limited to purchasing properties up to the value of their cash settlement amount.

In most instances, the value of Crown-owned properties that the Crown is able to offer claimant groups, without having to resort to memorialised properties, exceeds the cash amount that those groups receive in settlement of their Treaty claims. That means that there is usually not enough cash offered to claimants to allow them to purchase all Crown-owned properties offered to them, as well as additional memorialised properties.

4.3 Impacts of Crown Policy

The Crown's Treaty settlement policies therefore, raise the significant issue of land values. At the time that the memorial regime was devised in 1988, there was no fiscal cap on the value of Treaty of Waitangi settlements. However, in 1994 the then National Government released a proposal that a $1 billion cap be placed on the value of all Treaty settlements.

This "fiscal envelope" policy was widely rejected by Māori, but was nevertheless adopted. Although the fiscal envelope policy was formally scrapped as part of the 1996 National-New Zealand First coalition agreement, this move was largely symbolic, as the Crown's policy of relativity between settlements remains in place.

In order to achieve "relativity", the Office of Treaty Settlements (OTS) assesses how much redress, including a cash amount, each claimant group is entitled to receive in settlement of their Treaty claims. In many cases, the value of a claimant group's settlement is much less than the value of the land available for them to purchase as part of their Treaty settlement.

The value of land is rising, and in almost every instance, land is more valuable than when the first Treaty settlements were made in the mid-1990s. It is difficult to determine from the Crown's application of its policy whether that rise in value, or even inflation in general, is factored into its assessments of the value of each claimant group's Treaty claims.

Irrespective, it is clear that the longer the settlement process takes, the higher land values rise, and the less likely it becomes for claimants to secure all land that has been notionally, if not actually, set aside to settle Treaty claims. In other words, the longer the settlement process takes, the less likely it is that memorialised properties will be used to settle Treaty grievances.

4.4 Effect of Settlement

All deeds of settlement now include a provision that effectively removes the application of the resumption memorial legislation for the exclusive area of interest of the settling claimant group. That clause is usually drafted as follows:

> The [name of iwi] acknowledge that the following legislation (the "Land Claims Statutory Protection Legislation") does not apply to a Cultural Redress Property, or a Commercial Redress Property, namely:
>
> (a) sections 8A to 8HJ of the Treaty of Waitangi Act;
>
> (b) sections 27A to 27C of the State-Owned Enterprises Act;
>
> (c) sections 211 to 213 of the Education Act;
>
> (d) Part 3 of the Crown Forest Assets Act; and
>
> (e) Part 3 of the New Zealand Railways Corporation Restructuring Act.

In following this approach, Treaty Settlement enactments result in a "patchwork" of areas, within which the resumption protections do not apply. It is unclear how the areas outside of the "patchwork" will be dealt with in the future.

5 UPDATE ON CASE LAW AND WAITANGI TRIBUNAL JURISPRUDENCE

5.1 Recent cases on forest matters

The High Court[13] and Court of Appeal[14] have recently released decisions in relation to proceedings brought by the NZMC, FOMA and other parties seeking to prevent the Crown obtaining certain benefits pursuant to a deed of settlement entered into between the Crown and Te Pumautanga o Te Arawa Trust (the **Trust**, formerly the Nga Kaihautu o Te Arawa Executive Council), (the **Deed of Settlement**).

A key part of the Deed of Settlement is the inclusion of Crown forest lands, some of which will be purchased with the quantum received as part of the settlement, and some of which will be purchased post-settlement. The Crown intends to deem itself to be a "confirmed beneficiary" under the Forest Assets Act, and therefore receive the accumulated rentals relating to the Crown forest lands that the Trust will have the opportunity to purchase post-settlement. While other Treaty settlements have included Crown forest land as redress, this is the first time the Crown has deemed itself to be a "confirmed beneficiary" and thereby become entitled to receive accumulated rentals associated with Crown forest land.

The High Court recognised the fiduciary duties owed by the Crown that exist pursuant to the Treaty of Waitangi, and stated that the agreements that resulted from the *Forests* case and the Forest Assets Act are:

> "but contractual, and statutory, implementations that recognise the existence of, and provide for mechanisms to meet…[this]…fiduciary duty".[15]

However, the Court recognised that they could not intervene in the Parliamentary process of intended legislation by declaration or otherwise. The Court of Appeal confirmed that principle and stated that:

> "The obligation of the Crown to introduce a Bill to give effect to the proposed settlement is an executive act so closely tied to the parliamentary process that it would breach what Cooke P called the "established principle of non-interference by the Courts in parliamentary proceedings" if the Court were to issue

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[13] *New Zealand Māori Council v Attorney-General* unreported HC Wellington, CIV-2007-485-000095, 4 May 2007, Gendall J.

[14] *New Zealand Māori Council v Attorney-General* unreported CA, CA241/07, 2 July 2007.

[15] *New Zealand Māori Council v Attorney-General* unreported HC Wellington, CIV-2007-485-000095, 4 May 2007, Gendall J, para 53.

> a declaration that had the effect of deterring the introduction of the Bill. The combination of this principle, and the essentially political nature of the Settlement Deed means that the issues relating to the Settlement Deed are not justifiable."[16]

The Waitangi Tribunal is currently hearing submissions in the Wai 1353 claim relating to, among other matters, the mechanism by which the Deed of Settlement proposes that the Crown will receive certain accumulated rentals and in particular whether that mechanism is consistent with the principles of the Treaty of Waitangi.

5.2 Treaty settlements – direct negotiations or Waitangi Tribunal?

For iwi entering seeking to settle their Treaty of Waitangi claims, one of the first major decisions is whether to enter into direct negotiations with the Crown, or whether to seek a binding recommendation in the Waitangi Tribunal.

Where iwi choose to seek a binding recommendation in the Waitangi Tribunal, they must join a queue to have their claim heard. The Waitangi Tribunal has limited resources and many more claims lodged than it can hear.

Currently the Tribunal is considering how to prioritise the many binding recommendation applications before it. There are, of course, a number of approaches the Tribunal could take. For example, the Tribunal could give priority to those applications filed "first in time". The difficulty with this approach, however, is that applications filed later may be in a better position to be heard first. The Tribunal could give priority to those who are in negotiations, and are close to settlement. A difficulty with this approach is that other groups, who may have been waiting some time for a hearing, may get bumped down the queue. There are a number of other approaches the Tribunal could take.

The point of this discussion is to highlight that the choice of whether to seek a binding recommendation is not an easy one. Putting to one side the uncertainties regarding how the Tribunal might exercise the jurisdiction, there are issues regarding timing that must also be taken into account. The possibility (if not likelihood) of other claimant groups wishing to join any proceedings also adds to the complexity.

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[16] *New Zealand Māori Council v Attorney-General* unreported CA, CA241/07, 2 July 2007, para 83.

6 CONCLUSION

The Government has indicated that the terms of reference for its review of Crown land sale policies will be determined shortly. There's no guarantee that the review will include an assessment of the adequacy (or otherwise) of the section 27B memorial regime, or indeed the Crown's current Land Protection Mechanisms and associated Treaty settlement policy.

It would seem, however, that the section 27B regime is in need of review. It was originally set up to protect land for future Treaty claims and, at the time, was heralded as a success and a workable solution. Time has shown, however, that in practice the spirit and intention of the architects of that regime has not been realised. In fact, non-memorialised land is arguably afforded greater protection than land that is subject to section 27B. The Crown's Treaty settlement policies also appear to exacerbate the inadequacies.

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