NATIONAL OVERVIEW

volume ii

Professor Alan Ward

Waitangi Tribunal Rangahaua Whanui Series

WAITANGI TRIBUNAL 1997

The cover design by Cliff Whiting invokes the signing
of the Treaty of Waitangi and the consequent interwoven development
of Maori and Pakeha history in New Zealand as it continuously
unfolds in a pattern not yet completely known

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LIST OF ABBREVIATIONS

AJHR	*Appendices to the Journals of the House of Representatives*
app, apps	appendix, appendixes
BPP	*British Parliamentary Papers: Colonies New Zealand* (17 vols, Shannon, Irish University Press, 1968–69)
ch, chs	chapter, chapters
doc, docs	document, documents
DOSLI	Department of Survey and Land Information
ed	edition, editor
encl	enclosure
ff	following
fol, fols	folio, folios
GBPP	*Great Britain Parliamentary Papers*
ma	Maori Affairs series
ms, mss	manuscript, manuscripts
n	note
NA	National Archives
no, nos	number, numbers
NZLR	*New Zealand Law Reports*
NZPD	*New Zealand Parliamentary Debates*
olc	old land claims (see F D Bell, 'Report of the Land Claims Commissioner', AJHR, 1862, d-14, app)
p, pp	page, pages
para, paras	paragraph, paragraphs
pt, pts	part, parts
RDB	*Raupatu Document Bank* (139 vols, Wellington, Waitangi Tribunal, 1990)
rod	record of documents
roi	record of inquiry
s, ss	section, sections (of an Act)
sec, secs	section, sections (of this report, or of an article, book, etc)
sess	session
td	Turton's deed (see H H Turton (ed), *Maori Deeds of Land Purchases in the North Island of New Zealand*, Wellington, Government Printer, 1877, vol i)
vol, vols	volume, volumes
Wai	Waitangi Tribunal claim

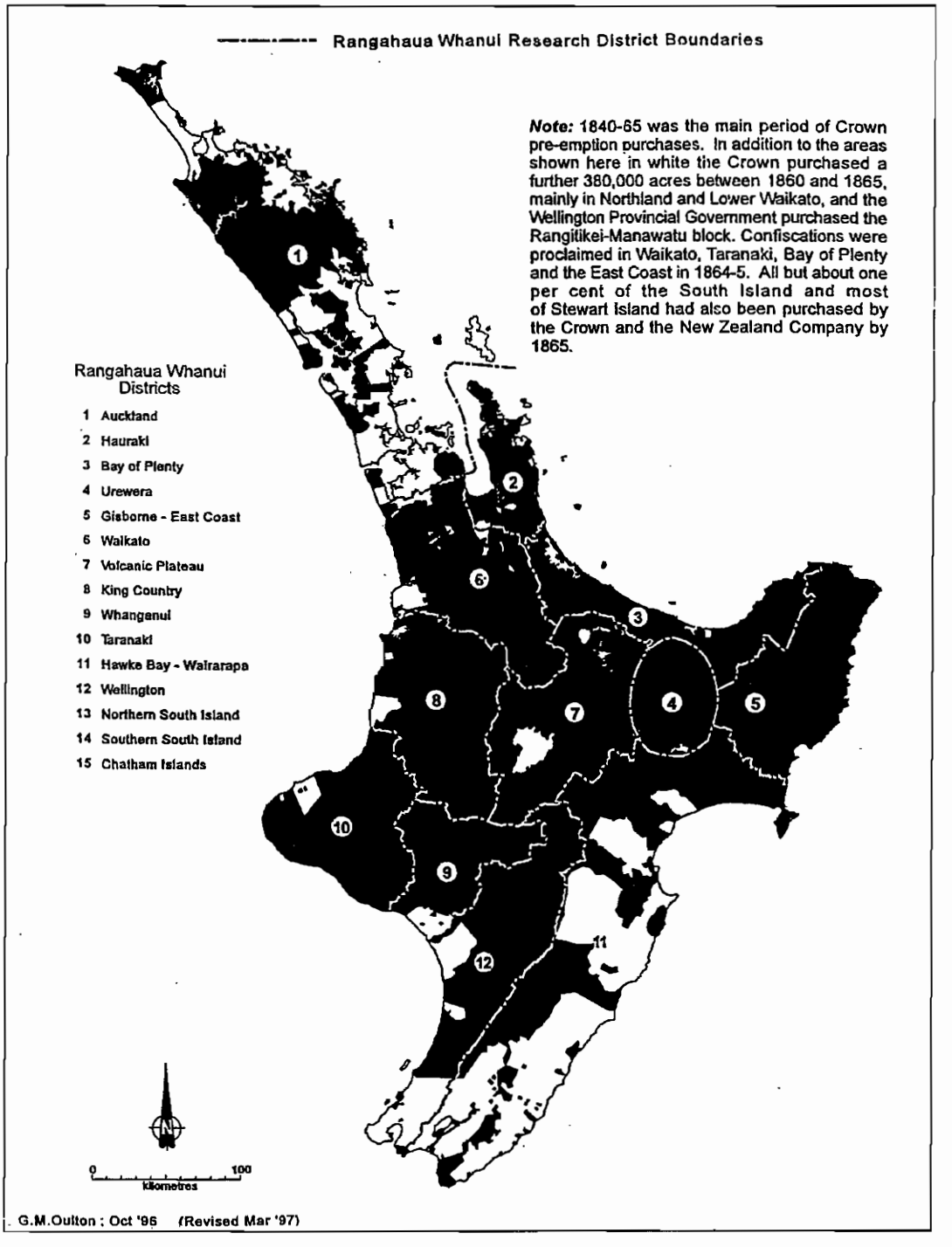

Figure 1: Alienation of Maori land in the North Island at 1860

The maps on pages x to xv have been drawn from maps compiled for the 1940 *Historical Atlas* (the project was abandoned because of the Second World War), which are now held in the Alexander Turnbull Library map collection. These are large-scale maps and cannot show blocks below a certain size. Together with the

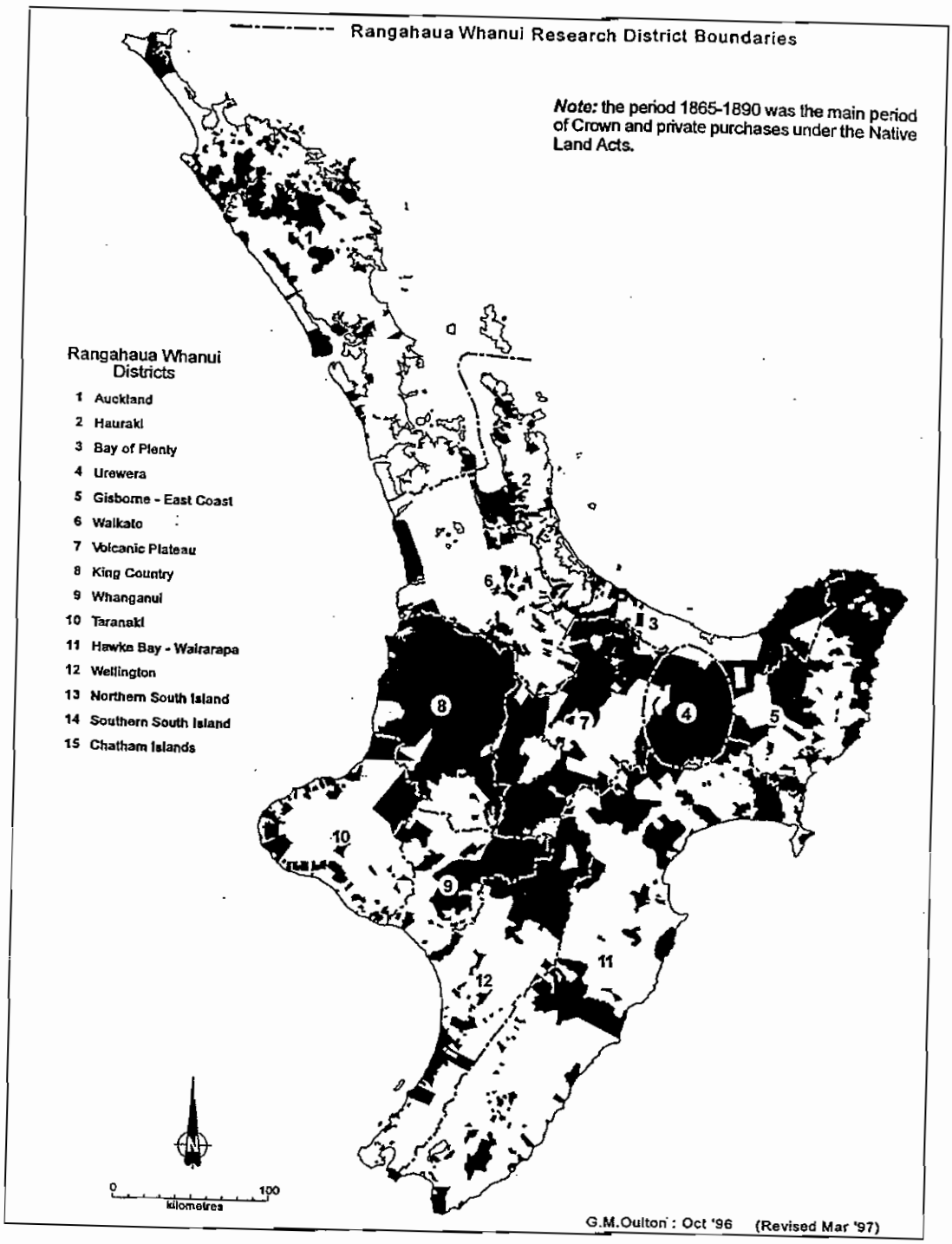

Figure 2: Alienation of Maori land in the North Island at 1890

accompanying tables and graphs, they nevertheless show the progressive alienation of Maori land in the various Rangahaua Whanui research districts, according to the main legal and administrative regimes put in place since 1840.

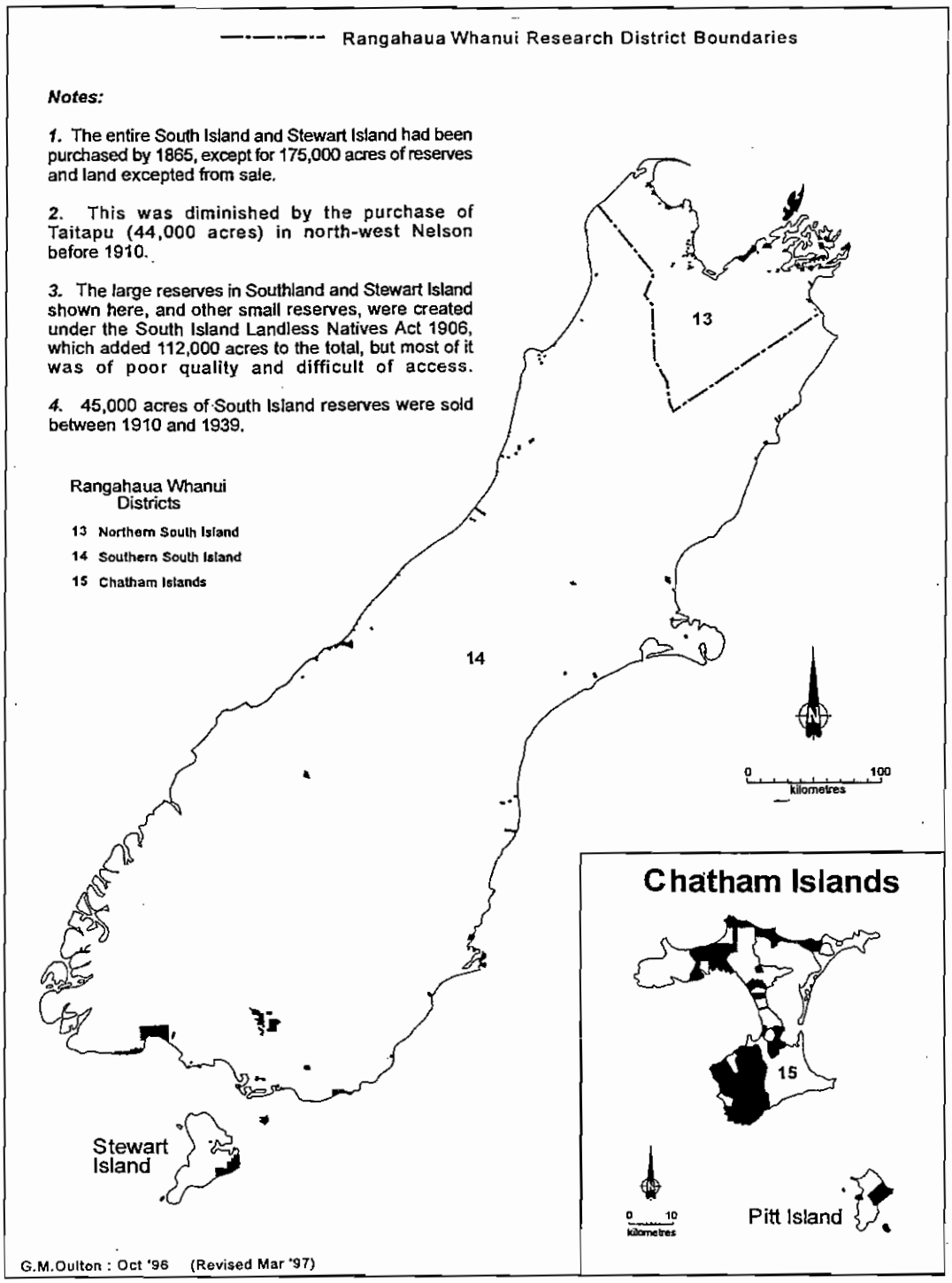

Figure 3: Alienation of Maori land in the South Island at 1910

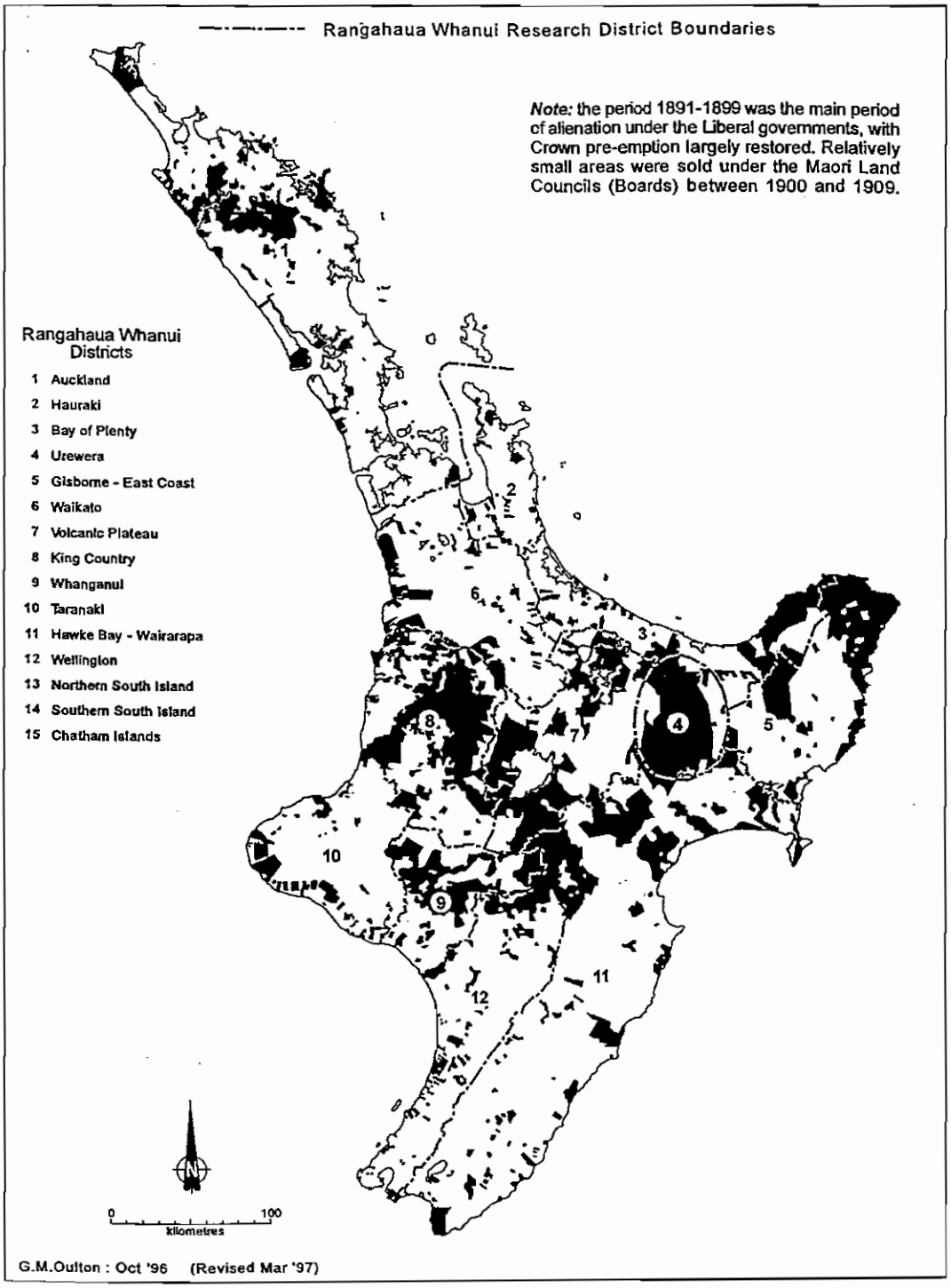

Figure 4: Alienation of Maori land in the North Island at 1910

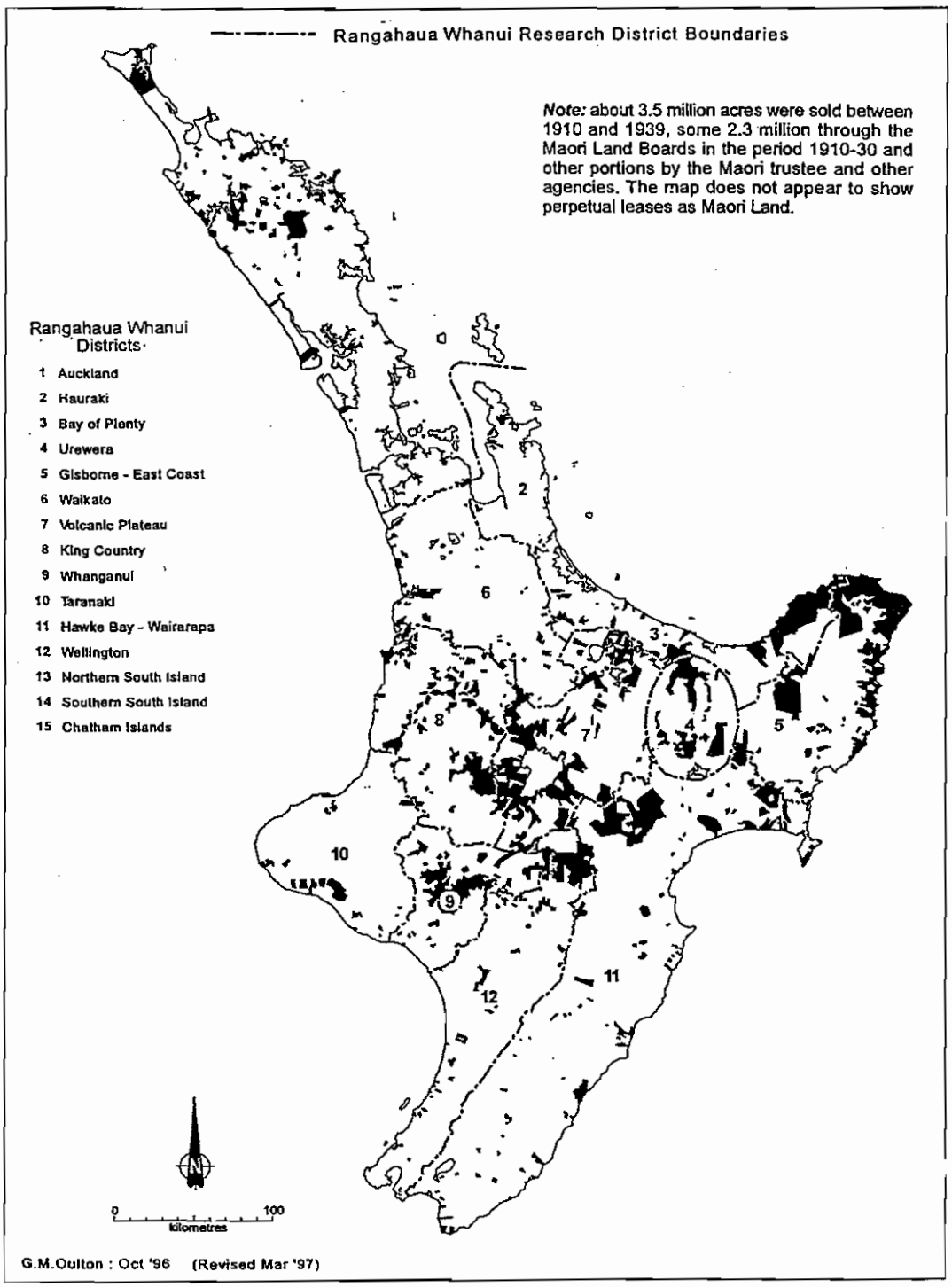

Figure 5: Alienation of Maori land in the North Island at 1939

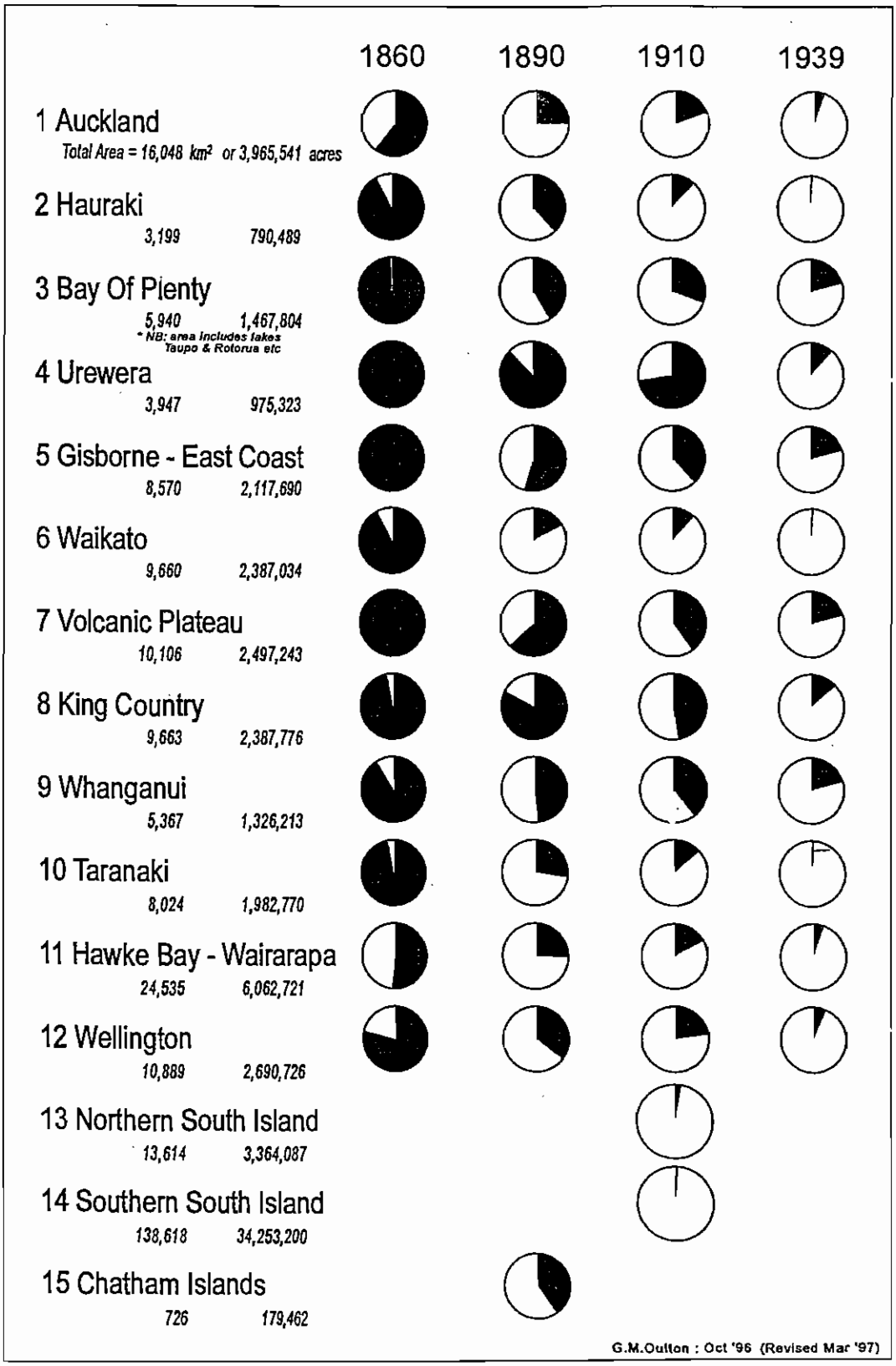

Figure 6: Proportions of Maori land by district at 1860, 1890, 1910, and 1939

Total district area			1860			1890			1910			1939		
District	km²	acres	km²	acres	%	km²	acres	%	km²	acres	%	km²	acres	%
Auckland	17,000	4,200,784	9815	2,425,378	58	4058	1,002,804	24	3108	768,109	18	884	218,461	5
Hauraki	3313	818,659	2975	735,073	90	1225	302,617	37	386	95,370	12	29	7141	1
Bay of Plenty	5862	1,448,530	5862	1,448,530	100	2464	608,795	42	1835	453,413	31	1223	302,106	21
Urewera	4105	1,014,366	4105	1,014,366	100	3471	857,692	85	2859	706,384	72	471	116,288	11
Gisborne–East Coast	8576	2,119,172	8576	2,119,172	100	4666	1,152,997	54	3262	806,015	38	1832	452,726	21
Waikato	9856	2,435,467	8980	2,218,894	91	1665	411,534	17	1173	289,792	12	133	32,984	1
Volcanic plateau	10,121	2,500,950	10,121	2,500,950	100	6388	1,578,517	63	4067	1,004,919	40	2038	503,568	20
King Country	9890	2,443,868	9358	2,312,292	95	8014	1,980,253	81	4577	1,130,898	47	1315	324,891	13
Whanganui	5415	1,338,074	4910	1,213,328	91	2597	641,781	48	2129	526,005	40	1082	267,256	20
Taranaki	8034	1,985,242	7679	1,897,598	96	2217	547,765	28	1104	272,700	14	81	20,060	1
Hawke's Bay–Wairarapa	24,404	6,030,350	12,686	3,134,675	52	6303	1,557,612	26	4257	1,052,010	17	1408	347,840	6
Wellington	11,020	2,723,097	8622	2,130,552	78	3886	960,371	35	2490	615,180	23	760	187,857	7
Northern South Island	13,614	3,364,087	—	—	—	—	—	—	429	105,981	3	—	—	—
Southern South Island	138,618	34,253,2o1	—	—	—	—	—	—	909	224,591	1	—	—	—
Chathams	726	179,462	—	—	—	—	—	—	295	72,881	41	—	—	—

Proportions of Maori land by district at 1860, 1890, 1910, and 1939

CHAPTER 1

THE HIGH PRICE OF CROWN PROTECTION: LAND TRANSACTIONS, THE TREATY, AND INSTRUCTIONS TO THE GOVERNOR

1.1 Maori Law

One of the most important outcomes of Treaty claims and Treaty-related research is the disclosure of a more complex, dynamic, and subtle Maori social order than has commonly been believed. A somewhat oversimplified and rigid view of Maori society and land rights had been generated by a variety of influences such as land-selling, official administrative requirements and early anthropology. Above all the Native (later Maori) Land Court decisions produced a quasi-codification of land tenure. Modern Treaty claims often begin with confident assertions of 'mana whenua' or 'tangata whenua' status over particular areas, but intersecting claims and related negotiations soon reveal a much more complex social order, often frustrating and inconvenient to Government and Maori negotiators eager to achieve settlements, and bewildering to the public at large, but ultimately undeniable. The following paragraphs attempt to set out some of the important insights from recent scholarship and from the Treaty claims processes themselves.[1]

It is useful to do this for several reasons:

(a) In order to appraise the effect of various Crown policies it is necessary to know, in essence, what the Crown policies were impinging upon. In other words, how did Maori society function at 1840, what was it that the Treaty guarantees were guaranteeing, and what did Waka Nene and other rangatira mean when they urged Lieutenant-Governor Hobson to stay and preserve their lands and their customs? How far had Maori society and values already changed by 1840 as a result of interaction with the wider world?

(b) From 1840 many (not all) British officials argued that Maori social structure and land rights systems were so inchoate and irregular that they did not warrant recognition at all, except in respect of lands under actual occupation and cultivation. This is the true meaning of 'terra nullius': not that the land was empty of people, for it manifestly was not; but that those people were

1. Other current projects currently under way are the study of the principles of succession being conducted by the Law Commission and a study of tikanga relating to land by the University of Waikato.

not organised in some form of government or regular system of authority and could not therefore make binding contracts about property or enter into serious international engagements. Although this narrow view was partly rejected by 1847, and Maori rights to uncultivated lands were acknowledged administratively by the Crown, many officials and settler politicians still held that such rights were confused, inchoate, and precarious, not able to be asserted and defended in the courts until replaced by a British type of tenure such as a Crown grant, after adjudication by some State-empowered tribunal. This view underlay the decisions of the judges in the New Zealand courts from the notorious Wi Parata judgement of Chief Justice Prendergast onwards.

(c) On the other hand, the contrary assumption is widely held, among Maori as among Pakeha, that Maori society and land rights were governed by such precise rules that it is possible to determine by judicial or quasi-judicial process the exact boundaries of group interests and group identity. Modern exigencies might make it necessary to import or reinforce such processes (with all their expense and the negative consequences of determining 'winners' and 'losers') but it was not a customary approach. Renewed understanding and use of more subtle customary approaches, and reasonable expectations of what might be developed from them, could be one of the very real benefits to emerge from modern Treaty processes.

From the outset it must be recognised that Polynesian (including Maori) concepts of relationships between people and land or water are of a different order from British property concepts as received in New Zealand. They are about relationships between people and gods, between people and the land and between people and other people. They do not translate neatly into common law categories of property and title, even though the best approximations have to be made because categories of property and title are the basis of modern economic systems. Canadian judges have said of indigenous hunter–gatherer rights in Canada and Australian judges have said of Aboriginal rights in the 1992 Mabo decision, that they are 'sui generis', of their own kind; they are subtle and elusive of easy description. But it would be an ignorant and outmoded attitude to suggest that they do not exist as regular systems of rights; 'Native title' or 'Aboriginal title' has existed from time immemorial and survived the assertions of British sovereignty in Canada, Australia, and New Zealand as (in common law terms) a 'qualification' or 'burden' on the Crown's 'radical' title. Moreover, though subtle and elusive, they are not incoherent and capricious. Again the superior common law courts, following the whole weight of modern anthropology and ethnohistory, have found among the indigenous systems regularity and consistency such as can be expected of a system of law. The Australian Supreme Court judge, Mr Justice Blackburn, hearing a claim by Aboriginal groups to proprietorship of certain areas of Arnhem land in 1971 said, 'if a definition of law must be produced, I prefer 'a system of rules of conduct which is felt as obligatory upon them by members of a definable group of people' to 'the command of a sovereign' [this being the view of law adumbrated by the

jurist John Austin in the early nineteenth century and still dominant in British legal thinking until very recently. Blackburn went on to say: '[b]ut I do not think that the solution to this problem is to be found in postulating a meaning for the word 'law'. I prefer a more pragmatic approach.Having appraised the evidence of the Aboriginal elders and the anthropologists he concluded:

> The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws and not of men', it is that shown in the evidence before me.[2]

This conclusion, often overlooked in legal histories, paved the way for the Mabo judgment a generation later. If this be true for the complex systems of Aboriginal hunter–gatherers how much more is it true for the systems of settled agriculturists such as the Austronesian peoples of the Torres Straits or Polynesia.[3]

It is also relevant to note that in the recent decision of the Australian Court of Appeal in the Wik case is to the effect that aboriginal title rights may survive the grant of pastoral leases, a decision which affirms the general principle developed in recent Canadian decisions as well as Mabo, that aboriginal title or native title survives unless explicitly extinguished by actions of state positively authorised by law. They cannot be extinguished by a 'side wind'.[4]

Dr Richard Boast has discussed the nature of the Crown's title to the foreshore in common law. This he regards as a presumptive title which 'can be displaced by proof of a Crown grant or continuous occupation'.[5]

Returning to the *nature* of aboriginal title, Mr Justice Blackburn encountered a difficulty in the Arnhemland case which is relevant to this discussion: although the Aboriginal claimants had demonstrated to his satisfaction that they held interests in the land under a regular and law-like system, he could not award them a proprietary title to the land claimed, because they did not hold it in 'exclusive possession'.

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2. *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia* 17 FLR 126, 126–127
3. The term 'Austronesian' needs to be much more widely understood and used than the erroneous division of Oceanic peoples into 'Melanesian, Polynesian, and Micronesian', a categorisation coined by the French explorer De Surville after his Pacific voyage of 1828 and taken up by French and British anthropology. De Surville's categories have only limited correlation with actual linguistic or ethnic boundaries. It is much more useful to apprehend the three-fold division between the very old 'Aboriginal' peoples now surviving only in Australia, the peoples often called 'Papuan' who entered the New Guinea/Solomon Islands archipelago about 10,000 years ago, and the 'Austronesian' or 'Malayo–Polynesian' family of peoples who entered south-east Asia from the south China region about 4000 years ago. The Austronesians peopled territories now called the Philippines, Malaysia, Indonesia, and coastal parts of what is commonly called 'Melanesia'. One branch then swung westward to occupy the huge island now called the Malagasy Republic; another branch or branches travelled eastward and, over 2000 years, colonised the hitherto unoccupied islands of 'Polynesia', including New Zealand. Maori are thus representatives of a family of peoples who accomplished one of the greatest migrations and settlements in human history, equalled only perhaps by that of the Germanic family of peoples which includes the English.
4. The current New Zealand law on customary title and its extinguishment, including the decision to like affect by Justice Blanchard in *Faulkner v Tauranga District Council* (1995), is noted by R P Boast, *The Foreshore*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), 1996, p 27
5. Boast, pp 25–27

Other Aboriginal people had rights in the land as well. Similarly, in New Zealand, it was (and is) typically the case that one Maori group had the dominant or controlling interest in an area of land but other individuals or groups had interests as well. As Professor Ron Crocombe said of Cook Islands land tenure, it is often more accurate to speak of 'owning rights in land' rather than of 'owning land': the rights are real and the ownership of them is real, but Crocombe's phrase gets away from the (recent) European notion of all the rights being owned by a sharply definable group within sharply definable boundaries to the exclusion of all others.[6] There are two important points in relation to this:

(a) The Crown, in the Treaty, undertook to guarantee Maori 'possession' of lands, forests, fisheries, and other 'properties' which they may collectively or individually possess; or in the Maori version. 'te tino rangatiratanga o ratou whenua o ratou kainga me o ratou taonga katoa'. The chiefs yielded to the Crown the exclusive right of pre-emption 'over such lands as the *proprietors* thereof may be disposed to alienate' at prices to be agreed upon between the *proprietors* of the land and the Queen's officers, (emphasis added). An issue of fundamental importance to this report is how well, or how badly, the Crown honoured these undertakings, having regard to the fact that customary Oceanic (including Maori) land rights systems do not fit easily into common law categories of proprietorship.

(b) Intersecting Maori claimant groups might avoid some of the difficulties the Arnhemland people encountered if they treat warily the English notions of exclusive possession, and accommodate instead the various levels of rights that Maori law allowed for in the same land, and the intersecting nature of groups.

1.2 Maori Society and Relationships with the Land

It is now generally well established that the hierarchy of whanau, hapu, iwi, and waka were (and are) not tidy political structures, the smaller neatly encompassed by the larger, but conceptualisations of the history of kinship over many generations, designating linkages and tuakana and teina relationships. It was and is of fundamental importance to Maori to be able to invoke whakapapa relationships of greater or lesser depth, according to a variety of current purposes, and to find a root ancestor, or take tupuna, from whom to validate a claim. or to establish common ground with others. The fact and ideology of common descent from a particular waka can allow for the mobilisation of large confederations of hapu for purposes such as common defence. Whakapapa, however, do not operate as immutable blueprints, of automatic and binding application, but as charters of possibilities for the living generation, as sets of flexible human boundaries about which groups formed.[7]

6. R G Crocombe, *Land Tenure in the Cook Islands*, Melbourne, Oxford University Press, 1964

The important units of Maori society in day-to-day terms were the whanau, the extended family, and the hapu. Whanau and hapu varied in size but always had a strong core of common descent. Individuals and families acted alone in much day to day activity but for many common purposes, including the occupation of land, acted together under the authority of senior chiefs. Dr Ballara uses the term 'community' to describe these associations, typically of 200 to 1000 people. '[T]he operative unit [of society] in peace time was the community, or cluster of small hapu together with sections of large hapu . . . bound together by their collective recognition of the mana of a great chief.'[8] That chief would normally be a member of the core descent group of the hapu in the cluster, and connected to the others. He might not be permanently resident in one kainga, but have two or three principal places of residence. Hapu, rather than iwi, is probably the term best translated by the English word 'tribe', as in the Treaty of Waitangi itself, though Dr Ballara notes that the line between big hapu clusters and iwi is indistinct. Hapu waxed and waned, divided when they grew large and ambitious leaders emerged, amalgamated with other hapu when numbers declined or when advantage suggested, relocated, and took new names from a recognised leader or ancestor. Often there were long periods of stability but warfare and migration could produce rapid change. The dynamics of hapu formation embodied the adaptability of Maori kinship systems to the exigencies of real life, avoiding the rigidity that had overtaken some Polynesian societies in the central Pacific. A hapu and its leaders would assert their distinctiveness in certain circumstances, as in visiting neighbouring hapu or receiving visitors: but their strength and survival also depended continually on making connections, on establishing whanaungatanga through whakapapa and other means. Clusters of closely inter-related hapu were stronger than those in isolation. Dr Stephen Webster, in recent draft papers, defines hapu as being both 'descent category' and 'descent group'. Individuals could claim membership of several hapu by whakapapa, so that hapu, in this sense, overlapped with one another. But they also grouped around strong leaders, people of mana, to meet political and territorial needs. Such groups could endure for several generations or reformed as a result of contingencies such as 'rising and declining influence of chiefs, conquest, migrations or refuge, political alliances and marriages'.[9]

The various whanau and individuals who comprised a hapu gained access to the land and other resources which the hapu controlled. They individually exercised rights over garden lands which they cleared and planted, and birding trees or fishing spots which they individually discovered, and they adjusted these rights within the

7. Chief Judge E T Durie, 'Will the settlers settle? Cultural conciliation and the law', F W Guest Memorial Lecture, Dunedin, 25 September 1996, p 3; Ann Salmond, 'Tipuna – Ancestors: Aspects of Maori Cognatic Descent', in *Man and a Half: Essays in Pacific Anthropology and Ethnobiology in Honour of Ralph Bulmer,* A Pawley (ed), Auckland, Polynesian Society, 1991 (Memoir no 48), pp 343–356
8. Angela Ballara, 'The Origins of Ngati Kahungunu', PhD thesis, Victoria University of Wellington, 1991, p 234
9. Steven Webster, 'Maori Hapu as a Whole Way of Struggle: 1840s–1850s before the Land Wars', draft paper, cyclostyled, Department of Social Anthropology, University of Auckland, September 1996, p 13. See also Webster, 'Maori hapu and their history,' draft, University of Auckland, 1996

family without the senior hapu leaders necessarily being involved. But their security in the exercise of those rights also depended upon participation in hapu activities, such as major fishing expeditions, hosting of large hui, building, and stocking of central food storage facilities and of course defence against attack, and in the rituals that accompanied all of those activities. Land rights were not isolated from membership of the hapu, participation in its activities, and acknowledgement of the mana – the spiritual potency – of its rangatira. For this reason individuals had only limited capacity to transfer land rights to those *outside* the group – temporary usage at most – without the wider group, the hapu, becoming involved through its leaders. To attain significant and lasting land rights meant *joining* the group, giving it primary allegiance and probably marrying into it. As Chief Judge Durie puts it, 'The essential point however is that the land of an area remained in the control and authority of an associated ancestral descent group. . . . Land and ancestors were fused'.[10]

'The common feature then of Maori law', the Chief Judge continued, 'was that it was not in fact about property, but about arranging relationships between people'. A chief's authority came from his relationship to his ancestors and to his people, and from those came his authority over land. That authority was not 'ownership' in a commodity sense . . . rangatira held chiefly status but might own nothing. It was their boast that all they had was the peoples'.[11] Maori today commonly speak of their kaitiakitanga, guardianship, over land and reserves: this too recognises their responsibility to their ancestors and future generations, and to the gods. It is not 'ownership' in a commodity sense, but it is perhaps an even more powerful and enduring conceptualisation.

The relationship of people and chiefs, and of both with the land were also relationships about power, ultimately spiritual power. When a group, under its rangatira, entered new land the chiefs formally claimed and named the land, and established sacred places on it. Establishing a strong community on the land and carrying out the religious duties that accompanied it, was the basis of chiefly power.[12]

As well as changes in the rights of individuals and families *within* groups there were obviously ways in which rights *between* groups constantly changed. The movement of a hapu, part of a hapu or a hapu cluster onto previously uncultivated land, and the building of settlements, planting of gardens and creation of wahi tapu, would establish the claims of that group. After a century or so most land was not wholly 'virgin' land but was used for hunting and gathering if not for cultivation by

10. Durie, p 5. Lyndsay Head makes the same point in slightly different language: 'The essential issue of survival was not land but belonging, because the right to cultivate depended on being allowed to live as a member of the group. Belonging, not land, was at the root of the organisation of Maori society; land was, in the domestic situation, simply its consequence. Land was culturalised as a personal possession, named and handed down. People owned their land in the same way they owned their history, and for this reason the terms 'useright' or 'right of usufruct', employed then and now to describe Maori domestic land tenure in English, miss entirely the texture of the relationship.' Lyndsay Head, 'Chiefly authority over land', draft report on Maori letters to Donald McLean, Waitangi Tribunal, 1996, p 31.
11. Durie, p 9
12. Head, p 22

some prior group; the process of migration and settlement therefore commonly involved displacement, or partial displacement of a previous group. Warfare generally began to secure utu for insult or injury but the need to control sufficient territory to secure the group's future was always an underlying imperative. Competition for resources was real within groups as well; knowledge about particular hunting or fishing places, for example, was often kept quite secret, within the lore of particular families whose right to safeguard it was respected. Maori society was competitive and the interests of group members were not equal. The term 'communal' to describe the way hapu and hapu members held rights is therefore somewhat misleading. But most agricultural practices were public and observable and many large-scale enterprises were hapu or inter-hapu based. The nineteenth century evidence includes statements by Maori to the effect that neighbouring groups, interconnected as they were, commonly used portions of each other's land or resources. Tacit if not explicit permission was implied – the mana of the principal right-holders was recognised.

Relationships could break down, however, over insult or injury, for which there could be many causes, or because of the competing ambitions of powerful men. Then physical conflict and displacement could occur. Yet total displacement was probably also rare. Sections of the previous occupiers commonly remained on the land, keeping the fires alight; or conquerors intermarried with them, their descendants acquiring the mana of the land through the ancestral claim as well as through raupatu. Land thus bore a greater or shorter historical sequence of occupation and mana. Some areas, such as the Urewera or the upper Waikato, saw relatively little change, with some kainga being occupied by the same groups over many centuries; other areas – Tamaki-makau-rau, for example – saw a succession of tribes enter, assume control and then be displaced in turn. No group that developed close associations with the land and named its features ever wholly relinquished claims in it. But if there were no resident members on the land for more than two generations – no resident grandparent through whom to claim an interest – it would be difficult to assert rights against the resident group. Conversely, while superior force and numbers could determine the outcome in the short term, continued occupation and control, giving birth and dying on the land, were the ultimate tests of legitimacy.

Given that the boundaries of groups were subject to continuous change as hapu and hapu clusters formed and reformed, it follows that the boundaries of group land were not immutable either, although the primary territory of a group might not change for very long periods. The rights of groups, and the individuals within them, were most closely defined by the cultivations and other forms of usage and association near the principal kainga, and became more attenuated further away, in the zones of hunting and gathering, where they might start to intersect with the interests of neighbour groups.[13] The sharing of certain resources such as lagoons and other waterways would commonly be worked out, over time, probably with the reordering of some priorities of control and usage. Amicable neighbours would accord each other access to portions of their primary territory. But in times of

tension areas of overlapping occupancy might be avoided by all parties, for fear of provoking conflict. Boundary marks such as prominent rocks or headlands or streams might be agreed between parties to end or avert conflict; posts (pou) were erected for the same purpose. These would be recognised or honoured for greater or lesser periods, in relation to a variety of factors. But continuous boundaries encircling the whole of a group's territory and demarcating it precisely from that of neighbours were virtually unknown; indeed the concept seems to have been somewhat alien to customary Maori ways of thinking and acting.

Instead there was a constant process of adjustment to accommodate births, deaths, marriages, adoptions, alliances, migrations, wars, and a host of related matters. The primary rights of those born and resident on the land were qualified by the contingent rights of those who married or were adopted out but later returned, the rights of their children, and the permissive rights of those who married in from other lineages or came as refugees or war prisoners. Gifting of rights was a common practice, with certain conditions commonly applying and a right of reversion to the donors if the donees or their heirs ceased to occupy the land. Allocations of land to allies in war and migration, however, seemed to be of a different order; once the lands were allocated and the alliance relaxed from its war footing, the residence and use patterns of the various participating groups tended, over time, to assume a primary quality. Time was indeed of the essence in many of the complex situations that arose in Maori relationships with land. Maori culture was relatively homogeneous and, although there were regional variations created by the history and geography of particular places, the principles or norms that established priorities of right were widely shared among a people with an abundance of historical and kinship ties. The application of these principles was flexible but not capricious. Constant discussion of issues, and the searching out of the minutiae of circumstances governing a particular case, was one of the richnesses of Maori culture, enjoyed by all. Some of the modes of discourse by which matters were debated and resolved became high art forms and the protocols of meeting were themselves of fundamental political and symbolic importance.

In this process of constant adjustment the role of chiefs was extremely important. They had authority over the admission or refusal of rights to those from outside the primary resident group, for the chiefs were arbiters of who belonged to the group. 'Chiefs' is of course a very vague English term. Recent discussion has rightly focused on the meaning of 'rangatira' and 'rangatiratanga' because (among other good reasons) 'tino rangatiratanga' is what the Treaty assured to Maori and because of the exigencies of leadership and representation that modern Maori communities constantly face. Chief Judge Durie's discussion of the concept notes that, 'The basis for the political autonomy and the cohesion of a hapu was the mana of a rangatira'.[14] That is, hapu as groups formed themselves largely through recognising the

13. Ballara cites the case of a person being killed because it was thought that he had been stealing kumara from a cultivation. His attackers were dismayed to discover that the man's kete contained only fern-root. Though taken from the same vicinity it was considered as open for collection by a number of groups. Ballara, p 347.

mana of important rangatira. The mana of a rangatira was the result of ascription (the mana recognised in people of senior lineage even as infants) and achievement, in the skills of peace and war. Mana was held in different degrees by all free people and was of different kinds. There is a sense in which all elders and heads of families, at least, were rangatira, though the extent of their authority varied considerably. Some held mana within their own hapu or within several related hapu or even within a whole district. Some rangatira led in war and others in peace. Senior rangatira were charged with such powers from the spiritual realm, with which all creation was kin, that contact with them or their artifacts was precarious, at least without the protection of appropriate ritual. They were tapu and could make other persons, property or places tapu. Rangatira demonstrated or enhanced their mana through qualities such as bravery, boldness, hospitality, eloquence, integrity, and honourableness. Rangatira were concerned to protect their name and station and were highly sensitive to insult or injury.

Although senior rangatira lines tended to preserve a certain distinction and to arrange marriages with one another there was not a distinct rangatira 'class' as in some islands of north and central Polynesia. Rangatira depended upon the support of the community. Powerful warriors of aggressive personality could act very independently in the short term and could sometimes be difficult to control. But, in the longer term at least, they could not persistently flout the opinion of the community upon whose support they depended. Widely shared norms constrained chiefly actions. 'To that extent', Chief Judge Durie writes, 'authority may be seen as vested in the community and the rangatira may be seen as a community representative and leader'.[15] Professor Sir Hugh Kawharu considers that rangatiratanga involves trusteeship and nurturing of the land and the people on the land.[16] Early in the settlement period Edward Shortland, a medical doctor, Sub-Protector, and one of the most perceptive of the early amateur anthropologists, remarked that Maori society was 'a democracy, limited by a certain amount of patriarchal influence'.[17] In respect of land rights, Dr Ballara notes that the garden lands of individual families could not be capriciously interfered with or reallocated by rangatira, whose authority in that sense related only to their own family lands. But rangatira authority extended to resolution of disputes and competing claims and to the gifting of land to ranking persons from outside the hapu and to calls upon the produce of the land for hui, gift exchange, and so forth. She suggests that very powerful rangatira could, in the context of tribal politics, come to arrangements with one another about land and even the people on it, without first consulting the people affected. A chief might gift land to another chief without diminishing his own mana over it, or the occu-

14. Chief Judge E T Durie, *Custom Law*, discussion paper circulated by the New Zealand Law Commission, January 1994, p 36. The remainder of this subparagraph is drawn from pp 34–40 of that source.
15. Ibid, p 34
16. 'Common property issues; experience in New Zealand', paper delivered at the Common Property Issues conference, National Centre for Development Studies, Australian National University, Canberra, 19 September 1996
17. Edward Shortland, *Traditions and Superstitions of the New Zealanders: with illustrations of their manners and customs*, Christchurch, Capper Press, 1980, p 227

pants upon it. In such situations the mana of the land shifted (from the point of view of the occupants) rather than the land being transferred.[18] In the longer term the people affected could repudiate the arrangement, by switching their allegiances, and recognising someone else's mana. In other words senior chiefs could initiate action with other senior chiefs, and some appear to have behaved very high-handedly. But, in the end, their authority relied on the active or tacit approval of their actions by the community.

1.3 Early European Dealings for Land

The ambiguities in the relative authority of chiefs and community over land were to become apparent when Europeans began to 'buy land' in the contact period. Most of the ships' captains and traders dealt with the chiefs whom they thought had full authority and subsequently discovered that many others had to be dealt with as well. Colonel Wakefield, conducting the negotiations for the New Zealand Company, deliberately dealt with the 'overlord' chiefs like Te Rauparaha first, and then sought to conciliate the 'resident' chiefs with supplementary payments later. This began a common European tendency to exaggerate the rights of 'conquerors' and to try to bypass the heads of the resident families. They then discovered that this did not work and began to lament the 'decline' of the authority of the allegedly all-powerful chiefs under the influence of Christianity. In fact officials vacillated about the authority or 'mana claims' of non-resident chiefs up until the Waitara purchase. Yet when it came to the authority of the 'overlord' chiefs to make land deals, Maori themselves seemed unsure, or the mana of great chiefs did indeed entitle them to a considerable authority to initiate arrangements. They gave contradictory evidence on the subject to Commissioner Spain's inquiry in 1843. [19]

Lyndsay Head's recent study of Maori letters to Donald McLean also suggests that it was not wholly inappropriate for the English to negotiate only with chiefs. It was a situation where power was meeting power. Maori communities would have expected the Pakeha to deal with the high-ranking chiefs. Head observes that when Wakefield negotiated with the Te Atiawa chiefs Te Puni and Te Wharepouri at Whanganui-a-Tara, or Te Hawe and Te Whiti at Queen Charlotte Sound, the Maori acted not as 'landowners' but as chiefs, reflecting their personal authority among the people on the land. When the Waikato chiefs Te Kati and Te Wherowhero were paid for their 'interest' in Taranaki lands in 1842, 'The payments recognised the authority they had gained by defeating Taranaki tribes; they were a tribute to chiefly power, not compensation for relinquishing homes and cultivations'.[20]

Wiremu Maihi (Te Rangikaheke) of Te Arawa expressed his view of his authority over land at a Government enquiry of 1856. Referring to his 'individual claim' he said:

18. Ballara, pp 314–317
19. See Duncan Moore's analysis, Wai 145 rod, doc e4, vol 2, pp 245–275
20. Head, pp 24–25

> Formerly I could have sold it after talking to the natives, even against their consent, but I must have divided the proceeds of the sale, or they would have seized the land from the person to whom it had been sold.[21]

This statement reflects both the extent of the chief's authority and its limits. Wi Maihi's reference to an 'individual claim' was not a reference to an individual property right in English terms but a reference to his own mana over that land and the people on it. Even so, he had to speak to them, and distribute the payment, in acknowledgement of their rights in the land. Two chiefs writing to McLean in 1851 said, 'Do not say the land belongs to the one. On the contrary, friend McLean, it belongs to the many'.[22] Head comments; 'The 'many', however, does not speak of an amorphous group ownership, but a collection of individuals who expected to be paid individually. . . . land sales were major community events – everyone had a stake in it. The domestic perception of individual ownership also explains why the largest single category of communications to McLean and the Crown consists of individuals seeking payment for land'.[23] (The question of what was intended by 'sale' is another matter which will be discussed further.)

The English officials and missionaries who drafted the Treaty realised that rangatiratanga, including authority over land, was distributed through various levels of Maori society, with a prominent role for the hapu. James Busby, official British Resident from 1833 to 1840, wrote in 1835 that, 'every acre of land in this country is appropriated among the different tribes; and every individual in the tribe has a distinct interest in the property; although his property might not always be separately defined.'[24] This was not a bad try for an Englishman two years in the country. And, although the Treaty frequently refers to 'Chiefs' in the English and uses 'Rangatira' as the Maori equivalent, Article Two 'ka wakarite ka wakaae' ('confirms and guarantees'), 'ki nga Rangatira ki nga hapu – ki nga tangata katoa o Nu Tirani te tino rangatiratanga o ratou whenua o ratou kainga me o ratou taonga katoa'. Thus the drafters of the Treaty seem to have recognised that tino rangatiratanga was distributed through Maori society, involving the tribes (hapu) and the people as well as the chiefs. A major focus of the ensuing discussion will be how far the Crown continued to comprehend and respect its undertaking.

1.4 European Contact and Maori Efforts to Control it

Maori customary society was of course greatly affected by the advent of the wider world after Cook's landfall in 1769. Maori engaged eagerly and willingly with that world, travelling widely from the outset, engaging intellectually with the English explorers, welcoming the opportunities for new material goods including new weaponry, engaging in trade, taking employment on European ships and accepting

21. BPP, vol 2, 1860, p 279 (cited in Head, p 29)
22. Te Kahawai and Te Hapimana to McLean, 22 July 1851 (cited in Head, p 36)
23. Head, p 37
24. Claudia Orange, *The Treaty of Waitangi*, Wellington, Allen and Unwin, 1987, p 38

the on-shore posts of European whalers, sealers, traders, timber cutters, and missionaries. These processes of 'modernisation' (if one can use the term in a neutral or value-free sense, for there seems to be no better one) created formidable problems for Maori as well as rich opportunities. They sought to control the interaction of course, trying to maintain the selectivity of what came across the beaches of New Zealand.[25] In most respects their achievement was outstanding. One can instance Hongi Hika's sojourn at Cambridge University with the missionary Thomas Kendall, writing an orthography for the Maori language; the freed war captives of the Ngapuhi, with the texts from the missionary printing presses in their hands, teaching their own people to read and write; the adoption into the local economy of the European pig and the white potato so that within a few years Maori were trading a surplus of these to the ships from New South Wales; and much, much more. In short Maori, like other Austronesian peoples, showed both a desire and a formidable ability to master and manage the forces of modernity to their own enrichment.

But maintaining control and selectivity was far from easy. Unwelcome influences crossed the beaches, the worst being new epidemic and endemic diseases. Although demographers now think that the decline of the Maori population has sometimes been exaggerated (because the Maori population at 1769 was overestimated) it was horrendous enough. A population of about 100,000 at 1769 had fallen to about 80,000 by 1840.[26] The incidence of loss varied widely; while some communities seem little impaired others were shaken by their losses and anxiety grew. Musket warfare also took a toll, not perhaps in the loss of life in battle (though again some communities suffered heavily) but in the sense that the traditional constraints and boundaries limiting the destructiveness of war had been breached. Much bigger groupings than before, armed with muskets, took the field; big combinations formed to resist and repel them; a wave of migrations and conquest took place as formidable leaders in war and politics such as Te Rauparaha vied for control of the ports where European shipping brought arms, and wealth through trade. From disease and warfare smaller tribes grew anxious and some chiefs lamented the loss of their young men, the absence of children in the villages. Still they sought to regain balance; their adoption and adaptation of Christianity, recognised, after a long period of scepticism, as a system of power was largely for that purpose. Then a new threat emerged, in part a product of the earlier ones: the unruly Pakeha[27] communities beginning to burgeon on New Zealand shores and the men on the armed ships, flying like sea eagles from the great fastness which was

25. For a rich study of the engagement of tradition and modernity, and of how the experience is only partially within the control of the people involved, see Greg Dening, *Of Islands and Beaches*, a study of contact in the Marquesas Islands over a similar period, Honolulu, University Press of Hawaii, 1980.
26. Ian Pool, *Te Iwi Maori: A New Zealand Population Past, Present and Projected*, Auckland, Auckland University Press, 1991, pp 53–57
27. I am, and always have been, perfectly content with the designation 'Pakeha' for white settlers and their descendants. It in no way derogates from my European heritage of which I am proud, while recognising that, like all societies, it is far from perfect. My forebears came to these islands with the intention of making a better society than the one they left and largely succeeded in doing so. I am not a European but a New Zealander of British descent. AW

Sydney to hang about the New Zealand coast and catch on deeds of sale the signatures of unwary Maori.

From the 1790s entrepreneurs based in Sydney began to place small parties on shore among Maori communities for the purpose of killing seals, trading flax, cutting timber and as depots for offshore whalers. In 1814 Marsden, with the agreement of Bay of Islands chiefs, established the Church Missionary Society in that area and negotiations for land for mission stations and farms began. In the 1820s traders began to establish posts on shore and bay whaling led to more elaborate shore stations. Places like Cloudy Bay, the Bay of Islands, and Hokianga began to support small Pakeha communities. Many of these residents negotiated deeds of purchase, usually of small portions of land, from the local chiefs. In 1825 an attempt at systematic British colonisation in these islands was launched by the first New Zealand Company under the principal direction of Colonel Robert Torrens and the Earl of Durham. The ships *Rosanna* and *Lambton* were sent out, with immigrants under Captain Herd. In 1826 Herd signed deeds of purchase with chiefs at Rakiura (Stewart Island), Otakou Harbour, Cloudy Bay, and the Thames.[28] But the immigrants apparently did not feel very secure and sailed on to New South Wales. The widow of Captain Herd later sold the land purchase deeds to Edward Gibbon Wakefield, progenitor of the second New Zealand Company, but there is no evidence that he ever tried to act upon them. Maori put their marks, and later their signatures to many more such deeds, in the 1820s and 1830s. They were often signed on the decks of visiting ships and purported to convey huge areas, sometimes from cape to cape and inland to the mountain ranges. Boundary descriptions were usually very vague. From about 1830 a standard form of conveyance in legalistic English was used by some of the Sydney business houses whose ships frequented the New Zealand coast.

What Maori thought they were doing when they signed these ‘deeds of sale’ has been the subject of intense debate, notably in relation to the Muriwhenua claim before the Tribunal. Claimants have argued that the transactions can only have been seen by Maori in terms of their own culture, and that they were essentially ‘tuku whenua’, that is grants of rights and occupation and use of portions of land within a general area discussed and then written in the deed. The mana of the land would be considered still to lie with the grantors, they would continue themselves to exercise rights in the land and they held a ‘right of reversion’ if the grantee moved away or did not fulfil obligations expected by the community that he had joined. On this view the chiefs had acquired a pakeha rather than sold land. There is indeed a great deal of evidence that this is precisely what obtained in respect of most of the ‘purchases’, especially the early ones. It would be fanciful in the extreme to believe that a few chiefs had sold the freehold of vast areas such as were covered by the deeds of whaling masters like Johnny Jones or the Weller brothers. Indeed, people like Jones occupied only a portion of the land they purported to have acquired and continued to make a series of gifts or payments of firearms and clothing, livestock

28. See journal of T Shepherd, on the *Rosanna*, Mitchell Library ms a 1966, Sydney, NSW

and farm equipment, whaleboats, and prefabricated cottages which the chiefs requested. Jones and Weller carefully wrote down the value of these gifts and used it in their subsequent land claims: in two years it amounted to over £1000, as much as they had paid for their land rights in the first place.[29]

But that is not the whole story. The evidence is also strong that the nature of some of the transactions was changing by the middle and late 1830s. Many Maori had by then been closely engaged with the commercial world for decades and were aware of European commodity concepts. Many had visited Sydney and ports beyond, served for years on European ships or worked in New South Wales. These experiences, together with the shipping thronging the Bay of Islands and, the increasing number of Europeans ashore, revealed a European society which could not so readily be fitted into the Maori world and controlled. Moreover, Maori knew about the fate of the Australian Aborigines and had themselves experienced the destructive power of European guns, as in the French reprisals after the killing of Du Fresne in 1772 and again after the attack on the whaler *Jean Bart* in the Chathams in 1836. In the blundering butchery by the crew of the warship *HMS Alligator* in 1834 while rescuing a merchant captain and his wife whom south Taranaki hapu were trying to ransom for muskets, Maori were given a demonstration of what British naval power could do. This is the climate in which an intensified spate of land purchasing by agents from New South Wales occurred, triggered by Governor Gipps's tighter land regulations of 1837. By this time some land transactions were moving beyond traditional Maori confines. Examples exist of Pakeha on-selling the land to third parties without objection from the original Maori vendors and of Maori renting back portions of land from Pakeha to whom they had previously sold it.[30]

The evidence from the missionary records in particular is that sections of the right-holders, usually chiefs, sold land in which others of the hapu had customary interests but did not seem able to stop the sale. They clearly saw the alienation as permanent or likely to be so – the land had gone to the Pakeha because the mana of the chief was apparently sufficient for him to make that arrangement. They sought the missionaries' aid in preventing the loss of more. The powerful chiefs entering into transactions with Pakeha may well have believed that they had everything (including the Pakeha) under control; in that sense they were still working within their tikanga. But clearly many Maori in the north, including the more far-sighted chiefs, were worried about the outcome of collusion between land-sellers and the burgeoning Pakeha. The missionaries themselves had been buying land, as permanent property, for some time, both to endow the missions and to provide for themselves and their numerous children. Indeed they had taken a leading role in inculcating the idea of individual property in land.[31] Now, in the late 1830s,

29. See olc 251–253, NA Wellington
30. Fergus Sinclair, 'Issues Arising from Pre-Treaty Land Transactions' (Wai 45 rod, doc i3), pp 136, 166, 184
31. One of their best students, David Taiwhanga, educated at Marsden's agricultural school at Parramatta, ran 20 dairy cattle on land near Kaikohe and supplied butter to the Bay of Islands at two shillings a pound – the first of a long line of successful Maori dairy farmers (F Sinclair, p 92).

especially when news arrived of the plans of the New Zealand Association, Henry Williams began to buy land in the areas of likely settlement in order to hold it in trust for Maori. Eventually the CMS submitted 19 deeds of this nature to the Secretary of State for Colonies.

Duncan Moore has cited evidence from the land claims commissioner's subsequent inquiries in Wellington to show that some of the chiefs there had very clear distinctions in mind between various kinds of alienation. Small lots which had been made available to traders like Tod, Scott, and Young, or whalers like Heberley, from the late 1820s onwards, were acknowledged as 'sales' in the 1842 and 1843 enquiries and eventually awarded to these Pakeha in freehold. Acquisitions by Henry Williams and his associates were regarded as 'tapu-ing the land' *against* sale, though some of them eventually did get exchanged for freehold sites for chapels or missionary residences. Colonel Wakefield's monster transaction for the New Zealand Company was quite something else again – at most a partial transfer of the rights within the area. But even the traders' small portions only assumed a 'freehold' character with the advent of British law. The individuals concerned had long had complex relations with the chiefs and communities with whom they resided, and these continued after 1840.[32]

The reasons why Maori made transactions in land are varied and not entirely clear. The most common reason was to locate some Pakeha among them as a source and focus of trade. Many Maori had become regular consumers of imported goods. The need to acquire muskets had for a time been a dire necessity and remained strong, but imported clothing and foods were becoming part of daily life. The realisation that Europeans paid for land as a commodity was an easy way to clear debts or buy more imports. Lands never before precisely marked, outside the main areas of residence and cultivation (disputed lands perhaps), were often the first sold. There is evidence of a kind of fatalism among some individuals; probably because of the impact of disease some stated that the land was passing anyway and they might as well participate before they died or before someone else sold the land from under them.[33] But this does not seem to have been a general attitude. More commonly the desire for trade, spurred by a spirit of emulation, prompted the transactions; to own whaleboats, or gentlemen's clothing or horses was virtually a necessity after some chiefs had first acquired them. A negative pressure was the depredation of cattle on Maori cultivations, traditionally unfenced; this was a very real problem when a pastoral society met a horticultural one and seems to have led some Maori to sell some areas to the Pakeha to keep their cattle while the Maori communities drew their cultivations apart.

Still it would be quite wrong to assume that all sales were becoming complete alienations in the European sense. Various kinds of resistance to dangerous new trends emerged concurrently with those trends. Those opposed to the actions of their 'paramount' chiefs would sometimes repudiate them, or demand further

32. Duncan Moore, 'The Origins of the Crown's Demesne at Port Nicholson, 1839–46' (Wai 145 rod, doc e3), pt 1, pp 57–8
33. BPP, 1838, vol 1, p 65

payments if they had not shared in the initial payment.[34] The Hokianga people, under Mohi Tawhai, convened a committee and began to organise a pact against selling.[35]

The need to organise to control dispersed interests was a real one because more large European consortia began to make purchases. The Manukau Company, for example, acquired from the widow of one Thomas Mitchell a deed purporting to embody the purchase from Ngati Whatua chiefs in 1836 of the whole of Tamaki-makau-rau. On the basis of this transaction a group of Scottish entrepreneurs formed the Manukau and Waitemata Land Company and sent out immigrants.[36] About this time various Sydney merchants secured deeds over most of the harbours and islands of the Hauraki Gulf and of the South Island. While in many – perhaps most – cases Maori vendors, in their view, still sold interests short of exclusive possession to 'their Pakeha' and expected them to maintain a relationship and provide ongoing benefits to the community, some localities, such as parts of the Bay of Islands, were becoming virtual European enclaves with the chiefs increasingly concerned about the independent behaviour of the Pakeha. Sections of Maori communities began to express anxiety that they were unable to restrain other sections of the right-holders – usually chiefs – who were entering into land transactions.[37] There appeared to be a good deal of confusion in the north and it is hard to generalise about how the hundreds of transactions seemed in Maori eyes. Some were kinds of joint occupancy, many were 'tuku whenua', others were something more than that. Each would need to be examined for its particular circumstances. But rarely would Maori have considered that they had totally and forever relinquished all interest in the land and they would eventually have sought to resume it if the Pakeha with whom they had dealt did not take up the land.

Meanwhile the possibility of settlers coming with such numbers and power as to assert *their* view of land transactions began to loom in the south. The threat came from three directions: New South Wales, France, and England.

By the late 1830s some of the whalers and traders from Sydney were claiming to have purchased huge areas of the South Island: the Weller brothers at Otago Heads for example, claimed over two million acres; Johnny Jones at Waikouaiti claimed inland as far as Wanaka. Various purchasers had deeds purporting to convey most of the good harbours and coastal plains. Purchases overlapped along the eastern coast while in New South Wales deeds were on-sold to third or fourth parties. Some – the Wellers among them – actually took up occupancy on the basis of deeds acquired in New South Wales, not directly agreed with Maori; nevertheless they continued also to make regular 'gifts' to the southern chiefs. How many of the

34. This is quite different from the person or group who had made the transaction and received the payment demanding further payments, over and above what was agreed.
35. Sinclair, p 160
36. olc file 629, NA Wellington
37. In discussion of his paper at the New Zealand History Association conference at the University of Auckland in 1994, Mr Rima Edwards of Muriwhenua was asked about this point. He replied that the burgeoning numbers and power of the Europeans was confusing people in the north. 'We were in a whirlpool (he ripo)'.

deeds could have been enforced by the purchasers against Maori determination to continue to interpret them in *their* own terms is debatable but in involving themselves with the likes of W C Wentworth, the most wealthy man in New South Wales and the most powerful under the Governor, the Ngai Tahu chiefs had a tiger by the tail. For in January 1840 Johnny Jones took Tuhawaiki, Taiaroa, and Karetai to Sydney and in Wentworth's office signed a deed which purported to convey to the speculators' syndicate all of the South Island not already sold. In persuading the chiefs Wentworth probably made much of the fact that official British intervention was now in train and argued that he would help secure the chiefs' independence in partnership with him. This was to be a favourite line with private purchasers both before and after the Treaty. And in a crude sort of way it might temporarily have turned out well for the chiefs with such powerful 'protectors'. But it would not have left much of the South Island for Maori; New South Wales settlers had long shown a propensity to impose their demands by force against the Australian Aborigines and it is hardly credible that they would not have tried the same again in the grasslands and harbours of the South Island where they would very soon have outnumbered the Ngai Tahu. Armed European merchantmen had long shown that they could destroy a coastal village.[38] The danger was very real that without official British intervention the South Island would have become a bloody moving frontier as settlers seized harbours and rode into the interior, setting Maori against Maori in asserting their claims, as they had been doing for centuries among the indigenous people of the Americas and Africa and more recently in Australia.

Around Banks Peninsula the picture was being complicated by the French. Dr Peter Tremewan's fine study has shown how a very vague purchase deed secured by the whaling captain Langlois in 1838 from a few of the right-holders around Akaroa, became the basis of the mobilisation of capital in France and the despatch of a colonising expedition. The French entertained the possibility of a much larger settlement, embracing most of what came to be called Canterbury by the English and, though the French Government was circumspect about direct state involvement it did send a warship (*L'Aube* under Captain Lavaud) to support the private venture.[39] The French venture was forestalled by official British intervention but again it is fanciful to assume that the warship's guns and landing parties would not have been used against local Maori if they had tried to prevent the French from implementing their shoddy deeds, as the Tahitian and Marquesan islanders found to their cost a few years later and those of New Caledonia and the New Hebrides by the end of the century.

Meanwhile, in England, Wakefield's New Zealand Association, refused a charter by the Colonial Office (after some initial encouragement), turned itself into a joint stock company and sent out a colonising expedition anyway. Colonel William Wakefield's purchases from Maori on both sides of Cook Strait, and his claim to

38. In 1817 the village at Otakou was sacked by a Captain Kelly in revenge for the death of two of his seamen (Erik Olssen, *A History of Otago*, McIndoe, Dunedin, 1984, p 6).

39. P Tremewan, *French Akaroa: An Attempt to Colonise Southern New Zealand*, Christchurch, University of Canterbury Press, 1990, p 32

have extinguished customary rights between latitudes 40 and 43 degrees south, is typical of the monster purchases of the period. With these converging streams of settlement it is tenuous to assert that South Island Maori held exclusive possession by the end of 1839. A trial of strength on land was yet to occur but offshore the warships were irresistible and even armed whalers had run down Maori waka which challenged them and bombarded villages, while the involvement of English merchants in assisting Te Rauparaha showed their potential for fomenting struggles between tribes, as occurred throughout the Pacific islands in the nineteenth century. The willingness of the company to resort to force was eventually to be demonstrated at Wairau in 1843. That resulted in a conspicuous victory for Ngati Toa, which showed that Maori would certainly for years have retained military dominance against private settlers where their numbers and the terrain allowed. But that was not the issue in 1839 to 1840. The issue was that the situation as regards land rights was becoming very confused by the thrust of unofficial settlement and that many Maori were concerned about it. In this context they tended to accept missionary advice and assistance more than before, and to discuss with representatives of the British Crown ways and means of retaining or restoring stability, so that the engagement with the wider world could continue in positive ways. They also began to explore wider forms of combination among themselves.

1.5 James Busby and the Declaration of Independence

It is well known that the British Government sought to regulate the conduct of British nationals in New Zealand by such devices as extending the authority of New South Wales courts to try them for offences committed on New Zealand shores, and by appointing some missionaries and some Maori chiefs as Justices of the Peace. These methods proved of limited success, partly because of the difficulty of establishing facts at such a distance and partly because of doubts about the extra-territorial jurisdiction of British courts. In 1831 a missionary-inspired petition from Hokianga chiefs seeking the protection of the British Crown against the French (occasioned by the visit of one of the warships that protected the French whaling fleet in the Pacific), and the involvement of the merchant captain Stewart in Te Rauparaha's bloody raid on Ngai Tahu, led to the appointment of James Busby as British Resident. This kind of appointment, beginning to be made to the courts of princes in British India and the sultans of the Malay Straits, assumed the formal independence of the local people concerned, but sought to influence them through a diplomatic official of some seniority, backed by soldiers and warships. As is again well known Busby was provided with no soldiers and no warship on station in New Zealand. He was, however, instructed to try to influence the Maori chiefs 'towards some settled form of government' and 'some system of jurisprudence' by which Maori courts 'may be made to claim the cognizance of all crimes committed within their territory'.[40] As in Asia the British Government hoped to avoid the expenses and entanglements of formal empire but to protect both their nationals' interests

and Maori interests by overseeing the development of some governing structure in New Zealand adequate to meet the needs of modern trade and international relations.

The first of Busby's efforts in this direction was to have a meeting of local chiefs in 1834 select a flag for the independent tribes of New Zealand and to establish a register for ships built in New Zealand. As E J Tapp has pointed out, this was largely for the convenience of New South Wales entrepreneurs building ships in New Zealand creeks and harbours and transporting cargoes from New Zealand through Sydney. At the time the British East India Company's monopoly of *British* (not foreign) trade through Sydney worked to the considerable disadvantage of local Sydney merchants. It therefore suited the latter to have their New Zealand based ships registered as distinctly foreign.[41] It no doubt suited Busby's purpose to involve the chiefs in this as a step towards promoting confederation among them and the evidence does suggest that several in the immediate area did accept and use the flag as a symbol of their identity and independence.

Organisationally, however, Busby took a more important step in 1835 when he convened a meeting of about 34 northern rangatira to draw up and sign a constitution and Declaration of Independence of the Confederation of the United Tribes of New Zealand. In the immediate term this was to frustrate the ambitions of the French adventurer De Thierry, who laid claim to a substantial area of the Hokianga, but in the longer term the Confederation was intended to be the Maori government which would regulate the increasingly complicated affairs of the emergent nation. Much has been made recently of the Declaration of Independence. Indeed it has been seen by many Maori as the instrument by which Maori national sovereignty gained international recognition. It is common enough in human history for later generations to read into past actions meanings that they did not carry at the time they occurred. The English did this from time to time, perhaps most significantly in respect of the Magna Carta of 1215.[42] But, at the time, the Declaration received only very limited recognition by the Crown; nor did it institute any working form of supra-tribal authority. At the 1835 conference Busby explained that, for the system to be effective, the individual rangatira would have to accept the superior authority of the Confederation congress. All present signed the Declaration but Busby reported that the chiefs had told him that if one of their number broke laws enacted by the congress he could not be compelled by the others to observe them.[43] It seems that Busby never convened the group again until they signed away their authority at

40. Bourke to Busby, 13 April 1833, cited Donald M Loveridge, 'The "Declaration of the Independence of New Zealand" of 1835, and the Confederation of the United Tribes, 1835–40', Wellington, May 1996 (typescript), pp 4–5
41. E J Tapp, *Early New Zealand; A Dependency of New South Wales 1788–1841*, Melbourne University Press, 1958, p 90. (Tapp cites Governor Bourke to Stanley, 29 April 1834 and Aberdeen to Bourke, 30 June 1834, *Historical Records of Australia*, vol I, pp 412, 609.)
42. The Magna Carta was a set of constraints on royal taxing power and property rights in baronial estates secured by the barons from King John for thoroughly selfish reasons. In the seventeenth century the leaders of the House of Commons, with the support of certain jurists, made the Magna Carta one of the bastions of the liberties of common people against the arbitrary exercise of executive authority by the Crown.

Waitangi in 1840. He did, however, continue to collect signatures to the Declaration and urge upon the chiefs the strength that would come from working together and diminishing their fierce rivalries. The act of signing did seem to reinforce in the rangatira concerned a sense of their independence; Te Hapuku of Hawke's Bay, for example, who signed while on a visit to the north, at first hesitated to sign the Treaty of Waitangi until a Ngapuhi chief in the official party persuaded him that his mana would not thereby be diminished.[44] But it was the sense of their personal mana, and that of their hapu, that remained the chiefs' dominant concern, not a national government. Moreover, the British recognition of the Confederation was limited. Busby forwarded to Sydney, for conveyance to the British King, the chiefs' thanks for recognising their flag, their offer of continued protection and friendship to British traders and settlers in New Zealand, and their entreaty 'that His Majesty will continue to be the parent of their infant State, and that he will become its protector against all attempts upon its independence'. The Secretary of State for Colonies, Lord Glenelg, sent a guarded reply to Governor Bourke in Sydney:

> It will be proper that they should be assured in His Majesty's name, that He will not fail to avail Himself of every opportunity of showing his good will, and of affording to those Chiefs such support and protection as may be consistent with a due regard to the just rights of others and to the interests of His Majesty's subjects.[45]

In 1840 Governor Gipps concluded that this response indicated 'a state of superiority and protection on the one side and of dependence on the other, rather than a state of equality such as exists between independent nations'.[46] The Chief Justice of New South Wales concluded that, 'there never was any distinct recognition of New Zealand as an independent foreign state'.[47] The point of these officials' statements was to deny Wentworth and his friends in the New South Wales legislature the basis of their land claims in New Zealand: if there was no New Zealand state there was no authority, in the view of Gipps and his superiors in London, capable of transferring land titles to foreign citizens. The legal correctness of this position and the question of what property rights tribes not organised in the form of a nation state can convey is beyond the scope of this report. In historical terms, the clearest statement of the British Government's view is that expressed in Lord Normanby's Instructions to Captain Hobson of 14 August 1839:

> We acknowledge New Zealand as a Sovereign and independent State, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed and petty Tribes, who possess few political relations to each other, and are incompetent to act, or even deliberate, in concert.[48]

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43. Draft letter, Busby to Earl of Haddington, 28 October 1836, and Busby unpublished ms 'The Occupation of New Zealand 1833–1843' cited Loveridge, p 12
44. Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, Wellington, Brooker's Ltd, 1995, p 32
45. Busby to Under-Secretary Hay, 2 November 1835, in H H Turton, *An Epitome of Official Documents*, vol 1, p 1, pp 8–9; Glenelg to Bourke, 25 May 1836, *Historical Records of Australia*, vol 18, p 427, cited Loveridge, 'Declaration of Independence', pp 16–18.
46. Gipps' speech of 9 July 1840, BPP, 1840, (311), p 75 (cited in Loveridge, p 20)
47. *Sydney Morning Herald*, 13 July 1840 (cited in Loveridge, p 31)

This assessment was a result of Busby's disappointed reports of the failure of his efforts to develop an effective Maori government, the resumption of tribal fighting in the Bay of Islands in 1837 and the increase of land purchases. Maori *aspirations* towards a nation state seem to have developed in the north largely as a result of Busby's efforts, but there was as yet no *practical exercise* of sovereign authority by a supra-tribal structure. Up to 1840 effective sovereignty in New Zealand still lay with the respective rangatira and hapu throughout the land.

1.6 The British Assertion of Sovereignty and Normanby's Instructions

The British Government had in fact concluded in December 1837 that settlement had 'to no small extent' already taken place in New Zealand and that the only choice lay between 'a Colonization, desultory, without Law, and fatal to the Natives, and a Colonization organized and salutary'.[49] They therefore entered upon negotiations with the New Zealand Association. These were still inconclusive in early 1839 when the New Zealand Company (as it had now become) sent Colonel William Wakefield out to buy land in the Cook Strait area, followed by its shiploads of immigrants. The Colonial Office then resolved to extend the authority of the Crown over the areas of likely settlement by annexing parts or all of New Zealand to New South Wales. Authority for Gipps and Hobson to do this was provided by Letters Patent of June 1839. It is highly likely that this authority would have been used regardless of the outcome of the Treaty negotiations. Nevertheless, although they considered Maori national independence now to be 'precarious and little more than nominal', an independence 'which they [the Maori] are no longer able to maintain' (in the words of Normanby's Instructions to Hobson), the British Government, in conformity with its previous undertakings, had resolved not to take possession without first securing 'the free and intelligent consent of the Natives'.

The British assumed, from the prior history of European colonisation of the Americas, Africa, Asia, and Australia, that the thrust of settlement could not be checked and that the Maori, like most indigenous peoples before them, would be overwhelmed by it. That assumption was perfectly logical and understandable in the light of all previous experience. Governments were not as powerful then, in relation to their own armed settlers, as they have since become. This largely explains why only limited constraints were imposed upon settlers – that on the contrary they were assumed to be the dynamic factor in the equation, entitled moreover, as British subjects, to legal and constitutional rights, including the right to acquire land and eventually to attain self-government. It was to take two or three years for the British Government to discover that Maori, notwithstanding the difficulties they were encountering, were still in control of much of New Zealand.

48. Normanby to Hobson, 14 August 1839, BPP, vol 3, pp 85–86
49. Glenelg to Durham, 29 December 1837, co 209/2, p 410

The purpose of the British intervention was to take control of the land trade. There were three purposes for this: to protect Maori from fraudulent dealings; to promote orderly, genuine settlement, and deter speculation in land settlement; and to provide revenue to fund the colony.

Hobson was therefore instructed to issue a proclamation, immediately upon arrival in New Zealand, that no previous acquisition of land by British subjects would be acknowledged as valid until confirmed by a grant from the Crown. Settlers would not, however, be dispossessed of property 'acquired on equitable conditions', at least 'not upon a scale which must be prejudicial to the latent interests of the community'. The instructions continued:

> Having, by these methods, obviated the dangers of the acquisition of large tracts of country by mere land jobbers, it will be your duty to obtain, by fair and equal contracts with the natives, the cession to the Crown of such waste lands as may be progressively required for the occupation of settlers resorting to New Zealand. All such contracts should be made by yourself, through the intervention of an officer expressly appointed to watch over the interests of the aborigines as their protector. The re-sales of the first purchases that may be made, will provide the funds necessary for future acquisitions; and, beyond the original investment of a comparatively small sum of money, no other resource will be necessary for this purpose. I thus assume that the price to be paid to the natives by the local government will bear an exceedingly small proportion to the price for which the same lands will be re-sold by the government to the settlers. Nor is there any real injustice in this inequality. To the natives or their chiefs much of the land of the country is of no actual use, and, in their hands, it possesses scarcely any exchangeable value. Much of it must long remain useless, even in the hands of the British Government also, but its value in exchange will be first created, and then progressively increased, by the introduction of capital and of settlers from this country.
>
> In the benefits of that increase the natives themselves will gradually participate. All dealings with the aborigines for their lands must be conducted on the same principles of sincerity, justice and good faith as must govern your transactions with them for the recognition of Her Majesty's Sovereignty in the Islands. Nor is this all: they must not be permitted to enter into any contracts in which they might be the ignorant and unintentional authors of injury to themselves. You will not, for example, purchase from them any territory, the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence. The acquisition of land by the Crown for the future settlement of British subjects must be confined to such districts as the natives can alienate without distress or serious inconvenience to themselves. To secure the observance of this, will be one of the first duties of their official protector.[50]

These instructions contained admirable measures for the protection of Maori against landlessness and envisaged their participation in the developing economy through the increasing value of land. They have been quoted repeatedly in Tribunal reports and claimant submissions in this sense. What has not been so frequently observed, however, is that they contained also a contradiction that was to be the

50. Normanby to Hobson, 14 August 1839, BBP, vol 3, p 87

origin of the systematic economic marginalisation of the Maori people. For although theoretically assured of the increasing capital value of their land, Maori were effectively denied much of that capital value by the combined effect of the Crown's monopoly of land purchase and the instruction to buy land at prices which 'will bear an exceedingly small proportion to the price for which the same Lands will be resold by the Government'. Moreover, it was false to assert that the land, in its unregistered and undeveloped condition, 'possesses scarcely any exchangeable value'. The site value of most of the harbours and accessible coastal lands was already high, as evidenced by the burgeoning trade, between third, fourth, and subsequent parties, in purchase deeds that traders and speculators had signed with Maori. Certainly a lot of the prices paid were speculative and the derivative purchasers lost their money when the Government investigated the titles and struck down the fraudulent ones, but the private titles that were confirmed after 1840 rapidly sold for many times the price that the original purchaser had paid to Maori. What gave them added value was the security of title offered by British property law (and later by the Torrens system of title registration). That alone, and the prospect of development even before development itself occurred, gave added capital value to the land. But that added value was denied to Maori, because of the Crown monopoly and the policy of paying minimal prices. This is discussed further in chapter 3 below but it should be appreciated that the root of the problem lies in the British Government's policy established in 1839.

It is difficult to discuss this in terms of a Treaty breach for there was not yet a Treaty. Moreover, when Maori signed the Treaty the following year they consented to Crown pre-emption, though with what degree of understanding is debateable. But they did not consent to a Crown policy of buying at low prices that bore little relation to the resale value of the land. There is a degree of subterfuge here which does not sit well with Normanby's instruction to Hobson to deal for Maori land on the principles of sincerity, justice, and good faith, and to protect Maori from becoming the unwitting instruments of their own destruction. The contradiction in the Crown's policy was to become more and more evident to Maori eyes and underlay their organised resistance to land-selling by the middle of the 1850s.

Crown officials and settler politicians later argued, explicitly or implicitly, that since the Crown did have to have a revenue to pay for the administration of the colony's infrastructure, the roads and port facilities and Government services from which Maori benefited along with settlers, the land fund – the profits from resale of Maori land – was a reasonable charge for Maori to bear, a reasonable offset for the land guarantee of article 2 of the Treaty. That was certainly how many officials subsequently justified the Crown monopoly and the low prices paid. The difficulty with that argument is that it is discriminatory, that as far as domestic revenue at least is concerned it involved Maori paying the bulk of the cost of the infrastructure at that time. True, Normanby proposed a tax on 'waste' or undeveloped land owned by settlers (which was not in fact levied) and local body rates began to be charged on settler property (and Maori property too eventually) when local government became established. But there is little comparability between annual charges on

registered titles and developed land, (or taxes on the resale of that land) and the minimal prices for extinguishment of customary title in the first place. Once the land had passed to the Crown the Maori had, to that extent, lost their capital base and that was an irremedial loss. The point was understood by some of the planners in London and was in theory addressed in the 1840–41 instructions, but very inadequately (see sec 1.9).

1.7 The Treaty

It is not necessary to traverse again, for this report, the detail of the drafting and signing of the Treaty, but the following conclusions, drawn from the available evidence, are relevant:

(a) The language of the Treaty reflected the British officials' belief that political authority in Maori society lay essentially with the rangatira (chiefs). Hence the 'cession' of 'sovereignty' (in the English version) or the 'tuku rawa atu' of 'kawanatanga' in the Maori version, was made by the rangatira (chiefs) of the Confederation and the independent chiefs elsewhere.

(b) On the other hand the officials and their missionary advisers seemed to understand better, though imperfectly, that rights in land were distributed through several levels of society. Hence the English language text of article 2 'confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective individuals and families thereof the full exclusive and undisturbed possession of their Lands and Estates Forests and Fisheries and other properties which they may individually or collectively possess so long as it is their wish and desire to retain the same in their possession.' In the Maori text the Queen affirms 'ki nga Rangatiratanga ki nga hapu ki nga tangata katoa o Nu Tirani te tino rangatiratanga o ratou whenua o ratou kainga me o ratou taonga katoa', subject to their agreeing to the sale ('hokonga' in the Maori text) of any of these resources to the Queen. The British were clearly thinking of property rights in the drafting of article 2, but as authoritative academic writers and the Waitangi Tribunal have argued on several occasions, the expression 'tino rangatiratanga' would have conveyed rather more than this to the Maori participants; it would still have implied, among other things, personal relationships and mana, rather than 'ownership' and 'use rights'.

(c) The Treaty does not confine the Crown's right of kawanatanga to Pakeha only. The Preamble makes clear that the Crown's authority would extend over the territory covered by the agreement and, by implication, to all within that territory. The records of discussion also show the Crown's determination to prohibit warfare and other violent practices within Maori society.

(d) Contrary to some academic opinion, the author is not of the view that the drafting of the Treaty was deceptive – in particular that the term 'mana', to indicate what the chiefs were ceding was deliberately avoided.[51] On the

contrary the British officials and missionaries were working under the assumption that the chiefs' mana was already under threat from unregulated settlement and they actually saw themselves as protectors of that mana, at least in its non-violent expressions. They frequently said that they would enhance the chiefs' standing through giving them access to individual property. On the other hand the relationship between kawanatanga and rangatiratanga was not pursued in detail; Hobson tended to regard the Treaty signings with a certain cynicism, peremptorily brushing aside suggestions that Maori participants may not have understood the Treaty. His missionary supporters and minor officials seem to have gone along with this on the paternalistic assumption that, unless British sovereignty was secured promptly, Maori were going to suffer heavily from unregulated settlement. The strategy was first to secure the transfer of sovereignty and thus control the land trade; other matters would be dealt with later. Meanwhile the missionaries would get on with their evangelical and educative roles. The neologism 'kawanatanga' was coined to refer to a new concept or institution (leaving aside the erstwhile Confederation), that is a functioning *national* government. Although it did not amount to a deliberate deceit in the author's view, the term kawanatanga, as various commentators have pointed out, would probably not have conveyed to Maori the full sense of the English term 'sovereignty', and the summary nature of official explanations left much room for misunderstanding.

(e) A most serious area of misunderstanding related to the leasing of land, or dealing with timber, or other kinds of transactions short of actual sale. The officials intended that all such transactions would be controlled by the Government. Some Maori took away the view that the Queen had the first right of 'hokonga' of the land; others that she had the sole right. But that related to the near-permanent and more total kinds of transfer, not to the myriad other kinds of dealings relating to the land. It is unthinkable, in the author's view, that Maori would have considered that all of these too had been interdicted except through the Crown; after all the chiefs had just been confirmed in the rangatiratanga of the land! Indeed they simply continued to make a variety of kinds of arrangements with private Pakeha. Within weeks of the signing at Waitangi Hobson began to consider the need explicitly to bring leases as well as sales under the constraints of Crown pre-emption, and did so in the Land Claims Ordinance 1841. The cutting of kauri timber and taking of other resources also began to come under licens-

51. James Belich, *Making Peoples: A History of New Zealand from Polynesian Settlement to the End of the Nineteenth Century*, Penguin Books, Auckland, 1996, p 194 argues that there was 'probably' deliberate or 'semi-deliberate' deception in the translation of the Treaty into Maori. The Waitangi Tribunal, perhaps the senior Maori body to assess the issue, considers that the Maori terms of the Treaty are appropriate. In their view, the two versions are complementary rather than contradictory (Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (the *Muriwhenua Report*) Wellington, Department of Justice: Waitangi Tribunal, 1988, p 212). Both versions must be consulted, but the stress, even so, is on the underlying principles (*Muriwhenua Report*, p 213).

ing controls from 1841, to the irritation even of chiefs like Waka Nene. The tight interpretation of pre-emption by the Crown, especially in respect of leases, would further deny Maori access to the capital value of their land and resources.

(f) For Maori the Treaty presented a serious and difficult choice. They knew well that the authority of the British Crown, backed by its military power, could result in their subordination and loss of liberties. Speaker after speaker made this clear at Waitangi and at subsequent meetings. On the other hand, unregulated settlement had already encroached, land already seemed to be passing and the threat of further loss of control was real. On balance, it seemed to Tamati Waka Nene and those who argued in favour of signing, that it was better for the Governor to stay, to be a protector of their chieftainship and of their lands. Again many speakers made it clear that it was on that basis that they signed. The rangatiratanga of the chiefs and hapu was to be respected, and (as article 3 affirmed) Maori would also join with the British authorities in building the new nation state.

(g) Given the way effective sovereignty had been distributed in Maori society before 1840, and given the terms of the Treaty and the manner in which the chiefs' signatures were collected, the Treaty was not a compact between two parties only, one British and one Maori, but a compact between the Crown and many Maori chiefs and hapu, inside and outside the Confederation. Nor was the Treaty alone the sole act by which Maori affirmed their engagement with the Crown. Over the following years there were chiefs, like Hone Heke, who signed the Treaty but who subsequently rejected the Crown's authority, and others, who had not signed, who entered into the state-building process by taking disputes to the new courts, accepting such offices as were made available to them in the machinery of government or assisting in military actions by the Crown. Years later, at the Kohimarama conference of 1860, chiefs who had and had not signed the Treaty, continued to affirm their basic commitment to the pact of 1840, but to protest very strongly at the Crown's failure to involve them fully, along with the settlers, in the making and administration of law, both as it related to land and to personal relations.[52] In short they were still strongly committed to supporting the kawanatanga of the Crown but were waiting for their rangatiratanga to be genuinely recognised.

1.8 The Company 'Tenths' and Similar Proposals

As is well known the New Zealand Company proposed to include at least the heads of leading Maori families in the growing economy of their settlements by reserving, *in the title of the Company but for their benefit*, one in 10 (or 11 in some versions)

52. See the official record of proceedings, ma 23/10.

of the urban and rural sections in the company subdivisions. Ambiguity about whether some of these would be occupied by Maori (rather than leased on their behalf) soon bedevilled the scheme, together with the taking of some of the tenths by the Crown for public purposes and Maori reluctance to abandon their villages for the neat subdivisions. But, in principle, the scheme did offer the Maori vendors a share in the new economy. Indeed, as Wakefield and the chiefs alike recognised, the pool of land reserved for Maori within the settlements was to be crucial to their future and far more important than the initial purchase price.

The House of Commons Select Committee on New Zealand, in 1840, recommended, among other things, that in all sales of land by the Crown (once having purchased the land from Maori) 'reserves be made for the natives of a quantity equal to one-tenth'; the Committee was of the opinion that 'a plan of reserves, similar to that adopted by the New Zealand Company' would offer the best prospect of securing Maori the benefits of British colonisation.[53]

1.9 The 1840 and 1841 Instructions

In 1840, with the ink of the Treaty scarcely dry, a new threat to Maori lands and rangatiratanga emanated from London. This came from Lord John Russell, who had replaced Normanby as Secretary of State for Colonies in September 1839. Russell was a supporter of the doctrines of theorists such as Vattel, who argued that people did not have valid title to land unless they occupied and used it. He argued in 1840 that the Government had proceeded in New Zealand in accordance with Vattel's principles, thus indicating that he believed the Treaty of Waitangi guarantee to Maori extended only to occupied lands. Thus the 'waste lands' theory was introduced into New Zealand, 'waste' here meaning not only that the land was uncultivated (which was the sense in which Normanby and James Stephen used the term) but that *because the land was unoccupied it would become the demesne lands of the Crown*, by virtue of the transfer of sovereignty from the Maori chiefs and tribes to the British Crown. He stated later that he had not imagined that 'any claim could be set up by the natives to the millions of acres which are to be found in New Zealand neither occupied nor cultivated, nor, in any fair sense, owned by any individual'.

Russell's instructions to Hobson of 9 December 1840, consequent on New Zealand being created a colony separate from New South Wales, were drafted, as were the 1839 instructions, by the Permanent Under-Secretary, James Stephen. The instructions included some passages distinguishing Maori from the hunter–gatherer peoples and noted that they had 'established by their own customs a division and appropriation of the soil'. They also acknowledged that they had formerly been recognised by Britain as 'an independent state', which was going much further (by the absence of any qualifying remark) than Normanby had gone in 1839 or Gipps

53. Report of the 1840 select committee, 3 August 1840, BPP 1840, 582, p ix (IUP, vol 1)

in 1840. But the instructions required Hobson to separate out the Crown's lands from private lands 'and from those still retained by the aborigines' and the charter accompanying the instructions referred to the rights of Maori 'to the actual occupation or enjoyment in their own persons, or in the persons of their descendants, of any lands *now actually occupied or enjoyed by such natives*' (emphasis added).[54] This was the waste land theory. It was never fully applied in practice but it underlay the very nominal payments to Maori for uncultivated land in the decades that followed. By 1841 even, Hobson was making allocations of Town Belts and other public facilities in Wellington and elsewhere on no other basis than the New Zealand Company deeds, still under investigation.

What did constitute a fair price to pay to Maori for uncultivated lands is a contentious question but the inference that they were strictly ownerless and therefore worth nothing in monetary terms is a doctrine which has been strenuously resisted by indigenous peoples throughout the Pacific.

On 28 January 1841 Russell issued supplementary instructions: 'the lands of the aborigines should be defined with all practicable and necessary precision' on the maps of the colony. The Surveyor-General and Protector of Aborigines were to indicate the areas to be made inalienable, for Maori use and occupation. The balance, the 'waste land', would form the Crown demesne. All conveyances of any kind by Maori to Europeans were invalid unless expressly authorised by the Governor. Assuming that the bulk of the land had passed, or would soon pass, to private purchasers or the Crown the Maori had to be provided for. Therefore, 'As often as any sale shall hereafter be effected in the colony of lands acquired by purchase from the aborigines, there must be carried to the credit of the department of the Protector of Aborigines a sum amounting to not less than 15 nor more than 20 percent in the purchase-money' to pay the cost of the Protectors' department and to promote the 'health, civilization, education and spiritual care of the natives'.[55] In fact the land fund did little more than pay the expenses of the Protectorate before it was abolished in 1846 and the 15 to 20 percent fund was not made available after self–government in 1852 (see ch 20).

1.10 Conclusion

By these means the Crown was at the same time protecting and pauperising the Maori people. The threat to Maori from organised private settlement and French settlement was real. The Maori acceptance of Crown intervention via the Treaty was appropriate and the Treaty, from the Maori perspective, embodied recognition of their tino rangatiratanga and the joint enterprise of the Crown and the tribes in building a nation state. But the Crown's price for its intervention was extremely high – far higher than was made clear to Maori at the time. The recognition of Maori property rights was a considerable advance on what had happened recently

54. Charter of 16 November 1840 accompanying Russell to Hobson 9 December 1840, BPP, vol 3, p 154
55. Russell to Hobson, 28 January 1841, BPP, vol 3, pp 173–174)

in Australia but it was hedged around with qualifications which threatened to reduce it to a formality, or worse. For the strict application of the Crown's right of pre-emption (especially the ban on direct leasing), the deliberate payment of low purchase prices by the Crown and the looming influence of the waste land doctrine together worked to shut Maori out substantially from securing the true economic value of their land. That was mostly to be creamed off by the Crown to run the colony, and Crown titles were to pass to settlers in order to attract private capital. It all made good economic sense but by 1840 to 1841 it was already doubtful that there would be much place for Maori in the new scheme of things. Much would depend on the extent to which they too received secure titles to reserves or areas exempted from sales. But even here there was a problem. If the reserves were wholly inalienable Maori would not be able to get access to the rising value of land (according to Normanby's theory), in order to secure capital for development, or even money for consumer goods, without selling more land – at the Crown's low prices. Only by allowing Maori to enter into the leasehold market or joint venture arrangements would the contradiction be resolved. Of course the depth of the problem was not immediately apparent as Maori still held almost all the land and the resources – even the food supplies upon which settlers depended. The British planners expected this to cushion them for a long time even as the Maori diminished as a separate population by death or by assimilation. Meanwhile provision was made for the Maori to receive the Government's benefice from its profits from land sales. But this would be viewed by Maori as poor compensation for being able to retain and develop their own land and resources. That is essentially what the 600 and more claims to the Waitangi Tribunal are saying.

CHAPTER 2

OLD LAND CLAIMS AND 'SURPLUS LAND'

2.1 The Scope of the Problem

Dr Barry Rigby has discussed the old land claims issues at length in chapter 3 of the first Auckland District Report and, with Mr Matthew Russell and Mr Duncan Moore, in his report on 'The Old Land Claims' both in the Rangahaua Whanui Series. In addition many major research reports have been compiled for the Muriwhenua claim, Wai 45, and I have made use particularly of documents i2, ('The New Zealand Land Claims Act of 1840' by Dr Don Loveridge), i4 ('The Land Claims Commission, Practice and Procedure, 1840–1845' by Mr David Armstrong), and j2 ('Surplus lands, Policy and Practice, 1840–1950' by Messrs David Armstrong and Bruce Stirling) and l7 ('Muriwhenua Land Claims', an overview by Professor W H Oliver). The Waitangi Tribunal's *Muriwhenua Land Report* was released subsequent to the drafting of this chapter.

One thousand and seventy-six claims were lodged in respect of pre-1840 purchases. By far the majority of these (722) relate to the Auckland research district, with 53 more to the Hauraki district, 68 to the Waikato and 155 to the South Island and Stewart Island. For a full list, see the appendix in Duncan Moore's Rangahaua Whanui report, 'The Land Claims Commission Process', Waitangi Tribunal (pending). The area covered by these claims was 9.2 million acres. If the New Zealand Company claims are added in their wider form, amounting to some 20 million acres, the claims covered about half of New Zealand.

The claims of the New Zealand Company, and other claims in the Cook Strait region, Wanganui, and Taranaki, were dealt with under somewhat different processes from those in the rest of New Zealand. They are discussed separately in chapter 3 below. They are discussed also in the Northern South Island, Wellington, and Whanganui reports of the Rangahaua Whanui Series and briefly in the District summaries of those reports in volume iii of this report.

2.2 British Policy

As stated above (ch 1), the British Government's decision in December 1837 to intervene in New Zealand and its subsequent policies towards the pre-1840 private purchases, were based on three considerations: to protect Maori from fraudulent

dealings; to promote orderly and genuine settlement and deter speculation in land; and to provide revenue to fund the colony

There was some inevitable conflict between these various purposes and it is a matter of judgement how far the Crown's actions can be seen as outcomes of reasonable efforts to steer between competing interests and how far it can be held responsible for avoidable error or negligence in discharging its Treaty responsibilities towards Maori.

Part of the purpose of Lord Normanby's and Governor Gipps' stress on the *limited* British recognition of Maori sovereign independence before 1840 was to undercut, in anticipation, the argument that the private purchasers would advance, namely that a fully sovereign Maori state or states could convey what they wished to settlers, and the British Government had no right to interfere. Hobson further sought to strengthen the Crown's position vis-à-vis the settlers by seeking, and securing, permission to declare British sovereignty over the southern islands by right of discovery, the Maori there allegedly being 'wild savages' incapable of making or enforcing contracts.

Although the term 'surplus land' was not yet being employed, a central purpose of Normanby's instructions regarding land was to curb the 'jobbery' or speculation which the Government rightly understood to have taken place, with a consequent parcelling up of the country among European purchasers but with the land itself lying idle and the revenue for promoting further immigration lost to the Government.

Thus Normanby's instruction that the land claims commissioners should ascertain the prices paid to Maori by private purchasers was not primarily for the purpose of finding out what was a fair price which ought to have been paid to Maori, but to determine the size of grant which the settlers would eventually receive from the Crown. Although Normanby's instructions had not yet spelt out the details, the implication was that a settler would get a grant, in proportion to his outlay, within any area found to be validly and equitably purchased; the balance would be available to the Crown for allocation to other settlers.

Normanby's views on appropriate price to be paid to Maori are indicated in his instructions on *Crown* purchases, that is, that the price should be an 'exceedingly small proportion' of the subsequent resale price. The Crown was to get a land revenue; the real payment to Maori was, in Normanby's theory, to be in the added value of the remaining Maori land as a result of development of the sold land by the settlers (see above chapter 1).

On 19 January 1840 Gipps issued the proclamation announcing that an investigative commission would be set up, that all claims to purchases from Maori would have to be proved before the commission, and that henceforth any purchases of land from Maori would be null and void. Hobson repeated the proclamation on arrival at the Bay of Islands on 30 January 1840. The Treaty signed at Waitangi a week later confirmed the Crown's pre-emptive (meaning sole) right of purchase. In the public discussion before the signing Busby stated that the Governor would return to Maori

all lands not 'duly acquired'. Hobson confirmed that 'all lands unjustly held would be returned'.[1]

2.3 The New South Wales Ordinance

The draft preamble of the Ordinance, and Gipp's speech introducing it, placed much stress on the argument based on English and American jurisprudence, that Maori, being an 'uncivilized people', a tribal people, had only 'a qualified dominion or sovereignty' over their territory. And that, holding the land in common, they could not convey an individual interest to a purchaser. This argument was opposed by the private purchasers and eventually the preamble was amended to state, not that Maori could not *convey* a legal or permanent interest in land but that *private* British subjects could not *acquire* one from them. Instead, a purported pre-1840 conveyances of Maori to the private buyers served to create a title in the Crown, when the Crown established its sovereignty. For the British authorities this became the settled legal doctrine underlying old land claims policy.

I am not sufficiently qualified to discuss the common law and international law arguments on the legal capacity of tribal societies to convey property rights. Maori chiefs certainly believed that they had the right to convey interests in property, or perhaps more correctly to establish relationships with Europeans in respect of the use of land and other resources under their control. Had they retained sovereignty Maori would certainly have sought to order their transactions according to their own tikanga. The risk they were facing, however, was that the private purchasers, and the French, while insisting on Maori having the sovereign right to convey interests in land, would have interpreted the transactions in *their* terms and, in the less populated parts of New Zealand at least, used force to do so, or played one section of Maori right-holders off against another. In asserting its doctrine the Crown had rescued Maori from this hazard; it remained to be seen, however, how the Crown applied its theory vis-à-vis Maori.

Once the New South Wales settlers heard of Hobson's proclamation of British sovereignty over New Zealand on 21 May 1840, they ceased contesting the legal basis of the Crown's intervention. In Wellington the company abandoned its incipient attempt to establish an independent government in the area of their purchases, and concentrated on trying in London to negotiate for themselves better terms from the Crown. Similarly, Captain Lavaud, leading the French to Akaroa, gave up trying to establish an independent settlement when he heard that the South Island chiefs had signed the Treaty.[2]

1. W Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi*, Wellington, Government Printer, 1890, pp 17–19
2. P Tremewan, *French Akaroa: An Attempt to Colonise Southern New Zealand*, Christchurch, University of Canterbury, 1990, p 119

In 1840 Governor Gipps of New South Wales secured the passage of the New Zealand Land Claims Ordinance. Among the important machinery provisions of the Ordinance were the requirements:

(a) that a strict inquiry be made into the purchases, gifts, conveyances or 'other titles' which settlers claim from Maori, and into 'the mode by which such lands have been acquired' and 'all the circumstances upon which such claims may be founded'. The Queen was disposed to recognise claims which have 'been obtained on equitable terms', and which were not prejudicial to the interests of British residents in New Zealand.

(b) That the value of goods paid would be ascertained and valued at three times the price paid in Sydney to determine their value when landed in New Zealand.

(c) (i) Once purchases were found to be 'valid' or 'equitable', grants would be made to settlers on a sliding scale – schedule d – which favoured the early genuine settlers and penalised those (especially absentees) who acquired land on the eve of the British assertion of sovereignty. Thus sixpence paid in 1815 to 1824 would merit one acre, whereas 4 to 8 shillings had to be paid in 1839 to merit one acre of grant under the ordinance. This scale had nothing to do with reckoning a fair price to be paid to Maori; subsequent inquiries have been mistaken on this point.

(ii) The maximum grant was to be 4 square miles (2560 acres). In debate it was accepted that the balance of the land acquired in equitable purchases would fall to the Government, not be returned to Maori. This was indicative of the Crown taking those lands as 'surplus'.

(iii) Land required for defence or other public purchases, or within 100 feet of high water mark, would not be granted to settler claimants.

(d) In making their inquiries, the commissioners were to 'be guided by the real justice and good conscience of the case without regard to legal forms and solemnities, and shall direct themselves to the best evidence they can procure or that is laid before them'. This provision was intended to facilitate matters for settler claimants but it also opened the way for Maori to present evidence as to their perceptions of transactions, *provided* the commissioners were willing to receive it. But a thorough examination of Maori understandings was not positively enjoined upon the commissioners.

The New South Wales ordinance was disallowed in London because of changed circumstances; the separation of New Zealand from New South Wales in November 1840 and the agreement between the British Government and the New Zealand Company in the same month on how to treat the company claims. The ordinance was re-enacted with little significant change in New Zealand in 1841, *except that* the New Zealand Ordinance added the term 'leases' to the kinds of title that required investigation. This was an endeavour to stop the informal leases that were springing up in New Zealand between Maori and settlers at the time.

2.4 Instructions to the Commissioners

Instructions by Gipps to the first commissioners, Edward Godfrey and Matthew Richmond, on 2 October 1840, filled some important gaps about procedure. Among the important requirements were:

(a) The Protector of Aborigines or his deputy was to be present at all inquiries to protect the interests of Maori.
(b) 'Competent interpreters' were also required.
(c) The commissioners were to set forth the 'situation, measurement and boundaries' of the land to be granted to settler claimants and a surveyor was to be put at their disposal for the purpose. They were also to describe the boundaries of land not awarded to the claimants – the surplus lands – 'with such exactness as to prevent subsequent intrusion or encroachment'.

In response to some further inquiries by the commissioners, Gipps instructed that a formal deed of alienation was not required as evidence: 'Proof of conveyance according to the custom of the country and in the manner deemed valid by the inhabitants is all that is required'.[3]

Gipps also instructed Hobson that he expected the commissioners' inquiries to place at the Governor's disposal considerable tracts of land, validly acquired from Maori, minus the maximum grant to the settler claimants:

> Where, however, any of these tracts are extensive it will be proper to reserve for the Aborigines such portions of them as may be required for their use, or can advantageously be retained for their benefit.[4]

In response to concerns expressed by Chief Protector George Clarke that a tribe might have lost its whole patrimony for a nominal consideration in large alienations such as those claimed by the French 'Baron' De Thierry, Gipps advised further:

> In every case in which the Chiefs admit to the sale of land to individuals, the title of such Chiefs to such lands are of course to be considered as extinct whether or not the whole or any portion of the land be conferred to the purchasers or pretended purchasers. Should it appear in any case that the land has been obtained for insufficient consideration, it will be proper and necessary for you, in concert with the official Protector of Aborigines to award some further compensation.[5]

This response has two troubling aspects in Treaty terms.

(a) Although the New South Wales Ordinance, and later the New Zealand Ordinance, referred explicitly to *other* forms of conveyance besides sale, Gipps' reply, and almost all official discussion thereafter, treats the conveyances from Maori *as sales, of absolute title*. Any suggestion that Maori might have conveyed to De Thierry, (or anyone else) a more qualified or

3. olc 5/4 and olc 8/1 cited D Armstrong, 'The Land Claims Commission. Practice and Procedure: 1840–1845', (Wai 45 record of documents, doc i4) p 17
4. Gipps to Hobson, 2 October 1840, Wai 45 rod, doc I4a, pp 213–214
5. Gipps to Hobson 30 November 1840, State Archives of NSW 4/1651, pp 29–30, cited in Armstrong, Wai 45 rod, doc i4, p 21

conditional title, is almost never raised. The Crown was clearly looking for extinguishment of native title. The making of additional payments was seen as 'compensation', not the making of a new purchase.

(b) Although extra payments were now authorised, there was still no guideline as to what constituted sufficiency of consideration. The over-arching philosophy was still presumably that expressed in Normanby's instructions: the Crown was to buy cheaply; unimproved land without a British title was considered to have a low monetary value.[6]

2.5 Lord John Russell's Instructions

Lord John Russell's instructions of December 1840 and his supplementary instructions of January 1841 directed Governor Hobson to define lands actually in the actual occupation and enjoyment' of Maori. Russell's view that uncultivated lands were not truly owned by Maori, strongly influenced official attitudes at this time.

To come to grips with competing Maori customary rights (upon which rival claims to have purchased the land might be erected) the January 1841 instructions directed that the Land Claims Commissioners were to be 'invested with an effectual and summary jurisdiction for determining controversies regarding land which may arise between different tribes, or between different members of the same tribe'.[7]

2.6 The Land Claims Commission Begins Work

In December 1840 Godfrey and Richmond arrived in New Zealand and began obtaining 'as full information and evidence as can be procured of the nature of aboriginal titles and the rights of the chiefs and others to the particular lands they may have sold or to which they claim an exclusive proprietorship against others of the same tribe'.[8] This was a positive start, but the hope of finding 'exclusive proprietorship' revealed the limitations of the officials' understanding of Maori tenure – a eurocentrism that would seriously mislead the commissioners and distort their inquiries.

In early 1841, public notices advertised the first sitting of the commission. According to an English language version, Maori 'land sellers' were invited to give evidence concerning the validity or invalidity of the 'purchase' of their land.

6. In his instructions to George Clarke, Chief Protector of Aborigines, as to the Protectorate's role in assisting the Land Claims Commission, Hobson virtually repeated Normanby's instructions to himself on this issue. He added that in estimating the fair purchase price of lands Clarke was to take into account any genuine comparative advantages such as water frontage. In theory then, site value, at least, should have been acknowledged, but there is no evidence to suggest that it was in any systematic way: see Hobson to Clarke, 9 April 1841, cited in Duncan Moore, The Origins of the Crown's Demesne at Port Nicholson' (Wai 145 rod, doc e3), pp 79–80.
7. Russell to Hobson, 28 January 1841, BPP, vol 3, pp 173–174
8. Godfrey to Colonial Secretary, NSW, 9 December 1840, cited Armstrong, Wai 45 rod, doc i4, p 40

'Hearken. This only is the time you have for speaking; this the entire acknowledgement of your land sale forever and ever'.[9] If some of the sense of this came through in the Maori language version, the view of the pre-1840 transactions as absolute and permanent alienations was clearly being advanced by the commissioners from the beginning.

Godfrey expected Clarke, the Chief Protector, to provide all necessary information about tribal rights and secure the attendance of necessary witnesses at the first hearing at Kororareka on 25 July 1841. In the event, neither the Protector nor an official interpreter attended. Godfrey proceeded to take evidence with a pro tem interpreter but made no final recommendations.

The next set of claims, those relating to Hokianga, were to be heard in Auckland. Clarke therefore urged upon Hobson the necessity of a prior investigation at Hokianga to get the necessary information. Notices of attendance were inadequate, he argued:

> from the very inaccurate descriptions of boundary lines, an incorrect orthography in names of places describing those boundary lines . . . The importance of proceeding as proposed would also appear, when it is considered, that the greater part of those land transactions were conducted by parties very partially understanding each other; and I fear in many cases but little pains taken to ascertain to whom the land they claimed belonged.[10]

No Protector turned up at the Auckland hearing either, but Henry Kemp was appointed sub-protector in time to assist the next hearing at Kaipara. His prior investigations at Kaipara, and subsequent hearings in the north, turned up a number of objections by Maori against claims in the Bay of Islands, Hokianga, Waimate, and Whangaroa. Efforts were made to establish these prior investigations as a regular process, but with what thoroughness they were conducted is doubtful.

Crown researchers have rightly drawn attention to the fact that the proceedings in the commissioners' courts advanced what Mr Fergus Sinclair has termed a 'tenurial revolution'. Maori had consistently thought in terms of scattered property rights in land, bird trees, eel weirs, fernroot patches, pipi beds, and garden lands. They were now being asked to think of discrete areas of land encompassed by continuous boundaries. This approach had obviously been promoted by the land transactions and settlements of the 1830s, but until boundaries were clearly marked on the ground would have had little real meaning to Maori, and until this was publicly done the intersecting interests of various Maori right-holders would not have emerged.

9. Cited in Armstrong, 'The Land Claims Commission. Practice and Procedure: 1840–1845', Wai 45 rod, doc i4, p 41
10. Clarke to Colonial Secretary 25 February 1841, ia 1841/250, cited in Armstrong Wai 45 rod, doc i4, pp 48–49

2.7 Complexities and Attempts to Hasten the Process

Meanwhile Clarke was expounding his understanding of the complexity of Maori land rights. He poured scorn on those, ignorant of Maori language and custom, who could purport to achieve an equitable purchase in a few hours from a few chiefs. The people living on the land also had to consent, Clarke explained. New Maori claimants were also coming forward, reviving claims to land from which they had been driven and which had since been sold by the conquering group. In June 1843 Clarke was arguing for the preparation of a 'Domesday Book', with the chiefs being asked to delineate tribal boundaries. The process would be expensive and lengthy but he did not know how progress could be made unless it was done.[11] By October 1843 Clarke reported his view that Maori land tenure was so complex, so many interests overlaid, all of which had to be requited for a purchase to be complete, that only small areas of land could be purchased at the time. This process, however, would be so expensive that it would absorb all the potential value of the land to the Crown.[12] Similar sorts of understanding were being attained by officials like Edward Shortland, sub-protector interpreting for the commission in the South Island.

Clarke had also revealed an explicit condition in the Maori conveyances:

> it never was the custom of the natives to alienate a tract of country upon which they were living unless they intended migrating or altogether abandoning it. The primary object of a New Zealander in parting with his land is not only to obtain the paltry consideration which in many cases is given to them for their land, but to secure to them the more permanent advantages of finding at all times a ready market for their produce with their white neighbours; but this important end is at once defeated upon the assumption of a total alienation as claimed by the New Zealand Company.[13]

Clarke was thus arguing that only slow and careful purchases of relatively small areas, should take place (or could have taken place), leaving the Maori vendors still in the vicinity and with access to the new settlements.

The question of surveys soon became critical. The commission's first surveyor accidentally drowned; the Surveyor General (Felton Mathew, then C W Ligar) and his small staff were already heavily involved with other public work. Meanwhile Godfrey had discovered that of the 1000 or so claims now before them, the boundaries were very roughly described in most deeds, the acreages grossly exaggerated, the claims overlapped and Maori had little idea of area or boundaries in English terms. Hobson instructed the commissioners not to delay their recommendations for a survey provided the claimants pointed out to them an accurately defined boundary line.[14] What exactly that meant is not clear, but it was no substitute for having Maori show, *on the ground itself*, the boundaries of what they intended to convey.

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11. Clarke to Shortland, 1 June 1843, cited in Armstrong Wai 45 rod, doc i4, p 72
12. BPP, 1844 (556) pp 955–959
13. New Zealand Company 12th report, Appendix e, cited Armstrong, Wai 45 rod, doc i4, p 70
14. Hobson to Russell, 30 July 1842, cited in Armstrong, Wai 45 rod, doc i4, p 87

Acting Governor Shortland then accepted a suggestion from Ligar that the claimants be allowed to employ private surveyors, with Government paying them up to £3 per lineal mile. He also followed up Hobson's plan to concentrate settlement, relocating claimants near Auckland by issuing 'land orders', later called 'scrip', at the rate of one acre for every £1 spent by the claimants. Lord Stanley approved these arrangements but the private settlers hung back from surveying their claims, still hoping that they might get the whole of their claim approved, not just the maximum allowed by the Land Claims Ordinance.

2.8 Adjustments of Claims in the Commission

By early 1842 it was quite apparent to the commissioners that Maori had no intention of total alienation of all the land within the vast general boundaries outlined in some of the deeds. Godfrey and Richmond had no hesitation in dismissing as utterly unintelligible, to Maori or European, some of the pretentious deeds drawn up in pseudo-legalistic English. It was also apparent that the commissioners accepted the evidence of Maori over that of the claimants, much to the chagrin of the settlers who often had their claims denied or heavily reduced by Maori evidence.

The commissioners also noted that Maori had continued to live within the boundaries of many claims and recommended that all their cultivations, fishing grounds and wahi tapu ought in every case be reserved to them, unless they had quite certainly been voluntarily relinquished.[15]

The reduction of boundaries and the recommendation of reserves was in fact a common practice by the commissioners, especially if a claim was disputed before them. Only rarely did the commissioners recommend an additional payment, though this did occur. It was, however, common for settlers to make additional payments to Maori before they would consent to appear before the commission and affirm a sale.

Thus the Maori who appeared before the commission rarely denied altogether the transactions they had entered into. They commonly denied them in the terms described by claimants but regularly agreed to the alienation of a lesser and more specific area. The commissioners believed that when surveyors were eventually sent to the land the Maori transactors would show them the precise areas.[16]

This adjustment of areas in the light of Maori evidence was a genuine attempt to come to terms with some Maori views of the transactions. The additional payments by settlers before the hearings and the adjustment of boundaries went some way towards meeting the question of adequacy of price and the variability of the quality of the land. But it is difficult to determine whether Maori were paid a 'fair' or 'adequate' price. It has been noted by Rigby that the multiplication by three of the value of goods in Sydney to get a New Zealand price was a very loose measure

15. Report of March 1842, cited in Armstrong, Wai 45 rod, doc i4 pp 114–115
16. Godfrey report, BPP, 1844 (556), p 4

which probably favoured the settler.[17] On the other hand, by the time settlers paid the fees for the commission, the costs of Maori witnesses and the cost of improvements (if any) they had made on the land, they were not getting the land cheaply – especially if they ended up with the maximum of 2560 acres. The question of adequacy of consideration paid to Maori is a quite separate matter, however, and commonly related to much larger areas than were granted to the settlers (included indeed the areas taken by the Crown as surplus', without any additional payment to Maori). The question is not a easy one to generalise about, though in relation to the on-sale value of the land, especially where there was millable timber and good water access, it can safely be said that the payments to Maori were very low indeed.

Perhaps more seriously, transactions were still couched essentially in terms of 'sales', that is of absolute alienation. There is virtually no indication of discussion of leasehold or other kinds of tenure, although the legislation allowed for it. The arrangements for reserves or demarcation of boundaries of the sale, if they allowed the Maori community concerned to remain close to the transacted land, would have partly met Maori desire to have Pakeha on hand for trade and employment. But, unlike leaseholds, they did not permit Maori to have these advantages *and* retain the beneficial title of the land as well. It is also clear that many, if not most, of the missionaries' claims were efforts to take land under trusteeship for local Maori, as well as to provide for the missionaries and their families. These trusts seem not always to have been recognised by the commission or, if they were, to have first involved an absolute alienation to the missionary settler.[18]

2.9 Adequacy of Inquiries

There has been much discussion in evidence about the adequacy of the commissioners' inquiries. Summary statements of Maori evidence typically read:

> that is my signature on the deed now before the Court. I saw the rest of the chiefs sign. It was read and explained to us before we affixed our names. We fully understand it and were satisfied. We sold the land described in the deed to Mr Maning when we signed it – its was ours to sell and was never disputed by other natives. We have not sold it to any other person. We received the money and goods specified on the back of the deed from Mr Maning at the time we sold the land. The boundaries are correctly described [in the deed] and I can point them out whenever required to do so. We were aware that in selling this land we were parting with it forever to Mr Maning.

These records are summaries of evidence taken in Maori, which was not recorded in full, and little can be assumed about what did or did not go into the actual

17. B Rigby, 'Old Land Claims' in Rose Daamen, Paul Hamer, and Barry Rigby, *Auckland*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), 1996, pp 113–114
18. See Waitangi Tribunal, *Muriwhenua Land Report*, Wellington, GP Publications, 1997, for an examination of cases in that district.

dialogue. Where claims were disputed by Maori the record of evidence is much longer.

There is also evidence that the commission did not accept unquestioningly the evidence of claimants as to the value of goods they had paid. Whereas William Webster, for example, claimed to have paid nearly £1000 for Great Barrier Island, Godfrey found from Maori testimony that he had paid only £580 and the rest in promissory notes.[19] Dr Rigby has rightly suggested that the value of goods paid in Sydney was probably not closely checked but there was clearly some effort to ascertain whether a payment was actually made to the Maori transactors.

What is more worrying is that the commissioners required the testimony of only two witnesses before accepting that an alienation had occurred. Moreover the witnesses often had to be paid to appear, especially if the hearings were at some distance from their village; some of the payments have the character of bribes to support the sale rather than real payments to the community. Given the intricacy of Maori land tenure, and the likelihood of intersecting interests by more than one hapu, the 'two-affirmers test' could well have meant that not all the right-holders were represented in the commissioners' proceedings, even if (which is uncertain) the witnesses attending had fully discussed the claim with their communities beforehand. Once again one comes back to the question of adequate and public boundary marking on the land itself, which alone was likely to bring forward all interested Maori parties.

By April 1843 the Government under Acting Governor Shortland had become so concerned that all intersecting Maori claims had not been identified and completely 'extinguished' that it was decided to require a double check before Crown grants would issue. A surveyor was to report that the survey of the land had not been interrupted or any (new) claim preferred by Maori in respect of the land; and a Protector was to report that he was 'satisfied of the alienation of the lands by the former owners'.[20]

Protectors continued to carry out some inquiries but no surveyors' reports appear to have been submitted before Governor FitzRoy arrived in December 1843.

2.10 FitzRoy's Intervention

Crown policy on old land claims was reviewed in London before FitzRoy sailed for New Zealand. FitzRoy gave it as his view that land that was validly purchased from Maori, but in excess of what the settler was allowed by existing rules, should be returned to Maori ('unless they or their descendants should not now prefer any claim to it'), rather than be sold to settlers or retained by the Crown. His reasons were that in selling 'such extensive tracts of land' Maori could not have known their value to settlers, nor foreseen the consequences to themselves. FitzRoy clearly had

19. olc 4/25 NA Wellington, cited in M Russell, 'The William Webster Claims' in Russell, Rigby, and Moore, 'The Old Land Claims'.
20. Shortland to Clarke, 21 April 1843, cited in Armstrong, Wai 45 rod, doc i4, p 175

in mind the big purchases like those of the New Zealand Company and was possibly unaware that those claims were already being modified in New Zealand to reduce boundaries and except or reserve Maori settlements.[21] FitzRoy was also aware that Maori were resisting the occupancy of one Charles Terry whom Acting Governor Shortland tried to place on surplus land in Fairburn's purchase at Tamaki. The question of surpluses was apparently being 'anxiously discussed' among Maori about this time. FitzRoy thought that Maori would 'become exceedingly irritated' if Government tried to put settlers in place or take land as surplus that Maori had sold to private buyers.[22]

Lord Stanley decided, however, that the excess of any land *duly purchased* from Maori should be retained by the Crown, but FitzRoy should protect Maori rights in respect of land they were actually occupying before offering any surplus for sale. Stanley therefore instructed FitzRoy in respect of land that had been alienated from Maori without 'such fraud or injustice as would render it invalid', and where neither on 'the grounds of inadequacy of price [ie that was an issue after all], nor on any other ground could the former proprietors of the land [the Maori] require that it be set aside', the settler's claim should be recognised to the maximum allowed. 'The excess is vested in the sovereign as representing and protecting the interest of society at large . . . for the purposes of sale and settlement'. Where it happened, however, that Maori were found in occupation or, 'prompted by feelings entitled to respect', solicited the return of the land, it would be FitzRoy's duty to deal with them 'with the utmost possible tenderness and even to humour their wishes so far as it can be done, compatibly with the other and higher interests over which your office will require you to watch'.[23] That is, land not wrongfully acquired from Maori might – not would – be returned to them as a matter of policy if this was not incompatible with 'other and higher' interests.

On arrival in Auckland, FitzRoy proceeded to muddy the waters. According to a *Southern Cross* report of 30 December 1843 he announced to a welcoming assembly of very senior chiefs that he would 'Disown any and every intention on the part of the Government to appropriate . . . the surplus lands of the original settlers, they are to revert to the original owners . . . the claim to the lions' share is abandoned'. A similar statement was noted in the *Southern Cross* of 20 January 1844. FitzRoy also told a CMS representative that the surplus would be returned 'except in cases where the question of the ownership might excite feuds'.[24]

But by mid-1844 FitzRoy's tone was apparently changing. By then he had set up a trust to administer the 'tenth' reserves of the New Zealand Company and the tenth to be reserved from purchases under his waiver of Crown pre-emption. On 6 July the *Southern Cross* reported that 'the surplus lands of the original settlers will also be vested in these trustees for the benefit of the aborigines generally'.[25] Armstrong

21. FitzRoy to Stanley, 16 May 1843, cited in D Armstrong and B Stirling, 'Surplus Lands. Policy and Practice: 1840–1950', Wai 45 rod, doc j2, p 9
22. FitzRoy to Stanley, 15 October 1843, cited in Armstrong and Stirling, Wai 45 rod, doc j2, p 26
23. Stanley to FitzRoy, 26 June 1843, Wai 45 rod, doc i4a, pp 213–214
24. Cited in Armstrong and Stirling, Wai 45 rod, doc j2, pp 13–14
25. Ibid, p 15

and Stirling are very likely correct in their surmise that FitzRoy's initial statements were made in the belief that monster claims were still being made over large areas, including Maori settlements, but that by mid-1844 he had found that the monster deeds had been demolished by the land claims commissioners and/or that Maori settlements were being reserved anyway. In fact FitzRoy, like his predecessors, was discovering that there was little Crown surplus available from which to endow the Maori trust or for any other purpose.

The confusion was worsened by the widespread belief that the surplus being retained by the Crown was not land which had been *validly* acquired by the Maori but land which had been acquired *fraudulently* or *acquired for inadequate payment*. Instead of returning this to Maori, the Crown was keeping it, or so it was alleged by the Government's critics. The settlers had, from the outset, hated the intervention of the Crown in their (largely shabby) purchases, and there can be little doubt that they fomented suspicion and hostility among Maori about the Crown's actions at the same time as they were cultivating Maori support for their campaign against Crown pre-emption. It was in the settlers' interest to evoke Maori prejudice against the Crown in the hope that their own original claims would be the more strongly supported.

Yet George Clarke himself suggested to the CMS Secretary that land unfairly purchased as well as fairly purchased should not go back to Maori but to a trust for Maori 'if there is any danger of their again squandering it away'.[26] This kind of paternalism was perhaps affecting FitzRoy's policy.

Yet at the same time as he was talking about a Crown endowment for Maori (from an already shrunken pool of Crown surplus), FitzRoy was greatly enlarging the grants to settlers. He did this via the fresh inquiries and recommendations of a new commissioner, Robert Fitzgerald, partly to reward missionaries for long service and partly to encourage settlers whom he thought would bring investment and development to the colony. Thus William Webster, a sharp operator who had already been imprisoned for debt in Sydney, was awarded 12,674 acres of his many claims in Hauraki and Piako. Godfrey and Richmond had accepted the testimony of two witnesses only, to the purchase of 80,000 acres west of the Piako River. Webster on-sold his interests but when settlers tried to occupy the land in the 1850s they were resisted by Maori. An official inquiring on the spot found the Maori communities universally denying they had sold land right down to the river frontage because it was important for eel fishing.[27] The example casts doubt upon the adequacy of the Godfrey–Richmond inquiries as well as exposing FitzRoy's recklessness in making large grants, especially without survey.

For despite the warnings of Clarke and others FitzRoy decided to issue Crown grants to settlers without waiting for survey. Godfrey protested that if this were done without the 'double check' agreed by Acting Governor Shortland, confusion

26. Clarke to Dandeson Coates, 9 July 1841, co 209/17, p 317, cited in Armstrong and Stirling, Wai 45 rod, doc j2, p 20
27. See Matthew Russell, 'The William Webster claims', in Russell, Rigby, and Moore, 'Old Land Claims', Waitangi Tribunal Rangahaua Whanui Series unreleased draft

would arise, as unsatisfied Maori claimants would resist the occupancy of the land either of the original settler or an innocent third party who had purchased a Crown grant in good faith (as the Webster case in fact later demonstrated). Edward Shortland, sub-protector, also confirmed that additional payment had been made (or promised) by claimants to interested Maori to induce them to support their claims before the commission; this might happen without the knowledge of other interested Maori and innocent settlers might later find themselves challenged when they tried to enter the land.[28] Major Thomas Bunbury, head of the Imperial forces in New Zealand since 1840, also warned of the need for the double check; in a minute to the Colonial Secretary about a scrip award at Kohekohe, Bunbury wrote, 'this amount of acres must however be verified by the Certificate of a Accredited Surveyor and Protector of Aborigines. Until that is done any and every Deed for the land exchanged [for scrip] must be withheld.'[29]

But FitzRoy would not be deterred. The Colonial Secretary, Andrew Sinclair, was instructed to write to Godfrey that:

> the many inconveniences and difficulties, such as you suggest in your letter are anticipated by His Excellency, and that he is prepared to encounter them. The Government issues Crown grants which are cautiously worded, and which do not bind the government to maintain the correctness of the boundaries or the extent of the land granted. For those who have made good valid purchases, and have fairly satisfied the native claimants, such grants will be sufficient. For those who have not done so, it is neither *intended* nor *desired* that they should be sufficient. I am further desired to say, that as the Crown cannot grant that which it cannot possess, if a valid and complete purchase has not been made, the Crown cannot give a title to the land.[30]

On the basis of this bland and irresponsible argument FitzRoy then began to issue Crown grants. Several were increased beyond the 2560-acre ceiling, at the recommendation of the new commissioner Fitzgerald, and under the authority of section 6 of the 1841 ordinance. Sometimes these grants exceeded what was originally claimed – all on unsurveyed land. The 1856 committee of inquiry calculated that about 400 grants were prepared and 350 issued. Many questions as to title and as to boundaries remained unresolved. Settlers were put in possession before the many exceptions, variations to boundaries and reserves recommended by the commissioner had been marked on the ground and all Maori interests identified. Disputes such as Godfrey and Shortland had envisaged indeed arose in a good many cases. What the settlers got from the Crown was, as FitzRoy frankly intended, a title which might or might not have seen the prior extinguishment of Maori proprietary rights. What is more, some of the settler occupiers were derivative purchasers, who had bought the Crown grant from the first grantee, in the belief that the title was clear of Maori claims. In some cases they inherited a dispute. And Maori inherited

28. Armstrong and Stirling, Wai 45 rod, doc j2, pp 188–190
29. Bunbury to Colonial Secretary, 24 June 1844, ma 1991/a 520, pp 10–12, cited in Daamen et al, *Auckland*, p 108. Bunbury has been inadvertently transcribed as Banbury.
30. Sinclair to Godfrey, nd (July 1844?), ia 1, 1844/1370, Wai 45 rod, doc i4A, p 452

an intensified grievance. Commenting on the situation in 1854 the Colonial Secretary, William Gisborne, noted the highly unsatisfactory state of settlers having 'floating rights' over thousands of acres, unsurveyed, and with the exceptions in the original transactions recommended by commissioners at the request of Maori not marked out. 'Thus vast tracts are left unoccupied, native claims, which in many cases have never been wholly extinguished are revived in full force, and become a fruitful source of confusion and discord'.[31]

2.10.1 Scrip land

Claims at Oruru and Mangonui could not be investigated because of fighting between the chiefs Panakareao and Pororua. The claimants were instead given 'land orders' or 'scrip' entitling them to a certain number of acres (or of pounds sterling at the rate of one pound for each acre of claim allowed) to be selected near Auckland. The Government then took over their claims. The process was in fact used more generally under Hobson, who was anxious to concentrate settlement about Auckland, and continued under Shortland and FitzRoy. Eventually some 152,953 acres of scrip or their money equivalent were awarded to settlers. Usually this followed from an investigation by the Land Claims Commission, but not always following an inquiry involving Maori, as in the case of the Mangonui lands. The Government, however, assumed the scrip land to be Crown land in each case. Thus the scrip claims were not investigated by the subsequent commission of F D Bell (see below). Whether the Crown in fact acquired the scrip land is another matter. If the claim was followed up promptly by survey and occupation (in the steps of the settler purchaser who had taken his land elsewhere), the Crown secured occupancy. In other cases the Crown's claim lapsed or was superseded by a subsequent Crown purchase encompassing the scrip claim. The whole issue of scrip claims is a confused one but it seems to have resulted at least in the Mangonui Maori losing land without the benefit of a Land Claims Commission investigation.[32]

2.10.2 The Godfrey and Richmond commission completes its work

On 30 September 1844 Colonel Godfrey submitted his final report. As well as the claims heard by himself and Richmond the report appears to include claims heard by William Spain in the New Zealand Company areas (of which six relate to the Company itself (see chapter 3) and the remainder to various other claimants). Of the 1049 claims submitted, half concerned the Auckland district and a further quarter the adjacent Hauraki and Waikato districts (as evidenced in the subsequent returns of Commissioner Bell in 1862 and 1863). Of those 1049 claims: 490 were allowed; no grant was recommended in 165 cases; 43 were formally withdrawn; 66 were not investigated for reasons not stated; 40 at Oruru were not investigated

31. Gisborne memo, 7 July 1854, cited in Armstrong and Stirling, Wai 45 rod, doc j2, p 47
32. See discussion in the introduction to Russell, Rigby, and Harman (appendix to 'Old Land Claims' report).

because of the conflict there over the rival claims of the chiefs Panakareao and Pororua; and in 241 cases the claimants did not appear. Six other claims concerned the New Zealand Company. Of the 165 claims where no grant was recommended the reasons were as given below.[33]

No Maori evidence	13 cases
Claimant refused to pay fees	23 cases
Derivative claims where the original purchaser had already received the maximum	62 cases
Derivative claims with no proof of transfer	4 cases
Maori opposition	30 cases
Purchases after the proclamation of 16 January 1840	10 cases
Incomplete purchases	3 cases
Maximum award already granted	8 cases
No reason given	12 cases

Of the 490 purchases recognised by the commissioners, Chief Protector Clarke made a very critical comment:

> All that has been ascertained is that various Europeans have made purchases from certain natives, but whether those natives had a right to sell or how that right was a acquired, is still, in the majority of cases, quite a matter of doubt.[34]

2.11 Maori Attitudes to the Transactions

It is likely, following Clarke's view, that in the majority of cases doubt remained whether all Maori with interests in the land had been consulted – or at least explicitly consulted, although many would have been aware of transactions taking place on or near their land.

Commissioners' reports show that the Maori who were consulted, in all but a small minority of cases, supported the transactions. In many cases, however, they insisted upon major modifications to the location and boundaries, and usually reserved their settlements, cultivations, and important mahinga kai.

Additional payments were also commonly sought but these tended to have the character of one-off payments for agreeing to support the transaction and appearing before the commission, rather than being one of a series of regular payments as in a lease situation. If a sequence of payments was sought it was generally by

33. New Ulster Gazette 1849, cited in Armstrong, Wai 45 rod, doc i4, p 192
34. Half yearly report, 1 July 1845, cited in Armstrong, Wai 45 rod, doc i4, p 192

interested parties who had not shared in the first payment. In this sense, in the face of the attitude being taken by the Crown officials, Maori may have moved some way towards European notions of sale.

The sense of sale or permanent alienation was certainly the mode which the commission process itself constantly inculcated – no other was seriously discussed save for some joint occupancy by Maori and missionary in respect of the missionary claims, and then usually only after conveyance of title to the missionaries had been assumed. In the face of the constant demands and insistence of the settlers and officials, and knowing as many chiefs did of the nature of European towns such as Sydney (or, closer to home, Auckland), it is scarcely credible that Maori would not have gained some understanding by 1843 or thereabouts that the land concerned was passing from them permanently. This is probably why they paid considerable attention to limiting the areas alienated, of defining important locations which they wished to retain and of distinctly delineating the areas which would go to the settlers. Most of the talk and action was about the boundaries of transactions, not about the terms on which the settlers were to occupy. The option of formal transfer less than sale was not given to Maori by the Crown.

Even when the land was defined and the transfer agreed, however, Maori continued sometimes to traverse the land, and to take materials from the bush, fish from the streams, and shellfish from the foreshore (possibly with permission, possibly not). There were also instances of their making commercial contracts in respect of timber on land which they acknowledged as 'sold'. It was to be some years before the question of what was transferred with the land was clarified in Crown purchase deeds and negotiations, and Maori expectations of using mahinga kai on formally alienated land continued late in the century. Indeed for much of rural New Zealand there was a kind of co-existence between Pakeha farming and Maori village life in terms of land use, employment, and social relations, although the Pakeha gradually asserted their control through fencing, swamp draining, bushfelling, and the enforcement of trespass laws over what had become, in the received law, their property. The European sense of 'exclusive possession' was probably not fully apprehended by Maori in respect of any of the pre-1840 purchases, or for some time after.

In this context there were, in the 1840s and even much later, expectations among Maori communities of what the Pakeha purchaser who had entered into relations with the community by the land transactions, should provide for them. This included buying and selling produce, employment, assistance with health care, and gifts of meat and other produce for important hui. Much of this indeed went on even into the twentieth century between Maori and Pakeha neighbours, whether on old land claims or on other kinds of direct purchase.

Although some of the big speculative purchases were done by agents, Maori generally considered themselves as having entered into a relationship with particular Pakeha in each of the purchases. On that basis they were often willing to affirm the transaction years later. Even if the claimant had disappeared from the scene in the meantime, those Maori who had made a compact with him tended to support

that compact when he reappeared, as in the case of the Banks Peninsula chiefs who had made a deal with the French whaling Captain Langlois. This, however, did not prevent other Maori with interests in the land from independently making arrangements with other Pakeha. Overlapping claims were common.

The personal nature of transactions was part of the reason for Maori objecting to the Crown diminishing the settlers' claims and taking a surplus. Another reason was that by interposing itself in the private transaction the Crown was slighting the mana of the chiefs who sought to control the relationship still. Maori did not always resent Crown intervention though. Against the New Zealand Company and other powerful claimants the chiefs were glad to have the support of the commissioner to discuss and reduce the claim. In Wellington they were glad even to have the support of the soldiers when a settler mob tried to evict Maori from contested lands at Te Aro in mid-1840. They were glad too to have the support of the Crown against the French claims in French Akaroa. But in the majority of cases, where relatively small purchases were concerned, Maori still expected at least a substantial voice in the arrangements. In this context the Crown's taking a surplus and placing other settlers on the land was commonly resented. FitzRoy complained that Maori would take up the cause of the claimants and that it was impossible to get them to comprehend the 'strictly legal' view of the Crown's right to a surplus.[35]

In time some of these matters were adjusted, and Maori accepted other occupants. But for this to happen smoothly and without rancour there generally needed to be a further negotiation. Where this was not done the Crown's taking of a surplus was commonly resented by Maori, probably as much from the slight to mana as from the loss of the land itself. This was particularly likely to be the case where large claims were advanced, but where the intention of the Maori was to locate the settlers on a portion only of the land within the general boundary described. In the absence of surveys to clearly define the 'external boundary' (of the area under discussion) and the 'internal boundary' (of the settler's actual area of occupation), the potential for confusion was very great, as was the likelihood of Maori resentment at the Crown taking the 'surplus'. Eventually some of these resentments were assuaged by the Crown making additional payments, undertaking purchases which subsumed the old land claims within their borders or defining reserves for the Maori transactors.

2.12 Grey's Governorship

Important time was lost under Grey's governorship because, instead of supporting surveys of the land or investigations by the Protectorate, Grey disbanded the Protectorate and attacked the missionaries heavily over their land claims. It is noteworthy that Maori did not generally support Grey in his effort to show that

35. FitzRoy to Stanley, 15 October 1844, BPP, vol 4, p 409

missionaries had 'robbed Maori blind', pronouncing themselves satisfied with the arrangements made by Henry Williams, for example, at the Bay of Islands.

The case of *Regina v Clarke* was brought by Grey in 1847 to test the validity of FitzRoy's extended grants. They were upheld by the Supreme Court as a valid exercise of the Governor's discretion but in 1851 this decision was overturned by the Privy Council.

Pressed by Grey over his 6589-acre grant at Waipapa, the missionary James Kemp strongly urged that if his grant was reduced the surplus should not be returned to Maori (for it would be a source of discord among them), but 'put in trust for the entire benefit of the social and religious welfare of the native race' (with other CMS property).[36] Grey did not act on the suggestion. The endowment trust concept required by Russell's January 1841 instructions, languished under Hobson, flourished briefly under FitzRoy, and died under Grey.

Little progress was made under Grey in implementing the promises and recommendations from the commissioners for more Maori reserves, which remained unsurveyed and ungranted, and increasingly forgotten by the officials. For example, instead of granting the one-third of the Fairburn purchase at Tamaki promised to Maori in the original purchase arrangements, Grey paid off some of the Maori complainants and took some 70,000 acres of prime South Auckland land for the Crown.

In 1849 Grey passed the Crown Titles Ordinance (sometimes called the Quieting Titles Ordinance). This confirmed the validity of unsurveyed grants and offered to increase them by one-sixth if settler claimants would have them surveyed. This attracted only about 20 responses, as most claimants still hoped to get the whole of their original purchase granted. The ordinance was effectively a dead letter.

2.13 Later Efforts at Resolution

In 1854 a pre-emptive land claims Bill was introduced in the New Zealand legislature to resolve questions of legality surrounding FitzRoy's pre-emption waiver purchases (see chapter 4 below). At the initiative of William Gisborne, the Colonial Secretary, a proposal was developed to appoint a new commissioner to investigate these and the old land claims. All the same, Gisborne feared the effect of reopening claims which had received the Governor's final decision.[37]

At this time efforts were being made to effect new purchases from Maori. The Government did not wish to purchase land which had already been sold before 1840 – which of course required identification of such land.

A parliamentary committee consequently reported on the situation in 1856:

> The whole amount the grants declare grantees entitled to may amount to 2,000 acres; but the grantees, considering themselves entitled to the whole amount

36. Kemp to Colonial Secretary, 11 October 1847, olc, 1/595, cited in Daamen at al, *Auckland*, p 91
37. Gisborne memo, 7 July 1854, cited in Armstrong and Stirling, Wai 45 rod, doc j2, p 47

> described by the boundaries in the grants, claim at least 3,000. The grants are often bought and sold, the repurchasers still preferring their claims. Some of the grantees are in possession of the lands granted; but a great part of those claims are unoccupied by anyone. Some portions have been resumed by the natives; and some, where the native title has been extinguished, and no grants made, have been considered Crown Lands, and taken by the Government as such; although in reality it has generally had to make the natives some additional payment. Still in a great number of cases no possession has been obtained by anyone; the natives disputing the ownership of the land in the absence of the claimants, or the insecurity of the titles they hold preventing the latter from attempting to enforce those supposed rights.[38]

Historians acting for the Crown have commented that it was unclear whether Maori were disputing whether the land had ever been sold, or claiming it because the buyer had never occupied the land.[39] Such a sharp distinction is not valid; Maori conceptions of pre-1840 land transactions would certainly have been on the customary principle that if the land was not occupied, the settler's right to it would have lapsed.

The select committee recommended that a commission be appointed to investigate a range of problems and claims left over from the Godfrey–Richmond inquiries as well as the FitzRoy waiver purchases. Assistant commissioners were to take local evidence and were to accompany surveyors to the land. 'Where the lands which commissioners should adjudge a claimant entitled to are withheld by the natives, the Government should be empowered to complete the claimant's or grantee's title', and recover the cost from the grantee. The Government was clearly anticipating the possibility of Maori resistance to claims; its remedy would be to 'complete' the claims, not abandon them.

The Land Claims Settlement Act 1856 then established the commission, stating that 'the peace and well-being of the colony' requiring that old land claims should be finally settled and 'disputed grants corrected'. The Attorney-General was empowered to call in Crown Grants already made and required the grantees to meet the requirements of the new commission; positive encouragement was given in the form of an increase of up to one-sixth more for having the land surveyed. No grant was to made unless the claim was marked out on the ground in a plan certified by an approved surveyor. The possibility of native title not being extinguished over the land claimed was dealt with by section 38, which stated:

> no lands shall be included in any grant under the provisions of this Act over which it shall not be proved to the satisfaction of the Commissioners that the Native title is extinguished.

Section 39, however, provided that where it was shown that Native title had not been extinguished the Governor could extinguish the title and obtain a cession of

38. 'Outstanding land claims select committee report', *Votes and Proceedings of the House of Representatives*, 1856, vol 2
39. Armstrong and Stirling, Wai 45 rod, doc j2, p 55

the land, grant it to the settler and receive from the settler the estimated costs of the extinguishment.

There were sharp limits to the range of the inquiry: where the Godfrey commission had found that a sale had taken place, and made a grant or an award of scrip, it was not proposed to reopen the question.[40] This meant that if the Godfrey–Richmond inquiries had themselves been inadequate, the new commission would not disclose that, or give Maori an opportunity to present new evidence. In view of Clarke's serious doubts as to what the first commission's awards really signified, this was a major limitation; clearly the Government and Parliament were seeking to finalise the claims, not to reopen them all.

2.14 Bell's Commission

F D Bell, a former New Zealand Company Agent, was appointed sole commissioner in 1857. The Attorney-General was empowered to call in existing grants. New grants were made conditional on the settler claimant providing a certified survey, which required actual work by the surveyors on the land. The physical marking of boundaries on the ground (at last!) was obviously going to be a test of real significance in terms of disclosing Maori attitudes to the transactions. If the surveys were interrupted clearly this would be an indication of discontent, if not with the transaction itself then with its boundaries.

Moreover, the Government now had in mind a new and rather devious purpose in requiring a survey of the land. Incentives were built into the Act in the form of a survey allowance of up to one-sixth more of the settler's allowable claim (plus other allowances for expenses) for surveying the outside boundary of the land claimed. As Bell reported:

> it has been laid down as a general rule that claimants should survey the external boundaries of their whole claim so that after laying off the quantity that they may be found entitled to, the surplus land may revert to the Crown without disputes – the supposition being, that while the Natives will give possession to a claimant and allow surveys to be made of all the land they originally sold him, they were likely to object to the Crown taking possession of any surplus afterwards, if only the part to be granted to the claimant is surveyed by him.[41]

This amounted to a very deliberate taking advantage of the Maori view of the transaction (that is a personal contract with the settler) to lever up a surplus for the Crown. It is certainly from the surveys done for Bell's commission, and the awards of that commission, that a surplus for the Crown starts seriously to be identified. The claims were enlarged beyond what the settler claimants might not (without the bonus incentive) have asserted, and they were of course treated as purchases of the freehold, not as any conditional tenure.

40. Armstrong and Stirling, Wai 45 rod, doc j2, p 65
41. Bell memorandum, 13 January 1857, cited Armstrong and Stirling, Wai 45 rod, doc j2, p 95

Maori objectors did indeed come forward in many cases during the surveys and efforts were sometimes made by Bell or his staff to adjust the claims in the course of proceedings, but such adjustments were minimal.[42] Bell's work has been rightly characterised as intended to identify and secure for the Crown a pool of surplus land such as had been envisaged from the outset of the process in 1839. To this end Bell took a very hard line against any Maori challengers to the awards of the first commissioners, Godfrey and Richmond. Even where a missionary such as James Kemp, who had acquired land partly to hold it in trust for Maori, sought to return to Maori land granted to him by Godfrey and Richmond, Bell ruled:

> The Commissioner, after explaining the law to the Natives, over-ruled all their objections, and he announced that it [ie, the land excluded in Kemp's survey] would be taken possession of for the Government, as it could not for a moment be allowed that a claimant should return to the natives any portion of the land originally sold.[43]

Because the land lay between two hapu and was not then surveyed by Kemp or anyone else, the dispute smouldered on, with Maori still occupying part of the land But the Crown treated it as alienated.[44]

Bell reported from his Mangonui and Whangaroa hearings, that in a number of cases he had explained the basis of the Crown's claim to a surplus. He reported that his Maori hearers expressed themselves satisfied with the process although whether that was actually so is open to question. Occasionally Bell made small reserves for Maori from the surplus.

But, in some contrast to the first commission, persistent Maori objections tended to focus on whether the land, or portions of it, had been alienated at all, rather than on the principle of surplus land as such.[45] This was perhaps indicative of the greater Maori awareness of what a 'sale' meant in the European view. In such cases Bell sometimes modified a settler's claim where he was satisfied the Maori objectors were genuine owners who had somehow been prevented from presenting their evidence to Richmond and Godfrey. However, he took a hard line against young Maori claimants who tried to modify awards of the first commissioners that had been accepted by their elders. He wrote after an inquiry at Russell in 1857 that in justice he would not put Maori off land which Europeans had claimed before Godfrey but which had been returned to Maori by that commissioner:

> equally they could not expect that after such a lapse of time I should listen to the claims of Natives to get portions of the land awarded to Europeans by the former Commissioners; and that although I had in accordance with my invariable practice heard all they had to say, I should certainly not give back an acre which had been validly sold by those who in those days where fully empowered to sell, nor allow the claim of anyone who had failed to bring his objection forward at the original inquiry.

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42. W H Oliver, 'The Crown and Muriwhenua Lands: an Overview', Wai 45 rod, doc l7
43. Bell memo, 26 March 1858, ma 91/20, p 10
44. Daamen at al, *Auckland*, pp 94–98
45. See example the case of Heremaia, in Shepherd's purchase at Whangaroa, olc 5/34, NA Wellington.

But Bell's distinction between these two categories of Maori objections is a tenuous one, resting upon the concept of certain Maori being 'fully empowered to sell' in the pre-1840 situation. Such a concept is of very doubtful validity; as Clarke and other officials had been pointing out, it was very difficult to say exactly who, if anyone, was 'empowered to sell'.

In a report to the Government in 1858, Bell referred to the positive and cooperative responses of the chiefs to his commission:

> There have been a number of very complicated cases which afforded ample opportunities for the display of a bad disposition if any had existed; there have even been many spurious claims advanced by the younger men because they know it was their last chance; it is an honour to the Natives that (with two or three unimportant exceptions) they have in every instance peaceably and patiently stated their claims before me, and cheerfully submitted to any adverse decision. They have done more than yield a passive acquiescence in the law; many of the Chiefs and Assessors have given me active and intelligent help, taking pains to make themselves acquainted with the principles and even details of the Act, and corresponding with me from different places as to the settlement of boundaries and other matters.

He claimed that Maori, far from objecting to the Crown policy of taking a surplus, accepted that when any right of theirs to land was extinguished by the initial transactions, they had nothing to do with the apportionment of it between the Crown and its subject.[46]

Professor W H Oliver, in commenting at length on the Muriwhenua claims, notes that no independent evidence has been cited in support of Bell's assertions as to Maori understanding and acceptance of his proceedings.[47] The plain reading of Bell's 1858 report is that it reflects the sort of optimism that officials tend to display when wanting to show ministers that they are succeeding. His own words show him trying to gloss over a difficulty: his suggestions for the extension of time and authority (which emanated in the Land Claims Settlement Act 1858) include a provision for settlers having difficulty getting quiet possession to have their grants exchanged for Crown land elsewhere. Bell explained:

> The commissioners make a favourable award, the title being really extinguished as far as the principal chiefs are concerned, but other Natives refuse to give possession, and Government for political reasons will not interfere; clearly the claimant ought to get land somewhere for his award.[48]

Once again Bell was erecting a distinction between 'the principal chiefs' and 'other Natives'. And once again it is a tenuous distinction, given that 'principal chiefs' had no right under custom to dispose of the interests of their kin without their active consent or at least their tacit consent over time.

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46. Bell to Colonial Secretary, 15 May 1858, AJHR, 1858, c-1
47. Oliver, pp 15–21
48. NZPD, 1858, 19–22, p 479, (cited in Armstrong and Stirling, Wai 45 rod, doc j2, p 90)

As noted earlier the scrip claims in Muriwhenua were not investigated by Bell at all. In other respects his awards were dubious. He was hurried out of Poverty Bay, for example, in 1859, by the local runanga who had reasserted the Maori view of their transactions with traders and denied altogether 'selling land'. Bell nevertheless made some favourable recommendations based on his incomplete inquiries and these were probably influential when the Poverty Bay commission allocated the land after it had been 'ceded' following the Pai Marire disturbances of the mid-1860s.

In 1862 Bell presented a final report. This showed that 1049 old land claims had been examined (by the earlier commissions and in many cases by himself also), together with 54 claims that had not come before the earlier commissions. Altogether the claims affected a total area of some 10.3 million acres. (This appears to include one million for New Zealand Company claims since the Tribunal researchers checking all claims other than the New Zealand Company claims arrive at a total of 9.3 million acres; at their grandest scope the company claims embraced some 20 million acres but they focused mainly on about 1 million acres within that.) From the claims in Bell's list 267,000 acres had been granted to claimants, and 204,000 acres retained by the Crown. About 152,000 acres of scrip had been awarded to claimants also.[49] Subsequently to Bell's reporting, about 5000 acres was awarded to Johnny Jones of Waikouaiti and nearly 10,000 acres to James Busby. Thus some 9,700,000 acres alleged to have been purchased remained in Maori hands. Tribunal researchers, checking Bell's return against figures compiled for the Myers commission of 1948, note that, of the land claimed, over seven million acres were embraced by a mere 14 claims ranging from 100,000 to one million acres each. These 'monster' claims mostly lapsed from non-appearance of the claimants, who knew they could not satisfy the tests of the Land Claims Commission process.[50]

Some £88,000 had been paid to Maori (estimated by giving goods used in payment three times their Sydney value) plus other payments made about the time of the first Land Claims Commission. Sometimes later Crown purchases overlaid the old land claim. But some important claims in Muriwhenua had not been investigated either by the Godfrey commission or by the Bell commission.

2.15 Later Adjustments

Bells' 1862 recommendations were not fully ratified until the Land Claims Arbitration Act 1867. Much of the reason for the delay was the persistence of settler claimants like Busby and John Jones, who had never accepted the limitation on their grants or other requirements of the land claims legislation.

As many submissions to the Waitangi Tribunal have noted, numbers of Maori claims in respect of old land claims continued to be brought forward, particularly to

49. AJHR, 1862, d-10
50. Russell, Rigby, and Moore, 'Introduction'

the Native Land Court after 1865. These refer in many cases to portions of the 'surplus lands'. The Government in most cases declined to allow Maori claims to be erected over these lands, and declared the Maori rights extinguished. Their efforts were at times clumsy and heavy-handed. For example a theoretical Crown entitlement to surplus land was asserted in respect of Richard Taylor's 57,000-acre block in Muriwhenua, which the CMS had not brought before Bell because it was one of blocks which the mission had purchased to keep in trust for Maori and the land had remained in Maori hands. The claim was not pressed by the Crown either in 1871 when the block came before the Native Land Court. In 1877, however, the Government needed an island, Motu-o-Pao, off Cape Maria van Dieman for a lighthouse, and asserted their claim to it as Crown surplus: this touched off persistent Maori protests.[51]

In 1880 a claim was brought by Maori to Taipaku, a block which lay within Richard Davis's claim, which had been investigated by Bell. This caused S Percy Smith, the Surveyor General, to remark that 'This was an attempt to raise again the question of the validity of the Crown's title to "Surplus Lands", a question which is constantly cropping up and giving rise to endless trouble'.[52] Armstrong and Stirling note that this was in fact the first case to arise in Muriwhenua in respect of land which had passed before Bell's commission. The claim was dismissed by the Native Land Court because the vendors had not objected to Davis's purchase, and one had even accompanied the Government's surveyor around the boundaries of the entire claim in 1859.

Smith later forwarded to John Curnin, a solicitor for the Crown Lands Department, a list of five Maori claims affecting surplus land in the Bay of Islands and further north. The claim of Wi Marena Tuoro to Te Huia block at Hokianga was one of them. Wi Marena claimed that the land had been sold before 1840, but not by the proper owners. However, such information had not been brought forward before, either to the Richmond or Bell inquiries and the land had been surveyed, with Maori cooperation, in 1858 to 1859. Wi Marena's claim was therefore dismissed. Curnin took the view that the Maori claims were opportunistic and partly prompted by unscrupulous Pakeha. The basis of his assertion is not clear.[53] No further details of claims to surplus land in the Native Land Court have been cited by historians but dissatisfied Maori began to petition Parliament.

In 1907, Robert Houston was appointed to inquire into six Maori claims to surplus land named in seven petitions from Maori of Tai Tokerau. The investigation concerned, in part, land at Tangonge which the CMS had apparently attempted to bring under its trusteeship plans and on which they had allowed continued Maori occupation. The Crown persisted in claiming it as surplus, asserting that Matthews (of the CMS) had no right to 'give back' land the Maori title to which had been extinguished.[54] In 1925 Judge McCormick upheld the legal argument of the Crown:

51. Armstrong and Stirling, Wai 45 rod, doc j2, p 382
52. Ibid, p 386
53. Curnin to Native Minister, 16 March 1885, ma 91/5, cited in Armstrong and Stirling, Wai 45 rod, doc j2, pp 389–390

that the land had been alienated and that Matthews had no right to return it to Maori. Armstrong and Stirling conclude in relation to this decision that while the Crown held legal right to all land found not to be Maori land, McCormick did not consider closely how the Crown determined that Maori title had been extinguished by the pre-Treaty transaction.[55] The root of the issue (as always) is whether either Godfrey and Richmond's inquiries, or Bell's, had adequately determined the intentions of the Maori parties to the transactions, or that Maori considered their interests in the land to have been extinguished.

Maori claims in respect of Tangonge and other grievances in the north were considered by the Sim commission of 1927 but without any clear outcome and the protests persisted. Inquiries by Judges Acheson and Jones revealed a great deal of confusion as to the legal basis of the Crown's claim to surplus.[56]

The Myers commission of 1948 was the most substantial of the twentieth century inquiries into old land claims and surplus lands. Armstrong and Stirling have pointed out that the list of 53 blocks which the five major iwi of Tai Tokerau put to the commission as 'surplus land' were not, in fact, concerned with surplus land, but land which had been granted to old land claimants.[57] This suggests that the pre-1840 purchases as a whole, not just the Crown's taking of a surplus, was of ongoing concern to many Maori in the north. In fact the majority of claims before the Myers commission were from Muriwhenua, the Bay of Islands and Hokianga.

The Myers commission divided in its findings and has since been criticised from various perspectives.[58] Certainly its proceedings and reasoning seem flawed and inadequate in the light of current knowledge. Messrs Samuels and Reedy misunderstood the nature and purpose of Gipps' scale for determining settlers' entitlements (believing it to indicate what was the due price payable to Maori) and recommended compensation of £61,307. Myers, the chairman, understood the purpose of the scale correctly and recommended compensation of £15,000 based upon the discrepancy between the area estimated to have been sold (in negotiations with Maori) and the area as actually surveyed. This seems illogical since Maori were not thinking in price-per-acre terms anyway. The commission certainly did not get to grips with the question of Maori understandings of the transactions in the first place and assumed that (however, adequate or inadequate they were) it was not possible to reappraise the findings of Godfrey, Richmond, and Bell, as late as 1948.

In any case dissatisfaction persisted in Muriwhenua, if only because of the extreme shortage of land in relation to the population and because the pre-1840 transactions form a very considerable percentage of the land alienated there. The issue is a most serious one for north Auckland claimants before the Waitangi Tribunal, spilling over into the nature of land transactions after 1840 as well as before.

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54. Armstrong and Stirling, Wai 45 rod, doc j2, p 396
55. Ibid, pp 428–429
56. Ibid, pp 409–410
57. Ibid, p 429
58. See for example, Armstrong and Stirling Wai 45 rod, doc j2; M Nepia, 'Muriwhenua Surplus Lands. Commissions of Inquiry in the Twentieth Century', Wai 45 rod, doc g1

2.15.1 Some case studies

Before proceeding to some general conclusions it is pertinent to reflect upon some case studies.[59]

(1) *The Fairburn purchase*

The Fairburn purchase is one of the more evident failures of the Crown to implement its own undertakings. It affects an area southward of the Tamaki Estuary from Otahuhu south to the Wairoa river and from Papakura in the west eastward to the east coast. The area was estimated by the Surveyor-General in 1851 to contain 75,000 acres and by planimeter in 1948 to contain 82,947 acres. During the Ngapuhi raids the area had been deserted by resident hapu. They returned in 1835 under the aegis of Potatau Te Wherowhero but there was renewed disputing between sections of Ngati Paoa, Ngati Tamatera and Te Akitai. To remove the bone of contention, Te Wherowhero accepted a suggestion from Henry Williams to sell the land to the CMS in the name of its agent at Maraetai, William Fairburn. In January 1836, the first of several deeds was signed and payments made. Four more deeds followed by 1839, with various sections of the right holders. By a deed on 12 July 1837 the CMS (or Fairburn) promised to return one-third of the land, when it was surveyed, to Ngati Paoa, Ngati Tamatera, Ngati Terau, Te Akitai, and Ngai Whanaunga 'for their personal use forever, in proportion to the number of persons of whom their tribes may consist in any part of the Thames and Manukau'.[60] Some Maori were living on the land at the time and Fairburn later testified that he understood that their cultivations were not to be disturbed.

After examining 11 witnesses, the Land Claims Commission recommended in 1842 that Maori be left in 'undisturbed possession' of one-third of the block as promised, that Fairburn receive a grant of 2560 acres and that the balance form Crown surplus (with the canoe portage at Otahuhu to be preserved as public land). Two of the witnesses in 1842 disputed that their portions were sold and these were excepted from the purchase. Later, in 1851, Katikati, one of the signatories in 1836, said he had not heard of the 1842 hearings and objected to the inclusion of a portion called Tewharau. Another witness said the evidence as recorded was not what he had said.

In 1851, Wi Tuke said that 'Governor Shortland gave us back Onepuhia (Umupuhia?) under the arrangement of one third being returned by Mr Fairburn'.[61] But this was only a few hundred acres. The promised one-third of the block was not actually granted.

Fairburn's grant was increased under FitzRoy to 5500 acres and the missionary selected this in various parts of block. But the land was still unsurveyed at this point. Shortland had meanwhile tried to place on the land a saw-miller, Charles Terry, with 20,600 acres of cutting rights. He was resisted by Maori who burnt his

59. The first three are summaries of Matthew Russell's case studies in Russell, Rigby, and Moore.
60. Deed of purchase in olc 1/590, NA Wellington
61. Testimony of Wi Tuke, 14 June 1851, enclosed in Gisborne (Colonial Secretary) report, 1 July 1851 olc 1/590, NA Wellington

buildings. William Brown, in *New Zealand and its Aborigines*, published in London in 1845, stated that the Maori view was that 'If the land did not go to Mr Fairburn it must still belong to them'.[62] In other words Maori understood their transaction to be with Fairburn alone, not an extinguishment of their rights in favour of the Crown or anyone else.

Governor Grey subsequently sought to reduce Fairburn's grant but in fact paid him for 400 acres at Otahuhu for the military pensioners' settlement, at £2 an acre (recouping to Fairburn about what he paid in goods for the whole 80,000 acres). He later sold other land at Otahuhu for up to £30 an acre.

Still the one-third was not marked and granted to Maori, and in 1851 Katikati of Ngati Tamatera halted the activities of William McGee who held a timber licence on the block. Katikati claimed that a large area of the land had never been sold.

The Colonial Secretary (William Gisborne) preferred the view of Wi Tuke, that the whole block had been sold in 1836 to 1837, but he acknowledged that the one-third was yet to be returned. He recommended a settlement of the claim by a mixture of land and money payment. In the event the Government paid £200 to Katikati for the relinquishment of Ngati Tamatera claims, £100 to Akitai, and £500 to Ngati Tai (Ngai Tai). There is no mention of Ngati Paoa and Ngati Whanaunga being paid. Because the Government took deeds of purchase for these payments, the large area of valuable surplus in the land never came before subsequent inquiries (such as the Myers commission into surplus land). Whatever one thinks of payments made before 1840, the £800 paid after 1851 was derisory in relation to the value of Tamaki land at the time. Apart from the fact that not all groups mentioned in the 1837 deed received payment the paying off of some Maori in 1851 denied the tribes the benefit of the added value of the promised one-third of the block. Nor was the recommendation of the Land Claims Commission itself implemented. This would appear to fall considerably short of the Crown's obligations under the Treaty of Waitangi.

(2) *Hokianga scrip claims*

In pursuit of its policy of concentrating settlement, the Government from 1842 offered settlers scrip (land orders equal to their claim, or to the maximum allowed), to be taken up near Auckland rather than in the area of the original purchase, the Crown acquiring in exchange the settler claimant's purchase. Due to the absence of surveys the scrip was issued for the acreage estimated by the claimants (provided the purchase was accepted by Godfrey and Richmond as bona fide). Often the claimants over-estimated the acreage of their original claim and left the Government with the shortfall when they tried to take up the land. An insight into Maori attitudes towards scrip arrangements comes from Hokianga where the interpreter John White was overseeing surveys in 1859:

> These claims were not disputed when I was in Hokianga. On a former occasion Mr Clarke was not allowed to survey these claims by the Natives, as they had heard that

62. Cited in Armstrong and Stirling Wai 45 rod, doc j2, p 23

> part of them had been exchanged for Scrip, hence they would not allow the whole to be surveyed least the Government should require them to make up the deficiency in case the land did not contain the number of acres equal to the amount of scrip given in exchange.[63]

The comment suggest an extremely precise understanding of the whole process by the Maori witnesses. It also indicates a willingness to allow occupation by the Crown of the original area the Maori themselves had identified as alienated, but not more. Government did not in fact try to take the shortfall from the Hokianga Maori.

White came to the area with the surveyor William Clarke and met the assembled Hokianga chiefs at Mangunu on 9 November 1858. He read out the boundaries of some 35 old land claims reported on by Godfrey and Richmond. He sought nominees from among the chiefs to accompany him round these boundaries. In eight cases the chiefs challenged the boundaries, but White said he must insist on them: they had had the opportunity to object at the Lands Claims Commissioners' hearings, at which time the commissioners would have adjusted the boundaries. He himself had no authority to do so. He reported that three weeks after the meeting 'this dispute was given up'.[64] Matthew Russell comments that White did not in fact hesitate to modify the commissioners' recommendations if it favoured the Crown to do so.[65] Moreover, when White produced six claims in the Hokianga group which had never been before the commissioners, the assembled chiefs acknowledged the alienation. White took their depositions and included the land in the surveys – an action for which he had no authority.

Matthew Russell identified several reasons why boundaries were not disputed until after the long interval between the original alienation and the survey. One was simply an attempt to push up the price, Maori having realised much more about the rising value of land. White usually referred to the chiefs' evidence given before Godfrey and denied claims based on 1850s prices. A second reason was a desire to protect cultivations which had developed since the sale. White recommended 15 additional small reserves to accommodate these. A third important reason was the existence of valuable kauri timber on the land. Bell had held a short hearing at Hokianga to discuss the Orira Valley claims, and secured agreement to the original boundaries. But when White went to survey these he encountered some resistance from two chiefs desiring to retain a stand of kauri. Bell secured their compliance by sending a letter which White read to the assembled chiefs threatening to stop the trade in the area altogether. The chiefs had been given cutting rights on the land claimed by the Crown and these rights were apparently seen as more important to the community generally than the interest of the two who tried to retain a specific stand of timber.

The dispute, and related correspondence over timber, shows that Maori considered that land could be alienated but not timber on it – that this could be the subject

63. White, 'Report of Proceedings in Hokianga', 8 August 1859, olc/4, NA Wellington, pp 9–10, cited in Matthew Russell, case study 'The Hokianga Scrip Claims', in Rigby, Russell, and Moore, p 4.
64. White, report of proceedings, 8 August 1859, Russell in Rigby, Russell, and Moore, p 7
65. Russell in Rigby, Russell, and Moore, 'The Hokianga Scrip Claims', p 8

of separate transactions. This would have conformed with customary law, where rights to specific trees or resources were often seen as lying with individuals or groups separately from the hapu who primarily controlled the land.

The Hokianga claims show that it was possible to adjust claims broadly to the satisfaction of Crown and Maori, at least in the short term. Maori options were reduced, however, by the officials' normal insistence on the findings of the first commission. Maori were pressed hard to accept these, not withstanding the doubts expressed in 1843 to 1845 by several officials about the adequacy of the inquiry. In 1857 to 1859 it took very determined Maori to move officials to make any fresh concessions.

(3) *The McCaskills at Hikutaia*

The essence of the McCaskill dispute was that Commissioner Richmond found on the evidence of three Maori witnesses, that McCaskill and Martin had made a bona fide purchase of 8000 acres south of Hikutaia Creek, and (on the testimony of two witnesses) of another 4000 acres. FitzRoy eventually recommended grants of 7000 and 3000 acres respectively. McCaskill took possession and began saw-milling, but the land was not surveyed until 1851. At that point, local Maori temporarily resisted the survey of any land east of the Paiaka Ridge and denied selling some two-thirds of the southern block. (At the initial purchase the boundaries had not been traversed but pointed out from a hilltop on a foggy day.) The matter apparently rested until 1858 when the land was resurveyed for Bell's inquiry, again with resistance. Even more resistance occurred when McCaskill began milling on the disputed land.

Bell came to Hikutaia in February 1859. Maori objected to several of McCaskill's purchases in the Thames area. Bell later reported that he stated distinctly to them:

> that it was not possible for me to entertain the claims of those who were mere children at the time of the sale . . . or [who] failed to bring forward their objections in a valid manner before the investigating commissioners in 1843.[66]

At McCaskill's request Bell granted an adjournment. But Bell did not return to hear the adjourned claim. In 1862 at Auckland, at McCaskill's request, he recommended that grants be issued to the McCaskill brothers for all four blocks claimed. Bell noted that Herewini, son of Rangituia, had been a protester, but his mother (a rangatira), had affirmed the sale in 1843 and 'I cannot admit that Herewini shall now be entitled to dispute his mother's sale'.[67]

Maori were angered by Bell's failure to resume the adjourned hearing and began to challenge McCaskill's occupancy by petition in 1868, and by occupying the ground themselves. The dispute smouldered on well into the twentieth century.

The key issue in this case is, once again, whether the Maori witnesses heard in 1842 to 1843 were sufficient to represent the community of owners, and make a

66. Bell report 23 June 1862, olc 1/287, NA Wellington, vol 1, cited by Russell in Rigby, Russell, and Moore, 'McCaskill's claim', p 12
67. Bell, 23 June 1863, cited by Russell in Rigby, Russell, and Moore, p 14

binding decision to alienate the land. The younger generation challenging the sale in the 1850s and 1860s may have been opportunistic, or they may have represented a genuine hapu interest with a genuine discontent about what their elders had allegedly done. In not taking evidence fully and in relying on the 1843 testimony, Bell circumscribed the investigation and the possibility of the satisfactory renegotiation and adjustment of the claim. (See also volume iii, chapter 2.)

(4) *The Manukau Company purchase*

On 11 January 1836, soon after Ngati Whatua had returned to the pa called Karangahape near Puponga Point on the north shore of the Manukau, one Thomas Mitchell, assisted by the Methodist missionary, William White, secured the marks of Apihai Te Kawau, Kauwae, and Tinana Te Tamaki to a deed purporting to sell forever the whole of the Tamaki Isthmus between the Manukau and Tamaki 'rivers' on the south and the Waitemata 'river' on the north, and from the Tasman sea to the Hauraki Gulf. The price was 1000 pounds of tobacco, 100 dozen pipes, and six muskets. On 3 November 1838, following Mitchell's death by drowning, the title was purchased from his widow for £500 by a group of largely Scottish entrepreneurs under the name of the New Zealand Manukau and Waitemata Land Company.

Following the establishment of British sovereignty the company's claims were presented to the Land Claims Commission by Captain W C Symonds, its New Zealand agent. But no Maori witnesses appeared before the land claims commission in 1841 to certify the deed. Meanwhile the company had sold subdivision sections to settlers in the United Kingdom, as if it did have title, and immigrants were actually on their way out in the ship *Brilliant*. At the request of the Secretary of State in London, Lord John Russell, the executive council in New Zealand decided, on 18 October 1841, that the Manukau company would be granted four acres for every £1 it had spent on colonisation, *in the area where it had any proven valid claim*. The formula of the Pennington awards to the New Zealand Company was thus applied to the Manukau Company. On the figures of expenditure presented this would have entitled to them to 19,924 acres. However, soon after this decision, W C Symonds was drowned and, lacking an effective local agent, the company's claims before the land claims commission languished. On 3 July 1843 the commission reported that no Maori witnesses having presented themselves during three advertised hearings, the company's claims were not proven.

Meanwhile the settlers of the *Brilliant* had arrived, distressed and bitter at having no titles. The New Zealand administration gave them permission to squat on a defined area at Karangahape, pending the hearing of their claim (which at the time, was expected to be at least in part in their favour). Many dispersed but about 30 settlers huddled in bush material huts on the land, presumably with Ngati Whatua agreement.

On 12 August 1844, Lord Stanley, the Secretary of State for the Colonies, ordered a special investigation into the claims, which was conducted by Governor FitzRoy's Executive Council. The deed was not in Maori, Mitchell was dead, and the company's witnesses failed to support the 1836 deed adequately (White knew

no Maori at the time it was signed). Theophilus Heale, the company's new agent in New Zealand, acknowledged that the boundaries of the claim were vague and abandoned them. However, he had apparently discerned that the Ngati Whatua chiefs would support a modified claim. They did appear at the special investigation. Though no exact transcript of proceedings have survived, Heale put on record his summary of what they said: Te Kawau had first denied ever having seen the deed, however, hearing Tinana, admits its genuineness, but within limited boundaries, he allegedly said, 'If the paper means only that portion of the land, I will acknowledge that I signed it, if for more then I know nothing about it'. Whatever the accuracy of Heale's summary the special investigation sought to implement the Maori understanding or agreement, and awarded the company an area at Karangahape which when surveyed amounted to 1927 acres at Puponga Point. This became the township (now suburb) of Cornwallis. The company was also awarded scrip for £4844 for purchase of Crown land elsewhere. Despite several attempts by the company to enlarge this award the Crown held to it. There is no record of any further Ngati Whatua objection.[68]

2.16 Assessment

In the light of the above overview and case studies and the evidence behind them, it is possible to make an appraisal of the Crown's handling of the pre-1840 purchases. This chapter has concentrated on the process for hearing claims other than the New Zealand Company purchases. For an appraisal of these see chapter 3.

2.16.1 The Crown's rights and obligations

In 1840 the chiefs such as Tamati Waka Nene, aware of incipient threats to their rangtiratanga from colonisation, welcomed the Crown's support in safeguarding it, and in the task of developing new governmental structures appropriate to new needs and conditions. The Treaty negotiations and Treaty terms suggest that the Crown acquired an obligation to help the chiefs appraise the pre-1840 land transactions in terms which, by and large, Maori would have wished. Notwithstanding the responsibilities of kawanatanga the chiefs had not invited the Crown to impose unilaterally a different set of terms upon the transactions than they themselves had intended.

It is not a simple to say what those terms were. A variety of kinds of transaction had occurred in the previous decade and some of them were beginning to have the appearance of straight commodity sales by chiefs against the wishes of their lineage. But rarely did Maori include their cultivating lands in the transactions and usually there was an assumption that the settlers acquiring land rights would enter into some kind of relationship with local hapu – favouring them in trade or in

68. See also olc 629, NA Wellington

employment, or giving gifts to the chiefs at major hui, for example. Where the land was disputed, chiefs might in some cases have sold their rights to Pakeha to score off rivals and be rid of the problem. Even there the Pakeha were probably seen as potential allies in future disputes.

These then are some of the terms which, at least implicitly, Maori expected from the land transactions. Sometimes the price paid was itself important – guns, steel tools, gold sovereigns were no light consideration and they featured in a number of transactions. But the piles of trade goods on the beach, soon gone, were not what the chiefs really sought from the deal; the price was the presence of the Pakeha themselves and their continued support.

The British Crown, however, did not assume authority in New Zealand solely to support Maori and protect their interests. Perhaps they should have. That is a moral, not an historical issue. By December 1837 the British Government had concluded, quite genuinely, though on incomplete information, that settlement was going to overrun New Zealand in any case. The Crown therefore saw itself as having a dual obligation – to protect Maori and to regulate colonisation in the interest of genuine settlers who would invest capital and labour and develop the country. Maori and Pakeha were alike expected to benefit. So far, at least in theory, there was no complete contradiction between Maori goals and those of the Crown.

But the colony also had to be paid for. The Crown needed a revenue and the obvious source of revenue was profit on resale of land. This (rather than protection for Maori) was the main purpose of the Crown's pre-emptive right of purchase. It was also one of the reasons for taking a surplus from land sold by Maori to private settlers. The other reason, also deemed to be in the public interest, involved not giving the old land claimants grants in the more remote areas but trying to locate them in certain areas where public services could reach them and their concentrated efforts would better assist development. Both these aspects impinged on the Maori view of the land transactions. The Crown was interposing itself between the private parties, preventing them from arranging the terms of land settlement exactly as either party would have wished.

It may be asked, however, whether the price demanded by the Crown for its intervention in the pre-1840 transactions, that is largely taking them out of the hands of Maori and taking surplus lands, was a reasonable offset to Maori for defence against unregulated, potentially brutal and rapacious settlement, and for the Government's efforts to develop the colony in a more orderly fashion. For the Crown also assumed obligations under article 2 to protect Maori property rights and rangatiratanga, which implied that Maori understanding of the pre-1840 transactions, and their limits, would in each case need to be determined and upheld, unless there were very good reason not to uphold them.

Sufficient legal authority appears to have been provided, in statutes of the New South Wales legislature in 1840 and of the New Zealand in 1841 and subsequently, for the Crown to award only part of the land equitably purchased from Maori, to the settler purchaser, and to retain the balance as a Crown surplus. By Normanby's instructions and subsequent legislation, however, the Crown set itself the task of

checking whether the pre-1840 purchases were bona fide or equitable. It has to be considered whether the Crown's tests were of equity were adequate and whether Maori title had indeed been lawfully extinguished (or extinguished in accordance with Treaty principles) before Crown made grants to settlers or took a surplus in the land.

2.16.2 A statistical evaluation

The totality of European's deeds of purchase and/or claims before 1840 have been estimated by Mr Jack Lee of the Bay of Islands to exceed 66 million acres – greater than the total land area of New Zealand.[69] This is in fact typical of nineteenth century colonisation in the Pacific: Fiji, Samoa, Vanuatu, the New Hebrides, and other groups were all subject to a flow of settlement, reams of 'purchase deeds' each carrying the marks of a few local men, and escalating warfare between factions of the local people armed and incited by factions of European in support of their claims. Lee is right in saying that the very establishment of a Land Claims Commission, requiring the affirmation of local people to support the transactions, did an enormous service: most of the specious or shoddy 'purchases', with vast areas and inadequate boundaries, simply disappeared. The holders of worthless paper knew they would never pass the scrutiny of the Crown officials and they were right. Godfrey and Richmond rejected such shoddy deeds with scorn.

Of the claims actually lodged, Bell reported in 1862 that they amounted to 10,322,453 acres (including 97,427 acres of claims under FitzRoy's waiver of Crown pre-emption) Of the pre-1840 purchases, 471,410 acres were found to be bona fide purchases, 267,176 acres of which were awarded to settler claimants and 204,243 acres retained by the Crown as surplus land. In addition £109,282 worth of scrip was issued (the Crown taking over the settlers' former claim). In other words, over nine million acres of the claimed land reverted to Maori ownership.

The Surplus Lands Commission of 1948 (the Myers commission) has rather different figures and Rigby, Harman, and Russell, Tribunal researchers, have produced totals from a careful survey of available information, as follows:

- Total claimed, 1119 claims (including the 'monster' claims of over 100,000 acres) 9,304,906 acres.
- Total claimed, *less* the 'monster' claims (that is less five New Zealand Company claims and nine other vast claims not seriously pursued to their full extent, 2,236,906 acres.
- Total confirmed alienations from Maori, 468,145 acres (326,356 acres granted to settlers plus 141, 826 acres Crown surplus).

69. J Lee, *Old Land Claims in New Zealand*, Northland Historical Publications and Society Inc., Kerikeri, 1993, in ix–x. A speaker in the House of Commons in 1845 estimated that nine claimants alone had submitted claims totalling 56,654,000 acres, Armstrong and Stirling, Wai 45 rod, doc j2, p 435. This would include the New Zealand Company claim of over 20 million acres, on the basis of their 1839 purchase deeds.

In addition some 153,000 acres of scrip was awarded to settlers; in some cases the Crown took up the land in the settlers' original claims, sometimes not.[70]

Of the New Zealand Company's initial claims, amounting to more than 20 million acres, about 1.3 million acres were eventually awarded, of which 828,000 acres were actually surveyed and selected. The Crown was involved in the repurchase of much of this land (for example at Porirua and Wairau) to fulfil the company's award, plus huge new purchases such as Otago and Canterbury. On the demise of the company in 1850 all the company land, except 199,000 acres on-sold to settlers, became Crown land.[71]

This demolition of most of the so-called purchases, mainly on the basis that Maori denied that they had actually sold all that land, is a remarkable result. Even on Lee's estimate of 2.5 million acres of awards to settler claimants (including the awards to the New Zealand Company), only 4.6 percent of New Zealand's area was regarded as alienated by pre-1840 transactions. This compares very well with the 8.2 percent for Fiji regarded as alienated by the Land Claims Commission there and the 20 percent for Samoa. In fact, Lee's 2.5 million acres is an over estimate, unless one adds in some of the land awarded to the New Zealand Company after additional Crown or company payments under Grey in places like Porirua and Wairau.[72] In the New Hebrides Anglo–French Condominium (now Vanuatu) the Land Claims Commission was emasculated by the French and about 40 percent of the country was deemed to have been alienated. New Caledonia had no Land Claims Commission at all, and some 85 percent of the group was deemed alienated either by private purchase or as state demesne. Any assessment of Treaty grievances in New Zealand must keep these perspectives in mind. The Land Claims Commission had gone a long way to fulfilling Hobson's undertaking at Waitangi to return to Maori land not validly acquired in pre-1840 transactions.

2.16.3 Were the checks adequate?

Of itself, however, none of the above proves that the 471,000 acres deemed by Bell to have been alienated (or the 468,145 acres in the calculation of Rigby, Harman, and Russell) were in fact all equitably alienated. The further question must be posed as to whether the checks imposed were sufficiently thorough to meet the Crown's own stated objectives. Should even more of the claimed land have remained in Maori hands? Should more payments have been made, or should the alienations have been considered as something other than absolute alienations? In other words, should some sort of Maori right or interest remained extant, as was certainly

70. Russell, Rigby, and Moore, 'Introduction'.
71. D Moore, 'The Crown's surplus in the New Zealand Company Purchases' in Russell, Rigby, and Moore, p 101.
72. Daamen, Hamer, and Rigby, p 68. Adding together the 468,145 acres awarded by the Land Claims Commission, 150,000 acres of scrip claims, and 1,300,000 acres of awards to the New Zealand Company, at most 1.9 acres was alienated in pre-1840 purchases after the Land Claims Commission awards, and at least half a million acres of that were not taken up. Thus, of the 66.4 million acres available in total, 2.9 percent was awarded and 2.1 percent taken up through pre-1840 purchases (see also ch 3).

intended by the chiefs in many of the pre-1840 transactions? Also, despite the relatively small percentage of alienations approved nationally, did the incidence of alienation fall heavily upon particular districts? How did Maori view the outcomes? These are not easy questions to answer, in respect of all parts of New Zealand. In the last resort they hinge upon a judgement of what could reasonably have been accomplished at the time, having regard to all circumstances.

The following points may be made in the light of the evidence:

(a) Firstly it is clear that the Crown officials under-estimated the task before them, both as to the number of the claims preferred, the vagueness of many of the transactions, and the complexity of Maori land tenure. Had there been more time to gather prior knowledge about these matters (and much was known about them by missionaries and Busby) better preparations might have been made. But once the New Zealand Company despatched its ships to New Zealand in May 1839, preparations for Crown intervention began to be made in considerable haste. As has been argued in the first part of this chapter the urgent necessity appeared to be to secure sovereign authority and take control of the land trade, including power to scrutinise pre-1840 purchases. The detail of how this was to be done had to be largely worked out by officials on the spot. In that sense Normanby's instructions to Gipps and to Hobson were not inappropriate.

(b) It is not reasonable to expect Gipps to have mastered the detail of the New Zealand situation by February 1840; the problem of New Zealand was rather sprung upon him and, rightly, he had to leave most of the detail to the men appointed to New Zealand. His 1840 ordinance covered in broad terms most of the essential points necessary to safeguard Maori interests. Gipp's instruction to Hobson of 30 November 1840, however, that where chiefs 'admit to sale' of land their title was to be deemed extinct, intruded heavily into the process and prevented a more comprehensive investigation of what the chiefs might have intended in the transactions.

(c) Godfrey and Richmond's investigations were conscientious and principled as far as they went. Greatly to the advantage of Maori was that their evidence was preferred over that of the settlers where contradictions were exposed. This resulted in the lapse or annulment of many shoddy claims and possibly some bona fide ones as well.

(d) One result of the collapse or diminution of the shoddy claims is that the Crown's own access to a surplus was also diminished. Judgment of the Crown's performance in respect of the half million acres of alienations (other than those of the New Zealand Company) recognised by the process, should perhaps be tempered by this consideration.

(e) On the other hand the Crown's investigations *were* inadequate in many respects. The taking of evidence from only two Maori witnesses, not always close to the land, was a serious weakness. Especially in view of the objections which emerged when the land came to be occupied, and of the highly sceptical statements of George Clarke and other officials, there is serious

doubt as the adequacy of Godfrey and Richmond's inquiries. Indeed Godfrey and Richmond themselves acknowledged the possibility of the testimony brought before them being inadequate and urged upon Shortland, then FitzRoy, the additional double checks of Protectors' reports plus an uninterrupted survey of the land itself. The responsibility lies with FitzRoy that grants were issued to settlers without this double-check; and with Governor Browne, the settler General Assembly and Commissioner Bell that Bell declined, in most cases, to admit new evidence in respect of Godfrey and Richmond's awards (although they did require surveys).

(f) The absence of survey staff was a key weakness in the early phase of the process. It was unfortunate that the surveyor sent to assist to Godfrey and Richmond was accidentally drowned soon after he arrived. The authorities did not replace him and underestimated the load on the Surveyor-General and his staff. In contrast, surveyors were provided to assist the New Zealand Company define its claims. A possible alternative to full survey was a formal cutting of lines and boundary marking on the land itself – a chain-and-compass survey and accompanying sketch plan sufficient to locate the land. This was feasible in most of the purchases, though expensive in heavy bush. It would have had the inestimable advantage of publicly involving the Maori transactors and making them aware early of precisely what land was involved. In 1856 to 1858 the Government was sufficiently concerned with security of title for private investment, and for precise definition of the land it could claim as surplus, finally to require survey. It must also be observed that one major reason for the frustration of Crown's objectives in regard to surveys, up to that point, was lack of cooperation from the settler claimants, who fought the reduction of their claims at every stage and would not survey the land if it tended towards identifying a Crown surplus within their claim, until they were rewarded with a percentage increase in their grants in the 1856 to 1858 arrangements.

2.16.4 The Crown's vested interest in the freehold

At this stage it might be asked whether the Crown would have done better to have abandoned the idea of gaining a surplus, allowing the settlers the whole of their claims (if they could substantiate them), or letting them return to Maori and purchasing them afresh. In hindsight, given the cost and confusion involved, the answer is probably yes, but it was hard to see this in advance, given the belief (apparently supported by the pre-1840 evidence reaching London) that very large areas had been alienated by Maori.

In its determination to require a surplus, however, the Crown became involved not merely in identifying what Maori had done, or intended, in their pre-1840 transactions, but in promoting the transactions as absolute alienations. Had the Crown thought more about recognising leases or licences from Maori – a form of alienation which suited both Maori and the settler in many cases, and which was

provided for in the 1840 and 1841 ordinances – a much more flexible set of possibilities would have emerged. Maori would almost certainly have been willing to alienate by lease much larger areas than they were willing to sell. They would have felt more in control of the land and of the whole situation; their rangatiratanga would have been substantially preserved. The Crown's role would have been to oversee the development of leasehold terms fair to both parties, perhaps with priority to the Maori owners in employment or in the buying and selling of produce.[73] Such an option was not for a moment considered by the Crown. From late 1840 at least, the Land Claims Commission essentially posed only two alternatives to the Maori; they had either sold the land to the settlers absolutely or they had not. The imperatives for this were partly an unquestioning assumption that settlers would want the freehold (true in most cases), and more importantly that the Crown needed to extinguish Maori title and obtain a surplus.

A serious point of difference between Maori and Crown views concerned timber. The Crown usually regarded a purchase of land as including the timber on the land; Maori, on the other hand, did not necessarily see the timber as necessarily passing with the land, and sought on a number of occasions to deal separately with it. Sometimes the Crown did license the timber rights back to Maori on land they had purchased.

2.16.5 Maori attitudes to the Crown's procedures

Maori responses varied. Powerful chiefs like Panakareao in Muriwhenua asserted plainly that they wished to control the nature of the transactions, who occupied and on what terms. Panakareao would not accept the idea of a Crown surplus. Other chiefs responded by defining more sharply what they were prepared to alienate, that is, sell, once they had realised the nature of the alienation that the process enjoined. So boundaries were drastically modified in many cases, more payments extracted, and some (usually small) additional reserves made. The outcome was that less land was alienated than might otherwise have been the case, but it was alienated without expectations of it returning to the former Maori owners, at least within a foreseeable future. There was probably another implied proviso, however, namely that the land was actually occupied. Abstract notions of legal title would have meant little to Maori; they made agreements with an individual or individuals, and unless those people took up the land the rights would not really have been seen to have transferred. Even when they did, there are indications in some cases at least, that Maori expected some kind of customary rights to endure, enabling them to co-exist on the land with the settlers. Or they expected ongoing reciprocal exchanges with the settlers or with the Crown officials.

73. Such a system was introduced in the Republic of Vanuatu with considerable success after 1980, the independence constitution having cancelled the former colonial freeholds. But leaseholds from indigenous owners were almost never officially introduced in Pacific colonies in the nineteenth century, even though informal leases were common before formal annexation.

While the Land Claims Commission did not give Maori an opportunity to press for leasehold arrangements, these were developing informally between Maori and settlers (though deterred by the Land Claims Ordinance 1841 and the Native Land Purchase Ordinance 1846). Maori also tried to have timber dealt with separately and sometimes persisted with timber claims even after agreeing before Godfrey and Richmond.to an alienation of the land. Otherwise there seemed to be loose expectations, which missionaries and officials fostered, of ongoing benefits from the proximity of settlers. In many cases the benefits were realised, in the sense that markets for Maori produce grew throughout most of the 1840s and 1850s in districts such as Auckland and Hauraki, and Maori availed themselves of these markets. Employment continued on the farms and timber camps in parts of north Auckland. In such cases, many Maori with interests in old land claims, in a sense, did get much of the real payment for which they had alienated the land in the first place. In areas bypassed by settlement, such as Muriwhenua, Maori would not have had such opportunities.

In summary then, Maori satisfaction or dissatisfaction depended upon whether the expected benefits of association with settlement actually followed and/or whether there had been a genuine opportunity to renegotiate and reaffirm the original transaction in the commission or in related proceedings (as in the Manukau Company claim, for example). Where such renegotiations took place, to Maori satisfaction, no subsequent protests appear to have been raised. There were many adjustments made in Godfrey and Richmond's court which, if implemented, appear to have resulted in no further protests about the transaction.

2.16.6 Official neglect

There were numerous occasions, however, when officials actions or inactions created dissatisfaction, particularly those of FitzRoy. According to the *Southern Cross* reports, FitzRoy promised to return to Maori land not granted to settlers, including even land in bona fide purchases. Even allowing the possibility that the *Southern Cross*, a rather venomous settler journal, had got it wrong, or that FitzRoy was meaning to put the land into his endowment trust rather than return it to its former owners, the Governor certainly confused the issue and made no subsequent clarification; nor did he return purchased land to Maori. More seriously, and despite the advice of senior officials, FitzRoy decided to issue Crown grants without first surveying or marking the boundaries of the land. Some of the grants were on-sold. This led to continued confusion on the land between intersecting Maori right-holders and between Maori and settlers.

Further confusion and injustice to Maori developed under Grey, who, for the seven years of his first governorship, neither advanced the surveying and definition of the land, nor pursued closer investigations as to Maori right-holding in the affected land. Moreover he neglected to implement recommendations of the commissioners to make reserves or return land to Maori. The Fairburn purchase is an example of this.

Bell's commission, based on surveys, went a long way towards resolving many issues of area and boundary. The increased grant to settlers for surveying the outer boundary of their claims (not just the limit of the award to themselves) tended to enlarge the areas claimed and contribute to the Crown's surplus. Again absolute alienation was the only kind of transaction seriously entertained and the finer points of transactions between missionaries and Maori (for example) tended to be overlooked. Bell was clearly determined not to allow sales approved by Godfrey and Richmond to be overturned by others beside the chiefs who had been acknowledged as owners and vendors about 20 or so years before. Evidence and challenges brought by a younger generation of Maori was heard but not heeded. This almost certainly shut out some interested parties. This approach rested on a view of senior chiefs having the right to sell quite large areas, whereas, as Clarke had demonstrated, a much wider hapu (or interhapu) involvement would have been necessary to secure full agreement to alienations of that kind. Some of those who objected to the alienations in Bell's commissions were very likely to have been speaking for the wider hapu interest, not simply as members of the younger generation trying to repudiate their elders' transaction (although that cannot be entirely ruled out in all cases). McCaskill's case is an example of the consequences of Bell and other officials relying upon quieting objections merely by making additional payments.

The result is that a doubt continued to lie over some of the old land claims. Some Maori grievances certainly continued to be expressed in particular cases, such as Webster's and McCaskill's claims in Hauraki and a number of cases in Tai Tokerau. There are also indications that, in parts of the north, the explanation by Bell and others as to how the Crown took a surplus, was not fully accepted. Over the years, these were the subject of a number of petitions, some relating to the surplus, some relating to the initial pre-1840 alienations. Several of these were considered by the Myers commission in 1948.

2.16.7 The balance of argument?

It is difficult to generalise about the Crown's handling of the pre-1840 purchases.

On the other hand, many of the claims were talked through during the commissions, marked on the ground, and adjusted with the chiefs in either Godfrey's or Bell's commission. Others were overlaid by subsequent Crown purchases and matters may have been adjusted in that context. In most of the 500 or so claims granted and taken up settlers did indeed have quiet possession. If a grievance was felt by Maori in such cases it seems to have related to a the general sense of alienation and marginalisation that Maori felt as a result on the far more sweeping losses of their land under processes much less equitable than those underlying the old land claims commission. Provided that necessary adjustments were actually made in the hearings and on the ground (which was by no means always the case) Maori may have come away from the process having felt they had made a genuine negotiation based on common understanding, even if it were a different kind of transaction from the one they had initially intended.

For this reason, despite the doubts that exist over the adequacy of the commissioners' investigations, and despite the Crown having propelled Maori towards one form of alienation only – absolute sale – it is difficult to conclude that each and every old land claim remained inequitable at about 1860, in the sense that it lacked Maori understanding and consent.

Lack of adequate discussion and consent certainly seems to have been common in Muriwhenua largely because there was no early investigation and readjustment of most of the claims – indeed no Land Claims Commission investigation at all in respect of many of the scrip lands. Where there was delay Maori tended to reassert their control of the land and their view of transactions. Poverty Bay is an area which Godfrey and Richmond did not reach; when Bell tried to investigate the transactions in 1859 he was virtually ordered out by the runanga.

Even more difficult to discern are the situations where settlers and officials thought they genuinely had a genuine understanding with Maori but in fact did not. Moreover, if this included an expectation by Maori of ongoing relationship and exchanges, the failure of these to materialise might not evoke immediate Maori protest, but could make the alienations a focus of grievance much later. This seems to have been the case in north Auckland, whence came most of the petitions and protests about the pre-1840 transactions.

In this context the Crown's taking of a surplus becomes a subsidiary consideration, although a far from unimportant one. If the whole transaction was adequately discussed and appropriate adjustments agreed and made, the Crown's taking of a surplus may have been understood and accepted as well, as Bell claimed it was. If the nature of a sale, as extinguishing pre-1840 Maori rights in the land, was not genuinely understood and accepted, then the Crown's taking of a surplus simply would not have been understood and accepted either.

Then there are the cases like the Fairburn purchase where the Godfrey–Richmond recommendations were ignored or forgotten by the Government and later Maori protesters paid off. The fact that no further Maori protest occurred was probably because so many tribes had interests in the land and were confused about their rights there – perhaps ignorant even of what the deed of sale entitled them to. In such cases unfulfilled Maori entitlements simply became forgotten.

Another sense in which Maori Treaty rights may have been overridden, is that in some areas too little land was left for Maori for their future needs, if not by the old land claims process alone then by that process plus subsequent Crown purchases. Tribunal researchers have calculated that about 11 percent of Muriwhenua was alienated through old land claims and 25 percent of the Bay of Islands.[74] Much of this was land of the best quality, on the rivers and harbours. Taken with the Crown purchases occurring about the same time as Bell's commission, the diminution of Maori interests was serious. Nor was there the off-setting prosperity which Maori had expected. Once the settler assembly took control in the 1860s, the northern Maori sense of alliance with the Crown weakened and a sense of something like

74. Rigby, Daamen, and Hamer, pp 213–215

betrayal developed. In that context the old land claims and the Crown's handling of them loomed as grievances – as giving up a lot and receiving little back. This alone goes far to explaining why there is a persistent sense of grievance about the old land claims in the Bay of Islands and northwards. Te Hemara, a Bay of Islands and Mahurangi elder speaking at Paora Tuhaere's 'parliament' at Orakei in 1879, referred to the iron pots, fish-hooks, blankets, and shirts given for land by the missionaries. He said 'The whole of the Bay of Islands was purchased with these worthless articles'. When Government was established Maori had lost all their land: 'the Ngapuhi trembled under the feet of the stipulations they had made with the Queen.' The missionaries had 'meddled with the land; and, as they were sent by the Queen, she is responsible.'[75] The people of the far north, Muriwhenua, did not even get the growth of townships in their vicinity which was part of their purpose in the transactions.

By contrast, Hauraki Maori benefited considerably for some years by being able to sell timber and other produce to Pakeha sawmillers and traders settling on their coast, or to trade with Auckland. In this sense their purpose in the pre-1840 transactions was largely fulfilled, and since they had transacted relatively little land at that stage (albeit strategic and important land) their objections tended to focus on particular issues, such as McCaskill's, rather than on the pre-1840 alienations or the Crown surplus per se. Even the Fairburn purchase, by far the biggest of all the Crown surplus areas, did not become a serious point of contention after the 1851 payments. Later alienations, the gold rushes and the spate of Crown purchasing seem to have overtaken the old land claims in Hauraki's perspective of loss.

2.16.8 An approach to redress?

Although the evidence of what Maori intended in pre-1840 transactions is contradictory in some respects, it is very unlikely that in more than a minority of cases – perhaps a very small minority – that Maori intended to convey absolute title and relinquish all connection with the land. Moreover, prices initially paid for the land were usually very low and in some cases derisory. On the other hand, many of the old land claims were adjusted in various proceedings. Boundaries were adjusted and additional payments made. In the process the notion of permanent alienation of the land probably was apprehended by Maori in many instances. It would appear that not each alienation has smouldered as a specific grievance among the former owners and their descendants. It therefore scarcely seem appropriate to open *each one individually* to review now. Moreover, the evidence surviving in relation to many of the claims is thin and would not disclose with any precision the contemporary understandings and feelings of the parties affected.

Yet doubts have persisted, particularly in north Auckland, as to the adequacy of the Crown's proceedings in regard to the pre-1840 transactions. Research shows that, on the admission of the Crown's officers themselves, about the time of the

75. Te Hemara Tauhia, AJHR, 1879, sess 2, g-8, p 19, cited in Bill Dacker, Michael Reilly, and Lee Watson, 'Te Mamae me to Taumaha,' Rangahaua Whanui Series unreleased draft, 1996, p 77

completion of the Godfrey–Richmond commission's work, doubts were entertained as to the whether the consent of Maori owners to an absolute alienation had been ascertained. The complexity of Maori right-holding and the newness of the concept of exclusive possession would have made such a conveyance inherently difficult. Maori objections to the Crown's taking a surplus, rather than grant the whole claim to the settler, suggests that Maori had not then seen themselves to have relinquished all interest in the land by the pre-1840 transaction. Research also suggests that subsequent proceedings (for example the Bell commission), while clarifying the nature of the transactions for some Maori, may have cloaked or glossed over other outstanding disagreements.

These persistent doubts, and persistent Maori complaints in north Auckland, caused the Myers commission in 1948 to attempt some general compensation rather than to approach the issue on a case by case basis. Their approach is understandable. Whether their calculation of the recompense was appropriate, is another matter. Myers himself came closer than his fellow commissioners to understanding the facts, in the present writer's opinion. But, as mentioned earlier, trying to calculate recompense on the basis of a discrepancy between the area estimated by the purchaser and the area eventually surveyed seems a somewhat illogical proceeding, given that Maori were not thinking in per acre prices in the first place. The 'under-payment' to Maori in not providing the settlements and the services they expected would be far higher than Myers' calculation allowed. So too would recompense for inadequate reserves or reserves promised and not made, or the exclusion of Maori from the future ownership and management of the land by the Crown's insistence on the sale of the freehold (although, as has been argued, Maori, in many some cases at least, accepted that situation and renegotiated accordingly).

In the light of the above analysis it would seem appropriate to apply the Tribunal's approach to remedy as discussed in the Orakei report, looking to the future and seeking to remove the prejudicial effect of land loss by restoring a tribal economic base. Old land claims and Crown surpluses might therefore be included as an element to be considered in Treaty settlements according to the proportion they constituted of a tribe or district's total land alienations – a very significant proportion in Taitokerau. There would appear be a need to pursue more specific inquiries only in respect of the cases where persistent Maori protest, dating from the time of the Godfrey–Richmond or Bell inquiries appears to have been overlooked or overridden.

CHAPTER 3

THE NEW ZEALAND COMPANY PURCHASE

3.1 A Special Category of 'Old Land Claims'

The Crown's handling of the New Zealand Company claims is considered worthy of special consideration because they were dealt with according to principles and processes somewhat different from other pre-1840 purchases and because, at their fullest extent, they covered about one-third of New Zealand, and eventually affected land alienations from Taranaki in the north to Otakou in the south. The Company purchases have been the subject of numerous analyses, among the most important of which are, Rosemarie Tonk, 'The First New Zealand Land Commissions, 1840–45', MA thesis, University of Canterbury, 1986 and Patricia Burns, *Fatal Success: a History of the New Zealand Company*, Auckland, 1989. In the Rangahaua Whanui research series, Dr Robyn Anderson has made a careful study in her report (with Keith Pickens) on the Wellington District (Waitangi Tribunal, August 1996), and provided a very full bibliography. In the context of the Rangahaua Whanui research, however, it was realised that there was not a comprehensive analysis of the company's relationship with the Crown through to the late 1840s, particularly in regard to the question (very important in other old land claims) of whether the alleged extinguishment of Maori title by private parties served to create a title in the Crown. To this end Mr Duncan Moore was commissioned to write a report on 'The Crown's Surplus in the New Zealand Company's Purchases'. Moore's report is original and very insightful. Among other things, it takes the perspective of the company–Crown relationship beyond well beyond Cook Strait and shows the interconnectedness of Crown and company activity from Taranaki to Otakou. Moore's report is likely to change substantially the accepted views of the Company and its role. The report is published in Russell, Rigby, and Moore, 'Old Land Claims' (an appendix to 'Old Land Claims', Waitangi Tribunal Rangahaua Whanui Series unpublished draft). A summary of the report, prepared by Mr Moore himself, is appended to volume i of this report. This chapter also draws upon it heavily and upon Mr Moore's submissions in the Wellington Tenths claim, Wai 145 record of documents, documents e3, e4, and e5.

3.2 The Scope of the Company Claims

The company's claims, as submitted in 1842 to William Spain, land claims commissioner, were based primarily on three purchase deeds made with Maori in 1839:

(a) The Port Nicholson deed of 27 September 1839, signed with Te Atiawa chiefs, principally from Petone and Ngauranga, and encompassing an area including the harbour and the Hutt Valley between the Tararua Range and the Western Hutt hills

(b) The Kapiti deed of 25 October 1839, signed with Te Rauparaha and Ngati Toa chiefs, encompassing all the land between 43 degrees south latitude (in the South Island) to a diagonal running from the Mokau River in the northwest to Castlepoint in the Wairarapa as the north-west corner.

(c) The Queen Charlotte Sound deed of 8 November 1839 with Te Atiawa, Rangitane, and Ngati Apa chiefs in relation to the area described in the Kapiti deed.

Colonel Wakefield considered that he had thereby acquired for the company the rights of the 'overlord' chiefs, to an area of some 20 million acres.[1] In addition to the payments of goods made by the company at the signings, the deeds provided that one tenth of the urban, suburban, and rural sections which the company would demarcate in its huge purchase area, would be reserved by the company for the future benefit of the 'chief families' of the tribes.

Wakefield then negotiated a series of other agreements, for actual settlements, with chiefs whom he regarded mainly as 'resident' chiefs, in Taranaki (with deeds being signed on 15 February 1840), Whanganui (May 1840), and Manawatu (1842). The company's efforts to survey and occupy lands, however, met strong resistance in every area, either because the resident Maori did not know of the transactions or had not understood and concurred in them in the terms that the company intended. In Port Nicholson in particular they showed little inclination to give up their pa and cultivations for the neat company subdivisions, and had clearly not understood the 'tenths' system. Frustrated settlers began encroaching aggressively onto Maori habitations and officials had difficulty in keeping the peace.

3.3 The Crown's Policy

In New South Wales, Governor Gipps was shaping the New Zealand Land Claims Ordinance in line with Lord Normanby's instructions, based on the principle that no private purchaser could hold a title by virtue of a purchase from Maori without its first having been investigated by Crown commissioners and confirmed, up to a certain limit, by Crown grant. The company leaders joined in the settler protests against this law. In May 1840, however, Lieutenant-Governor Hobson declared British sovereignty over the whole of New Zealand, an action precipitated by the

1. Duncan Moore, 'The Crown's Surplus Lands in the Company's Purchases', Waitangi Tribunal Rangahaua Whanui Series unpublished draft, pp 3–13

company having set up a municipal government in Port Nicholson based on its purported deeds of cession from the chiefs. In June, Hobson sent the Acting Colonial Secretary, Willoughby Shortland, plus troops, to Wellington to disband the municipal government. In August, Shortland averted a serious clash between Maori and settlers at Te Aro, by securing the agreement of the chief, Mohi Te Ngaponga, to put the land in the care of the Queen's officers and await the outcome of the pending Land Claims Commission.[2] In London, meanwhile, the company pleaded its case for the recognition of its titles, without prior inquiry.

A House of Commons Select Committee considered the company's petition and other evidence through July 1840. The committee took the same view as underlay Normanby's instructions and Gipps's Land Claims Ordinance, namely that among Maori there was no law to regulate the possession of property, its descent, or its alienation was in force' and that, the Crown having assumed sovereignty, all private titles purporting to derive from transactions with Maori were invalid unless confirmed by the Crown. This narrow view of Maori law now seems absurd in the light of modern understandings of Maori society and rights to resources, even if these do not equate tidily with common law notions of property. The committee might have been more accurate in saying that, before 1840, there was no governmental structure, above the whanau, hapu, and iwi themselves, to enforce Maori law. That is another issue but, as many of the 'Pakeha Maori' living with tribes could testify, considerable security could be found, provided one observed tribal norms. European authorities at this time, however, were prone to deny that a society had 'law' if there was no *state-like* governmental structure capable of upholding and enforcing commercial contracts and property with their notions of regularity and order.

The Commons committee recommended, however, that the 'possessory' rights of the Maori should be recognised in full, and supported the concept of reserved tenths as offering them the best prospect of 'securing the benefits of civilization'.[3]

The Royal Charter of November 1840 that provided for the establishment of New Zealand as a colony separate from New South Wales authorised the Governor to make grants of 'demesne' land subject to the rights of Maori to land in 'actual occupation and enjoyment in their own persons, or in the persons of their descendants'.[4] This meant village lands and cultivations. As Russell's supplementary instructions of January 1841, and his later comments indicate, he did not believe that Maori had title to all the uncultivated lands, and assumed that Maori land could readily be identified and granted (as inalienable); the remainder – millions of acres – would be Crown demesne As Moore notes, Russell assumed, *from his view of waste lands rather than from an assumption as to the validity of the Company's purchases*, that there would be little difficulty in identifying land from which the company's award could be granted.[5]

2. Duncan Moore, 'The Origins of the Crown's Demesne at Port Nicholson, 1839–1846' (Wai 145 rod, docs E3–E5), pp 64–69
3. Ibid, pp 45–46
4. Russell to Hobson, 9 December 1840, BPP, vol 3, p 154

In November 1840 too, the British Government came to an agreement with the company to grant them four acres for every pound spent on colonisation in New Zealand, subject to their forgoing any other claims. By the time the Land Claims Commission commenced its hearings in Wellington in 1842 the accountant Pennington had calculated that the company was entitled to 531,929 acres, with a likelihood of a further half million. Meanwhile, the charter issued to the company in January 1841 proposed an initial selection by the company of 110,000 acres in Port Nicholson and 50,000 (or 60,000) in Taranaki. By early 1841 a 221,000-acre selection at Nelson had also been authorised.

Lord Russell and the Colonial Office nevertheless accepted that the Maori claims had to be disentangled from the 'waste' land. They assumed also, however, that some at least of the company's grant would come from land which had passed to the Crown by virtue of the company's alleged extinguishment of Maori rights by their purchase deeds. The claims thus had to be investigated and Russell appointed William Spain as commissioner for the purpose. The company claims, and other small claims within the company districts, were thus heard by Spain, not by Richmond and Godfrey who heard the pre-1840 claims in other parts of New Zealand.

3.4 Official View of Chiefs' Right to Alienate Lands

Statements by senior officials as regards the pre-1840 transactions show a considerable degree of confusion and contradiction, together with not a little expediency. As has been discussed earlier (ch 2), the position taken by Gipps from 1839 to 1841 was that:

> uncivilized tribes, not having an individual right of property in the soil, but only a right analogous to commonage, cannot either by sale or lease, impart to others an individual interest in it, or in other words, that they cannot give to others what they do not themselves possess.[6]

This view had underlain the position taken in New South Wales and London that the pre-1840 private settlers could not acquire a title directly from Maori. Yet somehow the pre-1840 transactions had conveyed a title to the Crown. As Russell told the company:

> The basis for the [Land Claims] inquiry will be the assertion on behalf of the Crown of a title to all lands situate in New Zealand, which have heretofore been

5. Moore, 'Origins', p 71, footnote 145. Russell stated in 1844: 'I believed the extent of land which it would be in the power of the Crown to grant to be far greater than would be enough to satisfy its engagements. I did not suppose that any claim could be set up by the natives to the millions of acres of land, which are to be found in New Zealand neither occupied, nor cultivated, nor in any fair sense, owned by any individual.' (Russell to Somes, 29 June 1844, nzc 1/3/13, cited in Moore, 'Origins', p 73).
6. Gipps to Hobson, 6 March 1841 (cited in Moore, 'Origins', p 55)

> granted by the chiefs of those islands according to the customs of the country and in return for some adequate consideration.[7]

To Russell he wrote, 'the lands of each tribe are a species of common property, which can be alienated on behalf of the tribe at large only by the concurrent acts of its various chiefs'.[8] Of course that is just what the private claimants, and many of the chiefs, said that their transactions had been before 1840. As we have seen in chapter 2, however, whereas the Maori view of the transactions was, in many cases at least, that they were conveying something less than the alienation of full freehold or exclusive possession, the settlers considered the transactions simply to be sales, in the European sense. As noted above, whereas Gipps's 1840 ordinance appeared to contemplate transactions other than sales, in practice the land claims investigations simply boiled down to deciding whether the chiefs had sold or not sold (and the area concerned) not any kind of intermediate or qualified transaction. Thus Gipps, writing to Hobson in respect of Charles de Thierry's big claims in the north, stated, '[i]n every case in which the chiefs admit the sale of land to individuals, the title of such chiefs to such lands are (sic) of course to be considered as extinct'.[9]

As Moore had pointed out, in this respect the Crown's approach to the company districts was the same as in the other old land claims. The actions of the 'overlord' chiefs in signing the 1839 purchase deeds had served to create some kind of title in the Crown. From then on the Crown officials and company officials together set about 'completing' the purchases, by payment of additional consideration if necessary, usually described as 'compensation' for rights within an area already deemed to have been transferred.[10]

3.5 The Role of the Protectorate

Moore has also pointed out the central role of the Department of the Protector of Aborigines in the proceedings which unfolded. Writing to George Clarke snr, when re-appointing him Chief Protector in 1841, Hobson gave instructions which were in part identical with those he had himself received from Normanby in 1839.[11] The Crown had thus, via the Protectorate as well as the Land Claims Commission, bound itself in very closely to the resolution of the company's claims and very explicitly assumed the duty of active protection of Maori rights. The Protectorate was charged also with the duty of buying Maori land for the Crown, and again Normanby's instructions were the guideline: the price paid would be 'an

7. Smith to Somes, 2 December 1840, cited in Moore, 'Origins', p 74
8. Russell to Hobson, 28 January 1841, cited in Moore, 'Origins', p 56
9. Gipps to Hobson, 30 November 1840, cited in D Armstrong, Wai 45 rod, doc I4, pp 20–21)
10. Moore, 'Origins', pp 68ff
11. 'All dealings with the Aborigines for their lands must be conducted on the same principles of sincerity, justice, and good faith as must govern your transactions with them for the recognition of Her Majesty's Sovereignty in the Island . . .; they must not be permitted to enter into any contracts in which they might be ignorant and unintentional authors of injury to themselves etc.' Normanby to Hobson, 14 August, 1839, BPP, vol 3, p 87

exceedingly small portion' of the subsequent resale value, but the real payment to the Maori would be in the increasing value of their remaining lands.

Moore has pointed out that the paternalism of the Protector's role was very much a double-edged sword. The Protectors (most especially George Clarke jnr in the case of the company purchases and awards), would indeed be active in checking and limiting the company's exaggerated claims and cavalier attitude towards Maori rights. At the same time:

> Preventing unintentional injury was a parental role . . . ignoring, redirecting, or rewarding Maori desires. Put simply, while Maori might have told the Protector they wanted something, under this instruction, it was the Protector's duty to give them something else. It gave the Protector licence to decide on behalf of Maori, a licence translated at Port Nicholson into a general agency to decide whether or not they had agreed to sell their land.[12]

George Clarke jnr, on investigating the situation in Wellington in 1841, found that while Maori were very concerned at the unexpected numbers of settlers debouching from the company's ships, and were resisting the company surveys and attempting to confine the settlements, they did not have an objection to settlement as such. On the contrary, as in the case of the pre-1840 transactions elsewhere, they wanted settlers among them for trade, employment, and to learn new skills from them. *This giving of possession to some company settlers*, as well as the signatures of some chiefs on the deeds, is the basis upon which Clarke, and later Spain, concluded that the company had effected a 'partial purchase' from Maori. Clarke did not accept, however, that the company had achieved a total alienation of Maori rights. Alienation of any land would require the consent of the resident chiefs and communities as well as that of the 'overlord' chiefs. Although Te Atiawa chiefs (Te Puni, Wharepouri, and others) had signed the company's Port Nicholson deed, chiefs at Pipitea, Te Aro and other kainga had either not signed or not received payment. Although they were willing to admit some settlement, it was also clear that they wanted their pa and extensive cultivations reserved.[13]

3.6 Hobson and Wakefield Seek a Way Forward

Since Wakefield had long accepted that additional payments had to be made to 'resident' chiefs, he and Hobson were able to concur, in September 1841, on a strategy of trying to complete the 'partial purchase', in respect of the 160,000 acres which Lord Russell's charter authorised the company to select in the first instance, by securing the agreement of the Maori occupants of the particular lands required for actual settlement. This was of course subject to the Land Claims Commission determining that the company had made valid purchases. Hobson privately informed Wakefield that he would approve 'any equitable arrangement you may

12. Moore, 'Origins', p 82
13. Clarke to Hobson, nd but probably 20 October 1841, cited in Moore, 'Origins', pp 89–93

make to induce those natives who reside within the limits referred to in the accompanying schedule, to yield up possession of their *habitations*' (emphasis added) but no force or compulsory measures would be permitted.[14] The schedule (initially proposed by Wakefield) included 50,000 acres at New Plymouth, 50,000 acres at Whanganui and 110,000 acres 'near Port Nicholson' in fact to (be made up of 31,200 acres distributed from Porirua to Island Bay, and 78,000 in the Manawatu). Colonial Office approval for selection of the 221,000 acres in Nelson also reached the colony. Hobson's advice to Wakefield (sometimes called a waiver of Crown pre-emption) was of the greatest future significance because the company considered itself authorised to press Maori to leave pa and cultivations by additional payments or other inducements short of force.

Moore comments that in allowing the company to negotiate with the Manawatu resident chiefs the Crown was letting slip its protective duty, since that district was outside the ambit of the 1839 Port Nicholson deed.[15] This may be so, although it is a little difficult to see on what basis the company could rightly pick or choose which of the myriad 'resident' chiefs to negotiate with, given acceptance of the Kapiti deed with the 'overlord' chiefs, covering the area from Mokau nearly to Kaiapoi. As it turned out Wakefield was unable to reach agreement with the Manawatu chiefs.

In Moore's view, Hobson and Wakefield 'probably' assumed that whatever lands within the company claim area were found to have been validly alienated, but which were not awarded to the company, would go to the Crown.[16] By the same token, lands not found to be validly alienated would presumably remain Maori customary land.

In any case, through 1840 and 1841, the agreement of resident Maori to settler survey and occupation of portions of the claimed land was secured by painstaking negotiations, involving:

(a) The company making additional payments to Maori and assuring them that they would not have to give up their pa.

(b) The Crown officials making a range of promises:

    (i) that a Native Reserves trust would be established, using the original company tenths to gain revenue for education, medical care, and so forth;

    (ii) that all lands Maori did not want to sell would be excepted from the sale, especially pa, cultivations, and wahi tapu; and

    (iii) that the services of the Protectors of Aborigines would be provided (as a result of Lord Russell's January 1841 instruction that between 15 and 20 percent of the land fund be directed towards this and other Maori purposes).

While these various categories were blurred in the officials' thoughts and statements, Maori could not but have received the impression that they would both retain

14. Hobson to Wakefield, 6 September 1841, cited in Moore, 'Origins', pp 98–99
15. Moore, 'Origins', p 101
16. Ibid, p 102

their valued lands and also participate in the benefits of the developing town.[17] Moore comments:

> if the Crown took the Maori 'residents' surrender of peaceful possession as the real sign of their consent to land sales, then the particular Crown assurances which *won* that surrender must have formed the 'real consideration' due to those vendors. The Company's title – and therefore the *Crown's* title to any Company 'surplus' – appears highly dependent on how well the Crown honoured its early, possession-getting pledges.[18]

3.7 Issues Regarding Reserves

A number of Treaty-related issues arise from the selection of reserves in the company settlement:

(a) Hobson and other Crown officials initially sought to regard pa and cultivations that Maori wished to retain, as lands *excepted from sale*, apparently in line with Lord Russell's view that actual Maori habitations should be inalienable. But there appears to be a concurrent tendency, certainly favoured by the company officials, to designate the pa and cultivations as 'tenths', thereby diminishing the pool of tenths which were *also* supposed to be reserved for Maori.[19]

(b) In fact there was a tendency among the officials themselves to relieve tension over disputed pa and other sites by formally making them reserves. Moore notes Willoughby Shortland's intervention at Te Aro pa in 1840 and Police Magistrate Dawson's intervention in disputed land at Whanganui as examples. This tendency later increased, among both Crown and company officials. Moore raises the question of whether in agreeing to these arrangements (as they commonly did) Maori knew that the making of *formal* reserves actually meant that title to them transferred to the Crown (in trust).[20]

(c) The selection of *public* reserves in Wellington by Felton Matthew in late 1841 appears to have infringed Maori rights. He, like the company officials, saw the spur upon which Pipitea pa was located as the ideal site for public buildings, but the Maori owners would not relinquish it. Matthew therefore designated the tidal mudflat off Lambton Quay – one of Pipitea's food-gathering areas – for the customhouse and market reserve. Likewise he took Waitangi (the swampy 'Basin' near Te Aro, replete with bird life) for a public market. At the same time roads were being laid out, also encroaching on the foreshore near Kaiwharawhara. The officials were presumably relying on the authority of the Land Claims Ordinances and the Municipal

17. For a list of official statements about these undertakings, see Moore, 'The Crown's Surplus', p 17
18. Moore, 'The Crown's Surplus', p 18
19. See Moore, 'Origins', pp 140–141
20. Ibid, pp 108–109

> Corporations Bill 1842 to assert Crown control of all tidal land, headlands, and islands (for example Matiu or Somes Island). All this is before the Land Claims Commission had investigated the company purchases. Moore comments that, once the Crown had asserted radical title via the Land Claims Ordinances (subject to Maori possessory rights), Maori were excluded from formal participation in these arrangements for the shaping of the town. The Public Reserves in the town (including the Town Belt), the promontories and the Native Reserves (including the pa) were all promulgated on 10 September 1841 along with the town boundaries of Wellington.

This, Moore comments, technically made the residents of the pa squatters on Crown land, living there by permission of the Police Magistrate.[21] Once again the Crown's protection of Maori from private settler aggression involved some encroachments of its own.

Another extremely important limitation in respect of the urban reserves was the refusal of the company and Crown officials to let Maori lease them directly to settlers. The issue arose in respect of Barrett's Hotel in Wellington, when Barrett, who had been allowed the block by Wakefield on account of the whaler's marriage to Te Wharepouri's sister, Rawinia, tried to let it. Hobson intervened, claiming Crown right to the land still, and saying that the rent, if any, was payable to the Crown for the benefit of Maori.[22] (Hobson had only recently inserted a prohibition on direct leasing as well as direct sale in the Land Claims Ordinance.) In 1842 the company's reserves officer, Halswell, stopped the chief Wairarapa from directly leasing some land at Pipitea designated as reserves.[23] Maori must rapidly have come to doubt the value of the tenths and reserves system, at least as a means of gaining revenue. (That doubt, and the confusion over reserves in Wellington generally, almost certainly led the Otakou chiefs in 1844 to opt not for 'tenths' in Dunedin but to take the bulk of their reserves at Otakou heads, where they already had a promising commercial association with the whaling venture of the Weller brothers.)[24]

3.8 The Spain Commission

Hobson's letter accompanying his instructions to William Spain and reviewing the situation to date, included the remark, 'that the Town of Wellington and the shores of Port Nicholson have been guaranteed to the Company with the exception of the native pahs cultivations and burying grounds'. Moore comments that this was a

21. Moore, 'Origins', p 115. Moore also refers (p 114, footnote 219) to the effects of the Land Claims Ordinance 1841 and Municipal Corporations Ordinance 1842 on the Crown's disposition of the foreshore. For a discussion of the Crown's presumptive right to the foreshore, in relation to Maori customary rights, see Richard Boast, *The Foreshore*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), 1996. This report is summarised in chapter 13 below.
22. Moore, 'Origins', pp 139–140
23. Ibid, p 263
24. Alan Ward, 'A Report on the Historical Evidence in the Ngai Tahu Claim', Wai 27 rod, doc t1, pp 97–109

strong indication to Spain 'that his ultimate objective was to implement – as best he could – the Secretary of State's guarantee to grant certain neighbourhoods to the New Zealand Company'.[25]

Spain began his hearings in Wellington in May 1842 and took extensive evidence from the chiefs. He focused upon trying to determine who had authority to 'sell land' and who had done so, with considerable regard to the overlord/resident distinction, and to the relationship between Ngati Toa and Te Atiawa and other groups. As in the old land claims inquiries in the north, Spain's commission too reduced all kinds of potential transactions to this one category – sale. Moore rightly notes the irony of the British authorities' recognising a power of sale in the chiefs, when their whole intervention in the pre-1840 transactions was founded upon denial of the ability of tribal peoples to convey title, at least to private parties.[26]

In terms of determining which areas the chiefs had alienated, Spain concentrated upon the 'neighbourhoods' listed for the company's surveys and selections. Early inquiries focused upon the small claims of Tod, Scott, and other traders within the company's claim area. Most of those claims were very strongly upheld by the chiefs (both on the ground and before the commission) even though they may have been agreed after the signing of the company's deeds. In other words the Maori did *not* consider that they had conveyed exclusive possession to the company in 1839. Neither did Spain, who upheld the claims of Tod, Scott, and others.

Among other matters disclosed in the evidence was the assertion of authority over the land about Whanganui-a-Tara (Wellington Harbour), by Te Atiawa and other Taranaki groups but also some sense of threat from Ngati Toa, Ngati Raukawa and their Waikato and upper Whanganui allies, and from Ngati Kahungunu who were raiding the Hutt Valley from the Wairarapa. These tribal rivalries were given as reasons by Te Puni and Mahau for the movement of Ngati Tama and Ngati Mutunga to the Chatham Islands and as one reason for inviting the British to settle in the Hutt.[27] The movement of Ngati Rangatahi (originally from near Taumaranui) from Porirua into the upper Hutt seems to have been connected in part with Ngati Toa's dissatisfaction over the Te Atiawa chiefs' dealings with the British over the Hutt Valley.[28]

It was not long before Spain, like Clarke before him, had come to the view that the company's payments to 'overlord' chiefs were not sufficient to secure possession or ownership: the 'resident' Maori had to consent and receive payment as well.

25. Shortland to Spain, 26 March 1842, cited in Moore, 'Origins', pp 177–178
26. Moore, 'Origins', p 197, footnote 384. In fairness it will be recalled that in the debates on the New Zealand Land Claims Ordinance in New South Wales, the officials had shifted their stance from denying a power in the Maori to *convey*, to one of denying the right of private persons to '*acquire* a legal title to or permanent interest in' land by virtue of conveyances from Maori. (See preamble to the NSW ordinance and to the Land Claims Ordinance 1841, and ch 2 above).
27. Moore, 'Origins', pp 253, 269, 273
28. Ibid, p 249

3.9 The Shift to Arbitration

During 1842, disputes in the company districts worsened as a result of the survey and selection of allotments, notwithstanding Wakefield's payments to resident Maori opposing the settlers. Wakefield, and Spain too, formed the view that recognising each new claim for payment had a snowball effect, evoking demands from the next level of Maori right-holders. They therefore sought an element of finality and proposed to Acting-Governor Shortland that a process of arbitration be introduced, with Spain as final arbiter. Shortland promptly agreed and in January 1843 authorised Wakefield and Clarke to act as 'referees' for the company and Maori respectively and Spain as 'umpire'.

According to the evidence of Shortland and Spain, Maori at Port Nicholson and Porirua agreed to be bound by the decision of the umpire. Clarke too reported that the Maori wanted finality. But the finality they wanted had more to do with clearly demarcating which areas were theirs and which were the settlers'. Settlers were constantly encroaching onto their cultivations and Clarke had difficulty in preventing retaliation. The occupants of the pa still seemed disinclined to relinquish them and, according to Clarke, the occupants of Te Aro in particular seemed disinclined to accept arbitration based on a monetary payment.[29] Clarke nevertheless stated later that, '[h]aving previously obtained the general consent of the natives to accept a fair award', he joined in the arbitration process.[30]

Moore comments that:

> shifting to arbitration effectively deprived Maori in the Company's settlement areas of many of the protections afforded by the strict provisions of the 1841 Land Claims Ordinance. Foremost amongst these was the right of any sub-groups or individuals to entirely *refuse* to sell the bulk of their interests within the Company's 1841 Charter areas.[31]

The right to proceed on this basis stemmed, in the officials' view, from the Company having acquired a part-interest within their 1841 Charter areas, through their initial transactions and subsequent possession. But whereas Wakefield considered that the Maori had effectively alienated the whole of the district by virtue of the 1839 transactions, save for reserves which the company, in the main, would define, Clarke declined to agree to Maori being required to relinquish any pa or cultivations without their free consent – a position certainly much closer to Maori understandings of what they had agreed to, and also to earlier assurances given to Maori by Crown officials.

There are other aspects of the arbitration which are dubious in Treaty terms. First, as a consequence of the shift to arbitration the inquiry into the complex right-holding amongst Maori, and into what Maori thought they had actually conveyed to the company, ceased. Secondly, the basis of the monetary compensation was

29. Moore, 'Origins', pp 379–390
30. Clarke junior to Clarke senior, 29 June 1844 (cited in Moore, 'Origins', p 477)
31. Moore, 'The Crown's Surplus', p 27

unclear. It was apparently agreed amongst three principal officials that it would be based on 1839 valuations – very much less than those obtaining in 1843 and 1884.[32] After an initial offer of £1050 in respect of Te Aro pa in Wellington (whereupon the occupants asked for much more) Clarke, in May 1843, proposed £1500 for the *whole area* of the company's Port Nicholson deed. Clarke apparently thought that the real payment to Maori should not be so much in money but in reserving them one-fifteenth of the land actually alienated (an adaptation of Russell's January 1841 instructions), in addition to the land they wished to retain.[33]

The proposal was not taken up immediately. Clarke considered that Maori had not yet sold their pa and cultivations; Wakefield considered that they had. Their ideas were so far apart that Wakefield withdrew from the arbitration in April 1843.

Meanwhile Maori disputatiousness had increased, almost certainly encouraged by the now established practice of paying them goods to allow surveys to proceed. The arbitration had led to even higher expectations of payment and the Company's withdrawal from the arbitration heightened tensions. These overflowed in the disastrous affray at Wairau on 17 June 1843, followed by both Maori and settlers about Wellington preparing for further violence.

At this point some Wellington chiefs began to suggest to the local officials and to Shortland that the Crown buy the disputed district: that would get them their payment and settle the disputes.

3.10 Spain Persists with Arbitration

Meanwhile Spain had firmed up his views in a report to Shortland of 12 September 1843 to the effect that:

> the greater portion of the land claimed by the Company in the Port Nicholson district, and also in the district between Port Nicholson and Wanganui, including the latter place, has not been alienated by the natives to the New Zealand Company; and that other portions of the same districts have been only partially alienated . . . I am further of the opinion that the natives did not alienate their pahs, cultivations and burying grounds . . . and that the explanation of the system of reserves was perfectly unintelligible to the natives.[34]

He did not propose, however, that, in the face of Wakefield's intransigence, he cease his efforts and let the company flounder or fold up. Rather, he pressed Shortland to let him make his awards to the Maori and to advance him the money for the purpose of concluding an arbitration of the surveyed land. Shortland quickly concurred and allowed that the arbitration might extend to lands not yet purchased but which Maori might, without injury to themselves, be willing to abandon.[35]

32. Tod's 265 foot frontage at Pipitea was calculated to be worth £1393.17 s at the rate of £5 5s per foot. (cited in Moore, 'Origins', p 267)
33. Clarke to Wakefield, 2 March 1843 (cited in Moore, 'Origins', p 386)
34. Cited in Moore, 'Origins', pp 419–420
35. Col Sec to Spain, 16 January 1843, ia 4/253, p 38 (cited in Moore, 'Origins', p 299)

The arbitration still had a kind of 'general' quality however. Spain did not propose to attempt 'to separate the sold from the unsold portions of land' at that point: 'There would be the greatest difficulty in ascertaining correctly the boundaries and the quantities of the lands belonging to each division or family, or individual native claimant'. Since the Protectors (both George Clarke snr and jnr) were at that time moving towards the definition of Maori customary interests and boundaries, Moore is highly critical of Spain's having 'decided finally to treat those interests as a fuzzy mish-mash, to be swept away at a price he knew Maori would never consent to, but that he also knew was for their own good'.[36] Whilst the level of compensation and the manner of its imposition upon Maori are indeed very questionable, it would have been very difficult to determine with any precision the various customary rights in the claim areas *and their boundaries.* The multi-layered nature of Maori right-holding would have required Maori to make all kinds of mutual concessions in order to arrive at sharp boundaries for groups which were not in fact discrete. This is a somewhat different matter from ensuring that groups with interests in a given area had been identified, had consented to an alienation and been paid.

Certainly the concept of trying for some *prior* definition of interests, by systematic and public hearings (such as Spain had already in a sense embarked upon), before making any payments, would have promised greater equity. The making of payments to principal chiefs and letting them handle the distribution of it was not entirely out of keeping with custom, but in this instance it involved the most serious of all issues to Maori – the permanent alienation of land.

3.11 Lord Stanley's Proposals and Fitzroy's Implementation of Them

Meanwhile in London, in May 1843, Lord Stanley, in the face of company complaints of lack of support from the Crown, had agreed to issue a Crown grant to the company of its 1841 awards, conditional on the Land Claims Commission determining that Maori customary rights had been extinguished. Where Maori title still endured, the Crown would assist the company to continue negotiating for the required land, or compensate them for the shortfall. The new Governor, FitzRoy, was instructed to implement these arrangements.

FitzRoy did not make a conditional grant to the company but in February 1844 waived Crown pre-emption in its favour, appointing Spain to assist the company to negotiate for 150,000 acres in the Wairarapa and J J Symonds to assist the Company to purchase a similar amount in Otago.[37] In response to FitzRoy's inquiry, the Colonial office took the view that the Crown had the right to claim lands surplus to the company's awards, in the purchased land, but acknowledged that because of

36. Moore, 'Origins', p 425
37. Moore, 'The Crown's Surplus', pp 36–37

Maori views of land alienation, the 'social costs' of trying to enforce a Crown claim to the surplus might be high and that it might be prudent to let it revert to Maori.

As for Port Nicholson, FitzRoy instructed Clarke, Wakefield, and Spain to estimate the compensation only for the land 'surveyed or given out for selection . . . independent of pahs, cultivations, and reserves'.[38]

3.12 Compensation and Deeds of Release in Port Nicholson

At a meeting in Wellington between the officials and Colonel Wakefield on 29 January 1843, Wakefield raised the vexed question of defining what a Maori cultivation was, arguing that the fallowed gardens took up a great deal of the land required for the town and that Maori were reviving claims to abandon cultivations, including some upon which settlers had already built. FitzRoy replied that is was for the Maori to define the ground in actual use and occupation, and they would not be dispossessed, 'unless it can be shown that such occupation is an encroachment on the part of the Natives upon lands, valid claims to which can be substantiated by the Company.' FitzRoy further stated that the arbitration would not include pah or cultivations. However, that such 'detail' or exceptions could be 'adjusted to mutual satisfaction afterwards.' There was then discussion on what constituted a pah (as distinct from a kainga) and a cultivation or ngakinga. FitzRoy included within 'pah' the 'cultivated lands' outside the fence, and his definition of cultivations was lands used for vegetable production 'or which have been so used'. FitzRoy also noted the tendency of Maori 'to be exhorbitant' in their demands for payment, and told the officials to emphasise the 'comparatively valueless nature of their lands' at the time, when the settlement was formed.[39]

Following the meeting, Clarke asked Wakefield for a schedule of the 'surveyed and selected' lands for which he would recommend compensation. In January 1844 Wakefield submitted to Clarke jnr a schedule of land prepared by the company surveyor Charles Brees, including sections at Porirua and Ohariu, outside the boundary of the 1839 Port Nicholson deed, and including some lands in the Hutt Valley still 'under survey'. Clarke expanded the Ohariu sections considerably, but deleted the Porirua sections, and arrived at an area of 71,900 acres (or 67,890 acres when the Native Reserves were subtracted). This was the area for which £1500 was to be paid by way of compensation. Wakefield and Spain concurred in this proposal.

On 23 February 1844 the officials, including FitzRoy, went to Te Aro to offer the £300 allocated by Clarke as that community's share. The assembled Maori were asked to sign 'deeds of release', relinquishing claims to any interests they had in the 67,890 acres to go to the company. Te Aro Maori vehemently rejected the offer, declaring it to be trivial in relation to the worth of the land. They compared it

38. Spain, final report, 31 March 1845 (cited in Moore, 'Origins', p 468)
39. Minutes of meeting, 29 January 1844 in FitzRoy to Stanley, 15 April 1844 (cited in Moore, 'Origins', pp 465–468)

unfavourably with prices paid by settlers for transactions amongst themselves, and with what Te Puni and Wharepouri had been in 1839.

Despite declarations from FitzRoy and other officials that Maori had previously agreed to accept what the Queen's representative declared fair, the impasse lasted into the second day, when FitzRoy announced his intention to leave. He reminded Mohi Te Ngaponga of his acceptance of Shortland's August 1840 arrangements when Te Aro was threatened by a settler mob and argued 'that their own welfare was entirely dependent upon the satisfactory outcome of this question'. Abruptly Ngaponga and the other chiefs changed their stance, sent an apology to FitzRoy and agreed to accept the payment. Maori of other harbour kainga then followed suit, Kumapoko and Pipitea accepting £200 each and Tiakiwai £30.[40]

It seems clear that the chiefs were responding directly to FitzRoy's challenge, in order to defend and strengthen their relationship with the Queen's representatives. In the face of that, the question of the size of compensation payment was an entirely secondary consideration. But in offering to secure and promote the welfare of Wellington Maori, FitzRoy had certainly put the honour of the Crown on the line.

3.13 Other Company Neighbourhoods

As in Porirua, the Crown officials (minus FitzRoy) had little success. Te Rauparaha offered to accept the proposed £300 payment for Ngati Toa interests about Wellington harbour, but not if it included the Hutt Valley. Clarke and the officials were angry because they had been led to understand from previous discussions with him that Te Rauparaha would include the Hutt, and secure the removal of Taringa Kuri and his Ngati Tama people who had moved there, allegedly as a result of settler encroachments on his land at Kaiwharawhara.

At Petone, Te Puni declined the £30 offered as a gift acknowledging his mana, but agreed that he had sold the land.

At Waiwhetu the sum offered was rejected as trivial but Maori were told that the land would be given over to the settlers anyway and the money banked. Discussion followed on Maori requests for adequate reserves, then the chiefs signed.

At most other small kainga around Wellington a similar scenario ensued. The chiefs frequently accepted payment and signed releases only after being told that the Europeans would, in any case, be given occupancy of the land, except for pa, cultivations, and reserves.

At Manawatu, Watanui and other chiefs affirmed their decision to sell but Taikaporua reiterated his refusal. This time Spain's declaration that the land would be awarded to the company and the money banked did not bring about the chief's acquiescence.

40. Moore, 'Origins', pp 496–498

At Wanganui, there was a similar result, Te Mawai refusing to sell. Despite another attempt by J J Symonds in 1846 the Wanganui transaction was not yet agreed.

At Taranaki, Spain listened to Maori testimony and announced his decision that 60,000 acres should be awarded to the company. FitzRoy, shortly afterwards, declined to confirm this award, but secured Maori agreement to sell 3500 acres (the FitzRoy block).

In August 1844, awards were made and deeds of release signed in respect of Company selections at Wakatu, Waimea, Moutere, and Motueka–Golden Bay totalling 109,000 acres. At Motupipi–Motueka, Maori refused to accept the payment and it was deposited in trust for them.

At the end of the arbitration proceedings Clarke reported that the company had been put in position of their entitlement in the Port Nicholson district, except for the Hutt Valley where Te Rauparaha and Rangihaeata continued to resist and where Taringa Kuri and his associates remained in occupation.[41] Spain's final report in 1845 awarded the company 71,900 acres, saving all pa burial grounds and grounds 'actually in cultivation', together with 39 Native Reserves of 100 acres each (the country sections) and 110 town acres. Small areas were awarded by Spain to Scott, Young, Todd, and the Wesleyan mission.[42]

3.14 Problematic Features of these Arrangements

The arbitration procedures raise some serious concerns in term of the principles of the Treaty:

The supposed prior 'general agreement' of Maori to be bound by the award, upon which Spain and Clarke proceeded, would need closer inquiry. Maori certainly told the Crown officials from time to time that the were willing to have them resolve the disputes between Maori and the company, and put the issue in the officials hands in effect, but that does not amount to agreeing to accept a defined level of monetary compensation.

The imposition of the compensation payments under threat that the company would be given occupancy anyway, was a very strong action, clearly accepted with reluctance by the Port Nicholson Maori and firmly rejected by others. This was less than the full and free consent by Wellington tribes to the purchase – rather a reluctant acquiescence in an imposed award, on trust that somehow the Crown would provide for their future wellbeing.

While it may be accepted that Maori had indeed given settlers possession of some of the disputed lands, the question of *which* lands exactly they had given over was not closely defined. The general or blanket nature of the arbitration cut across that. Spain had given up trying to separate the sold from the unsold land; instead Maori were assured of retaining their pah and cultivations, though these were as yet

41. Ibid, pp 499–522
42. Spain report, 31 March 1845 (actually submitted 6 May 1845), cited in Moore, 'Origins', p 533

still imperfectly defined. Nor were the Native Reserves, and the external boundary of the whole purchase, defined at the point of the arbitrations. As Moore comments, these 'remained a matter of pledges and policies which Maori apparently accepted largely on trust.'[43]

The compensation payments made in the arbitration were, in themselves, very small. It must be noted, of course, that many Maori had participated in varying degrees in the payments made by Wakefield in 1839. The distribution of this appears imperfectly related to the customary right-holding – Wellington Harbour kainga, for example, received little or none of the goods paid in 1839.

It may be accepted, however, that the real payment to Maori would be in the form of the reserved 'tenths', according to the company's theory, or other endowments such as the 15 to 20 percent of the profits of the land fund which Russell's January 1841 instructions said should be reserved to promote Maori welfare. The Crown officials made some effort to keep these categories of benefit distinct. Thus in April 1844 Forsaith referred to the retention of sufficient land for Maori cultivations, as well as the company reserves in Wellington; and in May at Wanganui, Clarke defined certain lakes, eel weirs, etc, to be reserves, at Maori request, as well as recommending that one section out of every 10 given out by the company should be for Maori.[44] Nevertheless, the three categories did get confused and conflated. The company tenths proposal had been based on the supposition that Maori would relinquish their pa and cultivations and move on to the selected tenths. When Maori declined to move, many of their pa and cultivations were formally designated (by Crown or company) to be Native Reserves, while some of the intended Maori tenths became settler sections.[45] One might foreshadow here that most of the proposed Port Nicholson tenths disappeared along with the demise of the proposed Manawatu purchase, where half of them were to be located.[46]

Clarke's February 1844 schedule listed 4010 acres of Native Reserves, short by one-third of the amount of tenths which 68,000 acres about to be granted to the company would have amounted to. Clarke publicly declared that these reserves were a payment to Maori for the remainder of the land. Maori therefore looked upon them as their own and they effectively ceased to be available to be let on their behalf by Crown trustees. Thus when FitzRoy enacted the Native Trust Bill in June 1844, the trustees, who were meant to lease the Native Reserves and secure a revenue for 'Native Institutions' – schools, hospitals etc, but FitzRoy had to recognise that many of the reserves were in fact Maori habitations and the ordinance itself provided that they could be conveyed or let on peppercorn rents to the Maori beneficial owners. The Trust as a means of raising funds for Native Institutions never functioned.

As for the 15 to 20 percent of the land fund, the Crown in fact gained revenue from resale of Crown land only in the Auckland area, and that was insufficient to

43. Moore, 'Origins', p 532
44. Ibid, pp 513, 520
45. Moore lists most of the Wellington Native Reserves in 'Origins', p 451
46. Moore, 'Origins', p 534

pay for the cost of Government administration. The Protectorate certainly defended Maori interests to a considerable extent and can be seen as a service to them for general revenue. But there were no funds to pay for other services to Maori. Hence the Crown's public undertakings to them that their welfare would be assured and they would share in the benefits of the settlement (the inducements to give place to the settlers and accept the minimal arbitrated compensation payments) were already being vitiated even as FitzRoy and others were making those payments.

3.15 Manawatu

Spain concluded that no purchase had been effected in the Manawatu districts by the 'over-riding deeds' of 1839. Moreover, the company's negotiation of February 1842 with Manawatu chiefs had exceeded the authority given by Hobson in 1841 to make equitable arrangements to induce Maori to yield position of their 'habitations' in the 'vicinity' of Port Nicholson. The 1842 negotiation was, in Spain's view, effectively a new purchase. He nevertheless recommended that the Government allow a continued pre-emption waiver to the company to purchase in Manawatu, partly to ensure that the 'Port Nicholson' tenths were provided. Just why Manawatu was different in Spain's eyes from say, Taranaki or Wanganui in relation to the 1839 deeds, is not clear. Moreover Spain *had* tried to threaten the Manawatu chiefs with awarding the land to the company during the arbitration negotiations earlier that year – being blocked only by the intransigence of Taikaporua.[47] Given Spain's confused reasoning, the implication is that if Maori had held out in other areas, the dealings there would have eventually had to be treated as new purchases, beyond the authority of Hobson's 1841 advice to Wakefield.

3.16 Surveys

In 1844 and 1845, two very important surveys were conducted under the direction of the Land Claims Commission surveyor T H Fitzgerald.

(1) *The Wellington external boundary*

In April 1844 with only partial reference to the boundary description given in the company's 1839 Port Nicholson deed, Spain authorised company and Crown surveyors together to cut an external boundary enclosing the 68,000 acres of company lands. This boundary, when completed by October 1844, would eventually be found to embrace 209,372 acres. This was apparently agreed to by Clarke jnr, to accommodate the additional sections he had provided for at Ohariu. Clarke seemed confident that Taringa Kuri and the Ngati Tama would take the compensation allocated for their interests there. (They eventually did in 1846.) The external

47. Ibid, p 535

boundary, which embraced some 37,472 acres more than FitzRoy's award to the company, included Maori cultivations (which were to be excepted in the surplus area as in the company's lands), but no additional payment had been made to Maori other than what they received in 1839 and in the arbitrations of 1844.

(2) ***Port Nicholson***

From November 1844 Fitzgerald started to survey the Maori pa and cultivations in Port Nicholson. He managed, with difficulty, to survey and plot the gardens under actual cultivation, except in the Hutt Valley where the gardens of Petone and Waiwhetu were mixed in part with those of the 'intruding' Maori like the Ngati Tama and the Ngati Rangatahi; and except for areas cultivated two or three years previously 'which of course they have a right to' but which Fitzgerald had not time to survey.[48] FitzRoy nevertheless issued the Port Nicholson deed to the company on 29 July 1845 before Fitzgerald had time to survey the fallowed cultivations.

3.17 Erosion of the Reserved Lands

While Fitzgerald plodded on, with what time could be spared, in surveying old cultivations, the officials had begun to accept a blurring between the cultivations (excepted from purchase) and the reserves (an endowment trust for native purposes). In 1844 FitzRoy had authorised the use of the Native Reserves at Thorndon for a military barracks. He still intended, however, to maintain the quantity of reserves, the grant to the military being dependent on other land being given in lieu for Native Reserves.[49] But FitzRoy and Clarke had begun to accept the selection of the Native Reserves for cultivation purposes, while Maori relinquished the cultivations they had on sections ear-marked for company settlers. George Clarke snr noted that the company plan of subdivision allowed not for a tenth of the purchase area but less than a twentieth for Native Reserves. But his plea to FitzRoy to make up the shortfall was not heeded. George Clarke jnr hoped the reserves might be found within a *Crown* surplus, but he appeared to have given up hope of maintaining even such Native Reserves as had already been created, for the endowment trust. He replied to his father that he regarded the reserves in Wellington as a essential for providing a 'sufficiency' for Maori cultivation, and opposed them being leased by the trustees. In fact officials delayed setting up the 1844 trust with adequate lands until the company purchases were settled. Aware that the system of endowment tenths was languishing, Bishop Selwyn, one of the trustees, sought a fixed annual grant to enable the trust to meet Maori educational and medical needs. It was not provided and in 1846 Selwyn resigned as trustee. Moore comments:

> as Governor Hobson had remarked in 1842, once the Native Reserve were put at the disposal of the Company, available to be assigned to Maori in exchange for them

48. Ibid, p 547
49. Ibid, p 557

relinquishing their traditional habitations, the same could be repeated *ad infinitum*, until there remained *neither* any excepted traditional pa and cultivations, *nor* any reserves available for leasing. Rather than feeding each other and catalyzing social and economic developments [as Bishop Selwyn hoped], the two forms of reserve could be made to swallow each other up, depriving the vendors of both their traditional mode of life, *and* failing to provide the full tenth of new-tenured lands – leaving the vendors overly dependent on the Government's 15–20 percent and/or its good graces.[50]

3.18 Developments Elsewhere

At Otakou the outcome was more promising. In July 1844, the Otakou block, estimated to be 400,000 acres but later surveyed at 534,000 acres, was purchased by Colonel Wakefield with J J Symonds assisting for the Crown. The company was to select its 150,000 acres within the block, the balance remaining with the Crown. The Ngai Tahu chiefs participated in the definition of the outer boundary, and of the reserves equivalent to approximately a tenth of 150,000 acres. But they did not receive reserves equivalent to a tenth of the balance of the block.[51]

3.19 Lord Stanley's Arrangements with the Company

The terms of Lord Stanley's 1845 to 1846 arrangements with the company were to open the way for extensive colonisation in three new respects:

(a) By the end of FitzRoy's governorship the company had been put in place of its awards at Port Nicholson and Nelson but nowhere else. The House of Commons Committee on New Zealand (1844) strongly supported the Company's wider claims, and also the waste land theory. Lord Stanley remained cautious in both respects. However he did, in discussion with the company relating to his instructions to the new Governor, George Grey, agree to 'compulsory proceedings against the Natives' in respect of the lands arbitrated and awarded by Spain. Clearly if this was to extend to areas where Maori had resolutely declined to accept Spain's award and sign releases (the Hutt, Whanganui, Porirua, and Wairau) the potential for conflict would be heightened.

(b) The company, supported by Pennington's award, now claimed rights to acquire 1.3 million acres under the terms of the 1841 charter. Stanley therefore maintained and extended the waiver of pre-emption in favour of the company to select blocks in respect of its whole 1839 claim area from the Mokau–Ahuriri line in the north, as well as the South Island south of the 43rd parallel. The Crown would assist its purchases within that area. In

50. Ibid, p 555
51. See Waitangi Tribunal, *The Ngai Tahu Report 1991,* 3 vols, Wellington, Brooker and Friend Ltd, 1991, vol 1, pp 29–51

conformity with this arrangement Stanley instructed Grey to grant the *whole* of the Otago block to the company, and authorised the company to buy 300,000 acres in the Wairarapa. Stanley further agreed to advance the company £100,000, mortgaged against the land selected under the 1841 charter. Grey was also granted £10,000 to make purchases 'in the last resort' to assist the company.

(c) Major (later Colonel) William McCleverty was appointed to assist the company in the selection and acquisition of lands. Meanwhile the company had learned that FitzRoy's Port Nicholson grant excluded Maori pa and cultivations (which Fitzgerald was meanwhile surveying) amounting to about a quarter of Wellington. The directors refused to accept the award so Grey and McCleverty's duties were widened to include adjusting the arrangements apparently already arbitrated in Port Nicholson.[52]

3.20 Grey's Initial Steps

On arrival Grey promptly took a number of important steps. On 21 February 1846 he waived pre-emption in favour of the company in the entire zone of the company's districts. On 13 April 1846 he granted the whole Otago block to the company. On 17 April he sent Symonds to Whanganui to acquire the area to which the company was entitled by Spain's award and to determine *which* pa and cultivations were to be reserved (that is, not all of them were). Symonds' mission failed due to continued Maori resistance over the eastern (Whangaehu) boundary.

He also began building a road out of Wellington on one of the major Maori tracks to Porirua, partly to secure Crown land within the 1844 arbitration boundary, and the location of reserves and FitzRoy's grant. He had the approval of Te Ati Awa and at least the tacit consent of Te Rauparaha. He also exchanged and purchased land in the Hutt Valley to meet Spain's 1844 promise to find Waiwhetu better reserves. Grey's purpose was also to try to induce Ngati Tama and Ngati Rangatahi to leave the Hutt. Finally, he arranged for the construction of a hospital for Wellington.

3.21 The War in the Hutt

The rights and wrongs of the war in the Hutt Valley are complex. One of the best discussions of the complexities remains that of Ian Wards, *The Shadow of the Land*.[53] Spain rightly concluded that the Kapiti deed of 1839 was, at best, insufficient authority for company or Crown to occupy the land. The issue was whether the partial purchase', and five years of subsequent negotiations with the Ngati Toa

52. Moore, 'The Crown's Surplus', pp 60–63
53. Ian Wards, *The Shadow of the Land; A Study of British Policy and Racial Conflict in New Zealand, 1832–52*, Wellington, Government Printer, 1968

chiefs, and their Ngati Tama and Ngati Rangatahi associates, warranted the Government asserting possession.

Ngati Toa claimed rights in the valley and Te Rauparaha maintained that it was not part of the territory they had sold. Ngati Rangatahi moved into the upper portion of the valley from Porirua, paying tribute to Ngati Toa chiefs. But according to Sub-Protector Kemp, they also had permission from Te Puni and paid an annual tribute of snared birds to the Te Atiawa chief.[54] Underlying the complex and shifting rights to the valley was the tension between Ngati Toa and Te Atiawa. Taringa Kuri (Te Kaeaea) and the Ngati Tama also moved into the valley, their crops at Kaiwharawhara having apparently been trampled by settler cattle.

The attempts by the officials to secure possession by an additional compensation payment have been summarised carefully by Robyn Anderson in the Wellington district report.[55] Te Rauparaha was apparently willing to concede; Te Rangihaeata was not. Ngati Rangatahi and Ngati Tama sought at least to secure payment for the crops they had cultivated there since 1842. The issue was affected by the Wairau affray. Distrust increased on both sides and through 1845 the Government began to construct blockhouses to protect the settlements. Te Rangihaeata moved into the valley in strength, as did Te Mamaku of the upper Whanganui, to assist his Ngati Rangatahi connections. Grey, arriving with more military force in 1846, did succeed eventually in persuading Ngati Tama to take compensation and leave the valley. Ngati Rangatahi also left, reluctantly. Then Grey moved soldiers into the vacated area where they looted, burned the chapel and violated urupa. According to Wards, 'this hasty and ill-considered act put Grey irretrievably in the wrong'.[56] When Ngati Rangatahi retaliated at Boulcott's Farm, Grey proclaimed martial law in the whole district. He upgraded the road to Porirua, seized Te Rauparaha and other Ngati Toa chiefs and garrisoned Paremata, on Maori land. Te Atiawa assisted Grey in driving Te Rangihaeata out of the Hutt Valley.

3.22 Grey's 1847 Purchases

In 1847 Grey used the funds Stanley had put at his disposal for several purchases.

(1) *Taranaki*

Gladstone, who had succeeded Stanley as Secretary of State informed Grey in July 1847 that he doubted the wisdom of FitzRoy's reversal of Spain's 60,000-acre award to the company in Taranaki and instructed Grey to use his utmost to procure land for the company there. Grey apparently then tried to stop Wiremu Kingi from returning from Waikanae to Waitara. Grey believed – or said he believed – that the

54. Moore, 'Origins', pp 158, 249–250
55. Dr Robyn Anderson and Keith Pickens, *Wellington District: Port Nicholson, Hutt Valley, Porirua, Rangatikei, and Manawatu,* Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), 1996, pp 36–38, 41–44
56. Wards, p 245 (cited in Anderson and Pickens, p 43)

1840 Ngamotu transaction (to the summit of Mount Taranaki) from resident Maori was not intended to be set aside by FitzRoy; it still stood, the company had a partial purchase, and Maori had no general right to refuse its completion – only a right to compensation as in the Cook Straits settlements.[57] Grey accordingly instructed McLean to make reserves, register settler and Maori interests and compensate Maori on that basis. McLean purchased the Taitaraimaka, Omata, and Grey blocks between May and October 1847. Most of this land was outside the Ngamotu deed boundary and although represented by Grey as completing an existing purchase, it has much of the character of a new purchase.

(2) *Porirua*

In anticipation of company needs and taking advantage of his recent military successes against Ngati Toa, Grey purchased about 70,000 acres from the Porirua chiefs in February 1847. Te Rauparaha was still in captivity and Rangahaeata in refuge. The payment of £2000 and reserves of about 10,000 acres appear generous by comparison with other Crown purchases to that date.[58]

A few days later Grey paid £3000 to Ngati Toa chiefs in Wellington for the Wairau district – all the way to Kaiapoi, including some two million acres. These purchases were essentially Crown purchases for the company, rather than a company exercise of its pre-emption waiver.

3.23 The Loan Act 1847

Meanwhile Earl Grey (who succeeded Gladstone as Secretary of State for Colonies) and the company had negotiated a new loan, to be ratified by Act of the Imperial Parliament. This was based on the company having succeeded in persuading the British Government that the Crown was responsible for non-fulfilment of the company's 1841 charter. The agreement involved an advance of a further £136,000 over three years, with the Crown undertaking to buy back from the company its unexercised rights of selection of land at the end of the three years, at the same rate as they had been awarded under the 1841 charter, namely five shillings an acre. The Act authorised the company to manage the demesne land as if it were the Crown – on selling the land and using the proceeds to purchase more Maori land. The company was to indicate which lands it wished to purchase, Governor Grey was to retain the 'exclusive management of all negotiations with the Natives for the sale of the lands' but the New Zealand Company was to provide the funds and 'have the disposal of the lands so acquired'.[59]

57. Moore, 'The Crown's Surplus', pp 72–73
58. Anderson and Pickens, pp 45–47
59. Earl Grey to Grey, BPP, vol 5, p 177

3.24 Implementation of these Arrangements

The arrangements in London shaped Grey's handling of purchases and grants of land in New Zealand:

(1) *Port Nicholson and Porirua*

Colonel McCleverty had ascertained that there were 209,372 acres in FitzRoy's Port Nicholson grant, after the 1844 arbitrations and award. This included 71,900 acres awarded to the company (including Native Reserves) and 137,472 acres of town belt and unsurveyed land, claimed by McCleverty as wasteland of the Crown. Grey continued his policy of exchanging Maori cultivations wanted for settlement in favour of grants within the town belt or elsewhere in the surplus. These 'McCleverty awards' continued through 1847. Following completion of the exchanges, Grey granted the entire area within Spain's external boundary to the company, minus Maori and public reserves (without reference to any specific quantity of land awarded to the company, as in FitzRoy's 1845 grant). It totalled 209,372 acres. A Crown grant was also issued for Grey's large 1847 purchase at Porirua, except for reserves of about 10,000 acres.

The McCleverty exchanges of 1847 are currently at issue in the Wellington tenths claim before the Waitangi Tribunal. As Anderson states, in general Te Atiawa relinquished smaller fertile areas in and about Wellington for larger areas of land further out, though three pa, 105 acres of surveyed sections and 219 acres of town belt were retained. The McCleverty awards amounted to about 18,000 acres altogether. Some of the land granted was good quality land in the Hutt Valley (now considered to have been purchased), but included a large area in the Orongorongo Range for hunting and gathering. The exchanges did not entirely accommodate Maori preferences, but they were accepted probably because the Te Atiawa believed they gave them some security in a world that had become very volatile. The awards might be considered to have met the occupation needs of Te Atiawa at the time but they greatly reduced their prospect of a significant stake in the future economic life of the town, as the original company tenths scheme had envisaged. In the 1850s Te Atiawa and Ngati Tama sold some of the McCleverty awards and moved north.[60]

(2) *Nelson*

In August 1848, Grey granted the whole 'Nelson' block of some two million acres (following his 1847 'Wairau' purchase) less Maori reserves. This grant enveloped the company's existing estate. But the survey of the 'Gross Block' was not completed until February 1850, shortly before the company's demise. Meanwhile internal adjustments with Maori continued as in the Port Nicholson model, with Crown agent Major Richmond and the company agent F D Bell cooperating. In particular, at the company's request, Waitohi (Picton) was exchanged for a village and ploughed land at Waikawa.

60. Anderson and Pickens, pp 45–52

(3) ***Wanganui***

McLean, in May 1848, completed negotiations for the block at Wanganui awarded by Spain to the company, for the £1000 additional compensation payment first offered in the 1844 arbitrations. It was seen by Government as a compensation for outstanding claims within a partial purchase, rather than a new purchase. As in Wellington this involved Maori relinquishing some reserves inside the original company surveyed areas for lands outside them, but still within the external boundary. Again as in Port Nicholson the original block, supposed to be of 40,000 acres, was found to encompass a much larger area (86,000 acres), which grew to 110,000 acres when Maori agreed to accept natural boundaries for the back boundary. Again the Crown–company secured a larger area than the compensation payment was stated to be for. The evidence suggests, however that McLean achieved clear public agreement with all Maori engaged in the negotiations, both as to the external boundary and boundaries of reserves.

(4) ***Canterbury***

The huge 1848 Kemp purchase was also to provide land for company settlement at Canterbury. The 'surplus' to the Crown was some 20 million acres. The purchase deed was made in the name of the company although Kemp was a Crown official. Duncan Moore sees this as entirely consistent with the arrangements whereby the Crown acted as agent for the company within a vast pre-emption waiver district. However, it was later considered by Daniel Wakefield (of the company) and by Lieutenant-Governor Eyre to have been a mistake. Under the 1847 arrangements the Crown was to buy *for* the company.

(5) ***Wairarapa***

In 1848, company and Crown agents Bell and Kemp also went to the Wairarapa to buy land for the company. They did not succeed however. By the time Grey and McLean bought the land the company had been dissolved.

(6) ***Division of territory between Crown and company***

Within the vast areas purchased by 1848, 1.3 million acres nominally belonged to the company under the terms of the 1847 Loan Act. In practice it never did select this amount before it wound up in July 1850, so the distinction between Crown surplus land and simply Crown estate, becomes a little semantic. Yet, when the company did wind up, the Crown paid five shillings an acre not only for the 628,000 acres which the company had selected (in fact 828,000 acres minus 199,000 acres which the company had on-sold to settlers); *plus* 472,000 acres of unexercised 'right of selection' under the 1846 Act. Nor was the company required to refund the money advanced to it by the Crown. The total due to the company was £275,000, later commuted to £200,000 apportioned amongst the New Zealand's Provinces according to how much each had benefited from the company's activities. The company had negotiated extremely well in 1847 and the Loan Act and its outcome saddled New Zealand with a debt it could have done without – a debt ultimately

redeemed by the Crown's policy of buying Maori land cheaply and on-selling it at considerable profit.[61]

3.25 Comparison of Company Claims and Other Old Land Claims

Several points of comparison and contrast may be noted:

(a) Moore characterises as Crown 'surplus' the bulk of the land acquired by the Crown or company, or both acting together, in Taranaki, Whanganui, Wellington, Nelson, Canterbury, and Otago up to 1850. That amounts to some 22.2 million acres, less the 1.1 million acres the Crown bought back from the company in the 1850 wind-up. The designation of the land as 'surplus' arises from the arrangements made in 1847 and 1848, which saw the Crown acting as agent for the company in a vast zone where pre-emption was waived in favour of the company. The categories are not quite as neat as that, however, and Moore too sees the outcome as 'quite a hall of mirrors'.[62] 'Surplus land' in respect of other pre-1840 purchases or after FitzRoy's waiver or pre-emption in the Auckland area, means land retained by the Crown after a *private* purchase from Maori had been deemed to have extinguished Maori claims. Whatever the formal arrangements, the Crown was rather too much the actor in the southern purchases for the same categorisation to fit so neatly. The analogy between the Otago purchase and Grey's taking of a surplus in the Auckland pre-emption waiver purchases is close, however. The 'completion' of company purchases in Port Nicholson and Wanganui also has close parallels with the adjustments and additional payments sometimes made by the Land Claims Commissions to purchases in the north. But, notwithstanding the company claim based on the Kapiti deed, Commissioner Spain had concluded that it had not purchased the Wairau and Porirua and these areas were acquired by Grey in 1847 essentially as new purchases. FitzRoy has disallowed the Taranaki purchase and award too and however much Grey tried to dress them up as completions' of an existing purchase, his acquisitions in that district from 1847 appear very much like new purchases, and were seen that way by the Te Atiawa returning from further south. Similarly the huge Kemp purchase was essentially a Crown affair. Daniel Wakefield of the company, and Lieutenant-Governor Eyre both considered that it was an error to have drawn up the purchase deed in the name of the company.[63] No Crown grant was made to the company before it surrendered its charter in 1850. Although 2.5 million acres was granted to the Canterbury Association by the Company, and confirmed by the Canterbury Land Settlement Act 1850 (an English Act), this was little different from Crown grants to any other immigrants on

61. Moore, 'The Crown's Surplus', pp 100–103
62. Ibid, p 102
63. *The Ngai Tahu Report 1991*, vol 2, pp 403, 468

Crown purchases. In 1850 the Crown resumed whatever it had granted to the company in all the other settlements, except for the Maori reserves and whatever had already been on-sold to settlers.

(b) The most important point of inquiry about the Crown's handling of old land claims is whether the officials' investigations and awards adequately established that Maori had given full and free consent to the transactions and that the agreed settlements conformed with the Crown's own solemn engagements not to allow Maori to unwittingly injure themselves by excessive alienation. The evidence raises a number of doubts that this was the case.

(c) (i) As Moore points out, the legal theory on which the Crown's investigations were posited, and the Land Claims Ordinances, created an 'invisible layer' of Crown-held interests, which the Crown asserted even before the land claims inquiries and arbitrations. These are evidenced in the Crown's taking of land for public reserves, Native Reserves, and town belt in Port Nicholson from late 1841. Similarly roads were laid out and constructed without compensation to Maori.[64]

(ii) The acceptance of the company's 1839 deeds and the 'overlord' chiefs' acceptance of some settler occupation as constituting a partial' purchase placed other chiefs, the resident' chiefs, and their communities in an invidious position. There is a good deal of evidence that they accepted the additional compensation' payments with great reluctance, and there is doubt as to whether they had agreed in advance to accept a binding arbitration of the kind conducted by the Crown in 1843 and 1844.

(iii) There is ambiguity as to what areas exactly the payments finally accepted by Maori were for. In Port Nicholson especially they seem to have been presented as payments for the company's surveyed lands, but FitzRoy's Crown grant to the company enclosed considerably more land within the outer boundary. The company did not accept the grant and Grey made further adjustments of the Maori reserves, via the McCleverty exchanges of 1847, and a new and even bigger grant to the company. The nature of Te Atiawa understandings of this is currently an issue before the Waitangi Tribunal.

(iv) From 1840 the Crown intervened in the physical struggle between Maori and settlers in the Cook Strait settlements. In one submission, Moore characterises that as the Crown having stopped Maori efforts to repel the intruders'. This is rather one-sided, for the Crown also stopped mobs of settlers from expelling Maori from pa and cultivations. As Moore says, 'racial tensions threatened to get out of hand'. It was a reasonable endeavour on the part of the Crown to try to police the situation, and it was not unwelcome to Te Atiawa Maori in particular.[65]

(v) The Crown's use of military force in the Hutt Valley and Wanganui in 1846 is more problematic. The officials' patience had certainly been greatly

64. Moore, 'Origins', pp 568–569
65. Ibid, pp 569–570

tried by the vacillation and perhaps the lack of good faith on the part of some of the Ngati Toa chiefs and their associates, but there is considered professional opinion that Grey's sending of troops into the areas vacated by Ngati Rangatahi was premature and provocative.

(vi) The Crown leant its support to the company to get Maori to relinquish the most desired land in Wellington and elsewhere for the new settlements. The inducements, in addition to the money awarded in the arbitrated compensation' included promises to protect Maori pa and cultivations (unless Maori agreed to relinquish them), and the benefits of a trust managing some, at least, of the company 'tenths', and 15 to 20 percent of the profits of the onsale of land, according to Russell's instructions to Hobson of January 1841. But these categories became confused together. When Maori would not relinquish their pa and cultivations, many of the tenths were awarded over that land, which then ceased to be available for raising revenue. The 15 to 20 percent of the land fund did not materialise either, while the Protectorate Department, funded by the Crown served the process of settlement as much as the protection of Maori rights. Nor were Maori themselves permitted, in the early formative years of the Maori–settler relationship, to become lessors of reserved lands. In the 1850s some of the McCleverty awards were let but there was not much spare land available for leasing. Other reserves were eroded by the individualisation or pseudo-individualisation of title, and the subsequent removal of restrictions on alienation. Some of the tenths and other reserves administered by trustees were let on perpetual lease at peppercorn rental.

(vii) The Crown was in something of a dilemma of course, once (on the one hand) settlement had been admitted via the company's 1839 deeds, and (on the other hand) the limits of what Maori considered they had sold became apparent. The Crown tried to find a way through this, having regard to its obligations to both Maori and settler. In the event they leaned their weight heavily on the settler side. The most obvious measure of this was that by the 1850s the Maori of Port Nicholson and Nelson especially, were on the margins of, or confined to small areas within, lands which had once been of central importance to them, and into which they had invited settlement having been led to believe that they would participate equally with the settlers in its development. If part of the purpose of groups such as Te Atiawa in inviting the British in was to secure their position against Ngati Toa and Ngati Raukawa, they paid a very considerable price for the alliance.

(viii) The Crown's handling of company claims at Wanganui resulted, after several attempts, in full and public agreement with local hapu, at the end of McLean's careful negotiation of 1848. The outside boundary and the reserves were publicly agreed and marked. Even the extension of the back boundary in 1850 to the Whangaehu River was apparently entirely acceptable. The fact that the area of land embraced by the purchase was more than double that in the company's award, implies a considerable under-payment

in per acre terms, but perhaps that is of secondary importance when the boundaries and reserves were made with full Maori consent, and were reasonably substantial even if they were not 'tenths'. As in most of the old land claims, Maori generally dealt in terms of natural boundaries and important features within those boundaries, not in per acre terms.

(ix) For, regardless of 'full and free' Maori consent at the time, the Crown had an obligation, which it publicly accepted in the early years, to leave with Maori, and/or take in trust for Maori, an endowment of land sufficient for their future needs. Future needs might reasonably be construed to include land required for occupation and subsistence, land required for commercial development (for example, leasing) and trust lands used to raise revenue for health care, education, and housing (or the money equivalent thereof). This was not done adequately in any of the company settlements. Rather there was a process of erosion of Maori interests that began in 1840 and 1841 and continued step by step and piecemeal over many decades. For these reasons the duty of active protection can hardly be said to have been adequately carried out.

(x) Thus, as in the north, so in the southern settlements, *provided* the renegotiation, by the Crown, of the original private purchase was thorough, clear, and involved full Maori consent (rather than only reluctant and unhappy concurrence), and involved the protection in Maori title of adequate land for 'present and future needs' the Crown's obligations under the Treaty may have been reasonably honoured, at least at the time of the renegotiation. By this measure the Crown's handling of some of the company purchases stands up better than others in Treaty terms. But the price, in Maori eyes, was not simply the money; it included the security of the important lands they wished to have reserved, and a reasonable expectation of ongoing benefit from association with the settlement and with the Crown. It is also in the Crown's neglect to foster the relationship with Maori subsequent to the purchase that Treaty breaches arose.

CHAPTER 4

FITZROY'S WAIVER OF CROWN PRE-EMPTION

Note: The research underlying this chapter has unfortunately been limited by the illness of the principal researcher concerned, Ms Rose Daamen. In particular it has not been possible to examine in detail the investigation of the waiver purchases by Commissioners Matson and Bell or the Myers commission of 1948. This chapter nevertheless draws upon Daamen's 'Draft Report on Pre-emption', September 1996, and on Mr John Hutton's 'Land Purchases under FitzRoy's Waiver of Crown Pre-emption: an Analysis', October 1996, both written for the Waitangi Tribunal Rangahaua Whanui Series. John Hutton also wrote a summary of his report, which formed the basis of this chapter; the references to parliamentary papers and other sources are mostly drawn from his citations of them in his report.

4.1 Origins of Pre-emption in New Zealand

The issue of the Crown's pre-emptive (monopoly) right to purchase Maori land arose in the late 1830s in relation to the increasing numbers of people settling in New Zealand and to the increasing awareness by the British Government that it would have to take some responsibility for the actions of British subjects there. Pre-emption had been used in North America, both to control the spread of settlement and to provide opportunity for local governments to gain revenue from land sales. On a more humanitarian level, pre-emption was supported as a means of protecting indigenous people from unscrupulous land dealers.

In August 1939 Captain William Hobson was instructed by Lord Normanby that, on the establishment of British sovereignty in New Zealand, 'the chiefs should be induced, if possible, to contract with you, as representing Her Majesty, that henceforward no lands shall be ceded, either gratuitously or otherwise, except to the Crown of Great Britain'. This, it was hoped, would ensure a degree of responsibility in land transactions. Even before the Treaty negotiations, Hobson was to proclaim on his arrival in New Zealand that the Crown would not 'acknowledge as valid any title to land which either has been, or shall hereafter be acquired . . . which is not either derived from, or confirmed by, a grant to be made in Her Majesty's name, and on her behalf'. With regard to land that had already been acquired by British subjects, a commission was to be appointed to investigate title, and upon making its recommendations to the Governor, he would decide if the claimants were entitled to any confirmatory grants.

Normanby envisaged a system whereby '[t]he re-sales of the first purchases that may be made, will provide the funds necessary for future acquisitions; and, beyond the original investment of a comparatively small sum of money, no other resource will be necessary for this purpose.'[1]

On 14 January 1840, Governor Gipps of New South Wales issued a proclamation stating that any private purchases of Maori land were to be considered 'null and void' until investigated and confirmed by the Crown. Hobson confirmed Gipps' stance with an identical proclamation on 30 January 1840, the day after his arrival in the Bay of Islands.

4.2 Pre-emption and the Treaty of Waitangi

The second article of what was to become the Treaty of Waitangi was initially drafted by Hobson's secretary, J S Freeman, and asked that '[t]he United Chiefs of New Zealand yield to Her Majesty the Queen of England the exclusive right of Pre-emption over such waste Lands as the Tribes may feel disposed to alienate'. By 'waste' Freeman probably meant 'uncultivated'. Busby revised the draft and included at the beginning of the article (article 2) the guarantee to Maori of the 'full exclusive and undisturbed possession of their lands and estates, forests fisheries and other properties' as long as they wished to retain them. The pre-emption clause then followed and read: 'the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treaty with them in that behalf', or in Maori 'Otiia ko nga Rangatira o te wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te wenua – ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona'.

Controversy has surrounded the translation of the English text into Maori. Henry Williams used the word 'hokonga' to translate the concept of pre-emptive right of purchase. According to Orange, Williams' translation into Maori 'did not stress the absolute and exclusive right granted to the Crown'.[2] By implication then, the verbal explanations of the concept at Treaty signing meetings and Maori understanding of the explanation were to be crucial, 'particularly in a Maori tradition in which relationships were customarily sustained and modified through lengthy discussion'.[3]

According to Orange, treaty negotiations suggest 'that the exclusive nature of pre-emption was not always clearly understood. Nor did Maori grasp the financial constraints that pre-emption might bring; it was presented, it seems, either as a

1. Normanby to Hobson, 14 August 1939, BPP, vol 3, pp 85–87. For a lengthier quoting of these instructions, see chapter 1.
2. Claudia Orange, *The Treaty of Waitangi*, Wellington, Allen and Unwin,1987, p 42
3. Ibid, p 56

benefit to be gained or as a minor concession in return for the guarantee of complete Maori ownership'.[4] At the negotiations at Waitangi, Orange concludes, Maori understanding was possibly restricted by 'inadequate explanations'. Observers such as William Colenso and William Brodie noted that a number of chiefs did not fully understand pre-emption. Colenso did not 'for one moment' suppose that the chiefs were 'aware that by signing the Treaty they had restrained themselves from selling their land to whomsoever they will'.[5] Only one chief, Moka, demonstrated a knowledge of the workings of pre-emption by doubting Hobson's ability to enforce Crown pre-emption because, despite the 30 January proclamation, settlers were still privately purchasing land from Maori. Shortly after the signing Tamati Wiremu, a Paihia chief, appealed to the Governor to stop overtures being made by Pakeha individuals. This can be seen as evidence of an understanding of the exclusive right of pre-emption, or as evidence of the chief's understanding of the Crown's protective role towards Maori. Other Maori, like the chief Hara, continued to offer land for sale to private purchasers.

Hobson's instructions to the negotiators, mostly missionaries, who were to seek signatures to the Treaty from other parts of New Zealand do not appear to have contained any specific references to pre-emption. The negotiators were instructed to explain the Treaty's principles, which Maori were to understand clearly before they added their signatures. These negotiators then, had an important role to fulfil. It would appear that pre-emption was presented as a form of Crown protection for Maori. At Mangungu, John Hobbs, a Wesleyan missionary, told those Maori present that land would never be forcibly taken from them and would be purchased by the Queen if needed.[6] Major Bunbury told Maori at Coromandel and Thames that pre-emption was 'intended equally for their benefit, and to encourage industrious white men to settle amongst them', to share skills with them. Furthermore, rather than allow speculators to purchase large areas of land, Maori were told that the Queen would purchase their land at a 'juster valuation'.[7] Henry Williams also justified pre-emption in a similar manner to Maori south of Cook Strait and up the west coast to Wanganui, who were pleased to hear that there existed a check against land speculators.

Maori responses to pre-emption understandably depended upon their circumstances. In the areas of New Zealand Company settlements, Maori were anxious to gain assistance against the settlers who were claiming to have purchased large areas of land which Maori believed they had never sold. As Orange points out, '[i]t does not seem to have occurred to Maori to question whether the Government had sole right of purchase or only first offer'.[8] What they required was Crown protection. In the north, many Maori were still keen to sell land and made offers to Hobson. Financially constrained, Hobson had to turn down these offers, disappointing Maori

4. Ibid, p 100
5. R M Ross, 'Te Tiriti o Waitangi: Texts and Translations', *New Zealand Journal of History*, vol 6, no 2, October 1972, p 145
6. Orange, p 65
7. Cited in Orange, p 101
8. Orange, p 102

who consequently resented Crown pre-emption. In Auckland, where the Crown was buying land for the new capital (which was shifted from Kororareka in 1841), Maori quickly came to realise that the Government was greatly benefiting from the margin between purchase and re-sale price.

4.3 The New Zealand Company and Hobson's Pre-emption Waiver

In November 1840 the New Zealand Company secured an agreement with the British Government whereby it would be granted one acre of land for each five shillings spent on colonisation in New Zealand. A charter of January 1841 listed a schedule of 110,000 acres in Port Nicholson and 50,000 acres in Taranaki, to be selected from *validly purchased* land within the vast zone from Mokau to Kaiapoi that the company claimed to have purchased in 1839. Doubts then arose as to the application of the Land Claims Ordinances of 1840 (New South Wales) and 1841 (New Zealand), to these lands. In September 184, having visited Port Nicholson, Hobson wrote to Wakefield:

> Understanding that some doubt is entertained as to the intentions of the Government with respect to the lands claimed by the New Zealand Company, in reference both to the right of pre-emption vested in the Crown, and to conflicting claims between the Company and other purchasers. It may be satisfactory for you to know that the Crown will forego its right of pre-emption to the lands comprised within the limits laid down in the accompanying schedule, and that the Company will receive a grant of all such lands, as may by any one have been validly purchased from the natives.[9]

The schedule added to that already agreed by Lord John Russell, 50,000 acres at Whanganui, and 221,000 acres at Nelson was soon included. This waiver permitted the company to attempt to complete purchases already accepted as begun, but they were still subject to the inquiries of the Land Claims Commissioner (William Spain). The subsequent relationship between the Crown and the company has been discussed above in chapter 3.

4.4 Fitzroy Proposes a Waiver on Pre-emption

By the time Governor FitzRoy had arrived in New Zealand in December 1843 (Hobson had died in September 1842) expectations were running high that the pre-emption clause of the Treaty would be relaxed. Before leaving England, FitzRoy had written to Stanley, Secretary of State for the Colonies, about the possibility of waiving pre-emption in favour of certain other individuals or companies, besides the New Zealand Company. This, he believed, would allow settlers who had laid out capital on buildings or other improvements to acquire title, and meet the objections

9. Hobson to Wakefield, 6 September 1841, Wai 145 rod, doc a29, p 308

of Maori who would not sell their land to the Government at a low value knowing that it would be resold for a higher price. FitzRoy noted that '[s]ome powerful tribes are said to have already combined to refuse to sell land to the Government, and such combination is likely to be extended while the aborigines look upon the Government as opposed to their interest, seeking only its own advantage'. His tentative solution was that companies or individuals be permitted to purchase land from Maori as long as they were willing 'to give not less than the fixed upset price (say one pound an acre) to aboriginal landowners', and as long as each transaction was not only authorised by the Governor, but 'inquired into, witnessed and registered by a Government officer'.[10]

Stanley considered FitzRoy's proposal to be premature and instructed him to wait until he had arrived in New Zealand and viewed the situation first hand. Stanley did ask FitzRoy to keep two points in mind: firstly, that Europeans were to be prevented from acquiring land from Maori at a cheaper rate than if they had acquired it from the Government; and secondly, that if such purchases were made, a contribution was to be made by the purchaser to the emigration fund.[11]

Immediately after FitzRoy's arrival in New Zealand, Maori voiced their concerns to him. According to a *Southern Cross* report, Te Kawau, Tinana, and others of Ngati Whatua explained their understanding of pre-emption: '[a]t the meeting at Waitangi you pledged your Government that we should be British subjects, and that our lands should be sold to the Queen. But we understand from that part of the Treaty that Her Majesty should have the first offer; but in the event of Her Majesty not being able to bargain with us, we should then be able to bargain with any other European'.[12]

Te Wherowhero, Kati, and others of Waikato were reported as expressing very similar sentiments: '[t]his agreement at Waitangi said: The land was to be sold to the Queen; now, we supposed that the land was first to be offered to Her, and if Her Governor was not willing to buy, we might sell to whom we pleased; but no, it is for the Queen alone to buy; now, this is displeasing to us, for our waste lands will not be bought up by Her only, because She wants only large tracts; but the common Europeans are content with small places to sit down upon'.[13] Pakeha settlers were also vocal in criticising pre-emption. They were restricted to purchasing land only from the Crown and at the prices the Crown prescribed.

Within two months of arriving in the colony FitzRoy was to introduce the first of three pre-emption waivers. In justifying his action to the Secretary of State for the Colonies, FitzRoy described the situation:

> the natives have been clamorous to sell their lands. They called on the Government to buy, or let others buy; and great discontent has been caused among them by the inability of the Government to do either. But while they called on the Government to buy from them, it was at a nice price wholly out of the question. They said: 'Let the

10. FitzRoy to Stanley, 16 May 1843, BPP, vol 2, pp 387–388
11. Stanley to FitzRoy, 26 June 1843, BPP, vol 2, p 390
12. *Southern Cross*, 30 December 1843, cited in Ross, p 146
13. Ibid

> Government give us as much as it receives from others, or let them buy from us. By the treaty of Waitangi, we agreed to let the Queen have first choice (the refusal) of our lands, but we never thought we should be prevented from selling to others if the Queen would not buy. Is it just to us that you will neither buy at a fair price, nor let others buy, who will give us as large a price as they give to you, after you have bought from us for a trifle?'.

FitzRoy gave two reasons why he was unable to buy land: firstly, the high prices Maori were asking for their land, and secondly, he did not have sufficient capital. The situation, FitzRoy continued, was critical and he believed that had he deferred the decision:

> the character of the Government would have been so irretrievably injured in the native estimation, and such open opposition to authority would have been the consequence, that our moral influence, by which we alone stand firmly in New Zealand, would have been lost.[14]

4.5 Fitzroy's Pre-emption Waivers for the New Zealand Company

In January 1844 FitzRoy travelled to Wellington to try to settle the continuing difficulties arising out of the New Zealand Company claims there and the Wairau incident. Encountering the fact that more company settlers were preparing to embark for New Zealand and that the Government did not have the time nor the funds to purchase land, FitzRoy adopted the only solution he thought 'practicable'. On 27 February 1844 he waived the Crown's right of pre-emption over 150,000 acres of land for the proposed settlement in 'New Munster' (the South Island and the southern part of the North Island), to be selected and purchased by the company's agent 'under the superintendence and with the assistance of the most efficient Government officer of whose services' FitzRoy could provide: J J Symonds, former Sub-Protector of Aborigines and now police magistrate. This waiver led to the Otakou purchase of July 1844.

FitzRoy instructed Symonds 'not to countenance any, even the smallest encroachment on, or infringement of existing rights or claims, whether native or other, unless clearly sanctioned by their legitimate successor [sic]'. The new settlers in New Munster were to be informed that their cases would be dealt with 'most carefully and kindly' while Maori were to be told that the Government would 'not authorize, nor in any way sanction any proceedings which are not honest, equitable and in every way irreproachable'.[15]

FitzRoy was also authorised to waive pre-emption in favour of the New Zealand Company for 150,000 acres in or near the Wairarapa, and another 250,000 acres 'in other places within the limits claimed by the New Zealand Company under Mr

14. FitzRoy to Stanley, 15 April 1844, BPP, vol 4, pp 178–179
15. FitzRoy to Symonds, 27 February 1844, BPP, vol 4, p 437

Pennington's award'.[16] (In the event these purchases were not made during FitzRoy's governorship.)

The waivers were dependent on a number of conditions: firstly, that all the other detailed arrangements made by the Government in respect of the company's settlements were to remain unaltered (see chapter 3 above); secondly, that the land purchased under the waivers was in exchange for an equal number of acres claimed by the company elsewhere (namely in Port Nicholson, Taranaki, Whanganui, and Wairau, where Maori were not willing to sell in the quantity the company required), and that the purchase money was to be provided by the company; and thirdly, that all surveys of the land purchased were to be made by company surveyors at company expense.[17] (In the end the Government helped both with the surveys and by advancing funds.)

4.6 General Waivers

4.6.1 The '10 shillings an acre' proclamation

Upon his return to Auckland, FitzRoy issued the '10-shillings-an-acre proclamation', dated 26 March 1844. Pre-emption was to be waived over 'certain limited portions of land' under certain conditions. In addition to the cost of the land, the purchaser was to pay four shillings an acre to the Treasury to secure the waiver permit and six shillings an acre into the Land Fund for 'the general purposes of Government', in order to obtain the Crown grant on completion of the purchase from the Maori owners. Applications for waiver were to be made to the Governor and had to describe the area of land 'as accurately as may be practicable'. Before giving his consent, the Governor would consider the locality, the 'state of the neighbouring and resident natives', 'their abundance or deficiency of land', and 'their disposition towards Europeans, and towards Her Majesty's Government'. He would also consult with the Protector of Aborigines. In giving his consent, the Governor might 'judge best for the public welfare, rather than for the private interest of the applicant'.

No Crown title was to be given for any pa or urupa or land about them, 'however desirous the owners may now be to part with them'. Pre-emption was also not to be waived over any land required by Maori for their present use. Of all land purchased under the waiver, 10 percent was to be conveyed to the Crown by the purchaser 'for public purposes, especially for the future benefit of the aborigines'.[18]

Meeting with Maori chiefs at Government House on the day the proclamation was issued, FitzRoy told them that there was no longer any objection to them selling their land to Europeans, providing his permission was sought and the case was investigated to determine whether Maori could spare the land and to ensure any future difficulties were pre-empted. He also advised those present:

16. FitzRoy to Spain, 27 February 1844, BPP, vol 4, p 437
17. Hamilton to Wakefield, 27 February 1844, BPP, vol 4, p 437
18. Proclamation, 26 March 1844, BPP, vol 4, pp 618–619

> not to part with your land hastily, and only with such portions as you can well spare, and to be cautious to sell to the best advantage, and not to the first person that asks you. See that you get a fair price, and as much as the land will sell for; be very cautious in making your bargains, in order that when they are settled, you may abide by them honestly; in order that there may be no quarrelling, or even misunderstandings afterwards.

FitzRoy went on to say that one-tenth of the land purchased under the waiver would be set aside to be:

> chiefly applied to, your future use, or for the special benefit of yourselves, your children, and your children's children. The produce [agricultural or otherwise is not specified] of that tenth will be applied by the Government to building schools and hospitals.[19]

Before Crown pre-emption was restored under Grey, 57 waiver certificates had been issued under the March 1844 proclamation for areas ranging from nine and a half perches to 200 acres. One-third of the certificates were for areas of 10 acres or less, just over half were for areas of 20 acres or less, and just under a quarter were for areas of between 31 and 50 acres. In aggregate they authorised direct purchase of 2337 acres, by Daamen's calculations, or 1795 acres according to the Myers commission of 1948.[20] A third of the certificates were issued within the first month of the waiver, but demand then steadily dwindled until the more lenient waiver was issued in October. A few of the deeds attached to the waiver certificates predated the waiver proclamation. Almost all of the waiver certificates were issued for Auckland land: only three were recorded for land north of Auckland (two in the Bay of Islands and one along the Mahurangi–Waiwerawera coast); a further two were issued for islands in the Hauraki Gulf.

In terms of investigation into each application, in most instances it appears that Protector Clarke knew of no objection to the purchase, nor of anything to prevent it. The few exceptions to this seem to be based on Clarke's concern as to whether settlers were purchasing land from the correct parties. When Clarke was unsure of this he sought a local person from the area concerned to advise. (For example, when assessing applications from the Bay of Islands he asked Major Bridge to inquire into the matter on his behalf.) There appeared to be no inquiry into the price paid to Maori for their land, or at least no objections by the Protectors are recorded in respect of price. Daamen's research shows that payments to Maori ranged from 3s 5d an acre to £2 10s an acre, averaging 16 shillings an acre for the 32 claims where records of both price and acreage survive. (This was apart from the 10 shillings an acre payable to the Government.)[21]

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19. Copy of Minutes of a Meeting of Native Chiefs, by Appointment, at Government House, Auckland on Tuesday, 26 March 1844, BPP, vol 4, pp 197–198
20. Rose Daamen, 'Pre-emption and FitzRoy's Waiver Purchases', Waitangi Tribunal Rangahaua Whanui Series unpublished draft, 1996, ch 3, p 14; Sir M Myers report, AJHR, 1948, g-8, p 66. The discrepancy relates to the confusion of the records and to the fact that some waiver certificates under the March 1844 proclamation were reissued under the October proclamation.

4.6.2 The 'penny an acre' proclamation

Despite FitzRoy's March pre-emption waiver, dissatisfaction was still being expressed about land purchasing. The March waiver had done little to encourage land transactions outside Auckland. The 10 shilling an acre fee was precluding land sales elsewhere because it would be some time before the value of land would be worth the capital expenditure necessary to acquire it at that cost. In the north Maori were increasingly dissatisfied with the manner in which the Crown exerted its power through pre-emption, customs, and timber duties. These controls, and the shift of the capital to Auckland, diminished the flow of revenue to northern Maori and settlers alike. In July of 1844, Hone Heke expressed his anger at the loss of mana as well as economic opportunity by cutting down the flagstaff flying the Union Jack at Kororareka. In early October, FitzRoy, in an attempt to alleviate disquiet, totally abolished customs duties.

On 10 October 1844 FitzRoy also reduced the fee payable to the Government for a pre-emption waiver to 1d per acre. This fee was payable upon issue of a Crown grant and not before.[22] The remaining provisions for this waiver duplicated those of the earlier March waiver. FitzRoy argued that in order for the colony to prosper '[l]and[23] must be made easy of attainment in small quantities, when sellers and purchaser fully agree to the transfer'. The previous pre-emption period, however, was neither unfair to those who had already bought land at high prices nor to Maori. In the case of the former, unless the colony prospered, the value of their land would fall to nothing, and in the case of the latter, the previous four years of interaction with land commissioners, Protectors, missionaries, and others had 'so completely informed the natives of the value of land, that there is not now any doubt of their ability to manage their own transactions of this nature, as far as relates to their own present interests'.[24]

Under the October pre-emption waiver, 192 certificates were issued over an area totalling around 99,500 acres. The waivers ranged from 13 perches to 3000 acres. Many purchasers overcame the acreage limit (based on the phrase 'a limited portion of land' in the March 1844 proclamation, which was later interpreted by Attorney-General Swainson to mean 'not more than a few hundred acres'[25]) by submitting a series of applications for adjacent areas of land, or by submitting applications for each individual family member, increasing their claim to areas of around 2500 to 4500 acres. Apart from this, almost three-quarters of the waiver certificates issued were for areas between 100 and 1000 acres, a quarter for less than 100 acres and 'a small number' for between 1000 and 3000 acres which suggests that the implied acreage limit was not adhered to.[26]

21. Daamen, chapter 3, pp 14–18
22. Proclamation, 10 October 1844, BPP, vol 4, pp 620–622
23. Minute of 10 June 1852, olc 1240, NA Wellington
24. FitzRoy Memorandum, 14 October 1844, BPP, vol 4, pp 403–404
25. Swainson minute, 31 August 1848, olc 1/1240, NA Wellington
26. Daamen, chapter 3, p 28

Around two-thirds of the certificates were issued from December 1844 to March 1845, with FitzRoy issuing his last pre-emption waiver certificate in November or December 1845. Over three-quarters of the certificates under the October waiver were for land around the Auckland area, while a small number were issued for land in the Bay of Islands, Whangaroa, Ngunguru, Mahurangi, Hokianga, Kaipara, Coromandel–Thames, Bay of Plenty, and one in the Waikato.

According to Daamen's reading of the files, Maori received on average two shillings an acre for the land sold. The Myers commission gives one shilling and three pence per acre average.[27]

Some of the deeds were signed prior to the proclamation, and a large number were signed following the proclamation but before the certificate was granted. Like those under the March proclamation, such transgressions did not result in a refusal for the certificate to be granted, except in a small number of cases which came before the Attorney-General in 1846 to 1847, and, under Earl Grey's instructions of 10 February 1847, had to comply *precisely* with the terms of the waiver proclamations.

In terms of investigating proposed waivers, in Daamen's view, the Protectors only seemed to question an application if a previous purchase had taken place over the same area of land.[28] Part of the explanation was probably that the Protectors already had a very considerable knowledge of the land and the Maori ownership of it in the areas most affected.

4.7 The Colonial Office's Reaction

The Colonial Office sanctioned and approved the 10-shillings-an-acre proclamation. It recognised the pressure that was placed on FitzRoy by Maori and settler discontent. However, the office was of the opinion that the fee paid by settlers could be increased. This of course was impossible; few settlers were prepared to pay even the 10 shillings. On the other hand, FitzRoy's 'penny-an-acre proclamation' seriously undermined the possibility that the Government could derive a significant income from land sales. Consequently the Colonial Office was not pleased with FitzRoy's second waiver, but sanctioned it nonetheless, partly because they recognised that FitzRoy was trying to allay Maori unrest. Later, after Heke and Kawiti had sacked the township of Kororareka (Russell) anyway, the office changed its stance, calling the Proclamation 'a most impolitic arrangement'.[29] Among other factors the penny-an-acre proclamation gave the Colonial Office reason to remove FitzRoy from his post in November 1845.

27. Daamen, chapter 3, p 29; AJHR, 1948, g-8, p 76
28. Daamen, chapter 3, pp 27–30
29. Stanley to George Grey, 13 June 1845, BPP, vol 5, p 232

4.8 Grey's Restoration of Crown Pre-emption

FitzRoy's replacement, George Grey, was instructed to recognise the purchases made under the proclamations, but to re-assess the need for the waiver of Crown pre-emption. Grey saw little that he liked and soon after his arrival refused to sanction any further private purchases. In a series of didactic despatches to the Colonial Office in June 1846 Grey attacked the proclamations. He argued that FitzRoy had issued them under duress from 'agitators' who 'were those who most eagerly availed themselves of . . . [the concessions] when they were obtained' and that such coercion should not be tolerated.[30] Grey also attacked the way that individual waivers were not gazetted, so that more than one buyer could seek to purchase the land. Maori, he suggested (with some justice) would have got better prices had the land been sold at public auction. He complained that Maori would oppose the occupation of lands purchased under the Proclamations (although they had not done so), and talked of the numerous injustices suffered by the settlers (although the settlers had almost universally supported the penny-an-acre proclamation).

On 10 February 1847 Earl Grey replied to Governor Grey s June dispatches.[31] On the whole the Colonial Office appears to have been convinced by Grey's arguments. Earl Grey suggested that FitzRoy had 'plainly exceeded his lawful authority' and agreed that the waiver of pre-emption purchases should be disallowed and annulled. However, Grey was instructed to recognise individual transactions if purchasers could 'prove in the strictest manner that he had completely and literally satisfied the requisitions of the proclamations in every particular they contain'. Earl Grey anticipated that 'very few indeed [of the waiver purchases] will be sustained'. Grey was also instructed to ensure that the land had been purchased from the correct owners:

> the Attorney-General should certify to you that the natives from whom the purchases may have been made were, according to native laws and customs, the real and the sole owners of the land which they undertook to sell.[32]

Grey, however, had acted before receiving these instructions. On 15 June 1846 he gazetted a notice announcing his proposal to appoint commissioners to investigate and report on each 'alleged purchase' and calling on all persons who wished to lodge claims to submit their papers, 'whether deeds or surveys', by 15 September 1846. He would decide, in the light of the commissioners' reports, whether to issue grants in satisfaction of the claims.[33]

In November 1846 Grey issued two Ordinances relative to the land question. The first, the Native Land Purchase Ordinance, banned all private purchases and leases of Maori land. The second, the Land Claims Compensation Ordinance, authorised

30. George Grey to Stanley, 9 June 1846, BPP, vol 5, p 555
31. Earl Grey to George Grey, 10 February 1847, BPP, vol 5, pp 578–580
32. Ibid, p 579
33. Grey to Gladstone, 18 June 1846, BPP, vol 5, p 569

the setting up of the commission to investigate the pre-emption waiver purchases. The commissioner(s) would ascertain whether or not individual purchases had followed the terms of FitzRoy's waiver of pre-emption under the October 1844 proclamation. Before Crown grants could be issued for purchases under that proclamation it was necessary to check whether the claimant had 'duly complied with the terms and conditions prescribed by the said recited Proclamation, and by the Notice to Land Claimants published in the Government *Gazette* of the fifteenth day of June, 1846'.[34] If the commissioner appointed to investigate the claims was satisfied that a claim met the requirements of the ordinance, a debenture would be issued that covered the claimant's costs including the price paid to Maori, the expenses of the conveyance, survey costs, and the costs of improvements. By section 11, if the land had been occupied by the claimant (by fencing, cultivating, or erecting buildings), he was authorised to purchase the land from the Crown at an additional fee of £1 per acre, less what money had been spent on the land, other than the cost of improvements (but at most 10 shillings an acre).

The preamble of the Land Claims Compensation Ordinance in part sought to protect the interests of Maori:

> no Crown Grant of any such land can be safely issued until it shall be ascertained that such alleged purchases have been made from the true Native owners of such land, and that the rights of all persons thereto have been extinguished.

However, by section 10, any land not sold to the settler claimant was to revert to the Crown as 'demesne land of the Crown, saving always the rights which may hereafter be substantiated thereto by any person of the Native race'. The onus of proof was thus on the Maori: if they did not substantiate a claim they would be assumed to have surrendered all their rights to the land in the initial sale. In other words the same principle of a radical Crown title as underlay the Crown's handling of pre-1840 purchases, was applied to the pre-emption waiver purchases also.

In other very important respects the Ordinance worked against Maori interests. In a notable departure from FitzRoy's policy, section 14 of the Ordinance allowed successful claimants to purchase the 'tenth of the land that had been reserved 'for public purposes, especially the future benefit of the aborigines'. It was reasoned that 'such reservations cannot in many cases be conveniently made'. But FitzRoy had publicly stated that the Government would look after Maori interests and that the tribes would retain land in the growing settler community. Grey's rationalisation that such reserves were inconvenient is therefore highly unsatisfactory. This was poor treatment indeed for those tribes living in or near Auckland who had sold thousands of acres of land to the settlers.

34. 'An Ordinance to authorize Compensation in Colonial Debentures to be made to certain Claimants to Land in the Colony of New Zealand', 1846 no 22

4.9 *Queen v Symonds*

Like the Land Claims Ordinance 1841, the Land Claims Compensation Ordinance 1846 was highly unpopular among the settlers, and not all potential claims were submitted to the appointed commissioner, Major Matson, by the required date. Grey sought to strengthen his hand by recourse to the Supreme Court. In a test case, *Queen v Symonds*, brought by a Crown official, the court found that the Crown was the sole source of legal title and had the sole right to extinguish Native title. Purchases completed under FitzRoy's waiver of pre-emption thus had no valid or enduring title, unless followed by a Crown grant. Politically, the claimants were placed at the mercy of the Government, which held the power to authenticate the purchases as it saw fit.

4.10 Grey's Three Options

Grey only partly followed the instructions sent by the Colonial Office for the settlement of the pre-emption waiver claims. His overriding concern was to settle the claims quickly and acquire for the Crown a sizeable 'surplus of land that could be sold at a profit to the Crown. On 10 August 1847, in the aftermath of *Regina v Symonds*, Grey issued regulations presenting the settler claimants with three options. Firstly, the purchasers could have their claims assessed under the Colonial Office's narrow and strict instructions. Secondly, they could take the more generous settlement offered by the Land Claims Compensation Ordinance. Thirdly, they could follow a new set of regulations, whereby, if approved by the commissioner, the penny-an-acre claimants could receive a Crown grant for up to a maximum of 500 acres and at the payment of a fee of five shillings an acre, provided the claim was undisputed by Maori and was within 20 miles of Auckland. Ten-shillings-an-acre claimants could receive a grant when they paid the six shillings an acre fee required for the issuance of the Crown grant. Most claimants followed the third option.

4.11 The Matson Inquiry

Meanwhile, from December 1846, the inquiry conducted by Commissioner Matson had heard evidence for the vast majority of the claims, including claims under the 10-shillings-an-acre proclamation as well as the penny-an-acre proclamation The former group were relatively unproblematic. Of 62 claims lodged: 49 (relating to about 1500 acres) were Crown granted by Grey on payment of outstanding fees; nine claims (relating to about 280 acres) were disallowed for non-payment of the four shilling per acre fee at point of application for the waiver certificate (which should therefore never have been issued). According to the Domett committee, in respect of 189 applications under the penny-an-acre proclamation, affecting 97,472

acres, Matson was quick to disallow purchases outright or to authorise compensation instead of a Crown grant: 53 grants were awarded to settlers on payment of an additional five shillings per acre, 21 led to payments of compensation or debentures, 80 were disallowed for non-compliance with the requirements of the notice of 15 June 1846 (that is, plans and surveys were not submitted by Grey's deadline of 15 September 1846), a further 28 were disallowed by the Attorney-General for not meeting the Colonial Office requirement of 10 February 1847 that they conform precisely with the procedures laid down in FitzRoy's proclamations and seven were abandoned or disallowed for no stated reason.[35] This meant that, in the majority of cases, some or all the land went to the Crown, an outcome that was strongly resented by the settlers. It did not necessarily mean, however, that the land itself was identified and available for reallocation. An accurate survey had not been an actual requirement of Grey's 1846 proclamation and ordinance, and many of the claims, especially those distant from Auckland, were not yet surveyed.

Some Maori chiefs were interviewed by Commissioner Matson (Hutton suggests that this was especially the case in the 10-shillings-an-acre purchases), but the records examined thus far suggest that little information was sought from them other than to affirm the transaction, the location of the land and the receipt of payment for it.[36] In this respect Matson's inquiries were very similar to those conducted for old land claims by Richmond and Godfrey. Indeed, the records show no evidence of a thorough investigation of whether or not the land had been purchased from the 'correct group, as required by Earl Grey and by the 1846 ordinance. Either Maori did not come forward to contest the claim or the inquiry proceeded on the basis that the correct owners had been determined by the Protectorate at the time of the purchase. Furthermore, no claim appears to have been disallowed on the basis of Maori receiving insufficient payment, although in some cases the money paid was clearly trifling. For example Puketahi Island was purchased for 'five pounds cash and 12 blankets' and immediately on-sold for £200.[37]

A number of Maori opposed the Crown's acquisition of a 'surplus. As has been explained in chapter 2, the Crown took the position that any purchase by Europeans of land held under 'Native title extinguished the Maori interest but created a title in the Crown, not the private purchaser, and the Crown had the legal right to retain part or all of this title. This was fundamentally different from the common Maori view that the 'sale of land formed part of an ongoing relationship with a particular settler, a relationship in which the Maori vendors retained certain rights over the land. So when the Crown asserted rights over a 'surplus it interfered with the understandings Maori had of some, at least, of the transactions, and the relationship established between Maori and particular settlers.

35. AJHR, 1948, g-8, p 69
36. John Hutton, 'Land Purchases under FitzRoy's Waiver of Crown Pre-emption: an Analysis', report commissioned by the Waitangi Tribunal in conjunction with the Waitangi Tribunal Rangahaua Whanui series, October 1996, draft report, secs 3.2, 3.3
37. Ibid, sec 3.4

Evidence of this difference of view is that in a number of cases Maori refused to let Crown surveyors onto land they had sold to settlers.[38] Likewise, the Ngati Whatua chief Paora Tuhaere, who sold land to a settler called McConnochie, criticised the Crown when it tried to take possession of the land. As the *Southern Cross* reported, the Magistrate's Court explained to Tuhaere that 'he had nothing to do with it – that he had been paid for the land, and that consequently all his interest in it had ceased'.[39] The chief rejected this argument, and 'maintained that he had an interest in the land, and that he should be compelled to refund the money that he had received if McConnochie were not allowed to retain possession'.[40] He wrote to the *Southern Cross*:

> Friends, White People of Auckland, – Listen all of you. The Governor is unjustly taking the lands of the white people. Now I say this law of the Governor is wrong. Because I have sold the land to the white man. The money has been received by us, our eyes have seen the payment, and we were glad. But the Governor s payment we have not seen, his claims are shallow, therefore I said this principle is wrong, is it not so, friends? . . . let the lands which we sold to the white people rest with them in consideration of the payment received by us. . . . Our doings are right, there is nothing wrong in this our custom. You white people say we are a foolish people, now what is that? we can see clearly the evil of this confused work, therefore I say regarding this law it is wrong.[41]

Despite this opposition the Crown continued to assert a right over 'surplus' lands from the waiver purchases. The Crown also retained control over the 'reserve tenths' (which FitzRoy had publicly promised would be used primarily for Maori purposes). Grey chose to sell most of them to successful settler claimants under section 14 of the 1846 ordinance. There is little indication that the Crown used them for Maori purposes. It is possible that the 'model village' Grey fostered at Mangere for Tainui, may have included disallowed pre-emption waiver purchases, but more research would be required to establish this. Some of the Anglican endowment (including Bishop Selwyn's school) in the Remuera–Meadowbank areas might have included such lands, but again further research would be required.

In summary, the waiver of pre-emption purchases appears to have cut a swathe through Maori land resources in Auckland and south Auckland. Normanby had adumbrated the theory that, even though land was bought by the Crown at low prices, Maori would benefit from the increased value that settlement would give the remainder. But if Maori were to benefit from the increasing value of their land they would need to retain land either to sell at a later date, lease, or use as collateral. Similarly, if Maori communities were to remain healthy and prosperous they also needed to retain sufficient land for their own residence and commercial agriculture.

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38. In particular, the purchases by Chisholm, Hart, and Hay in Ihumatao and Papakura: A Ward, 'South Auckland Lands', draft report commissioned by the Crown Congress Joint Working Party, 1992 (cited in Hutton, sec 3.5).
39. *The Southern Cross*, 16 September 1848
40. Ibid
41. Ibid

For example, land at Remuera and Mount St John had been held back by the Ngati Whatua ki Orakei chiefs from previous sales to the Crown. But this was sold in the pre-emption waivers, partly as a result of the division of that land with Tainui right-holders, who were interested in selling. Grey and Matson's inquiries do not appear to have taken into consideration the long-term land needs of Maori vendors, by holding land in trust for Maori purposes or by returning it to Maori.

4.12 The Domett Committee and the Land Claims Settlement Act 1856

The resentment felt by settlers toward Grey's treatment of the pre-emption waiver claims and the result of Matson's inquiry simmered for some years. Many claims that had been disallowed applied to land outside Auckland and had not been surveyed, or taken possession of by either the claimants or the Crown. It is probable that Maori who had transacted them in 1844 to 1846 with private settlers assumed that the sale had lapsed and the land remained theirs. In 1856 a committee of the General Assembly chaired by Alfred Domett argued that Matson s practice of disallowing claims because claimants failed to send in plans of the land claimed by the required date of 15 September 1846, resulted in an injustice to the settler claimants. The committee recommended a second investigation of the 'unresolved waiver of pre-emption purchases and old land claims. These recommendations were adopted in the Land Claims Settlement Act 1856.

While the Land Claims Settlement Act did much to satisfy settlers, it did nothing to protect Maori interests. Surplus land continued to revert to the Crown and generous provisions (in the form of an allowance, in land, for survey costs) were included to encourage settlers to have lands surveyed. The commissioner appointed under the Act, Dillon Bell, commented that:

> If the Government had attempted to survey the claims themselves, the claimants would have had no interest in the whole exterior boundaries being got, and would only have felt called upon to point out as much as was actually to be granted to them. The residue would, practically, have reverted to the natives, and must at some time or other have been purchased by the Government: and a large extent of territory must have remained, as it was before the passing of the Land Claims Acts, a *terra incognita*. But when the claimants were told they would receive an allowance in acreage to the extent of 15 per cent. on the area surveyed, it became their interest to exert all their influence with the native sellers to give up the whole boundaries originally sold. The result has been not only to produce a large surplus of land which, under the operation of the existing Acts, goes to the Crown; but to connect the claims together, and lay them down on a map.[42]

These comments apply mainly to the pre-1840 old land claims, but would have applied to some of the still unsurveyed pre-emption waiver purchases, especially

42. AJHR, 1862, d-10, p 4

outside Auckland. It is possible that these compensation measures encouraged settlers to place undue pressure on Maori, or to exaggerate the area of land they had allegedly purchased. Section 48 of the Act provided for the satisfaction of any opponent to a claim except if these opponents were 'of the native race, or a half caste'. This exclusion of Maori from compensation implies that the provision was only included to satisfy overlapping claims where settlers had purchased the same land.

4.13 The Bell Inquiry

A number of cases examined by Bell therefore 're-visited claims for land which, in some cases, had in the meantime remained effectively in Maori control. For example, Bell's investigation of Whitaker and Du Moulin's pre-emption waiver claim on Great Barrier Island, originally made for 3500 acres, revealed that a purchase had allegedly been made for some 21,845 acres.[43] Whitaker, who financed the survey, was awarded an additional 4291 acres for his trouble, thus acquiring a total of 5463 acres for an initial payment to Maori of £172 and survey costs of £508. The Crown acquired a surplus of 17,554 acres at no cost to itself. Maori interests were not considered, as they were assumed to have fully alienated their rights over all the land surveyed.[44]

In total, the 250 waiver purchases examined (including the claims which went before Matson), when surveyed, amounted to 97,427 acres, all but about 1500 acres arising from claims under the penny-an-acre proclamation. Bell noted in his 1862 report that the land granted to claimants amounted to 25,300 acres, making the total 'surplus acquired by the Crown 72,127 acres.[45] However, it does not appear that the figure of 25,300 acres referred to *all* the land granted. The appendix to Bell's report (published in 1863) suggests that approximately 49,150 acres were awarded to the claimants, giving a Crown 'surplus' of approximately 48,200 acres.[46] The chairman of the 1948 royal commission on surplus lands, Sir Michael Myers, calculated that a surplus of only 16,427 acre arose from the pre-emption waiver purchases. The other two commissioners, Reedy and Samuel, issued a separate report as to compensation due to Maori, but were in agreement with Myers over this area.[47] Further research is necessary to account for the difference between Bell's 1862 and 1863 estimates of surplus, and between both of these and the calculation of the Myer's commission. It is likely that the pre-emption waiver purchases were intermixed with pre-1840 purchases (old land claims) in cases such as Great Barrier Island, or with Crown purchases after 1847, and were grouped differently in the various reports.

43. See olc 1130–1131, NA Wellington
44. Hutton, p 71
45. AJHR, 1862, d-10, p 6
46. Appendix to the Report of the Land Claims Commissioner, AJHR,O 1863, d-14
47. AJHR, 1948, g-8, pp 33, 71

The commissioners in the 1948 Surplus Lands Commission used different bases of calculation for reckoning compensation due to Maori. The chairman, Myers, apparently based his award on the difference between the acreage allowed by the certificate issued by FitzRoy, and the area actually surveyed or in excess of the 500-acre maximum allowed to claimants in the 1847 regulations. On the basis that Maori had been paid by private purchasers for the land (whether or not it was eventually granted to the settlers or was retained by the Crown) Myers only 'with great hesitation' added the pre-emption waiver surplus to the Crown surplus from pre-1840 purchases.[48] The principles behind the Myers commission's award, and its calculations, both require further examination.

4.14 Conclusion

Note: This section refers to the general waiver proclamations operating in Auckland and the north, not the waivers in favour of the New Zealand Company.

Fitzroy's waiver of Crown pre-emption was clearly in accord with Maori wishes at the time. Direct sale to private settlers enabled the vendors, at least in theory, to seek the best prices the market could offer. Initially, at an average of 16 shillings an acre, Maori seemed to do reasonably well, although they did not receive the £1 per acre which Fitzroy had thought should be a minimum price when he first proposed the waiver. The average of two shillings (or one shilling and threepence) an acre under the October 1844 proclamation is probably not a lot better than Maori had been getting from the Crown in its more generous moments (although average prices are very hard to determine). The pre-emption waiver purchases raised for the first time, the question of whether the Crown should have required private purchase of Maori land to be by public auction, with an upset price. As it was, the chiefs generally made private deals with individual Europeans who approached them. It is not clear that the rest of the hapu had much to do with the arrangements.

The sales also got out of hand as far as area was concerned. Fitzroy's initial proposal was that each waiver purchase was to be for 'a limited portion of land but many purchases under the October proclamation were for 1000 to 3000 acres, considerable areas, especially since the purchasers were picking the eyes out of prime land, mostly urban. The sale of 21,845 acres of Great Barrier Island, when the original waiver certificate had been for 3500 acres, if in fact carried through, is a travesty of FitzRoy's proclaimed intention.

The checks by the Protectors of Aborigines on whether the correct Maori parties were selling seem to have been fairly perfunctory, but most sales took place in and around Auckland and were by the Ngati Whatua chiefs. A potential problem arose over sales in the Mount St John and Remuera areas of the city. Portions there had been held by Tainui tribes following Tainui's assistance in restoring Ngati Whatua to Tamaki Makaurau after the Ngapuhi incursions. Ngati Whatua had not wanted to

48. AJHR, 1948, g-8, p 76

sell any more of Remuera, and the decision of the Tainui chiefs to sell seems to have contributed to a flow of sales in the area. But all groups cooperated in the boundary – marking and no subsequent protests are recorded.

Most seriously, however, there were almost no reserves for Maori in the waiver purchases. This would have been a reasonable act of trusteeship, in keeping with Russell's instructions to Hobson in 1840 and 1841. FitzRoy did indeed require one-tenth of the land in each purchase to be made over to the Crown as an endowment largely for Maori purposes. But Grey cancelled the 'Crown tenths', allowing settlers to buy them or including them in the general pool of Crown surplus which he took (having reduced or annulled a great many of the purchases following Commissioner Matson's inquiries in 1847). The abandonment of the Crown tenths would seem to be a clear breach of Treaty responsibilities as recognised by FitzRoy.

The Crown's taking of a very substantial surplus (possibly 48,200 acres of the 97,427 acres alienated under the general waivers according to Bell's figures, but only 16,427 according to the Myers commission) raises other Treaty issues. The recorded objections of Ngati Whatua chief, Paora Tuhaere, and the obstruction of surveys in the Ihumatao area, are evidence of some Maori dissatisfaction. Maori notions of sale still held connotations of transacting with 'my Pakeha' and of having some ongoing relationship with them and the land. The Crown was not supposed to be part of the deal. That is what pre-emption waiver means. For the Crown to change the rules under Grey, without consulting Maori, is highly questionable in Treaty terms. On the other hand, unlike the pre-1840 purchases, the waiver purchases were being made after the establishment of British sovereignty and under British law.

The Crown's taking of considerable surpluses remains problematic for other reasons, however. The practical consequences for Maori would have been different if some of the surpluses had been used to assist Maori enterprises in some way, or if the Crown tenths had been retained, principally for Maori purposes. But by the end of the waiver period the Maori people of Auckland, in particular, had lost almost all of the land except the Orakei Reserve block. This was a far cry from Crown and New Zealand Company proposals in 1839 to ensure Maori a share of the economic growth and rising capital value of the towns.

CHAPTER 5

CROWN PURCHASES TO 1865

5.1 Early Crown Policy

As discussed in chapter 1, Normanby instructed Hobson in 1839 to buy land cheaply from Maori in order that profits of resale of land would be available for the cost of administration and to promote immigration and development. Russell's 1840 and 1841 Instructions, however, reflected his belief that Maori title should be recognised only in respect of land they 'now actually occupied or enjoyed'. Other statements by Russell show that by this he meant settlements and cultivations, not hunting and gathering land.

5.2 New Zealand Realities

Officials in New Zealand, however, knew that the theories developed in London would not hold in New Zealand. Busby and Clarke had known all along that Maori claimed all the uncultivated land – that it supplied mahinga kai, building materials, clothing, medicines, and personal adornments as well as having deep historical and spiritual associations.

It did not initially appear, however, as if the recognition of Maori land rights would be at all an obstacle to settlement, for Hobson reported within weeks of signing the treaty, that Maori were pestering him to buy land, just as they had showered offers upon settlers and speculators in the late 1830s.[1] He argued that if he did not promptly buy some land Maori would feel that he had betrayed the 'promise' made at Waitangi. (that is, the Crown's pre-emptive right to buy Maori land was being construed by some Maori as a promise to buy it).[2]

What lay behind this urgent Maori desire to sell? Firstly there was a lack of realisation among many Maori of the commodity view of land and the idea of permanent alienation in return for a one-off payment. Although Maori understanding of those European concepts was fast growing – certainly to the point of recognition that the alienation was permanent (as permanent that is, as anything ever was in the somewhat contingent world order of the Maori); but the tendency persisted for Maori not to see land rights in isolation from other aspects of social relations. Maori certainly expected ongoing benefits from the land sales, in the

1. Hobson to Gipps, 20 February 1840, BPP, vol 3, pp 134–135
2. Hobson to Gipps, 5 May 1840, g36/1, NA Wellington, cited in David Armstrong (Wai 45 rod, doc i4), p 6

form of association with powerful and wealthy Pakeha, with whom to trade and seek advancement of status. And what better associate than the Crown, whose representatives possessed and paraded all the panoply of military and naval power? Then there was competition with rival hapu; as Dr Ann Parsonson has shown, to be able to sell land – especially land where there were intersecting interests – demonstrated the sellers' mana over the land. Maori leaders also seemed to see certain advantages in securing title to reserves of their most important lands, as a reasonable alternative to the web of competing claims over much larger areas of land. Moreover, for some Maori the frustrations and limitations of the traditional society probably became apparent once the prospect of individual wealth appeared before them; the temptation to cut away the web of kinship for at least part of one's land, must have been strong. Hence the early interest in securing individual blocks as part of the payment. Selling land brought a flush of immediate wealth, albeit short-lived, but also the hope and expectation of further opportunities from engagement with the new system. If one was to enter the new commercial economy the former hunting and gathering land did not perhaps seem so important for traditional purposes or perhaps could still be used for those purposes even after it was sold; and Maori strongly resisted selling their more important areas of settlement and cultivation.

The evidence is clear that, at the outset, many Maori had not grasped that Crown pre-emption meant a Crown monopoly right, as distinct from a right of first offer. Crown pre-emption is a central principle of the treaty and there are limits, in a report based on the Treaty of Waitangi Act, to the argument that Crown pre-emption is a principle that should not have been observed. How the right was used is, however, another matter. Although they put their signatures to Crown pre-emption as part of the Treaty, it was not wholly favoured by Maori as compared with trading on the open market. What this means, in Treaty terms, is that the Crown, in taking the pre-emptive right, assumed the obligation to use its privilege responsibly and with due regard to Maori rights and to the duty of active protection. In short, a use of the pre-emptive right to beat the price down, taking advantage of Maori inexperience and ignorance of land values and how they increase, thus denying Maori the full value of their land, would seem to be a clear breach of the duty of active protection. At the very least if, following Normanby's principles, Maori were to be paid low prices, the Crown was under obligation to ensure that they received other benefits from the sale, either through increased value for their remaining lands or being otherwise included in the developing economy and society.

5.3 Early Crown Purchases

The first significant Crown purchase from Maori was that of Waitemata, the 3000-acre site for central Auckland, the new capital. The deed of sale was signed on 20 October 1840, with Apihai Te Kawau, Tinana Te Tamaki and two others. The Ngati

Whatua Chiefs at Remu-wera (Remuera) had declined to sell that site, which had been Governor Hobson's first preference. Maori usage of the Waitemata land continued, in the sense of traversing freely, fishing on the foreshore, even still cultivating portions of it, as the streets were laid out, subdivision sales held and buildings and wharves sprang up.

Other purchases soon followed: the Kohimarama block, about 6000 acres, from Mission Bay to West Tamaki Head and south to modern Panmure, from Ngati Paoa chiefs on 28 May 1841; the initial deed for the 9500 acre Mahurangi block in April 1841; Waitemata to Manukau, about 8000 acres, between Orakei and One Tree Hill, on 29 June 1841, from Ngati Whatua chiefs; Manukau road, 200 acres, near Onehunga, on 14 September 1842. In 1842 also the Crown began buying in South Auckland: an agreement was made that year for a 9000-acre purchase at Papakura, the deed being signed by Ihaka Takanini and five others of Ngati Teata on 28 January 1842; and 16,000 acres called Pukekohe 1, from Ngati Teata, in August 1842 – a great strip of land running from the Manukau Harbour to the Waikato River. Some small purchases had also made in the Bay of Islands, overlaying Old Land Claims, and ill-fated purchase at Oruru from Nopera Panakareao and from Pororua. Various islands in the Hauraki Gulf were purchased in 1844.

The prices paid for these lands were low: an initial £28 of cash and goods for Waitemata with subsequent small additional payments; £100 for Kohimarama plus two horses, a large boat and other goods; £200, four horses and other goods for 'Waitemata to Manukau'; £400 and six horses for Papakura. There had been a substantial rise from 1840 to 1842, but even allowing for the importance of horses at that time, the prices were indeed low in relation of the resale value of the land. The first auction of subdivisions in downtown Auckland brought an average of £560 per acre in 1841; this should *not* be taken as typical, for in fact the development of the colony stagnated for the next few years. Even so resale prices for Auckland land in the period ranged from about £4 an acre to £7 an acre for suburban land and up to £30 an acre for prime sites in the 1840s.[3]

The Crown moved with some deliberation into intersecting tribal rights. To buy Waitemata from Ngati Whatua and Kohimarama from Ngati Paoa was one way – a rather rough way – of dealing with the situation where the interests of both tribes could be found in both blocks. In South Auckland tribal inter-connections and tribal land rights were extremely complex. The core interests of principal hapu might, with difficulty, have been located, but hapu interests were scattered across the region. The Pukekohe purchase was initially made with Ngati Teata chiefs who had offered the land. In forwarding the purchase deed Clarke noted:

> the land in question appears to have belonged to several tribes. I considered the titles of two of the principal claimants, viz. the Ngati Teata and the Ngati Tamaoho, to be extinguished by the accompanying deed, but I question whether that of the Ngati Pou is so; as however the consideration given is considerably within the ratio that has been

3. For a fuller discussion of prices paid and resale prices see Alan Ward 'Supplementary Historical Report on Central Auckland lands', Crown/Congress Joint Working Party, Wellington, 1992, pp 27–55.

estimated as the cost of the land per acre, there will be ample funds in the hands of the Government to meet any other equitable demands that may be made.[4]

In fact the purchase was immediately opposed by Ngati Tamaoho, Ngati Mahanga and Ngati Haua, supporting Mohi and Te Akitai, who were regarded by the tribes as the principal right-holders. In 1844 Ngati Tamaoho were proposing to sell the 35,000 acre Ramarama block (another long strip from Manakau to Waikato) which Ngati Teata opposed and in the event Ngati Teata withdrew claims from Ramarama while the others withdrew claims from Pukekohe, a further £100 being paid on the latter, part of it going to Mohe. Te Akitai continued to negotiate its claim for a promised reserve with Crown agents until 1853. The Crown subsequently paid £50 to 'quiet the claims' of 11 other hapu in Ramarama.[5]

These proceedings established very early on the Crown's policy of dealing with various Maori interests severally. Payments to the first vendor group at once evoked the irritation – or worse – of the others, but, at the same time, put them on the back foot. They tended to come in to accept a payment, and a recognition of their mana, but their ability to stop the sale altogether was limited, once it had been agreed between Crown agents and principal chiefs.

In South Auckland the Crown got away with having provoked no more than skirmishes between the competing parties. At Oruru, in Mangonui, however, the Crown blundered badly. Attempts to pay off in turn Pororua and Nopera Panakareao foundered on the latter's refusal to admit that Pororua had any right at all to initiate sales in Mangonui. Fighting erupted between the two parties.[6]

It was after this that Chief Protector Clarke began to write his 1843 memoranda pointing to the complexity of Maori tenure, the need to proceed very patiently and carefully if all Maori interests were to be extinguished, and to purchase only small areas at a time. Clarke also sought and received approval to have the Protectorate Department no longer involved in land purchase, because of the conflict of functions.

Other short-comings in the early Crown purchases were the signing of deeds on the basis of extremely loose boundary descriptions – usually a series of references to places such as 'a stream called Hingaia' or 'the head of Papakura'. Crown agents were supposed to furnish a plan showing the extent, boundaries, and quality of the land and the estimated number of acres. But such plans were usually only rough sketches on the back of the deed, and estimates of acreages were very inadequate. It is perhaps unreasonable to have expected formal surveys to be done – a very expensive process – before the Crown agents actually had a deal with Maori. But the use of general place names as identification marks was not adequate to disclose to the Maori parties with interests in the area exactly which land was involved and whether they should express an interest. A walking of the boundaries and a marking

4. Clarke to Colonial Secretary, 9 December 1843, Turton *Compendium*, sec c, p 279
5. Paul Husbands and Kate Riddell, *The Alienation of South Auckland Lands*, Waitangi Tribunal Research Series, 1993, no 9, pp 18–20
6. For Clarke's effort to mediate, see D Armstrong, "'The Most Healing Measure"; Crown Actions in Respect of Oruru/Mangonui, 1840–1843' (Wai 45 rod, doc j3).

of the corners *with* the chiefs involved was, however, entirely practicable and should have been done to identify to Maori interest holders exactly what land was under negotiation. Even a cutting of boundary lines was possible, though very expensive in labour costs in heavy bush. As it was, surveys did not in fact take place till years after the deed's signing, at which point new right-holders came forward and new quarrels broke out.

The other weakness in the purchases was the very minimal allocation of reserves. No reserves were made in the first three Auckland purchases nor in Papakura. Reserves were made in Pukekohe and Ramarama but some appear not to have been marked out and others to have been purchased soon after. The state of reserves was very confused. Moreover some of them were landlocked (which Husbands and Riddell note in their report to be a weakness in respect of the people who relied very heavily on the Manukau Harbour and the Waikato River for fish and shellfish).[7] Probably the Crown considered that Maori would have access to the foreshore along with all New Zealanders.

Under Governor FitzRoy, the Crown embarked on new strategies. One was to press ahead with issuing Crown grants for old land claims even though they had not been surveyed (see above, ch 2). The other strategy was to waive Crown pre-emption, starting with a proclamation of 26 March 1844, while having the Protectors make a check on whether the Maori vendors of land (to the private buyers) were the proprietors according to custom (see above, ch 4).

5.4 The Otakou Purchase

Perhaps the most striking success of the waiver purchase period was the Otakou purchase of 1844. This has been fully discussed in evidence submitted for the Ngai Tahu claim and in the Tribunal's Ngai Tahu report. The area purchased was estimated at 400,000 acres and was actually about 534,000 acres; the price was £2400; 150,000 acres was for the New Edinburgh settlement. It was in the lightly populated South Island and the customary owners were Ngai Tahu, led by their senior chiefs and with no cross claims. The purchase was by Company Agents supervised by sub-protector George Clarke Junior and other officials. The boundaries were publicly discussed and actually traversed with the chiefs (amidst snow and rain). Reserves were roughly one-tenth of the 150,000 acres of New Edinburgh, in locations the Maori requested; the vendors preferred to try to develop their own commercial venture at Otakou Heads, in association with the whalers, rather than accept 'company tenths', which were not working well in Wellington (see ch 3).

There was, however, as the Tribunal has found, a failure on the part of the Crown to set aside reserves in proportion to the balance of the 400,000 (or 534,000 acres) of the whole block; nor did the Crown take an endowment in these lands largely for

7. Husbands and Riddell, pp 27–32

Maori purposes, in line with FitzRoy's policy of creating 'Crown Tenths' in the waiver purchases in the north.

5.5 Governor Grey and the 1846 Constitution

Governor George Grey arrived in New Zealand in 1845 and began urgent tasks such as military operations against Heke in the north. His handling of pre-emption waiver claims is discussed in chapter 4, and in respect of the company's claims in Wellington, in chapter 3. Lord Stanley, Secretary of State when Governor Grey first took office, instructed Grey to 'honourably and scrupulously fulfil the conditions of the Treaty of Waitangi'. But Stanley did not believe that all lands in New Zealand were under Maori proprietorship and encouraged Grey, over a two to three year period, to press ahead with Russell's instruction to determine 'what portion of the unoccupied surface of New Zealand can justly, and without violation of previous engagements, be considered at the disposal of the Crown'.[8]

In March 1847, the despatches from London brought news of the New Zealand Constitution Act 1846. The Secretary of State, Earl Grey who, as Lord Howick, had considered the Treaty of Waitangi guarantee to have been a mistake and was an ardent supporter of the New Zealand Company, gave instructions for Grey to implement Russell's policy – that is to register all occupied Maori land (meaning cultivated land) and to treat the rest as Crown demesne. Governor Grey was aware by now of Maori attitudes to land and of Maori capacity for military resistance. He was also pressed strongly by eminent figures such as Chief Justice Martin and Bishop Selwyn, not to implement chapter 13 of the constitution, concerning 'the wastelands of the Crown'. Yet Grey was under strong pressure to get land for settlement. He had also been instructed to restore Crown pre-emption. Continued Maori interest in land selling offered him a way through his dilemma. He therefore proposed to his superiors in London a solution. He would not implement chapter 13 of the Constitution Act. Maori customary interests in land would be recognised; but Maori, he assured Earl Grey, 'will cheerfully recognize the Crown's right of pre-emption, and they will in nearly all – if not in all – instances dispose, for a merely nominal consideration, of all those lands which they do not already require for their own subsistence'. He even suggested that Maori would cheerfully give up land without payment 'if the compliment is only paid them of requesting their acquiescence in the occupation of those lands by European settlers'. In short Grey would recognise Maori customary claims, rather than impose Earl Grey's views, in order to buy them out. Grey's view was highly patronising and clearly took the most minimal view of the value of Maori equity in land. His main reason for asserting that Maori would be compliant was his belief that, even in the North Island, there were 'very large tracts' claimed by contending tribes 'to which neither of them had a strictly valid right', and that they would cheerfully relinquish their 'conflicting

8. Stanley to Grey, 17 June 1845, BPP, vol 5, p 230

and invalid claims' in favour of the Government, stipulating only small reserves for cultivation. He said that an instance of this kind had just occurred (he was possibly referring to recent purchases in South Auckland). He therefore proposed to modify chapter 13 of the Royal Instructions, extinguish 'for a trifling consideration' native title to large tracts ahead of settlement, reserve 'an adequate portion for the future wants of the Natives in that district', and register the reserves rather than register the Maori claim to the whole area, which was 'invalid' anyway. Note that Grey's phrase was 'extinguishing Native title' which avoided recognition of Maori rights in uncultivated lands as the equivalent of common law proprietorship. The real payment to Maori for their land, he argued, would be in the security they gained from Crown title to the reserves, the added value of the land which would come through development, and a market for their produce.[9]

This was a masterly dispatch, indicating as it did the Governor's recognition that Maori did generally want settlement among them, that they would go a long way to collaborating with officials if their mana was recognised and they were involved in the location of those settlements. Grey rightly identified also the tendency, which had been evident for some time, for Maori to sell their interests in contested land. But the despatch also indicated the Governor's dangerous tendency to be patronising and manipulative. His notion that Maori would willingly relinquish contested lands in large quantities, including in the North Island, was over-optimistic to say the least. It was a policy which was eventually to launch the Government on a course of buying land not only from chiefs with major interests, but also from claimants with lesser interests, in an attempt to influence those who had a stronger claim in the area and no intention initially of selling at all. His attitude to the value of Maori equity in land was also limited and rapidly became outdated, as runholders were informally leasing land from Maori in increasing quantities.

Grey had already, as instructed, restored Crown pre-emption through the Native Land Purchase Ordinance of March 1846. Informal leasing between Maori and settlers had been continuing despite the 1840 proclamations. The 1846 ordinance prohibited all kinds of private land transactions with Maori, whether by sale or lease, or the taking of timber or minerals, or the pasturing of sheep or cattle, without a licence from the Crown. Apart from timber-cutting licences, which were granted, the ordinance effectively circumscribed a whole range of transactions which Maori had been entering into with settlers; though many in fact continued to do so in defiance of the ordinance. The restriction can be seen as an elaboration of Crown pre-emption, as agreed in Article 2 of the Treaty. The English language version of the Treaty establishes Crown pre-emption only over 'such *lands* as the proprietors thereof may be disposed *alienate*' (emphasis added). The 1846 ordinance therefore, to have Treaty justification, requires 'lands' to be read as including trees and subsurface rights, and 'alienate' as including alienations other than by sale. This is certainly possible under common law usages of those terms. It does, however, involve much greater restrictions than were discussed at Waitangi or understood by

9. Grey to Earl Grey, 15 May 1848, BPP, vol 7, p 23

Maori at that time. The evidence suggests that many Maori came away from the Treaty debate with the idea that Crown pre-emption meant first offer only. Leases were probably not discussed at all. Whether the Maori term 'hokonga' conveyed the notion only of sales, being reserved to the Crown, or other kinds of alienation as well, is unclear: the term, while probably retaining a core of the Maori sense of reciprocal exchange, also appears to have gained connotations of commodity trading during fifty years of commerce with Europeans. But Maori did not regard trees – timber – as part of 'land' as English law did; so they would have considered themselves free to sell timber to someone other than the person to whom they had sold land, and cases quickly emerged of this. Crown purchase deeds therefore tended to become increasingly explicit about including things on the land and under the land. Of the Native Land Purchase Ordinance 1846 though, it can be said that it was enacted without serious consultation with Maori. The British Government and Grey wanted to secure the Crown monopoly via the colonial law and did so. If consulted, of course, Maori would very likely not have agreed, for they were enjoying a variety of engagements with the Pakeha over the land and its resources, other than selling it.

5.6 Early Land Purchases under Grey

Grey's first purchase in February 1847 was of the Porirua lands after his military invasion of the disputed Hutt Valley and Ngati Toa territory to the north, and after his seizure of Te Rauparaha and other Ngati Toa Chiefs. The deed was signed with eight paramount Ngati Toa Chiefs for an area, subsequently granted to the New Zealand Company, of nearly 69,000 acres. The price was £2000. Dr Robyn Anderson doubts that these signatures represented full and willing consent of the tribe, especially with Te Rauparaha under arrest, Rangihaeta in hiding, and Grey in the full flush of his military victories.[10] Some 10,000 acres, about 40 acres per head, were reserved for Ngati Toa at their insistence, including Taupo pa and part of the land fringing Porirua Harbour.

The following month Grey negotiated again with three of the Porirua chiefs, this time for Ngati Toa land across Cook Strait – the disputed Wairau Valley but also the Kaikoura Coast as far as Kaiapoi – some 3,000,000 acres in all. Grey dealt with Ngati Toa chiefs in the North Island, ignoring the interests of others such as resident Ngati Rarua and Rangitane, although his surveyor general's report said that they had interests in the land. Three Ngati Toa Chiefs agreed to accept £3,000 and signed the deed. The money was paid over five years, not out of concern for its distribution and beneficial use, but because, as Grey said, the instalment system would 'give us an almost unlimited influence over a powerful and hitherto very treacherous and dangerous tribe'.[11] Reserves of over 117,000 acres were made, Grey explicitly

10. Dr Robyn Anderson and Keith Pickens, *Wellington District: Port Nicholson, Hutt Valley, Porirua, Rangatikei, and Manawatu,* Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), 1996, para 2.17.

recognising that people of a hunter–gatherer economy required large areas from which to collect flora and fauna. Phillipson notes, however, that the reserves were purchased by the Crown a few years later. According to Bishop Selwyn the first instalment of the Wairau purchase money was spent by the three signing chiefs for their own benefit, but Government continued to pay the next instalment to the three; distribution within the tribe was not seen by the Crown as its problem. The Ngati Toa chiefs in the South Island were only involved in boundary marking, not in the initial receipt of payment. Ngati Rarua and Rangitane occupants were refusing to quit the lands several years later. Ngai Tahu, who had interests in Kaiapoi and northward, were not consulted at all.

Grey also attempted to rectify the New Zealand Company purchases in Wanganui and Taranaki. In Wanganui, Commissioner William Spain in 1844 had made an award to the company within the area of its 1839 purchase deed, allowing some fifteen reserves for Maori, but Maori opposition continued. In May 1848 Donald McLean then negotiated a further deed of purchase for 86,200 acres (with 5450 acres of reserves) after considerable negotiations with interested parties and public surveying of all boundaries.

In Taranaki, Commissioner Spain had awarded 60,000 acres to the New Zealand Company for the New Plymouth settlement, within the vast, but illegal, Wakefield purchase of 15 February 1840 (occurring after Gipps' proclamation of Crown pre-emption of 14 January 1840 and Hobson's proclamation of 31 January). FitzRoy disallowed Spain's award on the grounds that the absentee Te Atiawa in Queen Charlotte Sound had not been consulted. FitzRoy secured from Maori a 'cession' of a block of 3500 acres which bears his name (though no formal deed appears to have been drawn up) on condition that settlement expanded no further. The Government, however, allowed more settlers to arrive, and Grey, in 1847 and 1948 sought to buy more land. Wiremu Kingi, leader of the northward returning group of Te Atiawa, objected, but Grey bought blocks to the north, south, and inland of the FitzRoy purchase: Tataraimaka, Omata, Cook's Farm and the Bell Block. Maori signed the deeds somewhat reluctantly and only when McLean offered payment in cattle and horses and agricultural equipment, for Te Atiawa were more interested in building up their own farming enterprises than in cash, which was soon dissipated. In August 1853, McLean purchased interests in the Waiwhakaiho block of 16,500 acres. The Tribunal has noted the lack of records about these purchases, and doubts whether all the right holders had been consulted; it notes that there were disputes and resistance to occupation on the Bell block and the Waiwhakaiho block some years after the sale.[12]

The story of the Ngai Tahu purchases is well known, including the vast Kemp purchase of 1848 which left Ngai Tahu with a bare ten acres per head of reserves. In 1849, purchases followed at Port Levy and Port Cooper on Banks Peninsula.

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11. Grey to Earl Grey, 26 March 1847, Mackay, vol 1, p 202, cited Dr Grant Phillipson, *The Northen South Island*, Rangahaua Whanui Series (working paper: first release), 1995, p 91
12. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wellington, GP Publications, 1996, pp 27–28, 29–50

The depth and persistence of the settler attitude that Maori were entitled to the proprietorship only of their cultivations is revealed by a remark of Rolleston, variously Superintendent of Canterbury, Native Secretary and Native Minister, before the 1879 Smith–Nairn commission, investigating the Kemp purchase. Referring to the small reserves he said, 'that area represented all the land they had in cultivation – that is, that they bestowed labour upon, and really had any title to'.[13]

Similar attitudes underlay a blanket purchase known as Waipounamu, initiated by Grey and McLean in August 1853 with a payment to Ngati Toa chiefs in Wellington, intended to extinguish all Maori interests north of the Kemp purchase and west of the Wairau purchase. The payments included a £2000 instalment of the £5000 purchase price, and 200 acre individual grants to 38 of the interested chiefs (a promise not fulfilled) and £50 of scrip to 12 of those chiefs to buy back more Crown land at 10 shillings an acre (fulfilled probably in eight cases). The technique of buying support from the chiefs and making them part of the new middle-class was to become a regular feature of the Crown purchase processes, displacing Grey's brief dalliance (in the Wairau purchase) with making large reserves for the continuance of the traditional Maori economy.

Purchases also resumed in the Auckland isthmus and in south Auckland with the completion of the Ramarama purchase (from 11 more hapu) and about 17 more blocks in 1847 to 1948. By the time Grey left New Zealand, most of central Auckland and much of south Auckland had been purchased or was under negotiation.

The 'big purchase' system was extended by Grey and McLean to new areas of the North Island:

- The Rangitikei–Turakina purchase of 1849, concluding six years of negotiation with Ngati Apa for a 225,000 acre block between those rivers, for £2500. The deal was accompanied by an arrangement with Ngati Raukawa and Ngati Toa to give up their interests northward of the Rangitikei river in return for Ngati Apa relinquishing theirs south of the Rangitikei.
- Three huge purchases by McLean in Hawke's Bay in 1851: Waipukurau (279,000 acres), Ahuriri (265,000 acres) and Mohaka (85,700 acres).

The purchase of huge blocks was also extended to the grass lands and low ranges of the Wairarapa, where run-holders had been pasturing sheep and cattle on informal 'grass-money' payments to Maori since the mid-1840s. The negotiations had been pursued for some years without apparent success. In 1852, however, opinions among Wairarapa Maori changed, probably as a considered result of the example, and influence, of the Hawke's Bay chiefs, and warnings from Government that the run-holders would be prosecuted for breach of the Land Purchase Ordinance. McLean contracted a surveyor to lay external boundaries in response to indications from Wairarapa Maori that they would be interested in selling. He understood that Maori wished to:

13. 'Report of Joint Committee on Middle Island Native Claims', AJHR, 1888, i-8, p 81, cited in Jenny Murray, *Crown Policy on Maori Reserved Lands, 1840 to 1865, and Lands Restricted from Alienation, 1865 to 1900*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), 1997, p 22

> dispose of the whole of the coastline of country excepting reserves, lying between Whareumu and the Porongahau river extending inland as far as the Tararua ranges . . . Without appearing anxious or in any way urging them to dispose of more land than they seem perfectly willing to sell, at the same time it is most desirable that the whole of this district should be obtained subject to ample reservations for the limited number of natives that occupy the coastline.

Details were left to the surveyor to arrange with chiefs. In 1853 Grey and McLean landed at Palliser Bay and, in the words of Grey's biographer staged:

> A semi-royal progress up the Wairarapa valley, accompanied by a multitude of excited Maori and two well guarded pack horses carrying the money bags. All the way up to Napier he addressed Native gatherings . . . and talked to them of the benefits of selling their land so that the government could settle Europeans amongst them. Nearly every night blocks of land were offered, and some more advances made on them.[14]

There is little doubt that the chiefs' rather competitive drive to enter into relations with the high Pakeha rangatira, the Queen's representative, was a motivation here. Details of the actual transactions took years to sort out and met with some resistance by right-holders.

Goldsmith's figures are that almost 1.5 million acres were transacted in the Wairarapa in 41 deeds between 27 June 1853 and January 1854, for £23,547, of which £14,690 was paid before or at the deed signing. This amounted to about three quarters of the Wairarapa district.[15]

5.7 The Nature of Crown Purchases under Grey

As indicated above, Grey's purchase policy proceeded on the assumption that Maori groups held overlapping claims to large area of land but cultivated only a small proportion of it. He regarded as 'invalid' Maori claims to *proprietorship* of the uncultivated areas. He would, however, purchase whatever Maori interests existed in the large areas, and register proprietorship only of the reserves defined for Maori within those areas. His usual method was to try to identify a powerful group or groups of right-holders, conclude a purchase with them, and then to pay off subsequent claimants in a sequence of additional payments. Specific payments to chiefs figured frequently in the process, or the marking off for them of specific reserves in individual title in their own names.

During his governorship Grey had secured deeds of purchase over some 30 million acres of land. Maori engaged in these transactions fairly readily, and

14. Rutherford, *Sir George Grey* (cited in Helen Walter, 'Land Purchase Policy and Administration, 1846–1856', Waitangi Tribunal Rangahaua Whanui Series unpublished draft, p 7); see also McLean to Pelichet, 20 February 1851, ma 24/16 (cited in Walter , p 8)
15. Paul Goldsmith, *Wairarapa*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), 1996, p 41

settlement was able to proceed on either side of Cook Strait, in Auckland, Hawke's Bay, Wairarapa, Canterbury, and even in Wanganui and Taranaki. On the face of it Grey's purchase policy was remarkably successful. But when measured against the Crown's Treaty obligations the deficiencies emerge – deficiencies which were to become even more apparent under McLean's regime as chief land purchase commissioner.

A most important issue concerns the intersecting interests of Maori groups in the various blocks and the absence of careful investigations of ownership *before* purchase agreements were signed and payments made. Government usually did seek a report from one of its officers before the purchase, but the investigation was often fairly cursory and aspects of it could be ignored (for example in the Wairau purchase of 1847). To be fair, to achieve a comprehensive and precise determination of Maori ownership before a purchase negotiation, was extremely difficult. Customarily, hapu, and whanau interests never were neatly aggregated in one block but scattered; although most were concentrated near principal kainga, other interests intersected with those of neighbouring and related hapu. For a group to define a distinctive piece of land with continuous boundaries as its exclusive property required a substantial modification of Maori tenure, probably involving the related hapu relinquishing interests to each other on either side of an agreed boundary line. Maori would have no cause to undertake this complicated operation unless there was a good and specific reason, such as making a farm or selling land. The very action of land purchasing thus precipitated a process of discussion, definition, and boundary marking, to an extent quite new to Maori society. It was not something that could easily be done in the abstract, or for the remote possibility of a land sale. Either the vendor or the purchaser would have to give some indication of which land was to form the basis of the transaction, and then the process could begin. The definition of interests could, however, become much more precise during a process of negotiation and before any deed was signed.

It is thus perfectly understandable that the Crown should make offers to purchase land and discussion would then ensue, usually under the leadership of paramount chiefs. Often there were months or years of discussion before chiefs announced themselves ready to sell.

The process was all the more complicated in situations of recent migration and conquest, where the earlier inhabitants had by no means entirely vacated the land or relinquished claims to it, and the later arrivals had not yet inter-married and had few children born on the land or dead buried there. In these circumstances it would be optimistic to expect a swift consensus among the various groups of Maori with interests in the land.

The important issue that arises from this is whether the Crown's purchase process did in fact enable the great majority of the Maori owners to develop a genuine consensus that they wished to alienate a portion of their land. Or whether, conversely, many right-holders were dragged along rather unwillingly in something which their leaders, or a dominant group, had embarked on, in collusion with Crown agents. An equally important and related issue is what was to be done about

a dissenting minority. Were they to be bound by the decision of the majority (or the leadership) or were their interests to be severed from the block sold? And, if so, what land would they get for their portion? It is with regard to these issues, rather than to utopian hopes of a precise determination of all interests prior to a sale, that the Crowns' regard for its treaty obligations can best be tested.

Closely related to the above questions is the issue of boundary marking. If the parties did not really know what land they were talking about, either as regards the outer purchase boundary or the boundaries of reserves within the purchase, Maori consent could scarcely be meaningful. Certainly Maori identified land by natural features and the names of the places with which they had close associations; but there were many specific locations – a swamp, a stand of trees for example – which Maori often wished to retain. In their own land demarcations they erected posts or built mounds to mark corners: this kind of definition was very necessary in land sales too.

A third area for consideration is what the vendor group received in the bargain. The benefits sought were usually of three kinds:

(a) reserves, clearly defined as belonging to the vendor group. The evidence suggests that to secure reserves and have them backed by the Crown was a most important motivation in selling, especially where rights were insecurely held because of recent war or migration. So strongly was the security of title valued that in some areas Maori would actually buy back portions of the same land they had just sold, but this time on Crown title. Generally the reasons that Maori vendors sought such titles were for their own occupation and farming. Land which they still wished to retain, perhaps to lease (were the Government to allow it), was usually simply exempted from the sale. Sometimes (as in the Kemp purchase) Maori asked for very big reserves, which usually the land purchase officials did not grant.

(b) Continued association with white settlement for trade and employment, together with other benefits that Crown agents led Maori to anticipate, such as schools and hospitals. Maori certainly did not sell land in order to become marginalised; they sold it in order to establish settlement in their vicinity and to have access to the modernity that settlement represented.

(c) Payments in money, stock (horses, cattle, sheep), agricultural equipment, boats, and necessities for participation in the modern economy. Demands varied, but some mix of the above was typical.

(d) Linked to all of the above, an on-going association with the Crown to enhance mana in a situation of inter-tribal rivalry and to secure the expected advantages of association with the Crown's evident wealth and power.

How then did Grey's purchases stand up against these various measures? The answer is that the record is very mixed. In respect of the issue of identifying overlapping interests and securing genuine consent:

(a) The Porirua purchase involved a good deal of pressure, on a community on the defensive after the 1846 campaigns. The Wairau and the Waipounamu

purchases involved using the Ngati Toa leaders to achieve an initial alienation and then to put pressure on the other owners across Cook Strait.

(b) The Kemp purchase did essentially involve the right people (although the Poutini coast hapu was probably under-represented) but Mantell's minuscule allocation of reserves was disgraceful. The Murihiku purchase of August 1853 transferred seven million acres of land to the Crown for £2600 and 4875 acres of reserves – marginally better for Maori than the Kemp purchase but still a staggering area for a derisory payment.

(c) The re-purchase of Wanganui land was reasonably careful, thorough, and public – quite exceptional in the particularity of the deed of agreement and in the marking out of interests on the ground.

(d) But the Taranaki purchases, especially of the Bell and Waiwhakaiho blocks, revealed the tendency to push forward into the face of disputes among Maori owners – not yet serious but an omen for the future.

(e) Of the big block purchases of the North Island some, like Ahuriri, showed fairly considerable care to ensure public discussion and consensus and public boundary marking. But the boundaries of many of the blocks were very poorly described and caused problems subsequently. The Wairarapa and Hawke's Bay purchases had resulted in part from threats to remove the run-holders, the pakeha lessees contributing to the Maori economy, and involved a rather shameless use of chiefs like Te Hapuku to overcome resistance to sales.

(f) (i) The Auckland and south Auckland purchases produced a number of anomalies. The practice of dealing with the chiefs most assertive about their rights, in a situation of very complex intersecting claims, together with a lack of boundary marking, left a sequence of ongoing disputes. Surveys were delayed for years, at which time new right-holders emerged and had to be paid. Precisely because the tribal interests were so diverse in areas such as south Auckland and the top of the South Island, the Crown officials could push and cajole and buy their way through, acquiring the interests piecemeal. But it was a provocative and dangerous practice and again it was of doubtful equity in Treaty terms: belatedly accepting a payment for one's interests after others had sold, largely because there did not seem to be much option left, is not the same as making a willing sale from a position of genuine choice. While some chiefs were very willing to 'play the game' with the Crown purchase agents (as they had been with private buyers in the 1830s) others felt compromised. Husbands and Riddell cite a letter to the Governor in 1852 from Waata Kukutai, who had opposed land selling but now offered land because of the concern that Ngati Te Ata were offering it anyway:

> Therefore we are concerned about the stealthy work of Te Katipa regarding our land. We know that his work is wrong work, his work by stealth. Now we beg to inform you that we are willing to give up these large pieces of land to

> you . . . Should the Ngatiteata arrive to speak with you concerning these lands, do not attend to them, to their speech. They are stealing our land.[16]

In the Wairarapa, Grey and McLean worked through the younger chiefs who, in this area, were willing to sell and only overcame, after sustained pressure, the resistance of older chiefs like Ngatuere.

(ii) In respect of Wairarapa, Goldsmith cites four examples where the pre-payment system – later called 'groundbait' – appears to have been used to induce Maori to sell.[17] The tactic was to have disastrous consequences in due course. McLean himself considered that the Government got Wairarapa 'at a wonderfully cheap rate.'[18] Another feature of Wairarapa purchases was the promises by Grey to provide flour mills – then the current enthusiasm of many chiefs – in their expectation that the wheat boom would continue, and also for mana reasons; that is, competition with other chiefs. Grey generally did provide these mills but they were sometime more trouble than they were worth.[19]

(g) Grey's practice as described to Earl Grey was erected on the notion that Maori were very willing to sell disputed land. This was in part true. The Crown had many offers to sell land. The unfair part of the procedure was that Grey often accepted offers, signed deeds and made payments before investigating the area adequately and getting a genuine, not forced, consent from other interest-holders. The confusion was all the greater if the first vendor had very tenuous rights in an area (as in Ngati Toa's inclusion of the Kaikoura Coast in the Wairau purchase) and the purchase left those with more substantial customary interests at a disadvantage.

(h) The question of adequacy of consideration is a complex one, related to the issue of reserved lands and other factors. Maori who initiated land transactions did not usually regard the payment of money and goods, soon exhausted, as the full payment for their lands; the advent of a Pakeha settlement and the expectation of ongoing trade, employment opportunities and other benefits, were what many chiefs sold for; and/or there was an expectation of an ongoing relationship with the governor, who would be a powerful ally in inter-tribal rivalries and bring status and mutual benefits to the community. If they were selling contested land, in which their interests were tenuous, so much the better. For these reasons Maori were prepared to accept initial payments which were low in relation to the size of many of the purchases.

The officials, as we have seen, were under instruction to pay low prices in relation to the on-sale value of the land. The profits, making up the land fund, would pay for new immigration and development. Maori would benefit from this

16. Waata Kukutai to Lieutenant-Governor, 4 November 1852, Turton's *Epitome*, cited in Husbands and Riddell, pp 20–21
17. Goldsmith, p 57
18. McLean to Colonial Secretary, 20 September 1853, AJHR, 1861/23, p 262.
19. Goldsmith, p 61

(so they were constantly told) through the enhanced value given to their remaining lands and through their 'advancement in civilisation'. This theory pre-supposed that they would *retain* a significant proportion of their land to lease or to develop and thereby to gain access to the increased capital value. It pre-supposed also that they would be assured of access to the means of 'advancement in civilisation' – education, assistance with farming, access to trade, medical care, social equality – that is both Maori and Pakeha were to advance together.

What in practice did Maori receive? Again the record under Grey is mixed. The actual cash payments included £2000 for the 69,000-acre Porirua purchase, £2500 for Rangitikei–Turakina (25,000 acres), £4800 for Waipukurau (279,000 acres) £1500 for Ahuriri (265,000 acres) and £800 for Mohaka (85,700 acres) a price which Colonel Wakefield called 'large'. The payment for Wairau, including the Kaikoura Coast (3 million acres) was £3000. The Kemp purchase (Canterbury–Westland) of 1848, involved payment of £2000 for some 20 million acres. The Kemp purchase provides the extreme low price per acre paid by the Crown, but all the big purchases show a very low – if not derisory – figure per acre. Grey's view was, of course, that the Maori vendors never had proprietary title or exclusive possession; such claims were 'invalid' except for settlements and cultivations. He was buying out rights of an undefined kind, contested with other tribes. Therefore it was not appropriate, from that stand-point, to talk of prices per acre.

Maori in fact usually asked for considerably more than they finally accepted. Sometimes asking prices began in the order of millions but quickly tended towards figures such as £5000 in the case of the Kemp purchase, £5000 for Wairau, £4000 for Ahuriri (including Te Taha and Mataruahau later purchased separately). The Crown therefore typically paid half or less than the owners' serious asking price.

But almost invariably the discussion would focus on the reservation of mahinga kai of various kinds – swamps, eel weirs, stands of forest, launching places for canoes and so on. As in the case of the Kemp purchases and the Ahuriri purchase, Maori signed on the understanding, either expressed verbally or in the deed or both, that they would have continued access to these in addition to specific reserves. They were given the usual assurance of benefits from the coming of settlement, particularly the increased value of their remaining lands. On these understandings Maori signed the deeds: they too did not closely weigh the initial purchase price in terms of value per acre.

However the ambiguities over mahinga kai are well known. In the Kemp purchase the term in the Maori deed was translated into English by Kemp as 'plantations'; Kemp did not see himself as reserving all the eel swamps and fishing streams forever. In the Ahuriri deed, access to the lagoon Whanganui-a-Orotu was reserved to Maori *along with others*. In all cases the wider public usage, or the drainage of swamps, fencing of the land and the felling, of the bush and hardening trespass laws gradually circumscribed Maori access to mahinga kai.

Grey, in 1847, indicated that he knew well that people involved in the hunting and gathering economy required very large areas of land at least before they made their transition to a more cultivating economy. In 1850 Grey directed that Gisborne,

the commissioner of Crown lands, be instructed to ensure, 'that sufficient reserves are made for the present and future needs of the Natives, for which they will receive conditional titles authorising them to lease such portions of the land as the Government may not think necessary for their present wants' for periods up to 21 years.[20] Mistakes were made, however, in transcribing Grey's instruction, and Gisborne queried the sense of the direction he received. Unaware of the errors in question (corrected in subsequent correspondence) Grey minuted Sinclair that the instruction had been 'amply explicit' and added:

> It is always here understood that the Natives in addition to any right they may at present have over reserved lands gain the additional privilege of leasing them under the conditions named and that not for any limited period of time and until an alteration on their own part from their present system of holding lands almost in common to a tenure by single individuals . . . gives them more complete titles.[21]

Thus the title to reserves was to be a qualification on an essentially customary tribal title and the reserves were in theory to provide both for the subsistence needs and revenue needs of Maori. There was, apparently, in Grey's 1850 thinking, to be a waiver of pre-emption to allow these Maori leases. But little more was to be heard of this (except some very short term leases in Wellington). The emphasis was certainly on closing off the leases on customary land, and reserves rarely got big enough to provide for leases. Indeed Grey's record in reserve-making generally was abysmal, (as illustrated in Kemp's purchase) and at best very patchy. Reserves in blocks sold were made in varying numbers and quantity. Mantell's reserves in the Kemp purchase amounted to 10 acres per head. In Hawke's Bay McLean allowed eight reserves totalling 4378 acres in the Waipukurau purchase, in Ahuriri three reserves totalling 2415 acres (and a landing place), in Mohaka only one reserve of a hundred acres. Where Maori did not press for reserves McLean did not provide them; where they pressed for large reserves McLean allowed lesser areas (for example reducing the request for a reserve amounting to several thousand acres of millable forests at Puketitiri to only 500 acres).[22] Grey, mostly based in Auckland, took little notice of what his subordinates were doing, as he later admitted in respect of Kemp and Mantell's actions. The failure to survey reserves, or to see that titles were issued in respect of them, was characteristic of the period; a host of residual problems was the usual legacy of the dramatic 'big block' purchases.

At this stage the failure to make ample reserves did not necessarily bear hard on Maori as they still, in some areas at least, had a great deal of land in their possession, and, as has been mentioned, access to mahinga kai was not yet heavily circumscribed. But in respect of some iwi, such as Ngati Toa, and in some districts such as the north of the South Island and around the expanding towns of Auckland and Wellington, most land had already been purchased by the end of Grey's first

20. Grey to Colonial Secretary, 25 October 1850, ia 1/1851/509, NA Wellington
21. Grey to Colonial Secretary, 15 February 1851, ia 1/1851/509, NA Wellington
22. Dean Cowie, *Hawke's Bay*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), 1996, p 34

governorship: the making and preservation of reserves both for subsistence and for leasing was becoming an urgent necessity in these areas, if Maori were to be given security and development opportunity in the colony.

In Auckland and south Auckland payments were greater on a per acre basis than in a big rural purchases, for obvious reasons. But they still varied widely. Thus £15 was paid for a 20-acre block called 'adjoining Tetiki' (Hobsons Bay), £30 for 1200 acres at Pukeatua, £200 for 4000 acres at Te Ngaio, £50 for 600 acres called Roto, £50 for 2000 acres named Wharau and £23 for 500 acres at the Whau portage – all Waitemata and Manukau land. There is no clear pattern to these prices at all; even high site value as at the Whau portage did not attract large prices. £38 was paid for 200 acres in Remuera in 1847 and £150 for 250 acres in 1851. In 1849 two chiefs, William Hobson and Temanea, sold about 250 acres at Mount Smart for £10 and in 1851 a further 200 acres for £15. In the big Fairburn block from Tamaki to the Wairoa river, one third of an estimated 75,000 acres (that is to say, 25,000 acres) was supposed to be reserved for Maori by the purchase agreement in early 1836 between Potatau Te Wherowhero and Henry Williams; but instead three groups of claimants were bought off for payments totalling £800. Other south Auckland prices such as four mares for the Parahika block of 1040 acres were derisory, even allowing for the high value of horses at that time. These are derisory prices also in relation to the re-sale values amongst settlers or the upset price of 10 shillings an acre charged for Crown land, rising to £1 an acre in the early 1850s.

The contemporary assertions of Crown officials and settlers that it was only their coming which gave security of tenure to Maori and a value to their land has slight validity. Te Ati Awa and Taranaki certainly did benefit from the removal of the Waikato threat, largely as a result of the British presence; Ngati Whatua benefited from the protections against Ngapuhi or (perhaps more to the point) the burgeoning influence of their Tainui kin and allies in Tamaki Makaurau. But the protection argument cuts both ways: the Wellington settlements received assistance from Te Ati Awa against Ngati Toa in 1843 to 1846 and Auckland secured protection from Waikato and from a number of northern tribes during Heke's rising. In a sense it was Maori support that gave the British settlements value, not the other way round, in this crucial time. In the calmer period from 1847, when both Maori and settlers were constructing a new society together, it was clearly anomalous that Maori should have been denied access to most of the increased capital value of their land.

Moreover the officials' claim that the land had little or no capital value was falsified by some of the payments offered by private buyers before 1840, by some of the payments made during FitzRoy's waiver of pre-emption, and by the run-holders paying illegal rents or 'grass-money' for running their stock. In 1847 £300 was paid for rentals in the Wairarapa.[23] By 1849 run-holders were moving north into Hawke's Bay, Thomas Guthrie paying an annual rental of £69 for a run at Castle Point (rising to £200 by 1851) and J H Northward £60 to £100 a year for a run at Porurere. Lease rentals are commonly reckoned at five percent of capital

23. Goldsmith, p 22

value, which would imply capital values of £4000 and £2000 respectively for these runs alone.[24] Of course the precise area of land is not known and the calculation is a generous one, leaving out a variety of complicating factors. All the same it is difficult to reconcile the value of rentals with the one off payments for very large areas of very high quality land given in the Crown purchases. Grey and McLean knew very well that they had to move quickly to block the leasing system (using the authority of the Native Land Purchase Ordinance 1846) and buy the land before Maori became so aware of its rising market value that the Crown would be unable to purchase.[25]

This was effectively saying that Maori would to be denied the opportunity to gain the rising value of their land – that the Crown first, and then the settlers, should get the increased value. That would appear to be a clear breach of article 2 rights of Maori, notwithstanding the Crown's Treaty right of pre-emption. Crown officials, however, repeatedly claimed a public interest basis for their monopoly and for their prohibition of leasing: if the colony was to progress the Crown had to have a land fund and settlers must have access to the freehold. Again there is some validity in this view: capital intensive and permanent development does normally require the freehold, or at least a very long lease with predictable levels of rent. Given that Maori were also to benefit from the capital investment and settlement – indeed they expected and encouraged it – it is reasonable to assume they should sell some land in freehold. A co-existence of freehold and leasehold systems should indeed have been quite adequate for settlement, although the terms and conditions of leases would have required careful consideration, balancing the interests of landlord and tenant. But for the Crown to have shut Maori out of leasing altogether except perhaps on reserves (which were frequently either not made or allowed to be retained) was another matter.

A further problematic aspect of purchases under Grey is the lack of care with regard to distribution of payments. Much has been made of the open distribution of the initial Wairarapa and Hawke's Bay payments, at public ceremonies where hundreds signed the deeds and participated in the distribution and the chiefs made a show of taking little or nothing. But this was not typical. Payments commonly went to a handful of chiefs and little was done to follow up what happened to them. According to Bishop Selwyn the first payment to the Ngati Toa chiefs resident in Porirua for the Wairau block was appropriated by them. The owners living on the block itself, in Phillipson's estimation, 'were neither consulted nor paid for their interests in the Wairau, Kaipara-Te-Hau, and Kaikoura districts'.[26] The Government officials generally declined to intervene in the distribution, saying it was a matter for the Maori themselves. But outcomes like that at Wairau cannot easily be reconciled with the Crown's Treaty responsibility of dealing equitably with Maori; paying off the chiefs and making them accomplices in divesting communities of their patrimony, without tangible return, is hardly equitable dealing.

24. Cowie, p 12
25. McLean to Colonial Secretary 29 December 1851, AJHR, 1862, c-1, pp 315–316, cited in Cowie, p 13
26. Phillipson, p 92

Maori were far from insensitive to the appreciating exchange value of their land and, in respect of the Wairarapa, Grey took steps to meet their demands. McLean subsequently wrote:

> I should also state, that the Wairarapa to which these deeds refer was purchased under peculiarly difficult circumstances as there Natives repeatedly declined to alienate that Valley to the Government, while they were obtaining from the Europeans residing as Squatters on their lands rents to the extent of about £1300 a year, and the unsettled state of that district was a source of continued annoyance both to the New Zealand Company and to the Government.

The late Governor, Sir George Grey, feeling most anxious that the land should be acquired, dictated the terms in which the purchase would be made, authorising a clause to be included in the deeds of sale, by which the natives were to receive five percent, in addition to the gross sum of purchase money on all the lands alienated by them after such lands were resold by the Government.[27]

The relevant clause in the deed read that 5 percent of the prices secured for the Crown for the on-sale of the land, after deduction of survey costs was:

> to be paid to us for the forming of schools to teach our children for the construction of flour mills for us, for the construction of Hospitals and Medical attendance for us, and also for certain annuities to be paid to us for certain of our chiefs.[28]

The flow of land sales continued in the Auckland district. Most of the remaining central Auckland lands were purchased. Prices rose somewhat from the previously derisory levels, and included in the sales in the Remuera district was a 10 percent clause similar to the Wairarapa 5 percent clause. The difficulty, in Treaty terms, about these clauses is that while Government could use the revenue from the on-sale of land for constructing schools, hospitals or flour mills it is no means clear that this would be in addition to the Civil List vote of £7000 secured by the Governor for Maori purposes on the introduction of the Constitution Act 1852, or whether the five and ten percent clauses helped relieve the Government of a liability they had in any case assumed at the time of Russell's January 1841 instructions.

5.8 The McLean Purchases

After Grey's departure a distinct Land Purchase Department was organised, with Donald McLean as Chief Land Purchase Officer. McLean brought to his task a strong sense of mission. He stated in 1854:

> As yet, notwithstanding the exertions made by the Government, only four and a half million acres have been acquired out of the estimated area of thirty millions which this North Island contains leaving a residue in the undisputed possession of the

27. McLean memorandum, nd [1854], ia 3/1854/3632, NA Wellington, cited in Walter, p 21
28. Cited in Goldsmith, p 29

> Natives of Twenty five and a half Millions of acres; the greater portion is lying waste and useless to them, while the Colonists and the influx of population expected into the Country, must be under these circumstances, miserably circumscribed; . . . unless indeed, some strenuous exertions are made during the present year, to acquire land from the Natives, and to have persons employed qualified to perform that complicated and arduous duty, general dissatisfaction with both races must be the inevitable result; and moreover I feel quite satisfied that nothing could be of greater importance to the Natives themselves, as well as to the European population, than to have those claims and territorial rights that are frequently creating war and bloodshed among the tribes equitably adjusted and rendered available for their own advancement, as well as for the progressive purposes of colonization.[29]

The view that Maori would themselves benefit from the process was very genuinely held both by McLean and settler leaders. But the allegedly frequent 'war and bloodshed' among Maori over land rights was fanciful in 1854: the most serious feuding over land was in fact that in Taranaki in 1854, and later the war in Hawke's Bay in 1857, both provoked by the Government's own land purchasing. Yet in Taranaki McLean remained optimistic. The strategy was applied in the 1854 Hua block purchase of holding back one third of the £3000 payment for the vendors to make available to them to buy back surveyed sections at 10 shillings an acre. The expectations that individual titles of this kind could prove attractive, McLean thought, would:

> lead without much difficulty to the purchase of the whole of the Native Lands in this Province, and to the adoption by the natives of exchanging their vast tracts of country at present lying waste and unproductive for a moderate consideration which would chiefly be expended by them in repurchasing land from the Crown.[30]

McLean's early instructions to district land purchase commissioners continued to emphasise Grey's policy of buying all the land in large districts, save for reserves, which were to be confirmed to Maori under a form of Crown grant. Model purchase deeds in Maori were provided which by now included the explicit reference to timber and water on the land, and sub-surface rights, and phrases which indicated the total and permanent transfer of the land.[31]

McLean secured a more regular and substantial budget for his operations than before. In May 1855, he asked for £17,000 for a six-month period for purchases in various parts of Auckland Province. He wrote:

> This sum may appear, at first sight extravagant; but it is highly important that the present disposition of the natives to alienate considerable portions of their waste land in this province should be taken advantage of, more especially as the land is in such great demand by the Europeans, and as it may be hereafter more expensive and too difficult to acquire even at greatly advanced prices, and on the whole I do not expect greatly advanced prices.[32]

29. McLean to Colonial Secretary, 19 October 1854, ia3/1855/2618, NA Wellington (cited in Walter, p 12)
30. McLean to Colonial Secretary, 7 March 1854, AJHR, 1851, c-1, no 4 (cited in *The Taranaki Report*, p 50)
31. McLean to J G Johnston, 18 May 1854, ia3/1854/3631, NA Wellington (cited in Walter, p 12)

The policy of buying from Maori at low prices ahead of settlement continued.

McLean appeared to becoming more careful about surveys than previously. He instructed Commissioner Kemp:

> You will take care, that before any sums are paid to the Natives, the lands offered for sale by them are in the first instance surveyed, and the Reserves they require for their own present and future welfare, carefully laid off; . . . in order to carry out these necessary details of a Purchase, Surveyors will be furnished for that duty, upon an application being made to the Government, under an arrangement already with the Surveyor General to that effect.[33]

Surveyors of the Surveyor-General's Department were attached to work with the land purchase commissioners for the purpose.

McLean's instructions to his officers also suggested renewed care about reserves. His 1854 instructions called for locating reserves close to Pakeha settlements so that Maori could participate in commercial development.[34] He instructed Rogan at Kaipara 'to take care that ample reserves were made for the 'use' of the Maori, their location, number, and extent to 'be determined by the wishes of the vendors themselves, and at your own discretion'. In 1861 he reiterated the need to have reserves surveyed before completing payment.

McLean's purchase programme unfolded at a prodigious rate. The story of the southern South Island purchases has been told in detail in the Ngai Tahu report: in 1856 the Akaroa purchase of about 47,000 acres for a £150; in 1857 the North Canterbury purchase of over a million acres for £500 (and no reserves); in March 1859, the Kaikoura purchase estimated at 2.8 million acres for £300 and 5558 acres of reserves – extinguishing Ngai Tahu rights in land which Grey had bought from Ngati Toa in 1847; in May 1859 the Arahura block from Poutini Ngai Tahu who had not been adequately represented in the Kemp purchase negotiations of 1848 – rights in some 7 million acres for an additional £300, plus a quite unusually large area of reserves (6724 acres plus 3500 acres for educational reserves and 2000 acres for survey costs).

In the northern South Island, McLean 'completed' the Waipounamu purchase begun under Grey in 1853. He never did hold the promised meeting with the resident South Island hapu agreed when the initial deed was signed with Ngati Toa chiefs in Wellington, but a year later he paid another £2000 to Ngati Toa to join him on successive visits to local iwi – mostly in 1855 and 1856 – and press them into signing deeds and accepting reserves. Smaller blocks were acquired too, including reserves such as those made in the Wairau purchase in 1853. By 1861 the South Island had been completely transferred save for about 120,000 acres of reserves, very unevenly distributed.[35]

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32. McLean, Auckland, 10 May 1855, ia3/1855/1592, NA Wellington, cited in Walter, p 15
33. McLean to Kemp, 6 November 1854, ia3/1854/3631, NA Wellington, cited in Walter, p 18
34. McLean to Colonial Secretary, 29 July 1854, Turton, *Epitome*, d21; McLean to Rogan, 31 January 1857, Turton *Epitome*, c101; McLean to district land commissioners, 3 May 1861, AJHR, 1861, c-8, no 2, p 1. Cited in R Daamen, B Rigby, and P Hamer, *Auckland*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), 1996, p 203

In the North Island McLean continued the big purchase programme. Hawke's Bay continued to be acquired in large purchases such as the Ruahine Bush, an estimated 100,000 acres, and Porongahau, 145,000 acres. But smaller blocks were also acquired, including some reserves – 33 blocks in all totalling about 6000 acres. In Wairarapa, McLean's department made 143 purchases totalling about 1.2 million acres, leaving about 20 percent of that district in Maori hands. The other area of major concentration was Auckland, largely South Auckland and Hauraki Gulf at first then, later in the decade, Kaipara, Whangarei, and further north where Crown purchases were often laid over old land claims. The purchase officers also moved into Hauraki (36 purchase agreements affecting about 24,000 acres) and Waikato (27 purchase agreements affecting about 38,000 acres). In remote Poverty Bay, there were two purchases (57 acres for CMS Stations). It should be noted that these figures are by Rangahaua Whanui District, and acreages are minimal estimates, because published deeds do not always give acreages.

The Government also tried to push ahead in Taranaki against strong Maori resistance to selling. Deeds were signed for eleven purchases in respect of 31,500 acres, largely in the Hua and Waiwhakaiho blocks, and for additional claims brought in respect of earlier purchases.

By the time McLean fell from power after the Waitara war and the replacement of Governor Gore Browne, he and his department had acquired for the Crown about 5 million acres in the North Island and about 11 million acres in the South Island (some of it overlapping with earlier purchases from other right-holders).

In many of the purchases in the South Island and in Wellington there were anomalies – purchases from some tribes, leaving others (with little choice) to be paid later, perennial problems over boundaries of reserves, failure to make reserves and the subsequent sale of reserves. These are too many and too complex to enumerate in this report but it is undeniable that at the end of the McLean period the proud Ngati Toa, who had dominated Cook Strait 20 years before, were left with quite small reserves of good land and some grazing land around Porirua, some rights mixed with those of other tribes further up the Kapiti Coast, and virtually nothing in the South Island. The small tribes of the northern South Island, previously dominated by Ngati Toa, were pressed into selling most of their land by McLean and the Ngati Toa chiefs who were paid to support him. Some hapu, like Ngati Apa on the Arahura Coast, may not have been paid at all. Apart from the Taitapu and D'Urville Island, they were left with tiny, insufficient reserves.

5.9 Maori Motives and Government Tactics

As in previous years it is clear that almost all the purchases involved some willing Maori vendors, who offered the land to McLean and other Government agents. Their motives and intentions varied widely. Some were still making a considered

35. MacKay to Native Minister, 6 December 1865, Mackay, vol 2, p 342

decision to bring settlement into their district and benefit from the economic interaction that followed. Most of the 1850s were still years of prosperity, with growing markets for Maori produce. In areas such as Hauraki, where Maori retained much of the good forested land, selling timber tree by tree to nearby mills became a regular source of income. In agricultural districts Maori supplied meat, vegetables, and fruit to the growing settlements. Informal leasing – grass-money arrangements – continued in areas such as Hawke's Bay on the bulk of the land still not sold to the Crown. For many Maori the threat of landlessness and marginalisation in their own land would have seemed very remote; on the contrary, at least up to about 1856, there were still indications of achieving growing prosperity through selling some land to the Government.

But the motives of the sellers were very mixed. The Waitangi Tribunal has commented that in Taranaki:

> Some, it seems, sought to increase their standing with Europeans, some sought to prove their right or authority [in contested land], while a few sought to sell the land of others as utu for some previous slight or wrong. Strangest of all to Western ears were sales to 'whakahe' ones own people (to put all the hapu at risk on account of some injury or slight to the seller).[36]

These motivations, particularly the first two, occur frequently in the evidence from other districts. In the areas of strong inter-hapu rivalry, such as South Auckland, or where there was a real and genuine danger of attack from powerful former rival, to have an alliance with the British Crown could be very advantageous; increased mana, rivals frustrated, cash in hand and the opportunity to call on or write to Mr McLean again, were all hoped-for outcomes. Chiefs favoured by the Government, such as Te Hapuku in Hawke's Bay or Ahipene Kaihau of Ngati Teata, regularly requested gifts of either a personal nature or of stock or machinery to assist their new farming and trading ventures; the officials in turn continued to work through them to secure new offers of land. The officials' deliberate taking advantage of tribal rivalries did indeed commonly yield the results they were seeking. Once one chief or hapu had taken money for their interests, others tended to join, even though at first unwilling. But they were by no means all prepared to join and therein lay the danger of what the Crown was doing. For many Maori leaders and tribes did not want to sell: they were increasingly aware of what burgeoning numbers of sellers, or increasing Government power, implied for them: a loss of control, as well as a loss of land. For every Maori who thought that this was inevitable and that he or she might as well join with the Crown agents, as representatives of the powerful new order, there were more – increasingly more in the 1850s – who decided that the settlers and officials should be resisted and contained. In the hardening of attitudes and drawing of lines that then took place, those who persisted with land selling could stir powerful resentments.

36. *The Taranaki Report*, p 49

From the 1830s Maori communities had discovered the difficulties of resisting land selling by some of the hapu, especially rangatira, who clearly had rights in the land, though not exclusive rights. The sense of wider community interests in the land – among the whole iwi or hapu cluster – was offended, yet it was apparently difficult to prevent individual leaders with mana from selling. Maori leaders had tried very early on to organise their communities into agreeing not to sell land, as in Mohi Tawhai's runanga and compact at Hokianga in 1840 to 1843. The problem was evidently much discussed, for in 1853 to 1856, new forms of tribal and supra tribal organisation emerged to contain land selling. The most important of these, as is well known, is the Kingitanga. The recent outcome of Ngati Toa's war with Grey's forces, and of land-selling, probably contributed to the concern of the Ngati Toa leaders, Matini Te Whiwhi and Tamihana Te Rauparaha of Otaki, who in 1853 began to canvas the idea of a Maori king. Nor would their concern have been unconnected with the establishment of a settler parliament in Auckland and Provincial assemblies, from which Maori were excluded by the individual property qualification, that they also began to canvas the possibility of a Maori parliament (at a big meeting at Taupo in 1856 for example). There were several outcomes: the emergence of the goals of kotahitanga and mana motuhake Maori; the choice of Potatau Te Wherowhero as the first Maori king in 1858; the establishment of runanganui in various districts which did not wish to support the kingitanga but nevertheless wished to maintain autonomy in the face of colonisation. The central importance of land to these movements is described in many published histories. It is important perhaps to note too the resolutions of major hui such as that at Taiporohenui (Manawapou) in South Taranaki in April 1854 when hapu of southern and central Taranaki met and resolved to stop land sales. In 1854 also the tribes of middle Waikato, whose kin had been heavily involved in land selling between the Waikato river and the Manukau harbour resolved to 'tapu' the land south of the Waikato.[37] Some Hauraki iwi, irritated by the efforts to sell their land by chiefs who had some interests but not dominant interests, gave their support to the evolving Kingitanga. Over the greater part of the North Island, in fact, lines were hardening against further land selling. By the late 1850s, Commissioner Dillon Bell had to curtail his inquiries into the old land claims to Poverty Bay: the Rangatira there were denying that these were sales. Even the Resident Magistrate who came to Poverty Bay in 1858 had to leave it by 1860, so reluctant was the runanga to defer to the Queen's officers.

5.10 McLean in Hawke's Bay

There is no question that McLean's land purchase activities contributed to the tensions in Maori society and to the hardening of lines against selling in Hawke's Bay. It was not just that McLean and his staff sought to initiate negotiations with

37. Johnson to McLean, 6 October 1854, Turton, *Epitome,* p 384

particular chiefs: in a situation of complicated right holding they had to start somewhere. It was rather that they actually made purchase agreements with individual chiefs, and paid money over. Moreover they did this covertly. The Hawke's Bay purchase of Tautane (70,000 acres) and three other blocks in 1854, for example, was concluded by McLean with Te Hapuku and a number of chiefs whom he invited to Wellington. There is evidence that the chiefs made the marks of absent owners as well. The communities of those chiefs might, in theory, have repudiated the agreements and made the chiefs return the money. But that was difficult, in respect of men who had much traditional mana and were feeling confident of the Government's continued patronage. We cannot know for certain just how much dissatisfaction these deals caused between the hapu and their chiefs, but certainly Te Moananui of Ngati Kahungunu came under pressure from his people and tried to return some of the land he had sold in 1855. It was some years before G S Cooper could get him to accept the final payment.[38]

Te Heuheu of Ngati Tuwharetoa became concerned about the inland boundary of the Hawke's Bay purchases and supported Ngati Hineuru tribe who claimed the inland part of the Ahuriri block. The meeting he convened at Taupo in 1856 to discuss a Maori parliament also resolved to support leasing, in order to fund the chiefs and enable them to reassert their authority over the land and the settlers occupying it. Te Heuheu was opposed in Hawke's Bay by Te Hapuku 'who warned him against interfering with him [Te Hapuku] and his land'. Reporting this, G S Cooper commented:

> I believe that the necessities of Ngati Kahungunu will oblige them to sell more land in a very short time. The money they have to receive at present is insufficient to pay their existing debts, and they can no longer get goods upon credit, the late fall in the markets has a put a temporary stop to the production of grain and potatoes . . . they have no alternative but to continue selling their lands as a means of obtaining supplies which have now become necessary to their existence.[39]

This is a classic statement of the debt trap which was assisting the land purchase officers as it was to assist buyers of Maori land for the next 150 years; there was no indication from Cooper of anything but satisfaction and certainly no slackening of the official opposition to leasing. Indeed Cooper indicated his intention to profit from 'internal jealousy' of the Hawke's Bay tribes to buy more land. McLean instructed him to threaten prosecution of the squatters on land not yet acquired by the Crown. McLean's attitude was expressed in his warning:

> we shall soon have a repetition of the Wairarapa squatting with all the evil and expense it has entailed – a general scrambling for runs over unpurchased districts would ensue. The Natives would soon find it in their interests to coalesce with the settlers in opposing the sale of the land to the government; land purchasing would cease; those who had already sold to the government would say, what fools we have

38. Cowie, pp 36–41
39. Cooper to McLean, 29 November 1856, AJHR, 1862, c-1, no 20, p233 (cited in Cowie, p 42.)

> been to sell, when our opponents to those sales have held out against the Government and are now reaping the fruits of their opposition by obtaining heavy annual payments for their runs, and are greater men than we are by having the English settlers at their mercy and altogether in their power and subject to their caprice, so that they can order any man off his run who does not comply with their present demands, not only for stipulated rent, but for anything additional they may caveat.[40]

McLean and Cooper continued to deal with the man they had elevated to prominence, Te Hapuku, for the purchase of Heretaunga plains, against the wishes of Te Moananui and Tareha and their hapu, who had their principal interests in that block. Negotiations with Te Hapuku and payments to his Ngati Te Whatu-i-apiti community in early 1857 led to serious fighting, known as the Pakiaka war with Te Moananui, Tareha, and Ngati Kahungunu ki Heretaunga. Cooper acknowledged to McLean that Te Hapuku had 'robbed his enemy to an enormous extent' and tried to placate Ngati Kahungungu by payments of £1300; but despite mediation by McLean and Williams, Te Hapuku built a pa on the disputed land and war began. When the fighting was concluded in September 1858 the Hawke's Bay Maori proposed 'that the system of selling land through the Chiefs should be abandoned, and that anyone who should hereafter be guilty of selling another's property or of misappropriating any payment for land, should be punished with death'.[41] Maori were putting their house in order in their own way but it was clear that the Government policy of buying through chiefs was the issue at hand.

McLean and Cooper nevertheless completed purchases of Porohangahau and Tautane in 1857, both involving land the subject of earlier purchases in Wellington that were supposed to have already extinguished Maori title. Six further purchases were completed in 1859, sometimes involving separate payments to different groups of claimants. Several of these were immediately repudiated in terms of the 1858 agreement ending the Pakiaka war. Kingitanga support developed quickly in the region in 1859 and the runanganui was also formed. The latter began levying rents more systematically upon the squatters and planning the future economic development of the area, including town expansion and trade, to the benefit of Maori. Cowie comments that three Crown objectives stood in the way of these plans: firstly McLean wanted to buy a further 500,000 to 600,000 acres in the district including the Heretaunga plains and other prime areas; secondly the Government was not yet prepared to accept Maori leasing directly to pastoralists or the runanga controlling them; thirdly it was not prepared to accept support for the Kingitanga that threatened the exercise of British sovereignty.[42] Cowie concludes:

> An uneasy tension existed throughout 1860 as the Runanga consolidated its support. Cooper became shut out of proceedings, and was unable to continue any new or major purchase negotiations. Calls for about 100,000 acres of the inland portion of the Ahuriri to be reoccupied and the settlers with runs on it to pay rents or be pushed off,

40. McLean memorandum, 25 March 1857, AJHR, 1862, c-1 p 30 (cited in Cowie, p 43)
41. Cooper to McLean, 30 September 1858, AJHR, 1862 c-1 no 47, p 40 (cited in Cowie, p 46)
42. McLean to T H Smith, 29 June 1859, AJHR, 1862, c-1, no 56, p 345

filtered through to Cooper. On 20 June 1861 Cooper admitted defeat and informed McLean that, given the rumours circulating that the Crown was preparing to 'obtain the forceable possession of their land', it would be advisable to 'suspend all operations of the Native Land Purchase Department'. If they were ever to resume, Cooper noted, deals would have to be negotiated in public, with published prior warning, and involving a commissioner who, along with a few chiefs, would inquire into the customary ownership of the block. This was an important recognition of the Crown's failure to adequately investigate the customary ownership of the blocks it had purchased.'[43]

5.11 Wairarapa

In Wairarapa, McLean continued to buy land in the 25 percent of the district remaining in Maori possession. By late 1853 he was buying reserves made in sales only a year or so earlier.[44] Paul Goldsmith has detailed the Crown purchases in Wairarapa from 1854 to 1865 – about a third of the land remaining to Maori at the end of 1853. He describes a host of problems experienced by the settlers trying to take up runs – problems over boundaries, resistance by Maori owners who had not shared in the distribution of payment and demands for payment for timber which Maori did not consider they had sold with the land. These problems were exacerbated by the Provincial Government selling the land before the boundaries were settled, including sales of reserves noted in deeds as still belonging to Maori but not defined on the ground.

McLean came to the area and made additional payments to individual Maori, sometimes for instalments on earlier purchases, sometimes as advances on future sales. Goldsmith notes a trend in the new purchases towards fewer and fewer signatures on the deeds, and fewer and usually smaller reserves.[45] Despite his instructions to his officers about surveying before completing purchases McLean's own purchases were typically in advance of surveys. G S Cooper continued the purchases from 1854 to 1857 and William Searancke from 1858. These officials continued to make regular advances to a small group of chiefs who were clearly becoming dependent on this source of income. The demoralising effects were evident in Searancke's comments.[46]

Goldsmith notes a number of examples of Maori selling land then buying it back immediately, at a substantially more expensive rate, to get Crown grants. This may well have stemmed from a sense of insecurity of rights in customary tenure, and the desire to separate oneself out from one's kin on a small farm. But Goldsmith gives evidence of a quite different motivation: some chiefs had arranged individual reserves for themselves in the purchases, but Crown grants for these were slow to come and Goldsmith shows Maori waiting in irritation for them in 1860.[47] This was

43. Cowie, p 51
44. Goldsmith, pp 56–57
45. Ibid, p 60
46. Ibid, p 67

a likely reason for chiefs acquiescing in the buy-back arrangements which McLean had been encouraging since the Hua purchase in Taranaki.

Purchases continued at a steady rate until 1860, about 130 purchases in all totalling about one million acres. The system of buying relatively small blocks enabled McLean to proceed without needing to secure unanimity among a much bigger group of sellers necessary in large block purchases.

But the state of sales, including payment by instalments, had not brought prosperity to Wairarapa. Searancke reported Maori seeking food and employment by the late 1850s. In 1860 he the complained that the chiefs had squandered their capital, become heavily indebted, and increasingly embittered (especially if he declined to making more payments on specious pretexts), with some inclining towards the Kingitanga. A runanga was set up in 1859. Searancke was of a view that two thirds of what he had paid out in 1859 to 1860 was devoted to the purchase of arms and ammunition to send to the Waikato.[48] Some Maori who had not shared in distribution of earlier payments began to repudiate the sales, or argued that only a portion of the land had been sold or that their rights at least had to be compensated. According to McLean, the Wairarapa people were inclined to blame their own chiefs though they were increasingly disinclined to regard the actions of the chiefs as binding on all parties with interests in the land but only on those portions of land where the chiefs themselves had family interests.[49] These developments were, as Goldsmith notes, comparable to and no doubt connected with events in Hawke's Bay which had led to the war in 1857 to 1858. By Ballara's analysis, small residential groups, whanau or hapu, would typically cluster under the mana of a chief of renown, connected to but not necessarily resident among them. These 'paramount' chiefs then had their own particular lineage and lands, but also had influence over a much wider area. Traditionally they had often made arrangements with rangatira or ariki of their own rank, not necessarily consulting the various subgroups in advance (though their active or tacit consent would be needed in the long run). Because the high chiefs were considered to have abused their authority in their land dealings their mana was now being rejected by the various subtribes, each of which was asserting their own authority over their particular lands. As Goldsmith puts it:

> It appears therefore that the late 1850s and early 1860s was a time when the role of the powerful chiefs was being increasingly questioned. Smaller units of people were looking to splinter out of the paramount chiefs' control, or to unite in Runanga to control them. It is unlikely that this process was universal. A lot would depend on the actions of leading chiefs of an area and the traditional extent of their control.[50]

47. Ibid, pp 77–78
48. Searancke to McLean, 20 May 1860 (cited in Goldsmith, p 71)
49. McLean, commissioner's report to McLean, 10 March 1962, AJHR, 1862, c-1, p 384 (cited in Goldsmith, p 74)
50. Goldsmith, p 76

This whole situation was of course brought about by the new experience of permanent alienation of land with which Maori society was gradually coming to grips. Goldsmith notes that the paramount chiefs did not readily accept the diminution of their authority, with resulting quarrels over reserves between high chiefs and resident hapu. The Government meanwhile continued to try to hold their allegiance; chiefs were given small payments out of the Wairarapa five percents – technically within the purpose of the fund, but arguably intended for the benefit of the whole community – and many prominent land sellers were recommended for the position of Assessors in the Resident Magistrates' courts, at salaries of £30 or £50 per year.

5.12 Alienations in the Auckland Area

About 150 Crown purchases were completed in the Auckland district between 1854 and 1861, largely in Auckland and south Auckland, Kaipara, and Whangarei. Purchases were also made at Mangonui and the Bay of Islands, and in the lower Waikato. The tendency for purchases to continue in this district well into the 1850s and early 1860s, contrasts with the hardening of attitudes in other districts. The reasons are not altogether clear but probably have to do with the continued prosperity associated with the growth of Auckland and with the complex rivalries and intersecting rights among local tribes.

F D Fenton, at the 1856 board of inquiry into native affairs, reported that:

> The Kaipara Natives are willing to sell their lands, and they complained that the Treaty of Waitangi is infringed by the Government not purchasing their lands when offered for sale. Their argument is, that if they are precluded from selling to any but Government, the Government are bound to purchase when the offer is made, otherwise to release them from the restriction [of pre-emption].

Notwithstanding this eagerness, Fenton noted the importance of securing tribal consent because he had 'never heard of a Native holding a strictly individual title to land'.[51]

In fact the Crown purchase agents generally continued to work through favourite chiefs such as Apihai Te Kawau, and Te Keene Tangaroa (mainly of Ngati Whatua allegiance) who, it appears, had become increasingly dependent upon the favour of Government and upon land sales for a flow of income. Many of these men were appointed as Assessors under the Resident Magistrates Act and the Native Circuit Courts Act 1858 and secured small salaries. They generally assisted the officials in land purchases, though not necessarily in respect of their own core land.

Dr Barry Rigby, who has examined the Kaipara purchases in some detail, has noted that the mana of Tauroa Tirarau, the elderly chief of Te Parawhau hapu (connected with Ngapuhi) spread over both Whangarei and Kaipara. G J Johnston, land purchase commissioner at Whangarei, regularly consulted him prior to making

51. Cited in Rigby et al, p 168

approaches to 'the more immediate owners.'[52] The support of Tirarau and the officials was reciprocal, Johnston setting in train the securing of an individual grant for him of 1000 acres.

Dr Rigby's analysis shows that for Kaipara, as for other districts further north, Crown purchases overlapped with old land claims. On appointment to the district, John Rogan found himself mediating between rival Maori groups (under Paikea of Te Uri O Hau, and Tirarau, in respect of the upper Kaipara) in relation to various old land claims and Crown purchases. The Crown purchase at Waikeakea for example, overlaid an old land claim (with a Crown surplus), the extent of which was disputed. Mangakahea, northward of Waikeakea, had been the subject of a purchase by the CMS missionary Charles Baker; Baker was unable to occupy due to the rivalry between Paikea and Tirarau and the Government's attempt to resolve the dispute by purchasing the land did not prevent violence erupting in 1862. Despite the intersecting Maori interests Crown officials often concluded purchases with only one or two of the major hapu.[53]

Prices paid for Kaipara land averaged 14.3 pence per acre, but varied widely according to Maori determination in bargaining and to size and quality of the land. Sometimes the prices were 'ridiculously low' even by Rogan's own estimation, recoverable from the timber alone.[54] The officials generally resisted Maori asking prices but payments became more liberal after the 1860 Kohimarama conference (where the Kaipara chiefs had complained); this presumably reflected the Government's concern to secure their loyalty as war had begun in Taranaki. Rigby has noted the sharp contrast with the on-sale price of the land (often shortly after the purchase from Maori, with no evidence of improvements), and with the price of 10 shillings an acre paid to Kaipara Maori by Rogan as a private purchaser in late 1865.[55] It is clear that the Crown did take advantage of pre-emption to pay low prices to Maori, in continuance of Normanby's 1839 policy.

Although Rogan made 15 reserves in Kaipara, according to McLean's instructions, most of them were purchased within 18 months of their being created. In other words 'reserved' meant little more than land held back from initial purchases; there seemed to be no determined policy by the Crown either to see that the land remained in Maori hands, or to enlarge the endowment held by the Crown for Maori purposes (which was by now mostly under the Native Reserves Acts 1856 and 1862).

5.13 Hauraki

Land sales in the Hauraki district were uniformly resisted by the local chiefs until the late 1850s, although the Government purchases in south Auckland began to

52. Johnston to Colonial Secretary, 12 December 1853, Turton, *Epitome*, c53, cited in Rigby et al, p 174)
53. Rigby et al, pp 174–191
54. Ibid, p 194
55. Ibid, p 199

touch on areas where Marutuahu tribes claimed interests. Negotiations with local chiefs for access to gold resulted in agreement over licence fees in 1852; these negotiations and the resulting revenue led the Coromandel chiefs to affirm even more strongly their lack of interest in selling the land.

The creation of the Native Land Purchase Department in 1854 saw a more determined effort by McLean to acquire land in the area. Dr Robyn Anderson is of the view that, contrary to McLean's policy in Hawke's Bay and Wairarapa, officials in Hauraki approached local family heads and rebutted the authority of senior chiefs who, in that district, were inclined to veto sales.[56] In 1853 to 1858 McLean purchased Ngatipaoa interests in Waiheke Island and some small blocks on Coromandel, then interests on the Waihou and Piako rivers. James Preece continued to buy land around Mercury Bay, Cabbage Bay, Waiau, and Whangapoua. Drummond Hay purchased interests, in the Thames and Piako areas. By the late 1850s most Marutuahu tribes, except Ngati Tamatera had been drawn into sales. The officials were well aware they needed to buy ahead of further gold discoveries, when land prices would soar.

The move to individual purchases intensified in the district. In 1858 Preece reported:

> I know that the natives as a body are convinced that the time is at hand when each individual Native will do as he pleases with his own land. The conduct of Maihi and Horepeta, in selling the Waiau block in spite of all opposition, has operated well. Taniwha told me lately that he was convinced that the Government would soon make a purchase of all the spare land, for he had found that he and the other chiefs could not prevent other Natives from parting with their own land.[57]

In Piako, McLean, a little unusually, did attempt a prior definition of interests before making payments:

> I held a meeting with the whole of the claimants, who agreed to proceed with Mr Hay to point the boundaries of their land and settle their conflicting claims and differences respecting such portions as were claimed by other tribes. This being completed, Mr Hay was instructed (a copy of which is herewith enclosed) to furnish the plan of the district about to be ceded – estimated at about 140,000 acres – and a date was to be fixed on which all the claimants should be assembled at Auckland to effect a final settlement of that long-pending question.[58]

But this effort was spoiled when officials in Auckland made a payment to Ngatai and Hongi of Te Uri Karaka without first ascertaining their rights vis-à-vis other claimants. These two had been selling in South Auckland for a decade and overreached themselves in Hauraki, precipitating distrust of the Crown and a general reaction against selling.

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56. Dr Robyn Anderson, 'Hauraki Historical Overview Report', Confidential draft for Crown Forestry Rental Trust, Wellington, July 1996, p 13
57. Preece to Chief Commissioner, 6 May 1858, Turton *Epitome* c304, cited in Anderson, p 15
58. McLean to Governor Brown, 5 June 1857, Turton *Epitome*, c299 (cited in Anderson, p 16)

Kate Riddell has shown that the usual problems of vague boundary descriptions, few signatures on deeds, and their formulaic nature, obtained in Hauraki too.[59] Only one deed, that for Piako in November 1853, contained a '10 percent' clause.

Anderson notes that few formal reserves were made, the officials' perception probably being that Hauraki Maori still had ample land left. They were aware, however, of social malaise and liquor consumption among Hauraki communities and of growing indebtedness.

Among Maori there was a growing awareness and regret that the land had been sold for very low prices in relation to its subsequent value and that they had little or nothing to show for it. Here too, in consequence, there was growing support for the Kingitanga. Drummond Hay, however, persisted determinedly with buying from small groups against tribal opposition:

> The Natives were told distinctly that if any Natives, however few, could prove a sound title to land that they wished to sell, the offer would be entertained; and if opposed by the tribe on no better grounds than that the land should not be sold, such opposition would carry no weight with it; also in the case of the whole tribe being concerned in the offer, some few individuals alone demurring, their title would be fairly investigated, and their rights respected, however much the tribe might insist otherwise.[60]

Hay maintained the right of the hapu, including diminishing hapu, to sell rather than be 'tyrannized over by the rest of the tribe'.

5.14 Wellington

Negotiations were pursued by Land Purchase Commissioner Searancke in the Horowhenua (Waikanae) and Manawatu districts but the complex intersecting interests of Ngati Raukawa, Rangitane, Ngati Kauwhata, Ngati Apa and Te Atiawa, prevented any sales from being concluded except for about 34,000 acres known at Whareroa or Matuhuka, in 1858. Searancke apparently paid £800 for the land, mainly to Te Atiawa. There seems to be some doubt as to the existence of a deed.[61]

Searancke also made a payment of £400 in November 1858 to Ihakara and the Ngati Whakatere hapu for a 37,000 acre block at Te Awahau on the north bank of the Manawatu river. Ihakara was, by his own later account, deliberately acting against the 'anti-selling league' by which he meant the Ngati Raukawa nonsellers led by Nepia Taratoa. Searancke pushed ahead determinedly with the selling party and agreement was eventually reached in late 1858, with payments to Ngati Toa for take raupatu and Ngati Apa and Muaupoko for take tupuna. Reserves were marked including small fenced settlements for Teratoa, and another chief bought land from

59. K Riddell, 'Pre-1865 Crown Purchases – Hauraki/Coromandel', Waitangi Tribunal Rangahaua Whanui Series unpublished draft, pp 5–9, 11
60. Hay to Chief Commissioner, 4 July 1861, Turton, *Epitome* c, p 338 (cited in Anderson, p 21)
61. Anderson and Pickens, pp 79–80

the Crown at £5 per quarter-acre.[62] This outcome probably emboldened McLean in the dangerous policy of pushing forward with purchases from some right-holders against opposition. Searancke thought he had achieved another purchase called Wainui, near Paekakariki, but this was unconfirmed until the 1870s.

In early 1860 Searancke rather reluctantly suggested surveying or clearing boundaries first (apparently this was not being done) and buying smaller areas; but with the crisis developing in Taranaki, and Searancke's efforts being known to cause 'dissatisfaction' among the Maori of the area, he was ordered to stop his operations.[63] He made an interesting final comment though, on the attitudes of the selling parties in relation to land at Te Awahou:

> the Natives themselves are most anxious to see settlers among them and are disappointed at the delay and openly state that as the Crown is not making use of the land they will resume possession.[64]

5.15 The 1856 Board of Inquiry

It is appropriate, before returning to the Taranaki story, to comment on the 1856 board of inquiry into the state of native affairs convened by Governor Browne. Chaired by the Surveyor General, C W Ligar, the board heard evidence on selected questions from 24 pakeha and nine Maori, including McLean, Fenton, and Rogan. Its reports and minutes are printed in *British Parliamentary Papers*, volume 10, pages 509 to 611, and summarised in Helen Walter's report 'Land Purchase Policy and Administration 1846–1856'.

The first two questions concerned land: whether Maori should be required to mark out land before survey and sale; whether public notice should be given requiring all claimants to appear within a given time or forfeit their claims; whether the selling party should be made responsible for paying off subsequent claims; whether Maori should be given Crown titles over land not yet sold to the Crown, and if so whether under restrictions on alienation. Those questions clearly reflect concern about how to manage intersecting Maori rights and the difficulty of extinguishing Maori title.

The board's summary of evidence and opinion showed that the officials generally had a reasonable grasp of the complexity of Maori tenure:

> It will . . . be seen that no tribe has in all instances a well-defined boundary to its land and that the members of several other tribes are likely to have claims within its limits.

62. Anderson and Pickens, pp 80–83
63. Ibid, pp 85–87
64. Searancke to McLean, 1 February 1861, AJHR, 1861, c-1, no 79, p 302 (cited in Anderson and Pickens, p 87)

The members noted that individual Maori had rights to regularly use areas for 'cultivations, dwellings, or food gathering etc' but not a right 'clear and independent of the tribal right'. Chiefs had an 'influence' on the disposal of tribal land but individual rights in particular portions like everybody else. Walter points out that the board made no criticism of McLean and his department for buying huge areas on the basis of a few signatures despite these intersecting interests.[65]

The board noted the growing reluctance of Maori to sell land in large quantities. This they said, was because of Maori 'cupidity' and awareness of the rising value of remaining land. They advocated stepping up the offers of Crown grants to individual chiefs and heads of families after Crown purchases, but *not* inalienable titles.

They advocated registration of all Maori claims, greater publicity of purchases under negotiation and cessation of paying instalments before completion of the purchase. An elaborate scheme was advanced for stationing assistant commissioners (with surveyors) in 'conveniently sized districts' and securing the cooperation of Maori to sketch the boundaries of all claims – another version of the *Domesday Book* that George Clarke had advocated in 1843. The walking of boundaries and setting up of poles at corner points was also recommended. Much of this advice made quite good sense, although of doubtful practicality.

In the event McLean acted on very little of it. He supported paying by instalments, asserting that the first and largest instalment was distributed among the more general and remote claimants with 'the real owners of the soil' waiting for later payments. This seems to be an attempt at a justification of the way he proceeded in earlier purchases in the northern South Island. On the question of the relationship between chiefs and individual occupiers McLean hedged his bets. Though appearing to acknowledge tribal rights he added:

> The rule which applies to the purchase of one portion of land does not apply to another; each piece of land has its own history. A great deal must be left to the discretion of the person purchasing.

Asked in 1860 to explain why he apparently supported a tribal over-right in 1856 but rejected it in the Waitara purchase, McLean said:

> It varies so much in different parts of the country, I should wish to know what part of the country you refer to – as the custom which prevails in one place does not in another . . . in some tribes the different hapus must be consulted, in others chiefs; much depends upon the personal character of the latter . . . the various hapus or families which compose a tribe most frequently have the right of disposal, but not always; the custom varies.[66]

McLean could hardly say anything else; in Hawke's Bay, Wairarapa, and South Auckland he had been buying determinedly from compliant paramount chiefs; in

65. Walter, p 28
66. Opinions on Native Land Tenure, attached in Browne to Newcastle, 4 December 1860, AJHR, a, p 3, cited in Rigby et al, p 169

Hauraki and Taranaki, where senior chiefs were opposed to selling, he and his officers tried to ignore them and weasel their way into purchases by payments to small-group leaders. He reported a month after giving his evidence to the board that he had instructed local officers to investigate history, genealogy, and tenure in their areas, to formulate boundaries and use natural features where possible to mark reserves. Despite this, the actuality of purchases from 1856 to 1861 suggests that McLean's practice and that of his officers remained as pragmatic as ever: payments in advance to compliant Maori and attempts to promote offers of sale over what area one could, promising reserves to chiefs as inducements and doing very little about seeing them Crown-granted.

5.16 Waitara and War

The onset of the central tragedy of modern New Zealand history, the war that began at Waitara in 1860, is too well known to require further detailed analysis here. Keith Sinclair's *Origins of the Maori Wars* remains a masterly study and the Waitangi Tribunal's interim report on Taranaki has thrown new light on the complex tribal situation relating to the land dealings.

The Tribunal has also set out the complex history of the area following the arrival of the New Zealand Company and Colonel Wakefield's purported purchases, the return of large numbers of Te Atiawa from the south under the leadership of Wiremu Kingi, Maori efforts to limit the spread of white settlement, and the Taiporohenui (Manawapou) resolution of April 1854. Government attempts to buy land from a minority of right-holders at Waitotara too were subsequently seen as iniquitous. Attempts to buy land in north Taranaki led to a three-year feud between selling and non-selling factions of Puketapu in 1854 to 1857.

McLean's attitude towards the Taranaki 'Land League' as he and other officials called it, and the Kingitanga, was contemptuous and hostile. Despite the fighting that had occurred in Taranaki and Hawke's Bay between land selling factions and their opponents, and the evidence of increasing Maori opposition to selling in many districts, McLean and the settler ministry continued to try to push through land purchases. In 1858 there was a strong settler thrust towards individualisation of Maori tenure and direct dealing between Maori and settlers, which was given expression in the Native Territorial Rights Act 1858 – disallowed in London because the Government there still wanted to keep control of the land trade and of 'Native Affairs'.

But Governor Browne, with McLean as his closest friend and advisor, was moving increasingly away from the 1856 findings and towards recognising the rights of individual hapu and families, including the right of these to sell to an outsider, notwithstanding the wider tribal right as expressed through the paramount chiefs which was not now to be allowed to supervene. At New Plymouth on 8 March 1859 Browne announced publicly that he would not buy land with a disputed title and 'would buy no man's land without his consent' but he would

allow no one to interfere in the sale of land 'unless he owned a part of it'. The nub of the matter was the phrase 'owned a part of it'. Typically, as we have seen, hapu would recognise the mana of senior chiefs connected with them but not necessarily of their core lineage or residential group. Conversely senior chiefs had their lands in their own core lineage and residential group, but their mana over the wider tribal community gave them a voice in the disposition of land in the whole of that group. So said the 1856 board and so says the modern research of scholars such as Dr Angela Ballara. Indeed McLean said so too, when it was convenient to buy from Te Hapuku or Aihipene Kaihau or others selling well beyond their own residential area. But now, in New Plymouth, Browne and behind him McLean, threw the emphasis the other way – the paramount chiefs were not counted among the 'owner' group and were to have no say. This was seen as a new policy by many. A settler at the meeting wrote in his diary that night that His Excellency 'declares his intention of not allowing any native to interfere in the of sale but such as have a claim in the land in question ie not to allow the rights of chieftainship'.[67] Professor Keith Sinclair argued that it was a new policy; Professor Brian Dalton thought not.[68] In view of the practices developed by the land purchase commissioners in Hauraki it was not entirely new. But it was new to Taranaki where (much as they disliked it) McLean and successive governors had previously allowed Wiremu Kingi's view on land selling some influence. Now that influence was being set aside and Browne's public announcement made what had merely been McLean's pragmatism into official ideology. It is no wonder that senior chiefs throughout New Zealand became concerned, as was revealed at the Kohimarama conference in 1860.[69]

Te Teira offered to sell 'his piece' and Kingi resisted, both as spokesman for a general Te Ati Awa determination not to sell the south bank of the Waitara, and because he had family interests in the land. The war that Browne and McLean began went on for nearly 12 years.

5.17 Crown Purchases, 1861–65

With the advent of the Fox Ministry in July 1861, McLean was required to take leave. He remained nominally the chief land purchase officer until early 1863, but John Rogan ran the office and McLean performed various roving commissions at the behest of Sir George Grey, returning for his second governorship. Effective running of the Native Department fell to F D Bell (who was still completing his report on old land claims and pre-emption waiver purchases), W Fox, and Walter Mantell (who had been responsible for the minimal awards in the Ngai Tahu purchase). It is perhaps therefore unsurprising that nothing substantial appears to

67. A S Atkinson, Journal, 12 March 1859, *Richmond Atkinson Papers*, ed. G H Scholefield, Wellington, 1860, vol 1, p 452
68. K Sinclair, *The Origins of the Maori Wars*, Wellington, New Zealand University Press, 1957, p 139; B J Dalton, *War and Politics in New Zealand, 1855–1870*, Sydney, Sydney University Press, 1967, p 99
69. Minutes of the Kohimarama conference, ma 23/10, NA Wellington

have changed in the policies and practice of the Land Purchase Department, most land purchase commissioners remaining in their posts in various districts.

Land purchasing slowed in some areas because of the preoccupation of both Maori and Pakeha with the Taranaki war and the tense relations between Government and Kingitanga. Grey launched his 'new institutions' in 1861 – official local Runanga with salaried Assessors and Karere (village constables in effect) – using the District Circuit Courts Act 1858 for authority. It was intended that the Runanga, under Pakeha resident magistrates or Civil Commissioners might, among other things, define customary land ownership and regulate the informal lease arrangements which continued to flourish in districts such as Hawke's Bay. But the Hawke's Bay chiefs were uncooperative. They had tried before to get the courts to adjust disputes with squatters and been rebuffed on the grounds that their customary titles did not establish a proprietary interest in land that the courts could recognise. The chiefs therefore kept matters in their own hands, as before, seizing settlers' stock when they wanted to claim payments or damages. There was also a widespread anxiety among Maori that their land would be seized to pay for debts; indebtedness was widespread after the land sales of the 1850s, which had encouraged spending habits, and the agricultural depression after 1856, which left Maori without regular income from the sale of produce.

Between 1862 and 1865 the land purchase commissioners continued to make a number of purchases. Kaipara, Whangarei, the Bay of Islands and Muriwhenua were targeted by the Crown, resulting in 58 purchases, some of 20,000 to 30,000 acres – a total of about 382,000 acres, some overlaying old land claims. There were 13 purchases totalling about 14,000 acres in Hauraki and three in the lower Waikato from chiefs who considered the Kingitanga a backward development and land-selling a means of securing alliance with the British.

In 1864 the Crown purchased Rakiura from Ngai Tahu. Relatively, the terms were better than previous purchases in the South Island; a price of £6000 and a smattering of small but important reserves such as the Titi Islands. A feature of some significance was that one third of the purchase price was set aside to be invested for an educational endowment. Suitable land was in fact purchased in 1870 and is still in trust for educational purposes though under perpetually renewable lease. This by no means covered the needs of Rakiura Maori but it was an indication of what might have been done more systematically with Crown land purchases, had anyone had the will.

Another area where Crown purchasing was significant during the early war period was Wairarapa. McLean returned to Wairarapa in 1862 and completed some purchases he and Searancke had begun years before. The same old features recurred: in the 8000-acre Makara block only three signatories, a 100-acre reserve and boundaries indicated vaguely by place names. In 1863, Isaac Featherston, Superintendent of the Wellington Province, was appointed Special Commissioner; he made some 20 purchases in all totalling about 50,000 acres. About 220,000 acres were sold in Wairarapa between 1854 and 1865, leaving less than 20 percent of the district in Maori hands.

Featherston acted as special commissioner also in the highly significant Rangitikei–Manawatu purchase in Wellington district. This large and fertile block of some 250,000 acres had been the scene of rivalry between Rangitane (old occupants), Ngati Raukawa (coming into the area in the 1830s) and Ngati Apa (another older group who also had sold Rangitikei–Turakina to the Government in 1847 to 1849). The zones of occupation of the land were indistinct after the heke and fighting of the 1830s; now the confusion was exacerbated by quarrels and threatened fighting over the distribution of grass money. In 1849 to 1850 the Government had taken the view that Ngati Raukawa had the predominant interests, as conquerors, Ngati Apa confining their interests north of the Rangitikei. Now it was convenient to recognise Ngati Apa, who were offering to sell the block. Featherston had the Rangitikei–Manawatu block excluded by special clause from the operation of the 1862 and 1865 Native Land Acts and Ngati Raukawa had not the benefit (albeit a doubtful benefit) of a Native Land Court hearing before a purchase agreement was concluded.

5.18 The Crown Purchasing Period: An Assessment

It is to the credit of the Crown that, after some seven years of hesitation, it recognised Maori property rights under the Treaty to uncultivated or so-called ‘waste’ lands, as well as to cultivated and settled land. This was partly the result of understanding by local officials (starting with Busby at the Treaty negotiations), of New Zealand realities, and their defence of them against the self-interested and ideological position taken by the New Zealand Company and its powerful political backers in England. It should be recognised though, that Governor Grey and his colleagues in New Zealand might not have so readily resisted chapter 13 of the Constitution Act 1846 (which required that ‘waste’ land be registered as Crown demesne) without their sharp appreciation of Maori strength on the ground. Moreover, Grey’s rejection of the ‘waste land’ theory was heavily qualified by his assertion of the view that Maori rights in land were so intersecting, confused or inchoate as not to be really ‘valid’. In consequence, although Maori interests in land had to be extinguished by purchase before the Crown could assert beneficial title, Grey’s land purchase policy (like that of his chief land purchase commissioner Donald McLean) was characterised by sweeping ‘blanket’ purchases, purporting to extinguish Maori interests across vast areas.

The truly damning evidence of Crown purchase methods before 1865 is the war which began at Waitara and spread to most of the North Island. The Government’s policy in Taranaki in 1859 and early 1860 was not wholly new, however. During Grey’s first governorship and during McLean’s management of the Native Land Purchase Department, Government officers in all districts had taken advantage systematically of the complexity in Maori land tenure, as between various hapu whose interests intermingled or between the smaller groups in residence and the great chiefs whose mana extended across a number of hapu. The relative ease with

which they could do this arose in past from the fact that Maori themselves were uncertain as to the authority of rangatira in this new activity called selling land. Chiefs were expected to speak for their communities. But Maori witnesses before Commissioner Spain in 1843 were themselves divided on whether the consent of 'overlord' chiefs bound the lesser or 'resident' chiefs in the various villages within New Zealand Company purchases.[70] Officials in fact worked through whatever grouping or level seemed most likely to lead to a purchase. There were usually some chiefs willing to sell, for a variety of reasons. Sometimes they represented wider community opinion but very often they did not, and by negotiating with them, and above all by making advance payments to them, the Crown officials set up very strong tensions in the society or exacerbated existing ones. The 1856 board of inquiry was well aware of Maori *reluctance* to sell for a variety of reasons: Te Heuheu and the interior chiefs because of fear of their loss of 'nationality'; Arawa because they did not consider they had a surplus anyway; Poverty Bay because they were doing well out of growing wheat and trading it to Auckland and had no need or wish to sell land. The board was also aware of the hazards and injustices in the Native Land Purchase Department's methods and recommended a series of improvements to the procedures. There is little evidence to show that these were carried out. Serious fighting occurred among Maori in Taranaki and Hawke's Bay in the 1850s. The land purchase commissioners would sometimes leave highly sensitive areas for a time but keep negotiating in other areas, quite explicitly hoping that pressure and working through client chiefs, would cause resistance to crumble. Once they were confident that they had a deal with some influential leaders they would try to push through a survey or make an announcement of the deal as a completed purchase, immediately throwing the still resisting groups into a disadvantage. The resisters then felt obliged to participate for fear the land would be sold from under them.

Maori had a sharp awareness of what was happening and began, in tribal runanga or supra-tribal arrangements, to resist the sellers, especially the complaint chiefs who had used the mana they had acquired in traditional ways to sell land absolutely (where previously they had authority only to make conditional transfers of rights over it). Maori were generally restrained in their methods of opposition to sales with which they had not fully concurred but interruptions to surveys were very common. The officials' normal response was to halt the survey, negotiate further, perhaps make an additional payment, alter a boundary or mark out a reserve. Almost never did they accept that the sale had not occurred once one section of the owners had taken a payment and signed a deed. The difference in Waitara was that instead of negotiating further the Governor sent soldiers to support the survey, after Te Atiawa had non-violently resisted it. The other new aspect of policy at Waitara was the deliberate decision to set aside the authority of the senior chiefs like Kingi to express the views of the wider tribal community – an authority which McLean had found very useful to support at other times and places. For the use of elderly

70. See analysis of evidence of Te Atiawa chiefs in Duncan Moore, 'The Origins of the Crown's Demesne at Port Nicholson, 1839–1846' (Wai 145 rod, doc e4), pp 206–217, 246–268

and senior chiefs in Hawke's Bay and South Auckland was blatant. On this point the private correspondence of McLean and his staff makes unpleasant reading: they knew they had many of these chiefs dependent on them for a succession of payments or gifts and despised them even as they were using them. Chiefs like Wiremu Kingi of Te Atiawa, a friend of the British and supporter of settlement within limited confines, would not be bought when it came to the essential tribal lands. So in the end he was attacked.

It has been commonly asserted, both contemporaneously and since, that the officials should have made a thorough prior investigation of customary ownership before they secured deeds of sale and made payments. Otherwise, all interested parties could not have been identified or consulted and their prior agreement to the purchase secured. The criticism is essentially a valid one: advance payments and public announcement of a purchase should have not have been made without investigation and marking of the land. That too was part of the fault at Waitara. But Maori land tenure was so complex in many areas that officials, with the best will in the world, would not have always been sure that they had identified all owners, even if they spent months at prior investigation. This is largely because the concept of being an 'owner', amidst the whole complex of kinship ties and different kinds of rights and interests, could not become real and meaningful to Maori until the land at issue was defined – in the act of purchase itself. This is what was wrong with all proposals for *Domesday Book*s and the like in advance of purchase. In Fiji today, although almost the entire country has been covered by a land commission and the land awarded to *mataqali* (roughly equivalent to Maori hapu), when development actually takes place on the ground officials virtually have to start again, and investigate title: they cannot rely simply upon the group names or genealogies collected by the commissioners, although these are helpful. The people did not tell the commissioners everything and anyway the balance of rights has evolved over time.

What might have been practicable was to say that a specific area was 'under negotiation'; that was in fact commonly done and it did bring forward many interested parties. But until the land was physically marked upon the ground Maori themselves could not be sure whether they were entitled to be involved. The physical boundary marking would have been expensive, especially if lines had to be cut, and it would have taken time, but it would have been a much more genuine way of buying or of bringing forward interested parties and getting their prior agreement to a contract of sale. Many persons involved in the 1856 board of inquiry recognised this. But it was almost never done: it was too expensive, and too time consuming and both Government and settlers were hungry for huge areas of land, where even physical walking of the boundaries was difficult. So officials generally relied on a 'good sketch plan': they got their sales in many cases but they created a host of problems about boundaries and reserves and protests from owners of rights who had not been aware in advance of the sale. This is somewhat short of the full and free consent that Normanby's initial instructions to Hobson required.

Underlying the officials' rough and ready methods lay their conviction, articulated in London and essentially accepted by Governor Grey and other senior officials in New Zealand, that Maori did not really have 'valid' proprietary title to the uncultivated lands. The very fact of intersecting Maori interests reinforced the officials' view that they were buying Maori *rights*, inchoate and precariously held, not proprietary *titles*. They commonly said so even in negotiation with Maori, and offered them, in return for relinquishment of all their vague claims, clear proprietary titles under Crown grant, together with the prospect of employment, trade, and development associated with the settlement.

Moreover Maori, to a degree, accepted this reasoning. Maori law did emphasise relationships between gods and chiefs, chiefs and people, and all of them with the land, rather than the European-style property titles. These values were modified but not wholly displaced, but new perceptions deriving from the money economy. There were obvious attractions to a group in having a clear title to a reserve, or to a chief in having an individual farm, especially as Maori were constantly told that increased value and a host of commercial advantages would flow from it. But not all Maori by any means considered that their customary rights were inchoate and precarious: that depended very much on the local state of power and politics. Often it was the tribes relatively small in number in relation to a vast rohe who were most inclined to sell – Ngai Tahu for example, and sections of Ngati Kahungungu in Hawke's Bay and Wairarapa, recently returned from an exile to which they had been forced by the musket wars and perhaps still feeling insecure. Ngati Whatua in Auckland and Kaipara too were inclined to sell, welcoming the British alliance against powerful old adversaries among the Waikato and Ngapuhi. Settlers and officials took this to be an indication that the more association with settlement the Maori had the more content they were; it was the remote interior people who were organising against selling. Thus the 1856 board of inquiry asserted:

> The price with them is a secondary consideration. If they can make up their minds to sell, it is a proof that they are impressed with the necessity of the new order of things which has been introduced, and to which they know they will ultimately have to conform; or, that seeing advantages to be derived, they, by the sale of land, court its influence. More or less, every transfer of land may be looked upon as a national compact, and regarded as binding both parties to mutual good offices.[71]

This summary, while not wholly wrong, is simplistic and complacent. Certainly Te Hapuku and others had sold largely for the motives suggested, but Maori were not wholly oblivious to price. By the mid 1850s price was becoming less and less a 'secondary consideration'. More importantly though, the 1856 board was correct in suggesting that Maori saw land sale as a national compact binding both parties to mutual good offices. The officials were thus exposed in their own terms, to the Maori dissatisfaction (to say the least) if the mutual good offices were not in fact demonstrated to Maori by the Government.

71. BPP, 1860, p 514

Disillusionment among Maori land sellers was indeed widespread by the 1860s and this was partly because the British did not honour their undertakings to survey out reserves and issue Crown grants. Very little of this detailed administrative work was in fact done during the scramble to make the bulk of Maori land available for settlement. In this respect the Crown very markedly failed to honour its undertakings. There was indeed a persistent fundamental ambivalence about what the reserves were for in the first place. Many had no restrictions on alienation at all, and were bought within a few years of the initial purchases. Reserves then, were secure neither for Maori themselves to farm, nor as an endowment for fixed-term leasing by which Maori could gain access to increased capital value.

The percentages of land reserved from sale (whether or not Crown granted) varied widely but were not high. Nor was the slight proportion of reserves necessarily related to a sense of Maori retaining ample other land still in customary title. About 99 percent of the South Island had been alienated by 1865, the remaining one percent being divided between reserves for Maori residence and trust administration. Over 75 percent of the Wairarapa district had been alienated, about 3 percent of that being reserved. About 55 percent of South Auckland was alienated, and 3 percent of that reserved. Of course when very large areas are concerned, as in the South Island and Wairarapa, one to three percent could represent a considerable number of acres. Given that the Maori populations were often quite small (numbering at most 1000 in Wairarapa and probably between 750 and 900 according to Goldsmith)[72] that meant that in terms of acres per head Maori were deemed still to have a considerable patrimony. Even in a relatively populous districts like Kaipara, where an estimated 57.45 percent of land was alienated by 1865, the reserves plus land unsold amounted to 375.57 acres per head.[73] But this says nothing about the quality of the land remaining nor about the distribution of it among the various hapu. For example, although 45 percent of South Auckland lands were still in Maori ownership at 1865, much of that was in the Hunua and Kaimai Ranges, not readily suited to farming; much of the land remaining in Maori hands in Taitokerau (Northland) was of poor quality, still difficult to farm today.

As is well known, when the British Government had intervened in New Zealand they were aware that the Maori people were already suffering demographic decline from European contact and were firmly convinced that the continued decline and extinction of Maori was likely if not inevitable. By the early 20th century (and in some cases well before then) officials became aware that this was not so, but in fairness to the officials before 1865 the evidence available, such as Fenton's 1859 census, confirmed the Maori population decline. In that context the officials could well have assumed, without seriously examining the situation, that Maori had ample land yet available to them for their 'present and future needs'. In that Maori themselves, in asking for reserves tended to insist most strongly on reserves giving access to mahinga kai – especially inland and coastal waters – officials often assumed that they had done the essential thing for Maori needs. Maori also re-

72. Goldsmith, p viii
73. Rigby et al, pp 207, 213

quested reservation of stands of timber and this was sometimes granted. The forests in their unsold lands were also still important to Maori as sources of birds, pigs, and plant material and while alienated lands remained uncleared, unfenced, and undrained they too offered some facility for the hunting and gathering side of the Maori economy.

But none of this seriously involved Maori in the emerging modern economy, as was at least implicitly part of the duty of active protection assumed by the Crown in the Treaty, and explicitly and repeatedly offered to the Maori by officials negotiating for land purchases. The primary reason for this is that the Crown still saw the Maori as competitors, and the immediate focus of the competition was the leasing of land for stock pasturage. From the mid-1840s, Maori began to do well out of grass-money (rentals) from the pastoralists. But the Crown had opposed direct leasing as it had opposed direct purchase from the outset: it was intended to be covered within the 1840 proclamation of the Crown's pre-emptive rights along with other forms of land alienation because:

(a) the Crown wanted to give the settlers the freehold they so passionately desired; and
(b) the Crown needed the revenue from the on-sale of land purchased from Maori.

Hobson took steps in the Native Land Commission Ordinance 1841 to ensure that leases were included in the forms of alienation declared void unless confirmed by Crown grant: Grey ensured that the 1846 Native Land Purchase Ordinance debarred private leasing of customary land, and he and McLean launched prosecutions against the run-holders in order to pressure the Maori in Hawke's Bay and Wairarapa to sell. A huge avenue of potential development through leasing or (in modern terminology) joint venture arrangements, was simply closed off.

According to proposals by Grey in 1850, Maori were supposed to be able to lease reserves for which they had Crown-granted titles. But they were not, in fact, allowed to retain very large reserves where leasing could be developed: Ngai Tahu requested after the Kemp purchase a coast to coast reserve along the Waimakariri valley but this was denied by Mantell; Canterbury Ngai Tahu got only their miserable 10 acres per head and Wairarapa not much more in the blocks sold.

McLean promised many reserves, but they were usually at best modest in size, and the promises were often unfulfilled; Maori rarely got Crown-granted reserves. Early reserves, such as the New Zealand Company 'tenths' in Wellington and Nelson, were mostly administered (or maladministered) by trustees.

Yet even in respect of the South Island the evidence shows that the settler politicians and officials never doubted that Maori still had ample land left and never questioned their own assumptions or examined the evidence of what Maori actually had. In 1864 for example, William Fox, trying to allay concerns of the Aborigines Protection Society about the confiscation policy, asserted that 'a quantity [of land] much larger per head than the average occupation of Europeans in this [North] island, is proposed to be set apart for them, on a graduated scale according to rank and other circumstances'.[74] During the debate on the 1862 Native Lands Act the

official speakers frequently asserted that of 29.6 million acres in the North Island 22.6 million remained in Maori hands. They put it this way rather than that 7 million acres had been acquired. Other speakers reiterated the persistent belief that Maori did not have valid title to land other than their cultivations and settlements. In short the settlers were still envious, jealous of Maori land owners, still seeing them as having a dog-in-the-manger attitude over land from which settlers could benefit and use more productively. This attitude in fact persisted well into the 20th century.

Nor did the Crown take a substantial percentage either of land or funds from resale to endow Maori development. Grey sold the 10 percent that FitzRoy had reserved from the pre-emption waiver purchases. The 'Auckland 10 percents' and 'Wairarapa 5 percents', from the profits of resale of the Crown purchases in the districts, supposed to be for schools, hospitals, and general development, petered out, and some was used for footling payments to chiefs to keep them compliant. The 1856 Native Reserves Act represented a belated attempt to make productive the formal reserves, mainly in Wellington, Greymouth, and Nelson, but these were not added to. Maori got a little help with medical care and flour mills from the £7000 civil list arranged in 1852 plus a similar amount voted by Parliament, but this mostly went to salaries of Maori assessors and police; it did not contribute to general development. One might ask whether it is reasonable to expect the Crown to have done more, in an age of laissez faire and self-help, to promote Maori economic development, but measured against the spirit, if not the letter of Russell's 1840 and 1841 instructions (requiring a substantial endowment for Maori purposes) it all fell pathetically short. It was not only that the Crown did not actively assist Maori in these respects but, if Maori tried to help themselves, by organising their own runanga or the Kingitanga or through direct leasing or other economic ventures, they were angrily and ruthlessly undermined rather than be allowed to stand in the way of the Crown and the settlers securing the freehold to the great bulk of the land. The £2000 educational fund from the Stewart Island purchase, or GS Cooper's suggestion that reserves be entailed for a generation least the chiefs sell them, were belated and feeble recognitions that a problem existed. The show that ideas about helping Maori were not lacking, but they were not systematically and generally applied.

Why did Maori not bargain harder? Why did they continue to sell, at often for very low prices? The various motivations for selling had been discussed, along with the customary reasons why non-sellers had difficulty in controlling sellers. Prominent among the reasons for selling was the on-going aspiration among many Maori to engage with modernity – to leave behind or substantially curtail the traditional constraints of kinship and common property rights and develop land for themselves and their specific families or communities. Some chiefs articulated this as their reason for not joining the Kingitanga.[75] The staggering non-success of such mod-

74. Fox to Bishop of Waiapu, 4 July 1864, AJHR, 1864, e-2, p 78 (cited in B Gilling, 'The Policy and Practice of Raupatu in New Zealand', pt a, p 29)
75. Alan Ward, *A Show of Justice*, Auckland, 4th ed, Auckland University Press, 1995, p 88

ernising endeavours in other parts of New Zealand did not deter others, elsewhere, from trying as well. H T Kemp, when Native Secretary of the New Munster, took a census of his district in 1850 to 1851 and reported the disarray and decline of the village of the chief Ngairo in the Wairarapa within a year of selling, but soon all the Wairarapa chiefs were offering land.[76]

Another reason for selling was that many Maori had still not realised that 'sale' meant total loss of association with, or control over the land. They knew by now that the Pakeha were there to stay, often in considerable numbers. But chiefs often hoped still to be associated with the clusters of settlers they invited in to their rohe by selling land and to have some say in the developments that took place. Officials indeed encouraged this and land selling chiefs often did have roles as Assessors, and were given agricultural equipment or breeding stock to start farming. The line between 'selling' in the European sense, and bringing in some Pakeha friends and allies in the Maori sense, was still a blurry one.

Part of the reason for accepting low prices, minimal reserves and little else was the lack of counter-vailing advice. Grey had got rid of the Protectorate Department in 1846, just at a time when it was showing a real understanding of emerging problems and some vigour, sometimes, in defending Maori interests. The contrast between the Otakou purchase of 1844, with the Protectorate present, and later purchases such as Porirua, Wairau, and the Kemp purchase, is striking. Goldsmith has drawn attention to the way the missionary Colenso acted as some constraint on the Wairarapa land sellers until he 'sinned' and fell from influence.[77] And Cowie has referred to the restraining influence of the Reverend Samuel Williams in Hawke's Bay, although McLean eventually ignored him.

The pressures of the money economy were very difficult for chiefs to resist. Mana depended, to a large extent, on having modern lifestyles and this required cash. Moreover, by the end of the 1850s Maori up and down the country were caught in debt traps; threatened with prosecution to pay debts, they were then inclined to take more advances from Government officers on the remaining land. A cycle of dependency was developing. By 1858, as plans for direct purchase developed in the settler assembly, Maori began to accept advances from private traders and store keepers against their land.

Government made no serious effort to ensure that Maori invested part of the monies paid over for land. They may have resisted compulsory measures to this effect but there is little or no evidence of proposals being made by land purchase officers to create trust funds to assist Maori farming, for example. As a Mr Crawford put it in debate on the Native Lands Act 1862, Maori had 'no means of investment'.[78]

This whole network of economic dependency, together with the growing realisation among Maori that 'sales' meant loss of control over the land, caused a wave of repudiation by the late 1850s – repudiation not only of land transactions but of the

76. H T Kemp, statistical return, 1 January 1850, BPP, [1420], pp 238–239
77. Goldsmith, pp 33–34
78. NZPD, 1862, p 716

authority of British officials and legal structures which directly impinged upon Maori rangatiratanga or autonomy. The Kingitanga and Runanga movements did not yet reject the Queen's sovereignty (or at least that was a minority view within them) but disillusionment with the promise of Waitangi, of an alliance with the Crown which would see Maori as mutual beneficiaries with the settlers of land development, was widespread. A policy of reserving land more generously, giving it clear titles and developing lease terms which were fair to both landlord and tenant would have given Maori a very different image of the Crown's role. The surprise is not that Maori in many parts of the country resisted land sales and encroaching Government authority but that others still hoped that alliance with the Crown would yet be fruitful and continued to sell. In 1862, F D Bell in parliament, referring to the growing disaffection among Maori, stated:

> this arises simply and naturally from the one great mistake we have made, in always trying to give them the least price they would accept for their land, in order that we might ourselves get the greatest profit we could by sale. If you had said at the commencement that the Crown would obtain the Native land on a plan to secure the advancement of the race, as was specially done by the United States in one case a few years ago where a large sum – if I remember right more than £100,000 – was obtained and invested for the benefit of a particular tribe – you would have no distrust or dissatisfaction in the Native mind; but by always buying from them on the pretence that you wanted land for the purpose of colonization, without making provision – at least in the North Island – for their own improvement, you have at last brought the Natives to believe that your real object is to impoverish and degrade them.[79]

Although he had ulterior motives for making his statement Bell had fairly accurately summed up the outcome of 22 years of Crown purchasing.

79. Ibid, p 611

CHAPTER 6

RAUPATU

6.1 The New Zealand Settlements Act 1863

The New Zealand Government obtained authority to confiscate and dispose of Maori land by several Acts of Parliament. The most important of these instruments was the New Zealand Settlements Act 1863. The purpose of this legislation was set out in the preamble:

> Whereas the Northern Island of the Colony of New Zealand has from time to time been subject to insurrections amongst the evil-disposed persons of the Native race to the great injury alarm and intimidation of Her Majesty's peaceable subjects of both races and involving great losses of life and expenditure of money in their suppression And Whereas many outrages upon lives and property have recently been committed and such outrages are still and of almost daily occurrence And Whereas a large number of the Inhabitants of several districts of the Colony have entered into combinations and taken up arms with the object of attempting the extermination or expulsion of the European settlers and are now engaged in open rebellion against Her Majesty's authority And Whereas it is necessary that some adequate provision should be made for the permanent protection and security of the well-disposed Inhabitants of both races for the prevention of future insurrection or rebellion and for the establishment and maintenance of Her Majesty's authority and of Law and Order throughout the Colony And Whereas the best and most effectual means of attaining those ends would be by the introduction of a sufficient number of settlers able to protect themselves and to preserve the peace of the Country.

Section 2 provided for the proclamation of districts, wherein the Governor in Council was satisfied that any tribe or section of a tribe or 'any considerable number thereof' within these districts had been engaged in rebellion at any time since 1 January 1863. Section 3 provided for the establishment of military settlements on eligible sites within these districts. Section 4 provided that the Governor in Council might 'reserve or take' any land within a declared district, such land to be deemed 'Crown Land freed and discharged from all Title Interest or Claim of any person whomsoever'.

Since the focus of the legislation was on territorial districts, Maori within a district who had not fought against the Crown, and even those who had fought on behalf of the Crown, had their land confiscated as well. Section 5, however, provided for compensation to be made to those who had not rebelled, or engaged in any of a series of defined acts, to do with aiding rebels or promoting rebellion.

'Compensation Courts' were to be established to hear claims for compensation (to be lodged within six months) and to issue certificates entitling eligible persons to land 'according to the nature of the[ir] title interest or claim'.

6.2 PARLIAMENTARY OPINION

Fox moved the second reading of the New Zealand Settlements Bill on 5 November 1863. The legislation, he said, was intended to promote peace and prosperity in the North Island. In the Government's opinion:

> What is required is a large population, practically outnumbering that of the Natives in those districts where rebellion exists, or may exist, to be permanently settled, with ownership of the land, so that they may not only have an interest, but the ability, to defend their homes from future aggression; and to effect this the Government looks to the lands of those tribes who have been in rebellion.[1]

FitzGerald was the only member of the House to oppose the Bill. It was, he said:

> a repeal . . . of every engagement of every kind whatsoever which has been made by the British Crown with the Natives from the first day when this was a colony of the Crown . . . I am as satisfied as I ever was of any future event that Her Majesty will never be advised to give her assent to this measure . . . This bill proposes that it shall be lawful for the Governor to declare any lands of the Native race whatsoever to be Crown lands . . . that is contrary to the Treaty of Waitangi, which has distinctly guaranteed and pledged the faith of the Crown that the lands of the Natives shall not be taken from them except by the ordinary process of law – that is, taken within the meaning of the Treaty.[2]

FitzGerald also observed that the power of confiscation was being used in such a sweeping manner that it was 'repugnant to the spirit and the custom of the English law' and as such was contrary to the Constitution Act 1852.[3] In his opinion, the legislation was so severe that as soon as it became known to the Maori, 'it will drive every single one of them in this Northern Island into a state of hopeless rebellion'.[4]

Fox offered to amend the Bill to take account of the criticisms made by FitzGerald. A new clause (section 6) was added, 'closely analogous to what was done in the case of the Scottish rebellion'.[5] This allowed rebels who surrendered by a certain date to become eligible for compensation. Section 2, which clarified the distinction between loyal and rebel Maori, was added to the Bill as well.

In the Legislative Council the Bill's main opponent was Swainson. He objected because it 'authorised the Government to take the land of Her Majesty's Native

1. Fox, 5 November 1863, NZPD, 1863, p 783
2. Fitzgerald, 5 November 1863, NZPD, 1863, p 784
3. Ibid
4. Ibid, p 785
5. Fox, 10 November 1863, NZPD, 1863, p 863

subjects who were not in rebellion, but who were living quietly and in peace'. He also quoted the Secretary of State for the Colonies:

> policy, not less than justice, requires that the course of the Government should be regulated with a view to the expectations which the Maoris have been allowed to base on the Treaty of Waitangi, and the apprehensions which they have been led to entertain respecting the observation of that treaty. I cannot doubt . . . that the proposed appropriation of land, if effected against the will of the owner, and justified on principles which, whether technically correct or not, are alike contrary to the principles of English or Native Law, would be considered as a violation of Native Rights, would be resisted on the spot, and would provoke throughout the Islands warm resentment and general distrust of British good faith.[6]

The only other speaker to criticise the Bill was Pollen, although he seems to have been in two minds. On one hand, he contended that the Bill was acceptable, provided the extent of confiscation was 'strictly limited'. Not 'an acre more than was required' for the military settlements should be taken. On the other hand, he condemned confiscation as a financially 'unsound' policy, which was contrary to the Treaty of Waitangi.[7] In the end, however, he voted for the Bill.

6.3 New Zealand Opinion

Outside the General Assembly there was widespread support for the confiscation policy among the European community. Only a few, men like Sir William Martin, a former Chief Justice, spoke out in opposition.[8] William Williams, then Bishop of Waiapu, seems to have favoured confiscation, but when the Government began to use his endorsement as an argument in favour of their policy, Williams made it clear he supported only a limited confiscation, not the extensive taking of land the Government seemed to have in mind.[9]

Fox responded that wholesale confiscation was not what the Government intended; as 'large a portion of the confiscated lands as would enable [Maori] to live in independence and comfort' would be returned to them.[10]

6.4 English Views: Aborigines Protection Society

The Aborigines Protection Society was an influential English humanitarian group. They had objections to the New Zealand Government's proposals, which they sent

6. Swainson, 10 November 1863, NZPD, 1863, p 870
7. Pollen, 10 November 1863, NZPD, 1863, p 872
8. AJHR, 1864, E-2, app 1, encl 2
9. Ibid, p 77
10. Ibid, p 78

to Grey. They also arranged for their letter to be published in the *Times* and other newspapers.[11] The society's members were, they said:

> alarmed by the pertinacity with which . . . it has been proposed to confiscate the Lands of all contumacious and rebellious natives. We can conceive of no surer means of adding fuel to the flame of War; of extending the area of disaffection; and of making the Natives fight with the madness of despair, than a policy of confiscation. It could not fail to produce in New Zealand the same bitter fruits of which it has yielded so plentiful a harvest in other countries, where the strife of races has perpetuated through successive generations; and that, too with a relentlessness and a cruelty which have made mankind blush for their species.[12]

The Colonial Government replied by way of memorandum to Grey, a copy of which was forwarded to the society. This document, and the covering letter, were printed in the *New Zealand Government Gazette*.[13] In the letter Fox expressed the hope that the society, which had 'impugned the policy of confiscation' in the English press, would give the Government's response the same publicity.[14] According to Fox, to terminate the war by negotiation, which was the policy advocated by the society, would be seen as a sign of European weakness. The only way of ensuring a lasting peace in New Zealand, and of saving 'a remnant of the Maori race' was to defeat them completely, and then to take steps to ensure that rebellion could not occur again. Arrangements for ending the rebellion must also be made on the basis that British sovereignty was accepted without qualification. Any notion that Maori were an independent people, able to take up the sword whenever they chose, had to be completely destroyed. The alterative to the Government's policy was a state of 'chronic hostility' and series of 'wars of extermination'.[15]

As for confiscation, Fox went on, this was a Maori custom; there was nothing about it 'abhorrent to the moral sense or previous habits of the Maori race . . . they never do consider themselves conquered until their lands are taken'. Despite the Maori (allegedly) having undertaken to drive the Europeans into the sea, the Government's objective, Fox claimed, was neither punishment nor retribution, but the obtaining of a guarantee that there would be no further uprisings. If the Maori retained their land, these might become annual occurrences. The guarantee was to take the form of military settlement, by introducing 'colonists chiefly direct from Great Britain into those districts now sparsely inhabited by the rebels, and from which they make their inroads into the settled districts'.[16]

> The deliberate opinion of Ministers is that to terminate the present insurrection without confiscation of the lands of the rebels, making of course ample provision for their future, would be to surrender every advantage that has been gained, and practi-

11. AJHR, 1864, E-2, app 1, encl 2, p 25
12. Ibid, p 16
13. *New Zealand Government Gazette*, 21 May 1864
14. Fox to Chichester, 4 May 1864, *New Zealand Government Gazette*, 21 May 1864
15. Ibid, pp 234–235
16. Ibid, pp 235–236

> cally to announce that British rule over the Maori race must cease, and the Northern Island be abandoned as a safe place of residence for Her Majesty's European subjects.[17]

But it was not the intention to take all of the land: 'a quantity much larger per head than the average occupation of Europeans in this Island, is proposed to be set apart for them, on a graduated scale, according to rank and other circumstances. These lands would no longer be held under the pernicious system of tribal right, but as individualised properties under the security of . . . a crown grant'. In the opinion of the New Zealand ministers, customary tenure had been 'the principal cause of the slow progress, and in some respects (particularly their physical condition) of the actual retrogression and decay of the race'.[18] In short, confiscation was not only a measure that would ensure the peace; it was also (so the Government claimed) a culturally correct policy that would enable a benefit to be conferred on Maori.

6.5 English Views: The Colonial Office

Opposition within New Zealand to the confiscation policy could be ignored. The concerns of English bodies, like the Aborigines Protection Society, had to be addressed because of the connections they had at Westminster, and in an effort to get as good a press as possible in England. They could, however, be disregarded if necessary. But what could not be disregarded or ignored were the objections and misgivings of the British Colonial Office. The British Government retained the right to disallow the Act, provided this was done within two years. A British veto would completely undermine the Colonial Government's position; it was something to be avoided at all costs.

The British Government could only proceed on the information it received from the Governor, and on this basis, Newcastle, then Secretary of State for the Colonies, conveyed to Governor Grey British acceptance in principle of the idea of confiscation. But Newcastle pointed out that it would be difficult to limit application of the policy, given settler pressure to obtain land. There was also the danger that friendly Maori would be alienated, which could lead to a 'general rising'.[19] The New Zealand ministers, however, had no doubt that the confiscation policy could be confined within 'wise and just limits', and that in any case the General Assembly would not sanction confiscations that were excessive in nature. As for Maori reactions, every effort was being made to convey to them that the 'property of innocent persons and tribes will be strictly respected'.[20]

A more substantial statement of Colonial Office concerns arrived from the new Secretary of State, Cardwell, in the winter of 1864. He observed that the extent of

17. Ibid, p 236
18. Ibid, p 236
19. Newcastle to Grey, 26 November 1863, AJHR, 1864, E-2, p 31
20. Whitaker to Grey, 24 February 1864, AJHR, 1864, E-2, p 31

the land to be confiscated had quadrupled since the original proposal was made, that the land of loyal, as well as disloyal, Maori was to be confiscated, and that compensation was to be 'jealously limited'. Moreover, the legislation was to be 'permanently embodied in the law of New Zealand; and to form a standing qualification of the Treaty of Waitangi'. As such, there were 'grave' objections that could be made to the legislation:

> It renders permanently insecure the tenure of native property throughout the Islands, . . . it makes no difference between the leaders and contrivers . . . and their unwilling agents or allies . . . The proceedings by which unlimited confiscation of property is to take place may be secret, without argument and without appeal; and the provision for compensation is as rigidly confined as the provision for punishment is flexible and unlimited.[21]

Given the fact that Imperial Troops were defending the colony, Cardwell felt that he might be:

> justified in recommending the disallowance of an Act couched in such sweeping terms, capable therefore of great abuse, unless its practical operation were restrained by a strong and resolute hand, and calculated, if abused, to frustrate its own objects, and to prolong, instead of terminate war. But not having received from you any expression of your disapproval, and being most unwilling to take any course of action which would weaken your hands . . . Her Majesty's Government have decided that the Act shall for the present remain in operation.[22]

This was clearly a qualified approval, and Cardwell went on to spell out the circumstances that would need to apply if British acceptance of the New Zealand Settlements Act, 1863, was to continue.

First, it was desirable that confiscation should 'take the form of a cession imposed by yourself and General Cameron upon the conquered tribes'. If this was not possible, however, Grey was at liberty to bring the Act into operation, subject to various conditions and reservations:

> A measure should be at once submitted to the Legislature to limit the duration of the Act to a definite period, not exceeding, I think, two years . . . a period long enough to allow the necessary inquiries respecting the extent, situation, and justice of the forfeiture, yet short enough to relieve the conquered party from any protracted suspense, and to assure those who have adhered to us there is no intention of suspending in their case the ordinary principles of the law.[23]

The extent of the confiscations, and the exact locations of the land to be taken, should be made public as soon as possible. Cardwell suggested that a commission be constituted for the 'special purpose' of settling the extent of the confiscations,

21. Cardwell to Grey, 26 April 1864, AJHR, 1864, E-2, app, p 20
22. Ibid, pp 21–22
23. Ibid, p 22

and that the members of this commission 'should not be removable'. His (the Governor's) concurrence in any particular act of confiscation was 'not to be considered as a mere ministerial act'. He was instructed to withhold approval unless he was 'personally satisfied that the confiscation is just and moderate'. Cardwell pointed out:

> that if in the settlement of the forfeited districts all land which is capable of remunerative cultivation should be assigned to Colonists, and the original power, the Maori, be driven back to the forest and morass, the sense of injustice, combined with the pressure of want, would convert the native population into a desperate banditti, taking refuge in the solitudes of the interior from the pursuit of the police or military, and descending, when opportunity might occur, into the cultivated plain to destroy the peaceful fruits of industry. I rely on your wisdom and justice to avert a danger so serious in its bearing on the interests of the European not less than of the Native race.[24]

Cardwell accepted that, given the tribal nature of Maori land tenure, the innocent might be dispossessed, along with the guilty. But this outcome should be accepted only when absolutely necessary. Moreover 'every such case of supposed necessity should be examined with the greatest care, and admitted with the greatest caution and reserve'. He proposed that the section of the Act that limited the granting of compensation (presumably a reference to the time limit or to the actions deemed to associate claimants with rebellion) should be modified, so that the court was not 'limited in any manner which would prevent its doing complete justice'. Grey was to retain in his own hands the power to override any decision of the court, to ensure 'substantial justice to every class of claimant'.[25]

In the end, Cardwell accepted the necessity to punish rebellion while at the same time warning against the dangers of overly severe treatment, and stressing the need to protect the innocent. The Act would be left to Grey to administer, subject to the 'just and moderate limits' Cardwell had outlined. In arriving at this determination, Cardwell had in front of him Grey's assurance that a 'generous policy' was intended, and ministerial statements that this was the first and the last occasion on 'which any aboriginal inhabitant of New Zealand would be deprived of land against his will.'[26]

6.6 Legal Opinions of the New Zealand Settlements Act and Confiscations

Cardwell had noted at an early place in his despatch that because the power to pass measures of the kind under discussion had been questioned in New Zealand, they had been sent to the Crown Law Office for an opinion.[27] The advice received was

24. Ibid, p 22
25. Ibid, p 22
26. Ibid, pp 22–23

that the legislation was within the power of the New Zealand General Assembly to pass and was not repugnant to the laws of England.[28]

Attempts were made to question the legality of the confiscation legislation in 1880, during the sitting of the Royal Commission on the West Coast, and again in 1927, during the hearings of the Royal Commission on Confiscated Native Lands. Both attempts failed, the rulings being that the matter lay outside the terms of reference.

More recently, a legal opinion was commissioned by the Waitangi Tribunal. This opinion concluded that the New Zealand Settlements Act 1863 was not unlawful, which was the same advice tendered to Cardwell in 1864.[29]

The Tribunal was also advised that the 'conditions' contained in Cardwell's dispatch of 26 April 1864 were not binding, and the fact that they were very largely ignored thus has no bearing on the question of whether or not the confiscations were legally valid.[30]

However, each act of confiscation had to follow the letter of the law. First, districts had to be defined, on the grounds that the Governor was satisfied that 'any Native Tribe or Section of a Tribe or any considerable number thereof' had been in a state of rebellion within the time frame specified by the Act (section 2). Then 'eligible sites for settlement' were to be set aside within these districts (section 3). Then the land necessary for settlement was to be taken (section 4). Arguably, this process was designed to progressively limit the area that would be finally confiscated.

In its report on the Taranaki confiscations, the Waitangi Tribunal concluded that there was no contemporary evidence that could have reasonably satisfied, in every case, the standard set out in section 2. In other words, the districts defined were not always part of the Taranaki war zones; nor did all districts contain 'considerable' numbers of rebels, as required by the New Zealand Settlements Act 1863. The legislation also required that the land confiscated must be of a kind suitable for settlement. In Taranaki, and in other districts as well, more land was taken than was necessary for settlement purposes, and land that was patently unsuitable for settlement purposes was also taken.[31] These confiscations clearly failed the tests contained in sections 2 and 3 of the New Zealand Settlements Act 1863. On the face of it, they were illegal acts. At a later date, the New Zealand Settlements Acts Amendment Act 1866, legalised what had been done, and section 8 of the Confiscated Lands Act 1867, provided that any lands taken under the Settlements Acts could be declared Crown waste land.

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27. Cardwell to Grey, 26 April 1864, AJHR, 1864, E-2, app, p 21
28. Waitangi Tribunal, *The Taranaki Report: Te Kaupapa Tuatahi,* Wellington, GP Publications, 1996, p 127
29. F M Brookfield, 'Opinion for the Waitangi Tribunal on Legal Aspects of the Raupatu (Particularly in Taranaki and the Bay of Plenty)', 1996, Wai 143, ROD, doc M19(A), p 25
30. Ibid, pp 27–28
31. *The Taranaki Report*, pp 127–129

6.7 OTHER LEGISLATION

The New Zealand Settlements Act 1863, was amended in 1864, when a time limit (of 3 December 1865) was placed on the legislation, and in 1865, when the Act was made permanent, but the power of proclaiming districts was to cease from 3 December 1867. These amendments were intended to placate the Colonial Office, and avoid any possibility that the Act might be disallowed.

The Confiscated Lands Act 1867 allowed the Governor either to make or increase awards, and to provide reserves for both friendly tribes and surrendered rebels. This legislation appears to have been foreshadowed by Cardwell's instruction to Grey that he should retain in his own hands authority to make, or revise, compensation awards.

While the New Zealand Settlements Act 1863 was the principal measure underpinning the confiscation policy, it was just one of a number of acts, all supportive of each other, that formed the foundation of Government Maori policy after the 1850s. These acts included the Suppression of Rebellion Act 1863; the New Zealand Loan Act 1863; the New Zealand Loan Appropriation Act 1863; the Public Works Act 1864; the Native Rights Act 1865; the Native Lands Act 1865; the Outlying Districts Police Act 1865; the Friendly Natives Confirmation Act, 1866, as well as legislation passed to implement confiscations in the Bay of Plenty and along the East Coast.[32]

6.8 THE WAIKATO RAUPATU 1864

The confiscation of the Waikato district was proclaimed in December 1864 as a statement of intention, no reference to the New Zealand Settlements Act 1863 being made. Orders in Council under that legislation were, however, made subsequently, declaring the East Wairoa, West Pukekohe, Central Waikato, Mangere, Pukaki, Ihumatao, Waiuku, and Kerikeri areas districts in terms of the Act.

The 1871 return of lands confiscated gives the area of the confiscation as 1,193,306 acres, of which 278,891 acres were set aside for 'natives, whether friendly or not'.[33] The balance, over 800,000 acres, was retained by the Crown. The Sim commission accepted that the final situation was that 1,202,172 acres had been confiscated, of which 314,364 had been returned, the Crown retaining the balance of 887,808 acres. Some deductions would have to be made, the commission thought, for an area of 13,974 acres which was then (1928) before the Native Land Court and to represent £22,987 which had already been paid in compensation. Nevertheless, the commission considered the Waikato confiscations to have been 'excessive, particularly so in the case of the Mangere, Ihumatu [sic] and Pukaki

32. See A Ward, *A Show of Justice: Racial Amalgamation in Nineteenth Century New Zealand*, Auckland, Auckland University Press, 1995, chs 11 to 14 for a general discussion of policy and legislation in this period.
33. AJHR, 1871, C-4

Natives'. It recommended that an annual payment of £3000 be made 'for the benefit of the Natives of the tribes whose land had been confiscated'.[34]

Several attempts were made during the 1930s to settle the question of an annual payment. According to Nash, speaking during the 1946 debate on the Waikato–Maniapoto Claims Settlement Bill, the main difficulty was that the Waikato tribes wished to received £5000 a year, the amount the Sim commission had recommended as compensation for the Taranaki tribes.[35] The matter was not progressed during World War II, but in 1946 agreement was reached: a lump sum of £5000, £6000 a year for 45 years, and then £5000 a year. The legislation providing for these payments, and setting up a trust board to received the money, passed through both House in an atmosphere of general goodwill and approval. The measure was, said Nash, 'one of justice but of tardy justice'.[36]

In the 1980s, claims dealing with the grievances created by the Waikato raupatu were placed before the Waitangi Tribunal, and then, with some exceptions, settled by direct negotiation with the Crown. The preamble to the Waikato Raupatu Claims Settlement Act 1995 states that the Crown unjustly invaded the Waikato district, that the confiscations that followed were also unjust, and that these acts caused 'widespread suffering, distress, and deprivation'. The body of the Act contains the text, in both Maori and English, of the apology made by the Crown for these actions. Other sections deal with the compensation made. Section 30 says, with respect to the Waikato raupatu claims defined by the act, the deed of settlement, and the benefits provided to Waikato under that deed, that 'the [Waitangi] Tribunal shall not have jurisdiction to inquire or further inquire into, or to make any finding or recommendation in respect' of these matters.

6.9 Confiscation Policy And Practice: Taranaki, 1865

In January and September 1865 confiscations of over a million acres of Taranaki land were proclaimed.[37] A Compensation Court, as provided for by the New Zealand Settlements Act, sat in the district. Those wishing to make claims often had to travel long distances; information about hearings or adjournments was hard to obtain; delays were common; those who did not attend the court could make no claims; and arbitrary rules of procedure were applied that denied hearings to many who were entitled to receive compensation.[38] The Taranaki Compensation Court made 518 judgments, covering 79,238 acres of land, amounting to 6 percent of the confiscated area.[39] More than 10 years later it was found that at least 38 percent of

34. AJHR, 1928, G-7, p 17
35. Nash, 25 September 1946, NZPD, vol 275, p 181
36. Ibid, p 183
37. *New Zealand Government Gazette*, 30 January 1865; *New Zealand Government Gazette*, 2 September 1865
38. Hazel Riseborough, 'The Crown and Customary Tenure 1839–94', Waitangi Tribunal Rangahaua Whanui Series unpublished draft, 1996, p 84
39. *The Taranaki Report*, p 137

this land (about 30,000 acres) had never been allocated. It was this situation that led to the setting up of a commission of inquiry (the West Coast Commission)

It is a mistake, however, to imagine that the other 60 percent, that is to say, the balance of the land covered by the judgments of the Taranaki Compensation Court, around 49,000 acres, had been properly and speedily returned.

The Compensation Court issued certificates, which entitled the bearers to a certain quantity of land, at a location to be determined at some late date. Once the location was determined, the court would issue an award, and in due course a Crown grant would secure title. Land was returned on individual titles, but the land returned was not necessarily the customary land of the persons concerned. At every stage of this progression, contradictory regulations produced extraordinary complications and delays in implementation. Out-of-court settlements, which 'adjusted' compensation awards to available land, were common. The details of these 'adjustments' are obscure and their equity dubious.[40] By 1880, only 4 percent of the lands returned by way of the Compensation Court (or just over 3000 acres) were held on Crown grants.[41]

The Compensation Court certificates, in reality, were little more than IOUs, and in every respect they were an unfamiliar form of tenure. The awards seems to have been regarded in much the same light, although they at least defined where the land to be returned was located. In any event, the breakdown of hapu discipline, the awarding of land outside traditional boundaries, the difficulties of the times and Pakeha pressure soon saw the certificates and awards separated from their original owners: by 1880, in one area of Taranaki, at least 82 percent of the land awarded had been alienated.[42] If this was the general pattern, then only a small proportion of the compensatory lands remained in Maori hands by that date.

The Compensation Court in Taranaki was a dismal failure. First, it operated in a way that prevented many Maori from obtaining land to which they were fully entitled. Then, those who did obtain entitlements had to endure long delays before they received secure titles. This delay seems to be directly and causally related to the subsequent alienations of much of the land in question.

Taranaki Maori deemed to have been rebels could not be recipients of Compensation Court certificates. The Confiscated Lands Act 1867, however, provided that the Governor, at his discretion, could make reserves for rebels and others, for example, absentees, not able to make a case to the Compensation Court. Many promises to set aside reserves were made, but few were carried into effect. In the south, reserves were made on less desirable land away from the coast. According to the Taranaki Report, reserves made totalled about 20,000 acres, but it is not clear if all of this land was granted under the Confiscated Lands Act 1867.[43]

In the 1870s, the Crown, in a bid to obtain land for settlement, began to reacquire by purchase Taranaki reserves and Compensation Court certificates,

40. Riseborough, p 89
41. *The Taranaki Report*, p 142
42. Ibid, p 143
43. Ibid, p 180

awards, and grants. In addition, it made payments to acquire unreturned lands within the confiscation boundaries, the 369,000 acre Taranaki interior, and nominally confiscated blocks in central Taranaki. Many of these transactions involved takoha – the payment of gratuities. The West Coast Commission of 1880 considered that these payments were little more than bribes to chiefs to secure the Government peaceful possession. The Waitangi Tribunal has also strongly condemned this practice, and held that all or most of these Crown 'purchases' – totalling in excess of 640,098 acres – were improper and invalid.[44]

In 1928 the Sim commission accepted the Crown's submissions that the Crown had purchased 577,000 acres of the land within the confiscation boundaries, thus reducing the amount of land confiscated – after deduction had been made for land returned – to 462,000 acres.[45]

However, it appears to be incorrect to describe those blocks lying within the confiscation boundaries as returned lands purchased by the Crown since, in point of fact, these districts had not been returned to their Maori owners. At the time of purchase, they were under Crown control and title. Then there is the issue of the methods that were used to effect purchase of these lands. Moreover, what would have been the Crown's response had the Maori owners refused to sell? It is perhaps arguable that it was better that Maori got some payment for these lands rather than have their confiscation simply confirmed, but the expectations set up by the payments further confused the situation and led to the further loss of the land, before the claims to compensation or reserves had been heard.

On balance, the thousands of acres allegedly acquired by purchase have to be seen as part and parcel of a general expropriation of Maori land that occurred in and after 1865 in Taranaki.[46]

By the end of the 1870s, the complaints of Taranaki Maori had become too numerous to ignore. In 1880, the West Coast Commission was set up to investigate these grievances and suggest remedies. The commission was very supportive of the need to ensure that land for European settlement be made available. It had no immediate solution to the difficulties faced by Maori in the north and south of the district, where land for reserves was in very short supply. Nonetheless, it did agree that reserves should be made, and recommended that a second commission be appointed to carry out this work. By 1884, when the second commission had finished its work, it had provided sufficient reserves to cover most of the awards made by the Compensation Court and, as well, the lands that had been promised under the Confiscated Lands Act 1867. In all, around 214,675 acres, spread unevenly around the province, were set aside for Maori.[47] This acreage has to be considered the bulk of the land returned. As usual, titles were individualised. Then, in a new departure, management of the lands was vested in the Public Trustee, under the terms of the West Coast Settlement Reserves Act 1881.

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44. *The Taranaki Report*, pp 173–175, 193–195
45. AJHR, 1928, G-7, p 11
46. *The Taranaki Report*, p 312
47. Ibid, pp 245, 250–254

Most of this land was leased out to settlers on very favourable terms. By 1912, the reserves had shrunk to 193,966 acres, the result of alienations by the Public Trustee. Of this area, over 60 percent, or 120,110 acres were held on perpetual leases. Another 18,400 acres (9.5 percent) were held on 30 year leases. Maori held 24,800 acres on occupational licences, and another 25,798 acres were managed by the Trustee for Maori purposes. In all Maori had direct use of just over a quarter of the land, and no real control over any of it.[48] They had not consented to the leases in the first instances; nor were they consulted when these were altered to suit the needs of the Pakeha leaseholders. Rentals were kept low, well below market rates, and the costs of roading, surveys, and administration were deducted from the rent the Maori owners received. Maori opposition to the leasing arrangement was immediate and sustained, but the lessees too were clamouring for better terms: the Crown's response was the West Coast Settlement Reserves Act, 1892, which replaced terminating leases with perpetual leases. Maori protests, and appeals that the 1892 legislation be repealed, fell on deaf ears.

By 1974, the Maori estate tied up in the reserves had been reduced by over 60 percent, the result of Crown purchases or of sales to the lessees. By that date, the remaining areas of land – some 81,299 acres – was all that was left of the Maori share of the 1.2 million acres confiscated in 1865.[49]

The Sim commission accepted Crown evidence concerning the extent of the expropriation of land in Taranaki, and the legitimacy of the purchases made: the effect was to greatly understate the loss that had occurred. None the less, the commission decided that the Taranaki confiscations had been totally unjustified. The only remedy permitted by the commission's brief was monetary compensation, based on the value of the land at the time of its taking. The commission, however, apparently found it quite impossible to determine what this amount might have been. Instead, it recommended an annual payment of £5000 – for the 'wrong' that had been done, leaving the question of compensation for the land to be settled at a later date. The depression of the 1930s, and then World War II prevented any progress on the question of the £5000 although some payments were made during this period. In any event, it was not until 1944 that final agreement was reached, and regular payments began.[50] The compensation for Parihaka was assessed at £300.[51]

6.10 Confiscation Policy in Practice: Tauranga, 1865

The Tauranga district was confiscated in mid-1865 under the provisions of the New Zealand Settlements Act, 1863. The proclamation named the district, gave an

48. Ibid, p 246
49. Ibid, p 286
50. Ibid, pp 294–299
51. Section 3(1) of the Taranaki Maori Claims Settlement Act 1944

estimate of the area involved, 214,000 acres, provided a set of boundaries, and described the confiscation district as comprising the lands of the 'Ngaiterangi'.

The Ngaiterangi were certainly an important Tauranga tribe, but they were not the only tribe in the district; their close kin, Ngati Ranginui, and the smaller Ngati Pukenga, Ngati Tokototo and Ngati Hinerangi, among others, also being present. Ngati Raukawa and Ngati Haua had settlements in the Tauranga district as well. Moreover, lands to north and west was contested by tribes located in the Thames/Hauraki district: in the south and east, sections of Te Arawa disputed the Tauranga boundaries. Tauranga was in fact a district with an elaborate and fluid tribal geo-political structure: to simply call it Ngaiterangi land was a gross over-simplification.[52]

The Government's assertion that all of the Tauranga land belonged to Ngaiterangi did appear to excluded consideration of claims or grievance not made by Ngaiterangi or under the banner of Ngaiterangi. In practice, however, this did not happen; investigation of various tribal claims did resulted in payments and or grants of land to extinguish non-Ngaiterangi rights.[53] The only exception seems to have been part of Pirirakau, and they were left out not because they were non-Ngaiterangi, but because they refused to come in. Those of them who did received land along with the other tribes and sub-tribes. However, there is little doubt that the general identification of Tauranga Maori in the 1860s as Ngaiterangi muddied the waters thereafter, making non-Ngaiterangi grievances almost impossible to pursue, as the fate of the Waitaha petition in the 1920s seems to indicate.[54] Part of the problem is the fact that Tauranga seems to have contained a particularly complex set of interlocking and overlapping tribal affiliations – obscured by the habit of 19th century officials of referring to all of the different Tauranga Maori as Ngaiterangi. Given that the Native Land Court was prevented from holding hearings in the district, and that the proceedings of the land commissioners have survived only in fragmentary form, it may now be very difficult to reach any firm conclusions about the pre-confiscation rights of particular Tauranga tribe or tribes.[55]

As well as employing Ngaiterangi to describe all Tauranga Maori, the proclamation contained a mistaken set of boundaries, causing some doubts to arise about the legality of various arrangements that had been entered into post-proclamation. These doubts were sufficient to produce validating legislation – the Tauranga District Lands Acts, 1867 and 1868, which clarified the boundaries of the confiscation district, and extending this definition back to 1865. This legislation may also have been prompted by Fenton's 1865 attempt to hold a hearing of the Native Land Court at Tauranga, to determine tribal rights in the district, and particularly those of Ngaiterangi. The Crown blocked this move, on the grounds that by the act of

52. Evelyn Stokes, *Te Raupatu o Tauranga Moana: the Confiscation of Tauranga Land*, Hamilton, University of Waikato, 1990, pp 164–175
53. Ibid, pp 103–106
54. AJHR, G-7, 1928, pp 17–18
55. V O'Malley and A Ward, 'Draft Historical Report on Tauranga Moana Lands', Wellington, CCJWP, 1993, p 103

confiscation all native titles to land in the district had been extinguished. In effect, Tauranga was Crown land, outside the jurisdiction of the Native Land Court.

In 1867 Grey, Fox, and Whitaker held a meeting at Te Papa, to settle the details of the confiscation. The main outcomes of this meeting were, according to the official Government report, a promise that only a quarter of the land would be confiscated, a notification that all land returned would be secured by inalienable Crown grants, and a determination that land north of the Wairoa River (the Katikati/Te Puna districts) would be purchased rather than confiscated.[56]

According to information provided to the Sim commission, 9200 acres were returned from land described as outside the settlement area. This has been assumed to mean from the Crown's confiscation block.[57] A further 136,191 acres, described as exclusive of the purchase and confiscation blocks, was returned after proceedings under the Tauranga District Land Acts.[58] These two figures give a total for returned land of 145,391 acres. Figures in the Sim commission report, however, give the area returned as 147,062 acres.[59] The difference is around 1600 acres, which may simply be a computational error of some kind. Alternatively, there may be returned land, reserves made when the Katikati/Te Puna blocks were purchased, to be considered as well.[60]

The Tauranga District Land Acts provided the mechanism for the return – to loyal and former rebel Maori – of the three quarters of the land which the Crown had promised would be returned. The commissioners appointed under this legislation were not obliged to operate under the assumptions about customary land titles that provide a framework for the work of the Native Land Court, although in practice it does appear that they usually adopted a similar approach. Their brief also directed them to return land to members of the Ngaiterangi tribe but again, in practice, it seems that provision was made for all resident Maori – save for some unsurrendered rebels. In particular, all the villages still occupied in the 1860s were returned.

But while land was returned, with an eye to Maori needs, and with some regard to Maori customs, the process was a long-drawn-out one – the final commissioners' report was presented in 1886, 20 years after the Crown had promised to return the land. Moreover, the land was returned via Crown grants. Some of these were made to individuals for services rendered to the Government. Others were made to chiefs as trustees, although in law they became owners.

The total area confiscated was, according to the Sim commission, not 214,000 acres but 290,000 acres. The Katikati and Te Puna purchase amounted to 93,188 acres.[61] Despite the suggestion that Maori consented to the alienation, there seems little doubt that this purchase was essentially compulsory in nature, and somewhat

56. AJHR, 1867, A-20, no 1, pp 5–6, no 11, p 12
57. O'Malley and Ward, pp 113–115
58. AJHR, 1886, G-10, p 4
59. AJHR, 1928, G-7, p 18. The total area returned or purchased was said to be 240,250 acres, the purchased area being 93,188 acres, leaving 147,062 acres as the total returned.
60. Stokes, p 253
61. AJHR, 1928, G-7, p 19

covert in execution, in that it appears that the deposit was paid over before all of the tribes resident in these districts had been informed of the sale.[62] After all other deductions had been made, the area finally retained by the Crown contained 49,750 acres – close to a quarter of the land if the 214,000 acre figure is accepted: 17 percent if 290,000 acres was the true extent of the confiscation. If the purchased land is added to the equation, the total area of land taken becomes 142,938 acres: 67 percent of the lower estimate of 214,000 acres; 49 percent of the higher estimate of 290,000 acres.

The land returned was made inalienable, but applications for the lifting of restrictions appear to have been routinely granted.[63] Between 1879 and 1886 around 40 percent of this land was purchased, most of it by private buyers. The Crown had, by that date, purchased 4957 acres, and was negotiating the purchase of a further 13,936 acres. Private purchases totalled 49,243 acres.[64] By 1908, the Tauranga tribes possessed no more than one seventh (42,970 acres) of the land they had held pre-confiscation.[65]

The Sim commission considered it clear that the Tauranga tribes had been engaged in rebellion, that the Katikati/Te Puna purchase had been above board, that it was no longer possible to distinguish who had been 'loyal' and who had not, that 'substantial justice' had been done at the time, and that in any event the settlement of the confiscated land had been agreed between Grey and the tribes. The confiscation was, on one hand, justified, and on the other not excessive. No recommendation concerning compensation were made.[66]

Subsequently, petitions seeking redress, or asking for further investigation were rejected on the grounds that the Sim commission had already fully considered the Tauranga raupatu. However, in the early 1970s, the Government agreed to reopen the issue, and eventually a petition covering both the confiscation block and the Katikati–Te Puna purchase was received. The Maori Affairs Committee reported in favour of the petitioners with respect to the confiscation block: it made no recommendation concerning the Katikati–Te Puna purchase.[67]

The Tauranga Moana Trust Board Act 1981 provided for the setting up of a trust board, and for the payment of a lump sum of $250,000 in 'full and final settlement' of all claims arising from Crown confiscations or acquisitions in the Tauranga district.

Section 7 of the Act declared that those who had fought at Gate Pa and Te Ranga were not rebels. Section 11, Te Runanga o Ngati Awa Act 1988 restored the character, mana, and reputation of Ngati Awa similarly.

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62. Stokes, p 146; O'Malley and Ward, pp 41–42
63. AJHR, 1886, G-11, p 2
64. AJHR, 1886, G-10, pp 4–5
65. O'Malley and Ward, p 91
66. AJHR, 1928, G-7, pp 19–20; O'Malley and Ward, p 96
67. O'Malley and Ward, pp 98–102

6.11 CONFISCATION POLICY IN PRACTICE: OPOTIKI, 1866

The Opotiki district was proclaimed in January 1866.[68] It was intended to include the lands of both Ngati Awa and Whakatohea, and in the manner of the time delineated this area in terms of straight lines running from point to point. This was a method virtually designed to ensure that the confiscation district did not equate with tribal boundaries which were usually defined by rivers, mountain ranges, and other natural features. Indeed, a strict interpretation of the proclamation boundaries would have excluded the Whakatohea rohe completely.[69] In any event, the boundaries were altered in September 1866. It was later discovered that the second set of boundaries also contained an error, reducing the area confiscated by 5000 acres.[70]

Various reports dealing with the Opotiki confiscation were prepared during the 1860s and 1870s. The information contained in these reports is not consistent. For example, in 1867, it was reported that the confiscated block contained 440,000 acres, from which 5000 acres had to be deducted due to an error in mapping the district. An area of 87,000 acres had been claimed by Te Arawa, and returned to them, despite the objections of Ngati Awa. At the eastern end of the block 57,000 acres had been abandoned. To whom, and for what reason, is unstated. Another 38,000 acres were described as 'unarranged'. Lands given back to those defined as rebels totalled 96,000 acres, although a note in the report says that when the land was surveyed, it was found to contain 58,000 acres. This seems to indicate that a shortfall of some 38,000 acres had occurred. The land retained by the Crown, at this stage, amounted to 151,558 acres. The 1867 report classified the land returned by type, and examination of this data shows that only about 18,000 acres, around 19 percent, of the land returned, was suitable for agriculture.[71]

In 1873 a second tally of the land added up to 440,000 acres, the same total as in 1867, but contains no mention of the 57,000 acres that had been recorded as abandoned in 1867.[72] Conversely, there is a reference to 40,832 acres of land 'surrendered' (by the Government). Possibly this was a revised estimate of the area of land to the east that in 1867 had been described as abandoned land. The 1921 Native Lands Commission seemed to believe that this was the case.[73] The lands returned, including the 87,000 acres returned to Te Arawa, totalled 288,213 acres.[74] If the 40,832 acres described as 'surrendered' is deducted as well, the land retained by the Government amounted to 110,955 acres, about 40,000 acres less than had been reported in 1867. This probably represented the additional lands returned between 1867 and 1873.

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68. *New Zealand Government Gazette*, 18 January 1866, p 17
69. B D Gilling, 'Te Raupatu of Te Whakatohea: The Confiscation of Whakatohea Land 1865–1866', Wellington, Treaty of Waitangi Policy Unit, Department of Justice, 1994, p 123
70. Gilling, p 124
71. AJHR, 1867, A-18, p 1
72. AJHR, 1873, C-4B, pp 5–6
73. AJHR, 1921, G-5, p 27
74. 96,261 acres to 'loyal' Maori, 104,952 acres to 'surrendered rebels', 87,000 acres 'returned' to Te Arawa. AJHR, 1873, C-4B, p 5

Confusion and uncertainty about exactly how large the original confiscation block was, and what happened to the land, continued into the twentieth century. According to the Sim commission, for example, the Opotiki proclamation district contained 448,000 acres, of which 230,600 acres were returned. Excluding 6,340 acres of previously purchased land, the confiscated land amounted to 211,060 acres. Of this land 87,000 acres was returned to Arawa, leaving 124,060 acres, 24,000 acres more than the Government seems to have had in 1873. Three principal iwi – Ngati Awa, Tuhoe, and Whakatohea – were involved. The Sim commission report says that Ngati Awa owned 107,120 acres pre-confiscation. They were left with 77,870 acres, losing 29,250 acres, or 27 percent. Tuhoe owned 1,249,280 acres pre-confiscation and were left with 1,234,549 acres, a deficit of 14,731 acres or just over one percent. Whakatohea owned 491,000 acres. They lost 149,451 acres – 30 percent – leaving 341,549 acres. These losses, it should be noted, add up to a total of 193,432 acres, a considerably larger figure than the 124,040 acres stated in the report to be the full extent of the confiscation, and it is not at all clear how this discrepancy came about.

6.11.1 Whakatohea

In the case of Whakatohea, the 1921 Native Land Claims Commission estimated the extent of the confiscated Whakatohea land at 173,000 acres – or half the tribe's land, including all of the flat and better land.[75] If 173,000 acres did amount to half the tribe's land, then the total area of the tribe's domain must have been considerably less than the figure of 491,000 acres contained in the later Sim commission report.[76] This report also indicates that the Whakatohea loss was 149,451 acres. The difference between the 1921 and 1928 figures is approximately 23,500 acres – quite close to the acreage of the confiscated land returned to Whakatohea. This suggests that the Sim commission may have been dealing in net figures while the 1921 commission worked with gross figures, from which the amount of land returned has to be deducted. The large gap between the two estimates of total tribal lands is, however, harder to explain.

Of the land taken, some 22,000 acres were returned – principally the 20,326 acre Opape Block. It does not appear that the Opape land was returned by the Compensation Court; rather it appears to have been by arrangement between the Crown and the tribe, similar to the reserves that were made in Taranaki for rebel Maori. However, the court would have been involved in the issuing of the title, in determining the names to go on the title, and the relative shares of each of the owners.

The Compensation Court set up by the New Zealand Settlements Act 1863 had been intended to provide a leavening of justice to the confiscation process. The research evidence shows, however, that in Taranaki the court became, intended or not, part of the apparatus for separating Maori from their land, and that it simply produced an additional measure of injustice. The court in the Bay of Plenty, on the

75. AJHR, 1921, G-5, p 27
76. AJHR, 1928, G-7, p 21

other hand, seems to have been possibly a different kind of animal. For one thing, Fenton, the Chief Judge tried to resist Government pressure to convene the court at the earliest possible date, pleading that no experienced judges were available. When the court did sit, it questioned whether the confiscations had been legal, and it seemed to believe that it had the power to examine and perhaps overturn the out-of-court settlements made by the Crown Agent, Wilson. It also talked of taking an independent line as far as the Government was concerned, and of giving those claimants who could prove their case their own land back, rather than simply accepting the Government's position that any land would do. It even went as far as to suggest that the wives of rebels might have a right to land.[77] Whether these sentiments were indicative of a more sensitive approach to Maori concerns, or simply evidence of manoeuvring by judges anxious to establish their superiority over Wilson, the Crown agent, or if they had other causes entirely, is unknown. There is no doubt, however, of the importance of the Compensation Court in the district: the return of 1873 shows that the court had been responsible, by that date, for the return of 96,216 acres. This may have included 2000 acres for Whakatohea judged to have been loyal.

The Stout–Ngata commission estimated in 1908 that Whakatohea possessed 35,449 acres, including the Opape block, the bulk of the returned land.[78] This last result can probably be attributed to the long delay in settling title to this block, which would have effectively prevented alienation. Of the unconfiscated territory of the tribe, however, almost all of it must have been sold by 1908 – approximately 328,100 acres – if the information in the Sim commission report on the extent of the tribe's pre-confiscation holdings is accepted. The confiscations of practically all of the tribe's good land in 1865, and the alienation of almost all of the remaining land over the next few decades cannot be entirely unrelated events.

When the Native Lands Commission considered the Whakatohea confiscation in 1921 it concluded that it represented a degree of 'punishment or retaliation' beyond anything that had been intended, according to Government policy statements made at the time, by the passing of the New Zealand Settlements Act 1863. It was suggested that the emotions aroused by the killing of Volkner and Fulloon must have overridden the judgment of those responsible for ordering the confiscation. The penalty imposed on Whakatohea was, the commission said, 'heavier than their deserts'.[79]

The Sim commission agreed that the confiscation had been excessive, but by only a small amount. The amount of compensation recommended was £300 per annum. Little seems to have been done to implement this recommendation until 1946, when the Labour Government agreed to a lump sum of £20,000, to be used 'in the acquisition of land for settlement and development for members of the tribe and their descendants'.[80]

77. Gillings, 'Te Raupatu', pp 1–2
78. Gilling, 'Te Raupatu', p 124; AJHR, 1908, G-1M, pp 1–2
79. AJHR, 1921, G-5, p 27
80. Nash, 11 October 1946, NZPD, vol 275, p 727

It was inevitable, given the complexity of the tribal geography of the Opotiki district, and the way in lands were confiscated simply by drawing lines on maps, that some Maori land was subsequently found to be located on the wrong side of the lines; this was the contemporary explanation for the return of the 87,000 acres to Te Arawa, for example. The area on the east of the district that was described as abandoned or surrendered may also have been lands that belong to Maori who were not the targets of the confiscations. When this was discovered, it appears that the Crown claim to this area was simply allowed to lapse. Tuwharetoa may have lost land because they were confused with Te Arawa.[81] But there was no doubt that the lands of Ngati Awa were intended to be confiscated.

6.11.2 Ngati Awa

According to the Sim commission figures, Ngati Awa owned 107,120 acres pre-confiscation. They were left with 77,870 acres, losing 29,250 acres, or 27 percent of their land. However, the Sim commission accepted that the 87,000 acres returned to Te Arawa had been rightfully returned.[82] If that assessment was incorrect, then Ngati Awa had owned 194,120 acres pre-confiscation, and had lost 116,250 acres, or close to 60 percent of the land.

Like Whakatohea, Ngati Awa were considered a rebel tribe, to be provided with reserves. This did not, of course, preclude Ngati Awa from making applications to the Compensation Court, but they appear to have been generally reluctant to do so.[83]

The Ngati Awa reserves were arranged by John Wilson, who was appointed as the Crown's agent in the Bay of Plenty district in 1866. According to Mead and Gardiner, Wilson set aside 76,826 acres, an amount of land which is quite close to the figure of 77,870 acres contained in the Sim commission report.[84]It appears that Wilson worked to ensure that the best land went to the Government, and that Maori were generally left with the poor and hilly areas. As was the policy, the land was returned on individualised titles, where possible, which destroyed hapu control over it. Wilson also tended to ignore pre-confiscation patterns of occupation, which meant that hapu could be re-located onto the land of other hapu, a situation that could cause disharmony, and lasting problems in that it left some hapu on land to which they had no ties and, in Maori eyes, no claim.

The 87,000 acres claimed by Ngati Awa which had been returned or given to Te Arawa was broken up into a number of sections. A number of these, identified as awards made for military service, were purchased by the Government in 1874–1875. Another batch was acquired in the first half of the 1880s and the remaining sections were reported to be under negotiation.[85]

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81. C Marr, 'A Report Commissioned By the Waitangi Tribunal on the Background to the Tuwharetoa Ki Kawerau Raupatu Claim', Wai 46, ROD, doc A2, 1991
82. AJHR, 1928, G-7, p 21
83. H M Mead and J Gardiner, 'Ethnography of the Ngati Awa Experience of Raupatu', Wai 46, ROD, doc A18, pp 117–118
84. Ibid, p 115; AJHR, 1928, G-7, p 21
85. AJHR, 1884, C-2, pp 8, 16

As for the lands returned to Ngati Awa there were delays in issuing grants, and some at least of the land returned was held in trust, that is to say, it was not held on individualised titles. All of it, it seems, was made, or intended to be, inalienable, but this was not always apparent. The fact that the trustees were able to deal with the land when the other owners were not, and without consulting either the owners, or the elders, was also a cause of concern.[86]

The Government was approached to remove restrictions preventing sale, so that advantage could be taken of the good prices that Pakeha were offering, and because money was need for development. Some Ngati Awa seem to think that there was more than enough land, and favoured sale. Others were opposed to land sale. The Native Department seemed to think it was not desirable to lift restrictions on sale. In 1883 some Ngati Awa petitioned Parliament, seeking, in effect, the right to dispose of their land as they saw fit. The problem, as the Native Affairs Committee saw it, was that the land was held in trust: it was not the sole property of the trustees, but in law the trustees were the owners. If restrictions were removed, the trustees could sell the land, and retain all the benefits of the sale for themselves.

Difficulties over the grants continued for the rest of the century, not just over the form of the grants, but over who had the right to be included among the owners, not to mention matters to do with inheritance and the division of rental monies.

Raupatu was intended to administer a short, sharp lesson. The compensation provisions were expected to quickly restore Maori onto land of their own. No one could have expected that more than 30 years later things as basic as the issuing of Crown grants for these compensatory lands would still be causing problems, or that something as fundamental as the ownership of these lands would still be a matter for debate. But that seems to have been the case in the Opotiki district, and elsewhere as well.

The Sim commission did not regard the Bay of Plenty confiscations (except in the case of Whakatohea) as excessive, and it made no recommendation concerning the Ngati Awa (or Tuhoe) confiscation, which indicates that it accepted the evidence placed before it concerning the involvement of these two tribes in the Opotiki 'rebellion'.[87]

6.12 CONFISCATION POLICY IN PRACTICE: HAWKE'S BAY, 1867

In 1867, the New Zealand Settlements Act was used to confiscate an area of Hawke's Bay defined as the Mohaka and Waikare district. Although the boundaries of this district were described in the proclamation, there is considerable doubt as to the actual size of the area confiscated. In 1871, it was estimated to be 340,500 acres.[88] The 1951 royal commission thought that approximately 250,000 acres was the right answer.[89] The most recent assessment is around 270,000 acres.[90]

86. T Bennion and A Miles, 'Ngati Awa and Other Claims', 1995, Wai 46, ROD, doc 11, pp 138ff
87. AJHR, 1928, G-7, p 22
88. AJHR, 1871, C-4, p 2

The Mohaka and Waikare confiscation had a number of unusual features about it. First it was occasioned by the involvement of an inland hapu or tribe, Ngati Hineuru, with Pai Marire. Ngati Hineuru lived in the Te Haroto and Tarawera districts. They were related to Ngati Tuwharetoa, and probably to Ngati Kahungunu as well. In 1867 Pai Marire members of Ngati Hineuru – it is not clear if it was the entire hapu or just part of it – moved into the Napier district. It was assumed at the time that they were preparing to attack Napier, and a mixed force of local Pakeha militia and Maori launched pre-emptive strikes against their camps. Ngati Hineuru were defeated, and the survivors sent to the Chathams. The subsequent confiscation of the Mohaka and Waikare district was justified on the basis of this 'rebellion' – although it seems indisputable that the Government forces fired the first shots.

Second, McLean claimed that about half of the confiscated lands belonged to Ngati Hineuru and that there were only a handful of other, non-Ngati Hineuru, owners. Since titles to the land were never investigated, it is unclear what claim, if any, Ngati Hineuru had to it. But there seems little doubt that Ngati Kahungunu hapu were resident on the land, and in number far larger than McLean suggested. Ngati Kahungunu were generally one of the Crown's strong allies in the Hawke's Bay East Coast districts. Yet both at Wairoa and in the Mohaka and Waikare districts hapu of Ngati Kahungunu had their land confiscated.

In 1870 agreement was reached between Donald McLean, acting for the Crown, and some leaders of the Hawke's Bay Maori as to how the 1867 proclamation would be implemented.[91] This agreement was given legal status by the Mohaka and Waikare District Act 1870. According to the Crown submission made to the Sim commission, it was this legislation, and not the New Zealand Settlements Act 1863, that provided the statutory authority for any confiscations that were made in the Mohaka–Waikare district. The Sim commission accepted this argument, and determined that the Mohaka–Waikare confiscation lay outside its New Zealand Settlements Act terms of reference. Consequently, it made no investigations concerning this district.[92]

The 1870 arrangement was that the confiscated area would be divided into three portions. The first portion contained areas that the Crown claimed to have purchased previously. According to Boast, four blocks fell into this category.[93] Hippolite states that there were three blocks, totally some 18,156 acres.[94] The second division contained areas that the Crown retained. Boast gives the total of the five blocks involved as 45,623 acres; Cowie puts the acreage at around 52,000 acres.[95]

89. AJHR, 1951, G-7, p 11
90. Dean Cowie, *Hawke's Bay*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), 1996, p 101
91. RDB, vol 60, pp 22932–22948
92. Boast, Wai 201, ROD, doc J1, p 62
93. Ibid, p 2
94. Joy Hippolite, 'Raupatu in Hawke's Bay', Report commissioned by the Waitangi Tribunal, 1993, Wai 201, ROD, doc I17, p 47
95. Boast, Wai 201, ROD, doc J1, p 2; Cowie, p 112

The third and largest portion contained the land that was to be returned – 13 blocks according to Boast, 12 according to Cowie, containing some 200,000 acres.[96]

The size of the area to be returned seems to be in accord with McLean's 1869 direction that the Government did not wish to profit from the Hawke's Bay confiscation.[97] Nonetheless, all subsequent difficulties flowed from this 1870 agreement. When the Native Land Court was given special powers in 1881 to determine the ownership of the blocks, it decided it could do nothing other than accept the lists of owners prepared in 1870, and legitimated by the Mohaka and Waikare District Act, 1870. These lists, however, were flawed and incomplete. The result was that the land was returned in a way that dispossessed some of its rightful owners. Second, it seems to have been the intention that the land was to be held in trust by the listed owners. However, this was not stated in a way that carried legal effect.[98] The result was that when a Crown grant was issued for Kaiwaka, the most desirable of the blocks, the sole listed owner was able to act as the absolute owner. Third, the theory was that once titles were settled, and surveys completed, Crown grants would be issued. But surveys were expensive, and the listed owners appear to have been unwilling or unable to fund them. Without surveys, Crown grants could not be issued. Without Crowbit had failed to ensure that the principle of trusteeship had legal effect; it had neglected to issue titles to those who were recognised, by statute, as owners. The result was a flood of petitions, decade after decades, concerning nearly all of the Mohaka Waikare blocks. It was, of course, never the intention of the Crown to restore the pre-confiscation *status quo* in Hawke's Bay: land was to be returned to certified loyal Maori, in areas determined by the Crown, and on the basis of a Crown grant, overturning and destroying traditional titles. But the Crown was apparently unable to effect either a speedy or successful transition to this new order.

While this unsatisfactory situation remained unresolved, the Crown began to reacquire the land by purchase. Between 1910 and 1931 the Crown obtained possession of a very substantial portion (92,735 acres) of the returned land, including most of the better areas.[99] In the end, it seems that only 3 of the original 12 or more returned blocks remained substantially in Maori hands. These blocks, and other small pockets of Maori land in the district, totalled, according to Boast's figures, around 107,000 acres of mostly steep and rugged land.[100]

6.13 Confiscation Policy in Practice: East Coast

The New Zealand Settlements Act had assumed that everyone in a given district was a rebel. Maori, if they wished to have land returned to them, had to prove that

96. Boast (Wai 201, ROD, doc J1), p 1; Cowie, p 112
97. AJHR, 1951, G-7, p 11
98. Boast (Wai 201, ROD, doc J1), p 16
99. Boast (Wai 201, ROD, doc J3), p 45
100. Ibid, p 43

they had either not rebelled, or were no longer in a state of rebellion. The East Coast Land Titles Investigation Act 1866, on the other hand, provided that within a given district, the land of certified rebels could be confiscated after investigation of titles by the Native Land Court. These investigations were initiated by the court; no applications by Maori were required. The essential change was that the East Coast legislation placed the burden of proof on the Government. It had to prove that the owners of any land investigated had been rebels; only if the Government's case was proven could land be confiscated. The Act was intended to make confiscation along the east coast seem a more reasonable and moderate policy, and to lessen any risk that the British Government might disallow the legislation.

An error in drafting, which included among those eligible to receive land under this legislation those who were excluded from receiving land under the New Zealand Settlements Act, obliged the Government to amend the Act in 1867, when the boundaries of the district covered by the legislation were further clarified as well. The East Coast Land Titles Investigation Act 1866, as amended in 1867, applied to over a million acres of East Coast land.

The legislation was soon found to be unworkable. To begin with, it depended on Maori willingness to provide the information necessary to determine ownership. Equally serious, from the Government's point of view, was the realisation that even if successful proceedings could be conducted under the Act, the likely end result would be that the Crown would acquire a collection of bits and pieces of land scattered far and wide around the district – expensive to survey, difficult to settle and impossible to defend.

The Government changed tack, and attempted to obtain from those considered to have been rebels the cessions of suitable blocks of land. In exchange, the Crown would waive any claims it might have on any other lands in the vicinity. Cession before confiscation was in fact the policy Cardwell had recommended in 1864. However, because Maori land was held in common, and because the troubles on the East Coast had resembled a civil war, it was in fact very hard to find any large areas of land that were exclusively owned by either 'loyal' or 'rebel' Maori, however the Government chose to use these terms. This was pointed out to McLean by Biggs, the Crown agent.[101] The Government's response, at least in the case of Wairoa, was simply to insist that certain areas of land were rebel land which must be ceded, using threats, intimidation, and promises of compensation and reserves to overcome all objections.

6.13.1 Wairoa cession, 1867

In 1867, the Government demanded that land belonging to 'HauHaus' in the Wairoa district be ceded. Ignoring objections that there was in fact little such land at Wairoa, the Government negotiators created a general atmosphere of intimidation, insisting that the decision to take the land had already been made, and that if

101. V O'Malley, 'Report for the Crown Forestry Rental Trust on the East Coast Confiscation Legislation and Its Implementation', Wellington, 1994, p 83

the land was not ceded, it would be subjected to inquiry under the East Coast Land Titles Investigation Act. Faced with this pressure, and accepting Crown assurances that the rights of loyal Maori to land within the block would be respected, the Wairoa Maori (hapu of Ngati Kahungunu) agreed to cede the Kauhouroa block, less reserves of 1500 acres. A sum of £800 was paid as well, to extinguish any remaining loyalist claims. While the action was described as a cession, it was quite clear at the time that the land had been confiscated.[102] The Kauhouroa block, initially estimated to contain 71,000 acres, was eventually found to contain 42,438 acres.[103] In return for Kauhouroa, the Crown withdrew its claims to any other lands in the Wairoa district. These lands, basically inland Wairoa, extending as far as the southern shores of Lake Waikaremoana, reverted to their customary owners.

The Crown had promised to provide reserves within the Kauhouroa block for loyalist Maori, but the Sim commission later decided this promise had only been partly honoured.[104] The owners of Kauhouroa, predominantly loyalist, also appear to have accepted Government assurances that any lands owned by rebels in the district over which the Government had waived claim would be given to them. This land was mainly the Ruakituri, Taramarama, Tukurangi, and Waiau blocks, containing some 157,000 acres. But the Crown did not move expeditiously to obtain the necessary titles, and while agreement was reached with some Wairoa Maori in 1872 to return these four blocks other claimants complained about this agreement, and it was not executed. Subsequently, these claimants, Tuhoe, Ngati Ruapani and Ngati Kahungunu, took the land to the Native Land Court, to determine ownership. An out-of-court agreement resulted in the awarding of title to Ngati Kahungunu, and the subsequently purchase from them, and the other two tribes, of the 157,000 acres in question. The interests of Tuhoe and Ngati Ruapani in these blocks, were extinguished by the payment of £1250 and the granting of a 2500 acre reserve. Ngati Kahungunu interests were acquired, for £9700 and a reserve of 8400 acres. Early In 1876, a further payment of £1500 was made to 'loyal' Maori of Wairoa, Mohaka, Nukaka, and Mahia – individuals not included among the list of owners accepted by the Native Land Court – as compensations for their interests in the land.[105]

Thus land which had been promised to the Wairoa Ngati Kahungunu, as a consideration for the cession of the Kauhouroa block, had been awarded to others, and from them the Crown had immediately acquired the land.

The Sim commission considered the grievance thus created, and decided that the Crown had not honoured its promise to the Wairoa Maori. It rejected evidence that the payment in 1876 had been in lieu, and recommended that the Wairoa Maori be paid an annual sum of £300 in compensation, to be used to provide higher

102. Hippolite, *Wairoa*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), 1996, p 37
103. O'Malley, 'East Coast Confiscation Legislation', p 86
104. The Sim commission was apparently able to investigate the Wairoa cession, despite the fact that the New Zealand Settlements Act did not apply, because petitions concerning Wairoa were included on the schedule of petitions that formed part of the commission's brief, and perhaps also because the Crown made no objections.
105. Hippolite, *Wairoa*, p 42

education for the Maori children of the district. From the Maori point of view, the amount suggested was far too low, and the benefit not restricted to those who had suffered as a result of the Crown's actions. One problem, from the Crown's perspective, was that while the Sim commission had not tagged its award, the compensation was intended for the descendants of those who had been judged 'loyalists' in 1867. But no certain way of determining who these people might be seemed to exist.[106] Eventually it was agreed to pay £20,000 to the Wairoa Maori Trust, in settlement of any claims in respect to or arising from the cession of the Kauhouroa block, the beneficiaries being those Ngati Kahungunu resident in Wairoa county.[107]

The Wairoa Ngati Kahungunu were not rendered completely landless by the loss of the Kauhouroa block, or by the sale of the Ruakituri, Taramarama, Tukurangi, and Waiau blocks: it has been estimated that in the mid-1880s there was at least 300,000 acres of land in the Wairoa district still in Maori hands.[108] By 1897, however, the Maori holding had been reduced to around 110,930 acres.[109] Currently, it is said to amount to around 37,000 acres.[110]

6.13.2 Tuhoe–Ruapani

The manner in which the Government purchased the Ruakituri, Taramarama, Tukurangi, and Waiau blocks appears to have created a grievance for Tuhoe and the section of Tuhoe known as Ngati Ruapani as well. Tuhoe–Ruapani had a substantial claim to the inland Wairoa district, as the need to make payments and provide reserves for them when the land was purchased indicates. However, Tuhoe had supported the Maori King, and Te Kooti had been given shelter in their territory. While Tuhoe–Ruapani opposed Ngati Kahungunu's claim at the Native Land Court hearing in November 1875, they were in a weak position since if they took their opposition to the bitter end, and succeeded in proving their title, they would undoubtedly, under the East Coast Act 1868, be judged rebels, and their land would be confiscated. It appears that the presiding judge, Rogan, adjourned the court after a few days, to allow time for the Crown agents to persuade Tuhoe–Ruapani into withdrawing in favour of Ngati Kahungunu, with whom negotiations for sale of the land were by that stage well advanced. O'Malley believes that Ngati Ruapani were denied a fair hearing of their claims, and that their land on the southern shores of Lake Waikaremoana was effectively confiscated, in as far as it was awarded, in suspicious circumstances, to another tribe, and then, by pre-arrangement, purchased by the Crown.[111] In any event, by the early twentieth century the inland Ngati Ruapani were virtually landless.[112]

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106. O'Malley, 'East Coast Confiscation Legislation', p 174
107. Ibid, pp 174–175
108. Hippolite, *Wairoa*, p 64
109. Ibid, p 68
110. Ibid, p 75
111. V O'Malley, 'The Crown and Ngati Ruapani: Confiscation and Land Purchase in the Wairoa–Waikaremoana Area, 1865–1875', 1994, Wai 144, ROD, doc A3
112. Ibid, p 172

6.13.3 East Coast Act 1868

The Crown had obtained land at Wairoa, but efforts to obtain cessions elsewhere on the East Coast were bitterly resisted. This situation was at least partly responsible for the passage of the East Coast Act 1868, which repealed the East Coast Land Titles Investigation Act. By this new legislation the Native Land Court was empowered, if it found that land was jointly owned by both rebel and loyal Maori, to issue certificates dividing the land between the Crown and the loyal owners or, it if it wished to do so, to convey all of the land to the loyal owners. By this fine tuning of the role expected of the Native Land Court, the Government was hopeful of better achieving its two objectives on the East Coast: the punishment of rebels, and the obtaining of land. The East Coast Act 1868, was to provide an improved legal framework. At the same time, the extra-legal approach of obtaining land via voluntary cession was still to be pursued, despite the fact of strong and resolute Maori opposition to any further 'voluntary' cessions of the Wairoa type.

6.13.4 Poverty Bay cession 1868

The background to the Poverty Bay cession lay in the Government's treatment of some local Maori after the Pai Marire disturbances of 1865. They were detained on the Chatham Islands while the Government endeavoured to secure from 'loyalist' members of the tribe a deed of cession covering the land of the Chatham Island internees.[113] The exiles included Te Kooti. He and some followers escaped to Poverty Bay in 1868, where they were promptly attacked by local government forces. Te Kooti responded with a series of counter-attacks during the latter part of 1868. These raids focused attention on Poverty Bay as a district where the punishment of rebellion needed to be put in hand. Te Kooti had not restricted his attacks to Pakeha – indeed, more Maori than Pakeha suffered at his hands. It seems that the Poverty Bay tribes, in the aftermath of Te Kooti's forays, were anxious to obtain Government protection, and consequently were more amenable to the suggestion that they give up land. In any event, in December 1868, a deed of cession for the whole Poverty Bay district was signed – the whole district being ceded, apparently at Maori request, to simplify the transaction. No payment was made, but land that was found on investigation to be the property of loyal Maori was to be returned.

The Government justified its actions on the grounds that land was needed to reward the Government's Maori allies, and to provide for the security of the district by the establishment of military settlements.

Elsewhere, the New Zealand Settlements Act, with all its ensuing complications, had had to be used to effect the confiscation of entire districts. Not so in Poverty Bay. Nor did the Government have to look to the courts, operating under the various East Coast Acts, to prove its title to the lands it had obtained at Poverty Bay. That

113. O'Malley, 'East Coast Confiscation Legislation', p 111

was a matter of legal fact. All that needed to be done was to decide what areas would be returned, to whom, and under what conditions.

The district ceded to the Crown in December 1868 was thought to contain as least 300,000 acres.[114] In fact, the actual total was probably closer to one million acres. In 1869, at the first sitting of the Poverty Bay Commission, which had the task of investigating applications for the return of land, it was agreed that the Government would retain three blocks, and return the rest of the land to the principal claimants: Rongowhakaata, Te Aitanga-a-Mahaki, and Ngaitahupo.

The Maori perspective appears to have been that 15,000 acres, in three equal sections, had been given to the Crown. The Government's position was that the three blocks concerned – Te Muhunga, Patutahi, and Te Arai – had been acquired, irrespective of acreage. Certainly the three blocks contained far more than 15,000 acres – contemporary estimates ranging from 50,000 to 67,735 acres, the actual figure being around 56,000 acres. In 1921 the Native Lands Commission decided that the Government had in fact acquired 20,337 acres in excess of the 1869 agreement in the (largest) Patutahi block, and it recommended compensation. Eventually the sum of £38,000 was agreed.[115]

The rest of the 1869 sitting of the Poverty Bay Commission was given over to hearing applications for the return of land lying outside the three Crown blocks. In total, Maori claims amounting to 101,000 acres were decided; the rest of the land was unsurveyed and could not be dealt with.[116]

According to O'Malley, many of the awards were based on out-of-court agreements among the claimants – the commission, in short, merely ratified Maori arrangements about the land.[117] Nor were rebels, as a rule, excluded. The Crown agent – once the Crown blocks had been obtained – took little interest in the loyalty or otherwise of the various claimants, and the commissioners likewise. Of course, it is possible that those who might have had considerable difficulty persuading the commission of their loyalty did not apply for their land, and so lost it by default.

While the Poverty Bay Commission was returning the land, the Crown's military allies, Ngati Porou and Ngati Kahungunu, were making a case to the Government for compensation for military services rendered. Both were annoyed that they had not been advised of the sitting of the Poverty Bay Commission, and that consequently their claims to land in the Poverty Bay district were not being heard. It was agreed that they would receive 10,000 acres each from the ceded blocks, but in the end they received money instead. Some Ngati Kahungunu objections to this were settled in 1882, with a grant of 435 acres at Poverty Bay.[118]

When the Crown grants were issued following the awards made by the Poverty Bay Commission, the form of these grants caused great discontent among the grantees. First, the grants conferred equal shares, setting aside the unequal rights

114. O'Malley, 'East Coast Confiscation Legislation', p 119
115. Ibid, p 171
116. Ibid, p 128
117. Ibid, pp 128–129
118. Ibid, p 136

based on ancestry and customary title, and so dispossessing owners in some cases of part of their land. Second, they also set up joint tenancy, which prevented inheritance in the usual way, thus ensuring that even the portion returned could not be passed on to descendants. Understandably, when the Poverty Bay Commission sat again in 1870, it was more or less boycotted, Maori attending only to state their objections to what had been done. Finally, in 1873 attempts to return the rest of the land via a further sitting of the Poverty Bay Commission were abandoned in the face of deep-seated Maori reluctance to cooperate in any way with the commission, and the balance of the land was simply returned to the three tribes – Aitanga-a-Mahaki, Ngaitahupo, and Rongowhakaata – who had signed the original cession agreement.

Since traditional titles over the returned lands were considered to have been extinguished at the time of the cession, it was necessary for further legislation (the Poverty Bay Lands Titles Act 1874), to be passed, allowing these lands to come under the jurisdiction of the Native Land Court – otherwise individual interests would not have been ascertainable and partitioning impossible. One of the schedules to the Act described the boundaries of the lands returned, the area, and to whom the land had been returned. Aitanga-a-Mahaki were said to have received 400,000 acres, Ngaitahupo about 51,600 acres and Rongowhakaata 5000 acres. Additionally, a further area of 185,000 acres had been returned to Rongowhakaata and Ngati Kahungunu jointly. It is not known why the last tribe was given land. According to O'Malley, they had not been a party to the original cession, or involved in any of the subsequent agreements.

These returned lands must have comprised all or most of the balance of the land ceded in 1868, thus allowing a rough tally of returned land to be made. The exact area of the original cession is unknown, since the land was unsurveyed, but it was in the vicinity of 800,000 to one million acres.[119] Of this area, the Crown retained some 56,000 acres, including 20,000 acres to which it was later found to have no right, and for which compensation was awarded. About 1200 acres were granted to European claimants (who had arranged land transactions before 1840, or soon after) by the first sitting of the Poverty Bay Commission. Between 140,000 and 150,000 acres were returned to Maori before 1873, and another 640,000 acres were returned in 1873, the final total (of returned land) being somewhere in the vicinity of 800,000 acres.

Of the land that had been taken or ceded in Poverty Bay around 80 percent was eventually returned. However, the manner in which this land was returned was highly prejudicial. In the end different legislation, different methods of taking land, and different kinds of compensation arrangements had nonetheless produced outcomes for Poverty Bay Maori similar to those apparent in other raupatu districts.

119. The lands retained/returned or otherwise dealt with totalled 837,200 acres.

6.14 CONCLUSIONS

While the passing of the New Zealand Settlements Act 1863 seems to have been a lawful exercise of the powers of the Crown, the confiscations based on it appear in all respects to have been unlawful, in that they did not conform to the requirements set out in the legislation.[120] In the late 1860s, when different legislation was put in place, to allow for confiscations along the East Coast, it was used not to effect confiscations directly, but as a way of forcing Maori to agree to extra-legal 'cessions' of land, to the same effect. In any case, the confiscations via 'cessions' involved clear breaches of the Treaty.

Confiscation was originally advocated as a way of ensuring peace and security, by military settlement, and of paying for the war, by selling off surplus confiscated land. Initially, it was proposed to confiscate only limited areas in pursuit of these objectives, but the extent of the confiscations grew, and the reasons for confiscation multiplied as well. It was a logical extension of the original proposal to argue that large scale confiscation was a necessary requirement if the Crown authority was to be extended over, and accepted by, Maori everywhere. Then confiscation became a way of effecting a tenurial and social reform, by obliging Maori to accept individualised Crown grants in place of customary tribal titles. This also required very extensive confiscations. Provincial rivalries, and private advantage, also influenced the way in which the confiscations were implemented.[121]

A key element in all of the confiscation legislation and proceedings was the way in which Maori were divided into either loyal or rebel categories, at the Government's discretion. In effect, rebels were those who could not prove to the Crown's satisfaction that they were loyal, and the word could thus mean those who had simply resisted the Crown's aggressive and illegal acts, and those – like Te Kooti – who had more actively engaged the Crown's forces. But it could also mean the relatives, hapu or tribe of anyone who was not loyal as well. In Taranaki, the Waikato and elsewhere, it meant primarily supporters of the Maori King. At Opotiki, Hawke's Bay and along the East Coast generally, it often meant supporters of Pai Marire. In some places, it seems that it simply meant people who owned land the Government wanted. Very few of the many who were defined as rebels during the 1860s were, in the strict sense of the word, rebels, and the word has become, for historians, a convenient way of identifying Maori who, for one reason or another, were the subject of confiscation proceedings. By the same token, loyal did not necessarily mean unqualified support for the Crown; indeed, it seldom seems to have done so. Nor, in any event, did loyalty, however defined, confer immunity from confiscation.

The early idea was that confiscation would be a mild form of punishment after lawful proceedings; in Taranaki and some other places the extent of the confiscations was excessive to the point of vindictiveness. Along the East Coast there seems

120. *The Taranaki Report,* pp 128ff

121. H Mead and J Gardiner, 'Ethnography of the Ngati Awa Experience of Raupatu', Wai 46, ROD, A18, p 107; O'Malley, 'East Coast Confiscation Legislation', pp 63ff

to have been, even by the standards of the day, little real excuse for the confiscations that occurred. Nor is there any sound basis for distinguishing between the East Coast raupatu and the others in Treaty terms, simply because they were carried out under different legislation and involved (at Wairoa and Poverty Bay) an act of cession by the tribes. In both cases threats were made, and a great deal of pressure was brought to bear. The keeping prisoner, in the Chathams, of Te Kooti and other Pai Marire from the Wairoa and Poverty Bay while the Government pressed for cession of land was to prove utterly disastrous to the district. Maori efforts to cooperate with the Government by agreeing to the cession after Te Kooti's escape and attacks were ill-rewarded. The confusion over the return of most of the ceded land (as in other confiscation areas) led to on-going discontent and demoralisation. It seems certain that this contributed to the sales of lands in the 1880s. Again, in this respect there is no essential difference between the 'cessions' and the 'confiscations' although it is true that the actual area retained by the Government on the East Coast was much smaller than in Taranaki, the Waikato and Bay of Plenty.

6.15 SUMMARY OF THE RAUPATU

A numerical summary of the raupatu follows. Bear in mind that precise acreages were often not determined at the time, and have sometimes remained in dispute to the present day. Some figures have had to be based on partial returns of one kind or another. Where alternative calculations are possible, they have been provided. If compensatory payments were made pursuant to the recommendations of the Sim or any other commissions, this fact has been noted. An attempt has also been made to identify the amount of returned land that was alienated within a short period of its return.

Waikato*	
Proclaimed:	1,202,172 acres
Retained by Crown:	887,808 acres†
Returned:	314,364 acres
Compensation:	£22,987‡ Waikato–Maniapoto Claims Settlement Act 1946; Waikato Raupatu Claims Settlement Act 1995

* AJHR, 1928, G-7, p 17

† The Sim commission thought that deductions would eventually have to be made to this figure for an area of 13,974 acres that was before the Native Land Court in 1928 and also to represent the £22,987 that had already been paid in compensation: AJHR, 1928, G-7, p 17.

‡ Reported by the Sim commission as having been previously paid: AJHR, 1928, G-7, p 17. This was possibly compensation made by the Compensation Court.

Taranaki	
Proclaimed:	1,199,622 acres*
Retained by Crown:	984,947 acres†
Returned:	214,675 acres‡
Re-acquired by lease (in 1912):	138,510 acres§
Re-acquired by purchase (Crown and private by 1974):	141,394 acres¶
Left by 1974:	81,299 acres|
Compensation:	Taranaki Maori Claims Settlement Act 1944

* Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wellington, GP Publications, 1996, p 107

† Includes all land acquired by purchase or confiscation. Proclaimed area less area returned by West Coast Commission.

‡ Land returned by West Coast Commission: *The Taranaki Report,* p 12. This may need to be adjusted upwards to include lands reserved from blocks said to have been purchased. The Sim commission reported that 256,000 acres were returned: AJHR, 1928, G-7, p 11.

§ This was the land that while owned by Maori was under the control of the Public Trustee and was leased to Europeans. Market rents were not charged, and Maori owners consequently received a much reduced benefit. Reacquired by lease appears to be a substantially accurate description of the status of the land in question: *The Taranaki Report,* p 12.

¶ *The Taranaki Report,* p 286

| *The Taranaki Report,* p 286. This total represents the balance of the reserves made by the West Coast Commission and the residual of the lands reserved from purchased blocks.

Tauranga*	
Proclaimed:	290,000 acres
Compulsory sale:	93,188 acres†
Confiscated:	196,812 acres
Retained by Crown:	49,750 acres
Returned:	147,062 acres‡
Re-acquired by purchase (private, by 1886):	49,243 acres§
Re-acquired by purchase (Crown, by 1886):	4957 acres¶

Tauranga*	
Left by 1908:	42,970 acres|
Compensation:	Tauranga Moana Trust Board Act 1981

* AJHR, 1928, G-7, p 19
† Stokes, 'Te Raupatu o Tauranga Moana', p 146; O'Malley and Ward, p 41
‡ AJHR, 1886, G-10, p 1; O'Malley and Ward, p 41
§ AJHR, 1886, G-10, p 1
¶ Ibid, p 7
\| O'Malley and Ward, p 91

Eastern Bay of Plenty–Opotiki*	
Proclaimed:	448,000 acres
Retained by Crown:	211,060 acres
Returned:	230,600 acres
European claims:	6340 acres

* AJHR, 1928, G-7, p 21

Eastern Bay of Plenty–Opotiki (Whakatohea)	
Rohe:	491,000 acres*
Confiscated:	173,000 acres†
Retained by Crown:	151,000 acres
Returned:	22,000 acres
Left by 1908 (returned):	20,290 acres‡
Left by 1908 (other):	15,159 acres§
Total left by 1908:	35,449 acres¶
Compensation:	Finance Act (No 2) 1946

* AJHR, 1928, G-7, p 21
† AJHR, 1921, G-5, p 27
‡ AJHR, 1908, G-1M, p 1
§ The Stout–Ngata commission reported a total holding for Whakatohea, including the 20,290-acre Opape reserve, of 35,449 acres. Other lands held apparently totalled 11,959 acres, leaving a shortfall of some 3200 acres, if the total holding of 35,449 was correct.
¶ AJHR, 1908, G-1M, p 1; 1921, G-5, p 27

Eastern Bay of Plenty–Opotiki (Ngati Awa)			
Rohe:	107,120 acres*	Rohe:	194,120 acres†
Confiscated:	107,120 acres	Confiscated:	194,120 acres†
Retained by Crown:	29,250 acres	Retained by Crown:	29,250 acres†
		Returned to Arawa:	87,000 acres†
Returned:	50,321 acres	Returned:	50,321 acres†
Granted:	27,549 acres	Granted:	27,549 acres†

* AJHR, 1928, G-7, p 21

† Alternative figures counting the disputed 87,000 acres as Ngati Awa land.

Hawke's Bay (Mohaka–Waikare)	
Proclaimed:	270,000 acres*
Previous Crown purchases:	18,156 acres†
Retained:	52,050 acres‡
Returned:	199,794 acres
Re-acquired by purchase (Crown by 1931):	92,735 acres§
Left (by 1931):	107,059 acres

* D Cowie, *Hawke's Bay*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), 1996, p 101. One contemporary estimate was 340,500 acres: see AJHR, 1871, C-4, p 2.

† J Hippolite, 'Raupatu in Hawke's Bay', p 46. Boast says that a block called Mangaharuru, area unknown, had also been previously acquired: Boast, 'Esk Forest Claim', doc J1, p 2.

‡ Cowie, p 112. Boast, p 2, gives 45,623 acres.

§ Boast, p 45

Hawke's Bay (Wairoa)	
Cession block:	250,000 acres*
Retained by Crown:	42,738 acres†
Returned:	157,000 acres‡
Re-acquired by purchase:	146,080 acres§
Compensation:	Section 29 of the Maori Purposes Act 1949

* AJHR, 1871, C-4, p 2
† Hippolite, *Wairoa,* pp 37, 39
‡ Ibid, p 42
§ Ibid, p 44

Poverty Bay*	
Cession block:	1,000,000 acres†
Retained by Crown:	56,000 acres‡
European claims:	1200 acres§
Returned:	780,000 acres
Compensation:	Section 58 of the Maori Purposes Act 1950¶

* V O'Malley, 'The East Coast Confiscation Legislation and its Implementation', report commissioned by the Crown Forestry Rental Trust, 1994
† A rough estimate. A tally of the lands retained or returned gives 837,200 acres.
‡ O'Malley, p 168
§ Ibid, p 128
¶ Ibid, p 171

CHAPTER 7

PURCHASES UNDER THE NATIVE LAND ACTS, 1865–99

7.1 Proposals for a Land Court

Proposals for the adjudication of customary Maori title before the purchase of the land had been considered from the early years of the colony. George Clarke's 1843 proposal to have the Protectors work with the chiefs of each district to make a *Domesday Book* of Maori tribal holdings is perhaps the first such proposal (other than the general instructions to demarcate Maori land given in the Colonial Office instructions to Governors).

The 1846 Constitution drafted under Earl Grey proposed that land actually 'occupied and used' by Maori would be determined and registered in their title, the remainder being regarded as Crown demesne. Earl Grey's instructions to Governor Grey accompanying the constitution included:

> The Protector of Aborigines . . . shall . . . transmit to the Governor a statement of the extent (as nearly as can be ascertained) and of the locality of all the lands . . . to which any such Natives, either as tribes or individuals, claim either a proprietary or a possessory title, which claim shall forthwith be provisionally registered. [Land not so registered would become common land]. A land court shall be holden in each [district] for investigating and deciding on the accuracy and validity of such registrations; which court shall be competent to decide on the accuracy and validity thereof, both as between the claimant on the one hand, and us in the right of our Crown on the other hand, and as between different claimants asserting opposite and incompatible titles to the same lands.[1]

It is of course well known that Governor Grey did not implement that section of the Constitution but proceeded to buy Maori interests in his blanket purchases, proposing to issue Crown Grants only over the land reserved.

Largely because of the confusion and disputation arising from Governor Grey's and McLean's purchases, the question of the need for such an investigation of Maori title prior to purchase was raised again by Governor Browne before the 1856 board of inquiry, in the following form:

1. BPP, vol 5, p 84

> Can Crown titles be given to Maoris for land (not previously transferred to the Crown), with or without a restriction that it cannot be sold or let to an European until after the Grant has been in possession of the Native proprietor for a given term of years?[2]

Browne in fact favoured Crown granting lands to Maori with some restriction on alienability but the question of determining Maori title was linked to the possibility of Maori selling or leasing directly to settlers – a principle which settlers and many Maori themselves had sought since 1840, and which had been permitted (in respect of sale) in FitzRoy's waiver of pre-emption, and for which settlers were again beginning to press through their Parliament.

The board's main conclusions on the question were:

> 29. Before a Grant can be issued to a Native, it would be necessary that the Native title to the piece of land should, as a preliminary step, be transferred to the Crown; and in order to prevent any claims being raised to the land, after it was granted, the same forms should be gone through as if the Native title were about to be extinguished by a sale to the Crown for the purposes of resale to Europeans.
>
> 30. To give clear and undisputed title to individual Natives, would require mutual concessions on the part of the Natives themselves, and the whole of the claimants to the land should be ascertained and be made parties to the transaction, and sign the transfer to the Crown:—
> there would be no danger of any after-claims.
>
> . . . . .
>
> 32. With respect to the nature of the Grant and to whether it should have a restriction preventing the sale of it within a certain number of years:—
> the Board is of opinion that it should be similar in effect to that issued to Europeans in every respect as no other form would be appreciated. Their strong attachment to land and the importance with which they view what is requisite to supply their wants would prevent them from parting with it, so as to leave themselves destitute.[3]

The board also recommended (para 54) that assistant commissioners be appointed to 'conveniently sized districts', to build up a sketch or summary of the boundaries of Maori claims, these sketches and lists of names to be sent to the chief commissioner's office. 'In this way a complete registry of native lands would be compiled.' This well intentioned but somewhat impracticable advice was not put into effect.

The board rebutted the assertion that Maori were discontented with Crown pre-emption, arguing that, with the exception of a few in the vicinity of Auckland, they viewed the law as a necessary restraint on the settlers and 'a protection to themselves against the too general and indiscriminate sale of their lands, as well as a means of preventing confusion and disputes'.[4]

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2. 'Report of the Board of Inquiry into Native Affairs, 1856', BPP, vol 10, p 509
3. Ibid, pp 476–477
4. Ibid, p 513

The board rejected a proposal for the Government to act as agent for the Maori, selling the land and giving them the whole of the proceeds, less expenses. They predicted (rightly in view of Maori responses to eventual 1886 and 1900 legislation) that Maori would be very reluctant to let the land go out of their own control, since they would not know the eventual amount they should expect to receive and would be very suspicious of the distributions of the price paid even if in fact it was much higher than they had been getting. (Mr W C Daldy, dissented from this recommendation, saying that if Maori vendors were permitted to nominate an upset price for the land they would be satisfied).[5]

Seven Maori gave opinions on the questions put to the board but it is difficult to know how well issues were discussed and therefore how genuine was the consultation. Their opinions were divided on many issues. Most Maori and most settlers consulted were of the view that the widespread issuance of Crown Grants before Crown purchases was desirable but not practicable.

The settler General Assembly of 1858, without any Maori representation, passed a Native Territorial Rights Bill which envisaged the determination of land boundaries by District Circuit Court judges and Maori juries and the award of Crown Grants in individual title over 50,000 acres per year (intended to be the land near towns). These would be sold (but not leased) directly to settlers, subject to a tax of 10 shillings an acre on the resale value of the land). Governor Browne objected to various features of the Act, but most especially to the Ministers' encroachment on his control of Maori policy. The Bill was disallowed in London.

Browne then developed his own proposal for a Native Council to include protectors of Maori interests such as Bishop Selwyn and Chief Justice Martin, to purchase large areas of Maori land, return much of it to Maori on inalienable title, reserve some for a religious and educational endowment, and sell the remainder. The settlers lobbied in London to defeat this proposal. No evidence is avaiable to indicate how far Maori opinion was consulted on either of these two proposals.

In the aftermath of the Waitara disaster much criticism was levelled, both in New Zealand and in London, at the Government's failure to provide a due process for determining competing or overlapping Maori claims to land.

At the Kohimarama Conference assembled by Browne and McLean in 1860, the Governor proposed that differences between tribes might be referred to a committee of disinterested and influential chiefs selected by a conference such as the one then being held.[6] Maori leaders at the conference were certainly interested in getting clearer titles to land and in dealing directly with settlers. Mohi Te Awa-a-te-Ngu of lower Waikato complained that 'you keep the laws and do not allow me to share in them . . . I desired to let (retetia) my land at Te Wharau. You said "No"'.[7] Hukiki of

5. Ibid, pp 38–45, pp 477–478
6. Minutes of Kohimarama Conference, 18 July 1860, AJHR, 1860, E9, p 10
7. *Te Karere Maori,* 3 August 1860, pp 28–29, cited Bill Dacker, Michael Reilly and Leo Watson, 'Te Mamae me te Taumaha: A Report on Maori Representation and the Authority of Maori Bodies', Waitangi Tribunal, Rangahaua Whanui Series unpublished draft, 1997, p 30

Ngati Raukawa (Otaki) was interested in Crown grants as a protection against the chiefs:

> My name is Hukiki, the brand on my cattle is HU, but the land has not been branded. According to my opinion the land should be marked. Because the chiefs are grasping at great quantities of land, leaving none for the poorer people.[8]

Parakaia te Pouepa (Ngati Raukawa) said:

> It is wrong that a number should interfere and try to hold back the land of one person; it is also wrong that a number should try to force the desire of the individual owner. It is here that the fault is seen on our side. The fault on the side of the Government is, that they will not listen to our word respecting holding land . . . The payment is not given to the right owner of the land.[9]

Tamehana te Rauparaha (Ngatitoa) also supported direct leasing to settlers so that Maori could pay for churches, mills, medical attendance, expenses connected with the Maori towns (Otaki being a model township), and roads 'that they may be like the roads of the Pakeha'. A Ngati Whatua spokesman said thoughtfully:

> Let not the lands be bought carelessly, but let them be surveyed by the surveyors of the Government. Let the lands be advertised for three months before purchasing them . . . and let the sellers themselves point out the boundaries . . . you, the Governor, should give us a paper authorising the sale of those lands. When we receive the paper we should be at liberty to sell that land as we please; that we may be on the same footing as the Pakehas, having one law for the guidance of Maories and Pakehas.[10]

Kohimarama was a Government-run conference and *Te Karere* was a Government paper, but the chiefs' comments probably reflect their desire, evident since 1840, to deal with the land as they saw fit.

Nothing concrete came of the Kohimarama discussions and there is no evidence of systematic canvassing of Maori opinions over the next year or so. When Browne wrote to the Supreme Court judges for their view, they replied that the Supreme Court was not an appropriate place for resolving questions of Maori custom, but suggested a 'Land Jury' selected by lot or otherwise for the chiefs of defined districts, presided over by a European officer or commissioner, conversant in Maori, to guide the proceedings and pose appropriate questions and record the decisions of the group. O'Malley comments that 'This was remarkably close to what many Maori consistently advocated in the following decades.'[11] It was also broadly the shape of the court eventually created in 1862. Browne, however, did not act on the suggestion; he doubted the capacity of a Maori jury to decide impartially, and

8. *Te Karere Maori*, 31 July 1860, p 38 (cited in Dacker et al, p 31)
9. Ibid, 3 August 1860, p 40 (cited in Dacker et al, p 32)
10. Ibid, 30 November 1860, pp 29–30 (cited in Dacker et al, pp 32 and 35)
11. V O'Malley, 'Native Committees', report commissioned by the Crown Forestry Rental Trust, 1996, pp 12–13

proposed a European commissioner with assessors (the model eventually adopted in the Native Land Act 1865).

7.2 THE NATIVE LANDS ACT 1862

With the replacement of Governor Browne by Sir George Grey (for a second term) the scene was set for a new approach to the land question. Once again it was London which indicated the policy to be followed. The Duke of Newcastle instructed Grey, on 5 June 1861, to examine whether the system of negotiation between the agents of the Government and the Maori 'though in conformity with the Treaty of Waitangi and for many years successful' may not require to be modified or superseded:

> Her Majesty's Government will accordingly be willing to assent to any prudent plan for the individualization of Native title and for direct purchase under proper safeguards of Native lands by individual settlers which the New Zealand Parliament may wish to adopt.[12]

The settler lobbyists of 1858 to 1860, like those of 1840 to 1846, had found their supporters in the British Government.

The Fox Ministry, which took office in mid-1861, collaborated with Grey in his plan for 'New Institutions', namely officially recognised District Runanga, to be established throughout the country, apparently in a bid to satisfy the Maori desire to participate in the making and enforcement of law, but also to further Grey's strategy of trying to outbid or undermine the King movement. In support of his proposal Fox quoted one of his own speeches of 1860:

> We must engage them in the work themselves, and let it proceed from them. To this end we look to the Runanga, or Native council, as the point d'appui to which to attach the machinery of self-Government and by which to connect them with our own institutions. The Native Office shudders at the Runanga and sees nothing but evil in it. We see nothing but good, provided, as the Honourable Member for Napier says, we make the proper use of it. The Runanga contains the element of local self-Government in itself. It is the Parliament, the municipal council, the substitute for the Press; and by its machinery the Native Mind can be stirred in a few days from end to end of the Island. We have no choice but to use it, it exists as a fact, it is part of the very existence of the Maori – we can no more put it down than we can stay the advancing waves of the rising tide; and, if we do not use it for good purposes, it will assuredly be used against us for bad.[13]

Land was to be one of the main concerns of the official Runanga. Grey had prepared the policy in October 1861 and announced it in the following terms in his first visit to the Waikato in December 1861:

12. Duke of Newcastle to Grey, 5 June 1861, NZPD, 1862, p 610
13. Ibid, p 422

> I propose, therefore, now, that, wherever people live in considerable numbers, the Island shall be divided into districts, and Runangas appointed to make laws for them, and to determine if roads are to be made, and what share of the expenses the people have to pay. They will also determine the ownership and boundaries of land, and if it may be sold, and by whom.[14]

Before taking office, the Fox Ministry admitted that its policy was that when a title had been ascertained 'the Natives should then be left to hold, sell, lease, or otherwise dispose of it' as they saw fit.[15] The Runanga were therefore duly empowered under the Native Districts Regulation Act 1858 to permit the system to start.

The Runanga system – at least those that were formed – did show some promise of involving Maori in day-to-day problems about stock trespass, fencing and the like but proved very reluctant to touch land issues, even in respect of the Hawke's Bay run holders.[16]

In the 1862 Assembly Fox introduced a Native Lands Bill (No 1) which would have confirmed the power of the Runanga, under the Governor in Council to determine land title and recommend direct sale to settlers at the rate of one farm to each settler (subject to residence requirements and with freehold to come only after 10 years' occupancy); or to lease land. The restrictions were intended to curb speculators but were so unpopular with settlers that Fox resigned, knowing he could not carry the Bill.

The Domett Ministry, with F D Bell as Native Minister, introduced a new Native Lands Bill. Among the principal points of the Bill (eventually the Act) were:

(a) The preamble, having recited article 2 of the English language version of the Treaty, stated the objects of the Bill:

> And whereas it would greatly promote the peaceful settlement of the Colony and the advancement and civilization of the Natives if their rights to land were ascertained defined and declared and if the ownership of such lands when so ascertained defined and declared were assimilated as nearly as possible to the ownership of land according to British law . . .

(b) Clause 4 provided that the Governor could commission a court or courts 'for the purpose of ascertaining and declaring who according to Native Custom are the proprietors of any Native Lands and the estate or interest held by them therein'. Under section 12 the Governor could issue a certificate of title for the land. The principal member of the court would be a European; nothing was stated as to the membership but it was clearly intended that they would be Maori, in accord with previous proposals.

(c) The court was to ascertain and define, for the Governor's confirmation, the 'right, title, estate or interest' according to Native Custom of a 'Tribe Community or Individuals'.

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14. Duke of Newcastle to Grey, 5 June 1861, NZPD, 1862, p 610
15. Ibid, pp 609–610
16. Alan Ward, *A Show of Justice*, Auckland University Press, Auckland, 1995 (4th ed), ch 9

(d) Before the issuance of a certificate of title, the Governor, by section 9, could reserve some of the land from sale and 'as effectually as if such lands had been ceded to Her Majesty' grant the land in trust or exchange any of the incidents of title for new estates or interests, or exchange, mortgage or lease it. He could also make the reserves inalienable.
(e) No certificate was to be issued without a certified survey plan *and* the boundaries of the land 'distinctly marked out on the ground'. Maori could request surveys payable by loans from the fund for Native Purposes.
(f) The person or persons named in the certificate of title could sell or lease or exchange the land to any persons whomsoever.
(g) The Governor could exchange a certificate of title for a Crown grant.
(h) Purchasers would pay 10 percent tax to the Crown of the purchase price on the first sale of the land and 4 percent thereafter.
(i) The tribal community named on a certificate of title could request a partition of the land among the individual owners and have new certificates issued.
(j) The Governor would make regulations and plans for the settlement of the land by 'Partition Grant Lease Appropriation or Disposal' or by licence to work minerals, cut timber or depasture stock.
(k) Up to 5 percent of the land purchased could be reserved for public roads.
(l) The Manawatu block was exempted from the Act and the pending Crown purchase of it was to be completed. The Crown could also continue to purchase other land as before.

The 1862 Act has commonly been dismissed by historians because it had barely been brought into effect, in 1864, when it was replaced by the 1865 Act. Nevertheless it is of profound importance because the principles it introduced continued to be applied and several of them have major implications in Treaty terms:

(a) The Act finally recognised that Maori were to be owners, proprietors, of their customary interests in land as defined in certificates of title. The form of recognition was a two-edged sword, however, for section 3 provided that nothing in the Act would make Maori land rights cognisable in a court of law *until* they had been defined in a certificate of title. Many speakers in debate averred that the clear recognition of their customary rights would restore the confidence of Maori in the good intentions of the Government. Perhaps in less tense times it might have contributed towards that end, and perhaps it did in the Kaipara district where it was applied in 1864. But the Act clearly diminished the status of customary rights in practice and marshalled Maori into the Native Land Court, and into the Crown granting procedures, if they had a need to defend or define their rights. A draft clause declaring *customary* lands to be the 'absolute' property of Maori owners was struck out.[17]

17. Bell to Grey, 5 September 1862, Grey MS, Auckland Public Library (cited in Ward, p 153)

(b) With Crown pre-emption set aside, Maori now, in theory, had access to the market value of their land, whether by lease or sale. But there was no provision for public auction or tender and, as Sir William Martin subsequently contended, Maori could not be sure whether the offers they were receiving were full market value.

(c) The procedures for determining title and for subsequently managing the land envisaged considerable involvement of Maori; the Bill in fact arose out of the background of the official Runanga. But the powers of the Governor under section 9 to manage reserved land intruded heavily into Maori rangatiratanga (see section above).

(d) Although titles could be given to tribes and communities the Bill facilitated individualisation of title and individual dealings.

(e) The requirement not only to survey but to mark on the land the boundaries described in the certificate of title appeared to give the possibility of creating genuine individual farms but the process later developed into a mere listing of names on a title. Even in 1862, Henry Sewell, a former Attorney-General, felt that the Act would simply 'to a great extent convert the Native Lands into transferrable paper'.[18] This, in Treaty terms, is the fundamentally destructive aspect of the Native Land Acts.

(f) The removal of any restriction on direct dealing and on the amount of land settlers could buy, and the provision that prior dealings were only *void* (not illegal as in the 1846 Ordinance) opened the way to 'indiscriminate speculation and jobbery on a grand scale'. As one speaker on the Legislative Council put it:

> Much has been said about the teasing which the Natives had formerly suffered by the land purchasers of the Government; but this teasing was nothing to the pressure that would now be brought to bear on them. If they had been teased before, they would now be plagued by land sharks; if they had been chastised by whips they would now be tormented by scorpions.[19]

Another councillor, Crawford, said presciently:

> I believe this measure will prove the downfall of the Native race. The Natives, having no means of investment, have hitherto rapidly dissipated the funds which they have received for lands; and I see every reason to suppose that, however large the sums they may now receive, they will continue to squander their capital, and in a short year or two be as poor as ever.[20]

Crawford proposed instead the imposition of a moderate 'quit-rent' or tax on the land, which would teach Maori habits of property management. Nothing came of the suggestion and it is indeed difficult to see that it would

18. Sewell Journal, 3 August 1862
19. Stokes, NZPD, 1862, p 717
20. Crawford, NZPD, 1862, p 716

by itself have promoted development, any more than local body rates did later.

(g) There is no evidence of systematic consultation with Maori over the shift to direct purchase. Certainly in 1840 they had not all welcomed the imposition of Crown pre-emption or understood it as a Crown monopoly. Their complaints about it contributed very largely to FitzRoy's waiver of pre-emption in 1844. The restoration of pre-emption under Grey seemed to be accepted, but there was a proliferation of informal direct leasing. The 1856 board of inquiry, which included seven leading Maori, was of the view that Maori recognised its protective aspects and preferred it to direct purchase. Yet some speakers at the Kohimarama conference expressed an aspiration for direct dealing, especially leasing, and the unofficial runanga in Hawke's Bay and elsewhere had certainly been leasing. It is possible that Fox's abortive Native Lands Bill in 1862 may have owed something to discussions by district staff with the official Runanga, and reflected a strong, though not unanimous, interest among Maori in direct dealing, the form of the bill finally passed was certainly not discussed with Maori. They were not given opportunity to discuss what safeguards they might wish to see introduced in a direct purchase situation. This was a major departure from Treaty obligations and Grey knew it. He recommended acceptance of the law by the Colonial Office only because the Governor retained certain powers under it, notably in respect of reserved land..

(h) The provision for reserving land was meant to be a cushion against creating Maori landlessness but there was nothing to *require* that a percentage of land in a certificate of title should be reserved either for Maori occupation or in trust for Maori purposes. An important protection which had often been discussed, and even partly provided for under FitzRoy, was abandoned. Maori generally were left exposed to the full pressure of the market place, whereas the Crown's Treaty obligation of active protection implies that the requirement of ample reserves or endowment trusts should have been introduced, almost regardless of Maori resentment of Crown interference.

(i) Some members of Parliament were very frank about the underlying objectives of the Act. They were tired of not being able to settle titles and secure purchases; Mahurangi Block had allegedly been paid for 19 times; in Hawke's Bay and Wairarapa claims were allegedly settled 'over and over again' and lessees still had no security at all.[21] Mr Gillies thought the Act would 'give a mighty impulse to colonization and would open the way for it to roll over the length and breadth of the Northern Island by removing Native distrust'.[22] Two military men in the Legislative Council put it rather differently. Colonel Russell said, 'it was unpleasant to be living, as we are at present, in a state of sufferance'; if for no other reason he would support

21. Bell, NZPD, 1862, p 614
22. Gillies, NZPD, 1862, p 633

the Bill 'as it would enable us, in time to become masters of the country'.[23] Colonel Kenny said, 'It would put the Europeans in possession of Native lands – in fact make us masters of the country, which was the object desired'.[24] These gentlemen's frankness makes clear the connection between land titles, land purchase and the larger objectives of British colonisation in New Zealand. Their concern was explicitly to diminish Maori rangatiratanga over the bulk of the Maori lands, not to enhance or support it. The politicians ulterior motives suggest that in their protestations about reassuring Maori of their land rights they were not acting with 'utmost good faith'.

The Act reserved the rights of the Crown to continue buying customary land, which it did, as discussed above, while the Act awaited Royal assent. In 1864 John Rogan, resident Magistrate at Kaipara, did convene a panel of chiefs to hear a dispute under the Act, apparently to the satisfaction of all concerned. In January 1865, however, F D Fenton was appointed chief judge, both of the Native Land Court and of the Compensation Courts set up under the New Zealand Settlements Act 1863 to apportion confiscated land, and began to remodel the court.

7.3 THE NATIVE RIGHTS ACT 1865

The Native Rights Act 1865 was the work of J E FitzGerald, former Superintendent of Canterbury and Native Minister from August to October 1865. FitzGerald had been celebrated for a series of resolutions in the 1862 Parliament offering Maori equality before the law and (vainly) proposing to introduce Maori representation in Parliament, on the Provincial Councils and in the courts, and to give Maori Runanga, and the Kingitanga, equal powers and functions with Provincial Councils. The preamble of his Native Rights Act deemed every person 'of the Maori race' to be a 'natural-born British subject of Her Majesty to all intents and purposes whatsoever'. It thus in effect carried into statute law the Third Article of the Treaty and moved a step closer to Maori political enfranchisement.

The principal purpose of the Native Rights Act, however, was to remove doubts as to whether customary property rights could be adjudicated in the Supreme Court. The Act provided that they could, but FitzGerald had to concede that the Supreme Court was not a body well equipped to deal with customary issues. Section 5 therefore provided that where they arose they would be referred to the Native Land Court, whose findings on fact or custom would be conclusive.[25]

23. Russell, NZPD, 1862, p 716
24. Kenny, NZPD, 1862, p 716
25. Ward, pp 184–185

7.4 THE NATIVE LANDS ACT 1865

The Native Lands Act 1865, and the Native Land Court's proceedings under it, has been the subject of repeated analyses, both by Parliamentary commissions and committees and by academics. It would be tedious to go over all the ground again and readers are referred (among recent discussions) to the report by John L Hutton for the Rangahaua Whanui programme entitled 'The Interpretation of Customary Maori Land Tenure by the Native (Maori) Land Court', 1996; Dr David Williams's report 'The Land-Taking Court; Te Kooti Tango Whenua' for the Crown Forestry Rental Trust; and a comprehensive article by Dr Bryan Gilling, 'Engine of Destruction? An Introduction to the History of the Maori Land Court' (1994) VUWLR 24. Contemporary analyses of the problems arising from the Court and its operations are also to be found in the report of the Hawke's Bay Land Commission (AJHR, 1873, G-7), the parliamentary debate on the Native Land Act 1873, the 1885 and 1886 parliamentary debates on John Ballance's land Bills, and the Rees–Carroll commission on native land laws, 1890 and 1891 (AJHR, 1891, G-1.) The Waitangi Tribunal has discussed aspects of the land laws, and their application, in *The Pouakani Report* and the *Te Roroa Report*, among others. Among recent submissions for Tribunal claims, 'The Ten-Owner Rule' by Dr Grant Phillipson (Wai 64 ROD, doc K13) and Dr Fergus Sinclair 'Some Thoughts on the Origin and Application of the Ten Owner Rule' (Wai 64 ROD, doc L3) are very useful.

These analyses concur in showing that in many ways the Native Lands Acts and the Native Land Courts had a disastrous impact upon the Maori people. Moreover, this has been known officially for over 100 years. The issues then are how this came about, what was done to remedy it, and was it enough? These questions assume a sharper focus in the light of modern Treaty principles and Treaty jurisprudence.

I have published earlier on the subject, in *A Show of Justice*, 1974, and have seen no reason since to change my opinions despite increasingly close acquaintance with the subject.

To begin with, the preamble to the 1865 Act shows a firming up of the purposes of the 1862 Act. Having provided for the determination of 'owners' of land according to Maori 'proprietary customs', the Act was 'to encourage the extinction of such proprietary customs and to provide for the conversion of such modes of ownership into titles derived from the Crown'. Thus section 48 barred all other interests in the land except those interests named in the title, in favour of persons named in the title. The titles were fee simple titles, fully negotiable, and, as the 1865 Act repealed the Native Land Purchase Ordinance 1846, private purchasers were able to negotiate freely for them. The court had a discretion to impose restrictions on alienation but normally did not use it. As is clear from the parliamentary debates, the purpose of the Act was to enable the land to be alienated.

The constitution of the court changed from an essentially Maori panel under a European chairman to a court comprising a European judge and two (later one) Maori assessors – a quite formal court with power to receive 'such evidence as it

shall think fit' (section 23). It could make its own rules. A Maori jury was envisaged and could be empanelled at the discretion of the court at the request of any interested party. This jury system was largely unknown and almost never used. One effort to empanel a jury from among the Maori attending at court, resulted in so many challenges that only five were eventually selected. Then the debate between counsel was not translated into Maori. Maori commentators at T M Haultain's 1871 committee of inquiry thought the jury system would only work if a number of chiefs from outside the district where the land was situated could be selected.[26]

Section 23 authorised the court to issue certificates of title specifying the names 'of the persons or of the tribe' entered as owners of the land. But only ten persons could be named in the certificate and if the land did not exceed 5000 acres a certificate could not be made in favour of a tribe. The intention apparently was to facilitate or compel subdivisions into 5000-acres blocks with no more than 10 owners in each. That was not how things worked in practice. Instead a maximum of 10 owners' names were inserted into all blocks, regardless of whether they were more than 5000 acres. The 10 had the legal authority of absolute owners, fully empowered to sell the land. They were, moreover, regarded as joint tenants, not tenants-in-common, that is when one died his interests did not pass to his heirs but to the co-owners. By these provisions many customary owners, perhaps hundreds in each instance, were shut out of the titles of many blocks issued by the courts. (The reasons for this very damaging development are discussed below.)

This tendency to cut interested parties out of the titles was compounded by Fenton's refusal to allow evidence not actually presented in court to influence the court's judgment. Because of Fenton's rigid rule, claimants had to present their evidence in court; even where the judges knew of other Maori right holders who could be presumed to have seen the notice in the *Kahiti* of the court sitting but did not attend, these people were not admitted into the titles. It was subsequently revealed in various enquiries that many presumptive owners did not receive notification until after the period allowed for appeals had expired.

More than anything else, this forcing of the customary right-holders into the Native Land Court hearing on the application of any individual claimant (or else see the land awarded to others), and the refusal of the court to seek its own evidence, together with the extinguishment of customary title in favour of fully negotiable freeholds, was highly destructive of the rangatiratanga of the Maori kinship group. The chiefs too, made absolute owners, *by the legislation, not by the court*, were relieved of the trusteeship obligation of rangatira. Through the legislation and judicial process the patrimony of whole groups, the land rights of tens of thousands of Maori which the Crown was obligated by the Treaty to protect, was lost. Fenton was unconcerned by what was happening. He supported the emergence of a class of well-to-do Maori gentry. The power of the ten or fewer absolute owners to sell off their tribal patrimony did not disturb him (although in 1869 he did introduce

26. AJHR, 1871, A-A2, p 26 (TeWheoro and Tuhaere), p 30 (Tautari) and p 35 (Pomare); MA 13/2, NO 71/1153, NA Wellington

legislation to have them declared tenants-in-common, rather than joint tenants). Not only Fenton but few in authority supported J C Richmond's effort in 1866 and 1867 to have the named owners' status defined as trustees; the settlers' dread of the tribal system, their uniform desire to break up Maori 'communism' was the dominant attitude. Moreover, settlers were largely unconcerned at the way Maori were caught up increasingly in indebtedness with Pakeha traders, storekeepers, speculators, lawyers and agents who quite deliberately entangled them in debt and threatened legal action unless the land, or the proceeds of land sales, was given as payment. This travesty was a consequence not of judicial decision as such – the court working in its judicial capacity – but of the statute itself and the kinds of title created, together with the procedural rules authorised by the statute.

The old issue of surveys was solved, very expediently from the settlers' point of view, by the requirement that all applications were to be accompanied by a survey plan and the marking of boundaries on the ground, certified in court by a surveyor. By section 68 costs were chargeable against the land and the Crown Grant could be handed over to the surveyor until the debt was cleared. Dr Gilling has pointed out that the Execution of Judgments Against Real Estate Act 1867, allowed Maori land to be seized via Supreme Court actions. He adds that more generally:

> Surveyors found reimbursement of their legitimate fees could be delayed for months or years if the land remained unsold and they became entrapped themselves, having to sell their claims to moneylenders at a great discount. When unsure of rapid payment, they raised their initial prices accordingly.[27]

Survey in bush country especially could be very expensive and survey costs, in Gilling's view required 'an inordinate acreage of land' to be disposed of to cover the cost.[28] Evidence submitted in the 1891 Royal Commission into the Native Land Laws suggests that it was not uncommon for subdivisional surveys to cost more than the value of the land.[29]

The preamble to the Act also stated the intention of regulating the 'descent' of lands over which the title had been 'converted' by its passage through the court. The intention of the legislators was to prevent the reversion to 'tribal' title. Section 30 therefore authorised succession to be determined 'according to law as nearly as it can be reconciled with Native custom'. This was a considerable discretion and Fenton explained in a memorandum of 1867 how he exercised it:

> The intention of the legislature appears to be that English law shall regulate the succession of real estate among the Maoris, except in a case where the strict adherence to English rules of law would be very repugnant to Native laws and customs. The leaning of the Court will always be to uphold Crown Grants and the rules of law applicable to them, and the Court will decline to consider the particular circumstances under which the Grant was originally obtained, or the equities which have been

27. B Gilling, 'Engine of Destruction?: An Introduction to the History of the Maori Land Court,' 1994, 24 VUWLR, Wellington, p 133
28. Gilling, 'Engine', p 133
29. AJHR, 1891, sess 2, G-1, p 1 (para 13) and p 71 (para 962)

> created, or understood to have been created, at the time thereunder, unless the evidence shall disclose strong reasons for deviating from so obvious and desirable a rule. It would be highly prejudicial to allow the tribal tenure to grow up and affect land that had once been clothed with a lawful title, recognized and understood by the ordinary laws of the country. Instead of subordinating English tenures to Maori customs, it will be the duty of the Court in administering this Act, to cause as rapid an introduction among the Maoris, not only of English tenures, but of the English rules of descent, as can be secured without violently shocking Maori prejudices. In this case we think that the evidence discloses no equities in favour of the tribe and we see no reason to make any interference with the ordinary law excepting in one particular. The Court does not think the descent of the whole estate upon the heir-at-law could be reconciled with Native ideas of justice or Maori custom, and in this respect only the operation of the law will be interfered with. The Court determines in favour of all the children equally.[30]

Fenton was no doubt correct in his appreciation that Maori would not have wanted intestate succession governed by English rules, but the issue arises in Treaty terms, whether they would have preferred some other principle than distribution among all children equally. For by allowing all children to inherit equally, from both parents, regardless of whether they were absent from or resident on the land, that produced the rapid fractionation of the title which has been a feature of Maori tenure since.[31] Fenton probably talked with some of the Maori Assessors before putting in place his rule, but there is no evidence of formal or widespread consultation with Maori in respect of this part of the Act or any other part; it was driven by English purposes and English ideology. Maori rangatiratanga was overridden. On the other hand it should be acknowledged that succession has been a difficult issue throughout Oceania. Traditionally people inherited potential rights to land through either or both parents (or up to four grandparents) but could normally *activate* only the rights of one line at a time by residence on the land and active participation in the group. As people become mobile and leave the village for life in towns or overseas, the traditional residence requirement gets dropped; people, though absent, still cling to their family ties and their land, often through both sides of their parentage, and are very opposed to any suggestion that they should be denied succession to interests in land. They often keep connections through sending money or gifts to family or visiting as frequently as possible, but this is not always practicable and so genealogy alone comes to be emphasised. In so far as Maori have been consulted in the 20th Century they have strongly resisted any proposal for arbitrary limitations of their right to inherit land through either parent, although their interest in the land may have long ceased to be an 'economic' one. This is not to say, however, that discussion might not have been fostered in the 1860s about giving greater *managerial* control of the land to those of the inheritors who lived on or near the land and formed the active membership, as distinct from the absentee membership, of the

30. AJHR, 1886, I-8, p 49
31. 'Fractionation', rather than 'fragmentation' of title is considered to be a more accurate term by Sir Hugh Kawharu, in *Maori Land Tenure*, *Studies of a Changing Institution*, Oxford, Clarendon Press, 1977

group. Even this is problematic but, in a sense, it did eventually come about in part through the block committee elections and meetings of assembled owners from the early twentieth century. Suffice it to say here that Maori were not systematically consulted, let alone encouraged to develop their own systems of managing succession to land. This was a time of British imperialism in full cry and the settlers systematically ignored Maori rights and article 2 of the Treaty. Even their guise of conferring upon Maori full article 3 rights was patently hypocritical; it was hardly consistent with 'the rights and privileges of British subjects' to have one's land and property parcelled about according to the whims of an assembly in which one was not even represented.

7.5 INTERPRETATION OF CUSTOM UNDER THE NATIVE LANDS ACT

Some analyses have been made of the way Fenton and his fellow judges interpreted Maori custom in finding the 'owners' of the land. Even with the best will in the world it could be no easy matter to translate a complex of different kinds of rights in Maori law to arrive at a defined list of owners. Probably, such an outcome should never have been attempted. Modern efforts to define ownership in Oceania tend to give a group name and allow the community itself to determine who is included or excluded from membership. (Examples are the Papua New Guinea Land Groups Act 1975 and awards under the Aboriginal Land Rights Act (Northern Territory) 1974). Even this is fraught with difficulties and litigation commonly arises in whatever local tribunal is empowered to hear such issues. But it is certainly a less drastic interference with custom, and hence with rangatiratanga, than that of the New Zealand legislature in the 1860s.

The 1862 and 1865 Acts both provided for a tribe or community name to be entered but the option was almost never used (in two cases only according to Fenton's somewhat selective memory).[32] Most writers, including Mr John Hutton, writing in the Rangahaua Whanui Series, argue that Fenton did not actually give Maori the option of entering a tribal title, which is quite possible in view of the purposes of the 1865 Act expressed in the preamble, and of Fenton's stated hostility to tribal title.[33] It is also likely, however, that Maori would have had difficulty identifying which 'tribe' they wished to have named in the title. Given that in any block of any great size going through the court more than one hapu would have had substantial interests and others minor interests, choice of a hapu name might well have evoked strong contention. In practice, in the selection of up to 10 owners, it was common to include two or three chiefs from *each* of the owning hapu and perhaps one or more from some of the hapu with lesser interests. This was part of a

32. AJHR, 1891, G-1, p 46 These cases have been identified by Mr John Laurie, University of Auckland Library, as Whakatere (sometimes called Mahurehure) in north Auckland and 'Kukutauaki' in Welllington district

33. John Hutton, 'The Interpretation of Customary Maori Land Tenure by the Native (Maori) Land Court', Waitangi Tribunal Rangahaua Whanui Series unpublished draft, 1996, p 77

typical use of aroha to include groups without strong primary interests but with whom the principal groups wanted to maintain relations. This was but a short step from the way hapu clusters customarily formed around the mana of prominent chiefs, in voluntary associations based on a core of descent. The court's efforts to apportion 'relative interests' were not therefore wholly inappropriate in principle, but the basis on which the court determined relative interests in each case is very problematic indeed. Most serious, and most distorting of custom and rangatiratanga, was the grant of absolute ownership over the land to the named owners, according to the statute.

The above interpretation implies that Maori themselves were, to a large extent, making the decisions with the court acting as umpire and recorder. And this is what happened in many cases. Hutton cites examples from the Hauraki Minute Books of 1866 of how the court adjourned to allow, or indeed to encourage, the intersecting parties to reach agreement outside and return to report their agreement.[34] The practice indeed became a normal court procedure for the next 30 years and can be seen as an opportunity for Maori to make their own title determinations. But for it to produce an equitable result in terms of customary rights and Treaty rights, it would have had to include *all* Maori owners of interests who could reasonably be expected to have assembled. It assumes also an unpressured process by which they debated publicly their various claims of right. The outcome could not have accurately reflected *all* the various kinds of levels of rights which Maori would customarily have recognised and might have discussed; these were all collapsed into a single category of 'owners' named on the title as absolute owners in fee simple, not as trustees. But at least it might have reflected, and no doubt did on many occasions, relatively free Maori adaptations to that outcome, rather than the arbitrariness of the judges and their efforts to interpret custom.

But in many, probably most, cases Maori were *not* free to make such arrangements unhindered. Because prior dealings in land were void, not illegal, under the Act, some or all sections of the Maori claimants had usually long since been approached by speculators and creditors, who frequently supported their faction in court by paying their fees for surveys and other costs. This and the adversarial process invited by Fenton's insistence on taking account only of evidence presented in court, instigated decades of bitter contesting between factions, with much money (or the clearance of much debt) riding on the outcome. For this was a winner-take-all situation, quite the opposite of one which encouraged Maori to respect each other's interests in a spirit of aroha. In this situation distortion of evidence or outright lying became a fine art and judges and Assessors could be fooled or influenced. False or misleading evidence was often exposed by Maori objectors who put forward alternate evidence in many cases, but still it was easier to fool a judge than to fool a Runanga or hui of Maori elders. Gilling gives the example of crucial evidence having been given by Keepa Te Rangihiwinui (Major Kemp) in the 1873 hearing of the Horowhenua block:

34. Hutton, pp 56–61

> He admitted to a later inquiry his perjury without remorse, his reason having been his friendship with a former ally, the wish to advance his take over Ngati Raukawa rivals and the tribe's firm arrangement for all witnesses to tell a unified and predetermined story to that end.[35]

The problem now is that there is no easy way of knowing, for each of the thousands of blocks that went through the court, whether perjury occurred, or even a mere excess of emphasis on one side of the evidence which the judge could not detect. Maori groups may genuinely feel, and they sometimes say, that the court awarded the land to the wrong owners, or insufficient owners. This certainly occurred; number of grave injustices did emerge in re-hearings or in Parliamentary inquiries when the court (or the Government) refused to allow a re-hearing. Various 'washing up' Bills (or Special Powers and Contracts Acts) gave statutory correction to some of the errors. Now, if an entitled hapu was *completely* left out of an award it might be possible to prove an entitlement on surviving oral and written evidence. But if several hapu, all with valid but competing claims of a right, were admitted to the title, and the error consisted only of getting the *proportion* wrong between them, that would be very hard now to detect and correct.

But what of the principles upon which the court awarded title? Fenton made clear his desire to achieve a 'common law' of Maori tenure, that is a set of precedents or a quasi-codification that the judges would apply uniformly. In the first place it is a considerable invasion of Maori rangatiratanga for a Parliament to have launched Pakeha judges onto this course of action, uninvited by Maori and with no systematic process established for consultation with Maori about their own laws. Consultation in a sense did occur in the court proceedings themselves; the minutes are replete with witnesses' statements of what tikanga prevailed in relation to a myriad of issues. The Assessors usually also had to concur in decisions on judicial matters.[36] But the authority to determine the principles lay essentially with Fenton and his fellow judges and, from 1866 and 1867, Fenton began to make seminal decisions (which he later published) intended to be precedents.[37]

Researchers have identified and discussed a number of the key rules which the court enunciated, including the 1840 rule. In the Oakura case in the Compensation Court in 1866, Fenton asserted:

> Having found it absolutely necessary to fix some point in time at which the titles as far as the Court is concerned must be regarded as settled, we have decided at that point in time must be the establishment of the British Government in 1840.[38]

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35. Gilling, 'Engine', p 120
36. The statutory requirement that at least one assessor concur with the court's judgement applied from 1865 to 1873, 1874 to 1882, 1886 to 1894. Otherwise, the court normally required an assessor's presence but not necessarily his concurrence with the judgement (see D Williams, Maori Land Law Manual, CFRT, (not dated) pp 7–9).
37. Fenton evidence, Rees–Carroll commission, AJHR, sess 2, G-1, p 145 (cited in Gilling, 'Engine' pp 125–126)
38. AJHR, 1866, A-13, p 4 (cited in Gilling, 'Engine' p 126)

This meant that some hundreds of absentee claimants to confiscated Taranaki land who had moved south before 1840 and had not returned in the interim and shown 'constructive possession' (as Gilling puts it) were excluded from the titles. The court did, however, recognise *peaceful* changes to land occupation that occurred between 1840 and the time of the court hearing. In subsequent hearings, for example, changes since 1840 in the occupancy of the Rangitikei–Manawatu and Horowhenua blocks were in part recognised. What was not supposed to be recognised were changes 'by force of arms' since 1840 for that would be inconsistent with the formal prohibition of warfare from that date.[39] It is very understandable that such a rule be attempted but there is evidence that it was inconsistently applied, some changes since 1840 being recognised and others not.[40] There are also questions to be asked about force of arms in the Rangitikei and Horowhenua, since Ngati Apa and lower Whanganui under Major Kemp, well armed as kaupapa auxiliaries in the Wars, had moved onto the land with their guns, possibly at Ngati Raukawa's expense when it came to the court hearings.

There is also the serious problem that (as Moriori claimants in the Chatham Islands, and many others, have pointed out) tribes which had been 'conquered' a few years before 1840 were commonly passed over by the court in favour of 'conquerors' who had barely achieved ahi ka let alone ahi ka roa. This emphasis upon conquest, as much as the 1840 rule itself, greatly diminished the rights of people who had been on the land for hundreds of years. It is of course difficult to know what other cut-off date besides 1840 might have been used. Because to go back further, invites a kind of infinite regress where any tribe which had ever paused on the land at any time since Polynesian arrival, could claim an interest. This scarcely accords with custom either, since Maori do have a strong sense of rights having become 'cold', and complications would certainly arise from admitted claims (other than to wahi tapu) where one cannot show a grandparent living on the land. Even so, for the court to have excluded people who left the land within living memory – or indeed were on it only a few years before 1840 – sharply intersected a process which, under custom, would still have been in flux.

The problems with the 1840 rule also involved the courts' concept of the bases of title: discovery and first occupancy; conquest (take raupatu); ancestry (take tupuna); and gift (take tuku) together with ahi ka. Modern commentators, notably Dr Angela Ballara, have shown that the Native Land Court has over-emphasised conquest, commonly presenting it as 'total', with the conquerors allegedly annihilating conquered tribes or totally clearing them out of a district. This was in fact rarely the case; considerable minorities, at least, of the previous occupants usually remained on or near the contested land. Frequently too the newcomers intermarried with them. Dr Ballara even believes that without the marriages the newcomers could not claim 'mana whenua' (which goes with the ancestral right) but only 'mana tangata'.[41] Such a sharp conceptual distinction is perhaps debateable,

39. See minute of T H Smith re the Heretaunga block, Napier MB 48, 1866 (cited in Gilling, 'Engine', p 127) Also Fenton in his Orakei judgement of 1869 (cited in Gilling, 'Engine', p 129, footnote 54)
40. B Gilling, 'The Queen's Sovereignty Must be Vindicated', Wai 64 ROD, doc A14, 1994, p 80

although in other Pacific societies such as New Caledonia, indigenous peoples do indeed accord a primacy to first occupiers, regardless of how many changes follow, because of the ritual association first occupants have with the spirits of the land. In any case modern scholarship and modern assertions of Maori opinion suggest that both the fact and the significance of 'conquest' have been overdone in the Native Land Court proceedings and that marriages between early and later arrivals to an area are at least equally important. Under custom, substantial rights of longstanding occupiers almost certainly survived, in varying degrees, the advent of new military overlords, whose occupation was recent and whose tenure was as yet uncertain. The court's emphasis on conquest as giving title, has had the effect of diminishing, for example, the rights of Rangitane and Ngati Kuia in the Nelson Tenths on the basis that they were conquered in the 1820s by Ngati Toa and their allies; and the aforementioned rights of the Moriori.[42]

It is in respect of these various take, and the relative weight given to each – hence the relative interests apportioned to the owners – that the court's decisions become most arcane and problematic. The Himatangi and Kukutauaki judgements in the Wellington district, for example, show the court floundering as to the relative interests of the long-standing occupants such as Ngati Apa and Muaupoko and those of the tribes arriving in the 1830s, notably Ngati Raukawa. Different answers were arrived at by different judges at different times; the emphasis of the first decision was towards the state of the tribes at the time of the hearing rather than at 1840 – a decision rather convenient to the land-selling groups, and one which was revised by later inquiries.[43]

7.6 EFFECTS OF THE 1865 ACT AND ATTEMPTS AT REMEDY

Given the reluctance of Maori in the late 1850s and early 1860s to accept Government institutions affecting their land, settler politicians and officials were astonished at the readiness of Maori to bring land to the Native Land Court, that Wiremu Tamihana, of the Kingitanga, quietly accepted a judgment against him, and that Maori who became boisterous through drinking were ejected or even jailed by the court without difficulty.[44]

The reasons for Maori involvement are not hard to seek. The complexities and rivalries within customary tenure create tensions within Oceanic societies so that, throughout the Pacific, people very quickly respond to new institutions provided for discussing land issues. Nor are Oceanic peoples slow to use them to their advantage against rival groups, or for their own self advancement. The bringing of claims to court was also quite obviously prompted by the prior dealings for land which the

41. A Ballara, 'The Origins of Ngati Kahungunu', PhD thesis, Victoria University of Wellington, 1991, p 325
42. Gilling, 'Engine', p 129, in reference to Judge Mackay's 1892 decision
43. See below vol 3, ch 12, Wellington district; Dr Robyn Anderson and Keith Pickens, *Wellington District: Port Nicholson, Hutt Valley, Porirua, Rangatikei, and Manawatu*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), 1996, pp 113–134, 198–202
44. Fenton to J C Richmond, 11 July 1867, AJHR, 1867, A-10

direct purchase and direct leasing system now provided. Maori had long been interested in direct leasing and, in many districts of New Zealand, from Northland to the remote Chatham Islands, leasehold arrangements, as well as sales, were immediately entered into. Whether for lease or for sale it is obvious that many of the lands brought to court were already subject to deals with settlers or land agents who had, in many cases, assisted claimants with the fees and survey costs. There is no great mystery about the rush of interest.

The other factor that almost certainly operated to support the court's authority was the demonstration of British military power in the preceding three years. Although the British advance had been stopped at the borders of what was becoming known as the King Country, it had not been without effect, giving new mana to the Queen's officials. The deliberate decision of Wiremu Tamihana and other Kingitanga leaders to seek peace was accompanied by an acceptance of the Queen's institutions, outside of the areas where aukati were established. If a tribe did not want settlement and Government institutions, the aukati remained firm and no land came to the court; if the tribe opted instead to engage with settlement and Government institutions, they accepted the authority of the courts and sought to use them to their advantage. Given that the main centres of Maori land tenure were the hapu and whanau, if the leaders of these chose now to go to the court, there was little that a tribal runanga could do about it. In fact, however, most of the central North Island remained closed to the court, until the 1880s and 1890s.

The authority vested in the 10 owners to take charge of and alienate the tribal patrimony immediately gave concern to the more observant politicians, especially as Fenton's strict rule of accepting only evidence presented in court also worked to exclude consideration of customary owners who did not appear.[45] An 1866 amendment to the Native Land Act therefore authorised judges to take note of the future needs of claimants and to recommend restrictions on the alienability of blocks awarded to them. Native reserves were to be inalienable save by lease of up to 21 years, except with the consent of the Governor in Council.

The Government then became aware, from correspondence with him in 1867, of Fenton's reluctance to cooperate with them, especially as regards the powers of the ten owners. Fenton reported to J C Richmond that in putting forward only a few names for entry into the certificates of title he did not know whether they were 'put in' as trustees for the sale of the land or whether they were 'intelligent members of the tribe determined to possess freeholds for themselves'. Even if there were unfortunate consequences such as the excessive sales in Hawke's Bay:

> it is not part of our duty to stop eminently good processes because certain bad and unpreventable results may collaterally flow from them, nor can it be averred that it is the duty of the Legislature to make people careful of their property by Act of Parliament, so long as their profligacy injures no one but themselves.[46] The fact that the actions of the named owners were *very* likely to be injurious to the interests of

45. See, for example, Whitaker to Colonial Secretary, 19 February 1866, IA-66/627, NA Wellington
46. Fenton to Richmond, 11 July 1867, AJHR, A-10, pp 3–5

> others of the customary owning group seems to have escaped Fenton. So also did the Treaty obligation of providing protections to Maori in place of the customary ones which the 1862 and 1865 Acts had removed.

J C Richmond, Native Minister in 1866 and 1867, was, however, inclined to provide some protections, including defining the 10 owners clearly as trustees for the other owners, not as absolute owners. It had apparently been the intention of the drafters of the 1865 Act to force subdivision of the land into blocks of 5000 acres or less (each with no more than 10 owners who would be trustees only for minors among the dependents). But the cost and impracticability of subdivision surveys caused Maori to have little interest in the proposal. Fenton later argued that this was *solely* the reason why not more than 10 owners went into the titles – that Maori always conspired, systematically, outside the court, to put forward only a few names. This was patently absurd to some of Fenton's critics and he came under very hostile questioning about his own role in this process.[47] Richmond approached Fenton in 1867 to secure his agreement to using the 1866 amendment to recognise the ten named owners as trustees; but the Chief Judge was unwilling, stating that he did not believe the received law on trusts was appropriate for Maori land. Richmond then secured the enactment of the 1867 Amendment Act, section 17 of which *required* the judges to record in court the names of all customary owners, whether or not they were claimants, and restricted the alienation of land awarded to leases of up to 21 years unless with the consent of all the owners or unless the block was subdivided. That is, the 10 named owners could only act in effect as trustees.

Even so the amendment was only partly successful because Fenton argued that to declare the titleholders trustees would be to:

> make perpetual the communal holding of the Natives, by getting them in their existing state registered in a Court of Record and made sustainable in the Supreme Court, but it is difficult to suppose that they would have the effect intended, as it would be distinctly opposed to the declared intention of the Legislature, and, in particular, to the essential objects of these Acts.[48]

Arguing that the mind of the Legislature had not been clearly expressed, Fenton asserted that he had a discretion in the interpretation of the law.[49] In 1880 he stated:

> The whole theory of the Native Land Acts, when the Court was created in 1862, was the putting an end to Maori communal ownership. To recognise the kind of agency contended for would be to build up communal ownership and would tend to perpetuate the evil instead of removing it.[50]

Richmond reported to Parliament in 1868 that:

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47. See, for example, Bryce's questioning of him in 1886, minutes of evidence in the Kaimanawa-Owhaoko committee, AJHR, I-8, p 36
48. Fenton, 'Opinion on Section 17 of the Native Land Act 1867', 7 April 1868, AJHR, 1871, A-2A, pp 40–41
49. Ibid
50. Cited in Ward, ch 15, note 57; AJHR, 1886, G-9, p 13

> the Government finding themselves foiled by the apparent unwillingness of Mr Fenton to cooperate with them, had hurriedly sent round to discover cases where the 17th Section had been over-leaped by the Court and to obtain declarations of trust on the part of those Natives who had received grants for their tribes.[51]

It is doubtful that this method was very effective but the contemporary evidence clearly shows that it was specious and self serving of Fenton to claim subsequently that the omission of the trustee principle, or the refusal to name all the owners on the title, was solely because of a Maori prior agreement, or a conspiracy of silence.[52]

In discussing the 10-owner rule and Fenton's part in it Dr Fergus Sinclair has omitted to mention the very explicit exchange between Richmond and Fenton, although he does give another reason, namely Fenton's evidence to the 1891 Native Land Laws Commission to the effect that 'The true remedy [to the emerging problem] was to compel the tribe to subdivide, until each block had only ten genuine owners'. Fenton went on:

> The objection to the scheme of subdivision was the expense of the survey, which of course was a great objection; but you cannot subdivide millions of acres without hardship and difficulty in some cases. The true remedy, however, would have been the refusing to do anything until they had marked off for each ten men their own share.[53]

This bland attitude illustrates both Fenton's ignorance of the immense practical difficulties and expense of what he was suggesting and also, his extreme paternalistic attitude towards Maori.

Dr Sinclair also argues, with some justification, that Maori claimants themselves commonly preferred to put only a few owners in the title, even when after 1873 they had the opportunity to name many more. This certainly reflected the continued influence of the chiefs in the whole process, and customary deference to them (as had been evident in the transactions from the 1830s onwards). For those chiefs interested in selling, Section 17 of the 1867 Act would indeed have been a frustration, since it authorised only leasing unless other elaborate steps were taken. So land-selling Maori had a vested interest in not invoking it. Dr Sinclair does, however, acknowledge that Fenton's shifting the blame onto the Maori owners for the way they used the court 'was possibly too facile' and that 'Fenton might have been too willing to shift the responsibility onto Maori shoulders'.[54] He alludes

51. NZPD, 1868, vol 4, p 231
52. The Commission of Inquiry into the Native Land Laws in 1891 was given an example of the judge's influence when the 164,000 acre Mangatu blocks were going through the court in 1881. He proposed to vest the title in 12 out of 118 identified owners, explaining that it would destroy the value of the land in the eyes of would-be purchasers or lessees if they had to deal with all 118. The assembled owners accepted his advice (AJHR, 1891, sess 2, G-1, p 82). Technically the judge's intervention was probably illegal. It is impossible to know how frequently such leading from the bench occurred, but there was probably a good deal of cooperation between judges and conductors of claims in this region.
53. AJHR, 1891, G-1, p 46 (cited in Dr F Sinclair 'Some Thoughts on the Origin and Application of the Ten Owner Rule', Wai 64 ROD, doc L3, p 18)
54. Sinclair, Wai 64 ROD, doc L3, p 21

briefly, but rightly, to Ballara's recent scholarship about the authority of chiefs and to her assertion that loading them with the responsibility of full ownership was giving them more responsibility than they were fitted by education and experience to bear. But in terms of Treaty principles of active protection, it would seem that the Crown had a very strong obligation, having removed the customary check-and-balance between chiefs and hapu members, to insist on the named chiefs being made trustees, for which Richmond and others were contending. The fact that self-interested Maori and doctrinaire judges acted to prevent the use of section 17 (or apply any other principle of trusteeship to the ten owners) scarcely warrants the Crown's inaction.

In fact protest by Maori, and by settlers who understood and sympathised with their predicament, was almost as prompt and as common as Maori acceptance and use of the 1865 Act. In 1869 Karaitiana Takamoana of Hawke's Bay submitted a petition to the General Assembly that succinctly summarised the Maori concern about the ten owner rule and the land sales which followed:

> Let me here speak of one thing. A disapproval by me of this institution, the Native Lands Court. Its fault is this – listening to the false statements of men who have no just claim to the land. Friends, this a very bad practice; our Maori custom is much preferable to this.
>
> This is another thing – the regulation of Crown Grants. The fault in that is this: Do you listen! Where there are 100 or more men (as claimants) the Court only admits of ten being inserted in the Crown Grant, while the 100 are thrown carelessly out of their land. This is the fault of that (regulation).
>
> Another fault of the Crown Grant is, the European invites the man to whom the Crown Grant belongs to drink spirits, and that Maori then says, 'I have no money'. Then the European says, 'Your money is your Crown Grant: your land is (your money)'. I look upon this as being a cruelty to the Maoris, so that they may cease to have any land.[55]

This kind of complaint was to be repeated hundreds of times in the next half century; officials such as G S Cooper reported that Hawke's Bay Maori were 'allowed indeed sometimes tempted' to take credit 'without stint' from merchants, tradesmen and even their own tenants, and that some of the principal land owners were in debt by many thousands of pounds. 'The pressure is put on them, and, seeing no other means of raising the money, they have begun to sell their land in every direction'.[56]

J C Richmond, aware that the debt trap was drawing Maori to bring their land into the court, secured approval from Fox and McLean to draft a Bill to restrict advances of credit to Maori to five pounds. A fortnight later the Bill was withdrawn by McLean, as a result of pressure from the speculator lobby.[57]

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55. AJHR, 1869, A-22, pp 3–4
56. Cooper to Richmond, nd, AJHR, 1867, A-15 (cited in O'Malley, p 34)
57. NZPD, 1869, vol 4, pp 220, 608. For a copy of the bill see Maning, Autograph Letters, no 497, Auckland Public Library

The seriousness with which Richmond himself was willing to intervene to protect Maori from market forces must be questioned in the light of statements by him in respect of his 1866 and 1867 amendment acts. He wished to protect Maori, he said, from 'the curse of pauperism; to prevent the establishment of a sort of gipsy race, homeless, destitute and idle'. But the object of policy was not so much to prevent landlessness altogether but to 'give a somewhat longer time and better chance for the adooption of European habits of mind before the Maori settles down to the poverty and nesessity for labour to which he must in most cases come'.[58] This attitude was commonplace among settlers, resulting in what Murray calls 'a very weak sense of trusteeship'.

The Native Lands Act 1869, drafted largely by Fenton himself, included Section 12 which made the grantees of land not already sold tenants-in-common rather than joint tenants. Sections 14 to 15 specified that a majority in value of the land had to consent to alienations. But the grantees' interests could informally be purchased piecemeal, until a majority in value had been secured by the buyer; or a grantee could apply for a subdivision of his individual interest, which could then be sold. The Act apparently did not slow the practice of individuals selling piecemeal, although it may have afforded some protection to the heirs of deceased owners.

In 1870 McLean secured the passage of a Native Lands Frauds Protection Act, by which trust commissioners – officers of the Native Department not the land court – were authorised to disallow any transaction in Maori land if contrary to equity or in contravention of any trusts or if liquor or guns formed part of the transaction. The measure had limited effect, partly because these officers could not exercise close control and partly because some of them were careless of their duties if not downright corrupt.[59] Sale of land before restrictions on title had been removed was not uncommon. A later Native Minister wrote:

> It is notorious that the Fraud Commissioners in the past have performed their duties in the most perfunctory manner, and passed transactions when the consideration was a mere bagatelle.[60]

In 1871, McLean appointed Colonel T M Haultain to investigate the Land Acts. Haultain reported again the Maori criticism of the ten owner rule and also the pressures from debt that caused Maori to use the court to sell land. He urged urgent reform of the system.

An important part of Haultain's report was the evidence and opinions of the Maori witnesses – chiefs like Te Wheoro who had been loyal to the Crown in the wars and who were experienced assessors of the court. Te Wheoro and Paora Tuhaere (the loyalist Ngati Whatua leader) objected to the constitution of the court *as such*, and recommended instead that Maori arbitrators be appointed by the

58. AJLC, 1867, p 41, cited J Murray, 'Crown Policy on Maori Reserved Lands, 1840–1865, and Lands Restricted from Alienation', 1865–1900', Waitangi Tribunal Rangahaua Whanui Series (first release), 1997, p 32
59. Ward, p 252
60. John Ballance, NZPD, 1886, vol 54, p 463

parties, their decisions to be ratified by the Resident Magistrate. They objected also to high survey expenses and the court fees borne by all parties, including the losing parties; the ignorance of the Assessors; insufficient notice of hearings; hearings too far from the land; the excessive involvement of lawyers and interpreters; and the refusal of judges to impose restrictions on alienation even when requested.[61] Te Wheoro had resigned his position as an Assessor, complaining of the way things were being done and of the Government's failure to consult with Maori in 1865 on the form of tribunal. He wrote separately proposing a runanga of seven members not interested in the land concerned, with judges assigned to each district to assist but not override the runanga.[62] Te Wheoro complained that the land was not inspected and it 'becomes the property of him who has made the most plausible statement', since the court only heard what was presented before it.

Other leading Hawke's Bay chiefs were scathing at the way the court operated, Henare Tomoana stating that a presiding judge had denied his request to make Heretaunga Block inalienable.[63]

The Arawa assessor, Wi Hikairo gave a detailed critique referring to the failure to inform Maori about the jury system. A system was needed, he said, for:

> hindering single individuals, who may have claims in blocks of land, from bringing on an investigation in the Court without the previous knowledge of the majority of those concerned.

He cited the way Arawa lands at Maketu were brought into the court, which always listened to the applicants, whereas, 'the majority wanted to settle amongst themselves how the land was to be divided and then bring it into the Court for ratification'. O'Malley comments that this kind of role for the court came increasingly to be the preferred Maori position, though pressure for abolition of the court altogether persisted.[64]

Sir William Martin and Dr Edward Shortland at this time also proposed remodelling the court along the lines of a commission with Maori juries convened by a Pakeha official. Lawyers and agents would be excluded from the court. Succession would be strictly according to Maori custom. They condemned the 10-owner system and recommended that the names of tribes and hapu, and their principal men, should be entered into the grant, with the chiefs having only power to lease but not mortgage or sell the land. Sales would require the consent of all owners and be by public auction only. Salaried surveyors would be appointed to the court to reduce survey costs (which would be recoverable at a fixed percentage at sale of the land). Profits above £500 were to be invested in Government securities for 21 years to prevent their being squandered. Martin draw up a Bill along these lines. The

61. Joint evidence of Te Wheoro and Tuhaere, 18 July 1871, AJHR, 1871, A-2A, p 26
62. Te Wheoro to Haultain, 23 May 1870 [sic 1871?], AJHR, 1871, A-2A, pp 28–29
63. Evidence of Henare Tomoana, 31 May 1871 and Karaitiana Takamoana, 28 July 1871, AJHR, 1871, A-2A, pp 37, 40
64. O'Malley, p 42

Secretary of the Native Department, H T Clark, proposed similar measures.[65] Fenton violently denounced Martin's draft Bill.

In 1873 a commission of inquiry chaired by Judge C W Richmond was appointed into native lands alienation in Hawke's Bay. Although expressing sympathy with the views of Martin and Shortland, Richmond hesitated to interfere with the court, in view of the 'great point gained to have secured any sort of submission to such a jurisdiction'. He recommended instead that 'District Officers be appointed to undertake preliminary enquiries into the bona fides of claims before they came to the Court'.[66] Richmond also condemned the failure to define the ten owners as trustees and the practice of allowing their interests to be alienated severally. This constituted 'a very serious grievance' in Richmond's view, especially as it extended to supposedly inalienable reserves which had passed through the court and been sold. Richmond suggested that fresh legislation might make provision for titles going to hapu and any number of individuals, with elected trustees allowed to carry out strictly defined alienations; his own preference was for a full scale individualisation, with Crown Grants issuing only to individuals – a standard view among many settlers. His conclusions on the damage done in Hawke's Bay were relatively mild:

> True the procedure of the Court has snapped the faggot-band, and has left the separate sticks to be broken one by one.

But the 558 people out of 3777 in Hawke's Bay 'who have accepted the rights and advantages of independent proprietorship, should not be the ones to impeach it.'[67]

The report of the Maori commissioner sitting with Richmond, Wi Hikairo, was equally critical. But generally the commission did not find that fraudulent practice had occurred. The relatively mild outcome and lack of remedy for what had been a disaster for many Maori of the district, caused several chiefs such as Takamoana and Tomoana to join the Repudiation Movement, then developing under the leadership of Henare Matua and subsequently supported by McLean's political opponents John Sheehan and H R Russell.

7.7 THE 1873 ACT

McLean had received a great deal of counsel from Maori leaders and prominent settlers alike for a root-and-branch reform of the court. In the end, however, he adopted only limited changes to the form of the court. It remained essentially as Fenton and C W Richmond preferred.

McLean's solution to the problems of the ten owner rule was to require the inclusion on a 'Memorial of Ownership' of the names of all the individuals found to be owners of a block. All would have to agree to a sale of the block but under

65. Ward, pp 253–255
66. O'Malley, p 43
67. 'Report of the Hawke's Bay Native Land Commission', 1873, AJHR, 1873, G-7, pp 6–9

Section 65 a majority in favour of alienation could have their share partitioned out. Then successive partitions could follow. In debate Henry Sewell (who had once supported the break up of Maori 'communism' via the land laws) now felt that it should be left intact for some time; he criticised the new principles whereby the Maori would be 'governed by majority, and that their interest in the land should no longer be tribal or collective, but that each individual should have a distinct aliquot part. That was a fundamental vice in this Bill'.[68] Insofar as the Act gave each individual an absolute interest which was negotiable, it certainly was a departure from custom, and tended towards the destruction of the rangatiratanga of the hapu as a whole.

Sections 97 to 98 provided that land held under Section 17 of the 1867 Act, and hence under restricted title, would become equivalent to land under Memorial of Ownership. The same partition principles applied and the ten owners recorded in the old certificate of title ceased to be trustees. This removed one of the most important protections so far devised. Indeed where the owners named under the 1865 Act *had* acted as responsible trustees and resisted sale on behalf of their hapu, they were now undermined. Because Martin and Shortland's safeguards of sale only by public auction or tender never got adopted, the piecemeal acquisition of signatures from individuals, indebted and under pressure, could continue until a buyer had a majority necessary for a partition.[69]

Dr Michael Belgrave has made a systematic analysis of all blocks that went through the land court in both the Auckland Province and the Auckland Rangahaua Whanui District between 1865 and 1908. From a sample of 474 blocks across Auckland Province that went through the court in the period 1865–69, 41 percent of the number, and 27 percent of the area, was alienated by 1869.(In the Auckland Rangahaua Whanui District the figures are 37 percent by number and 48 percent by area).[70] The rate of alienation of blocks awarded under the 1873 Act seems to have been slightly slower, but the survival rate at 1908 is similar.. The rate of alienation depended very much upon when the Crown was buying vigorously, as in 1875 to 1879 when large blocks were purchased for Vogel's immigration and development programme. The proportion of all blocks that went through the court in 1865 to 1869 still in Maori hands in 1908, was 10.5 percent, by area. The survival rate of all blocks granted between 1865 and 1885 was 13.2 percent by area and 32 percent by number.[71] In other words more large blocks were purchased, more small blocks survived in Maori ownership.

In 1873 McLean did adopt a suggestion of appointing District Officers to make prior investigations into the genuineness of claims before they went to court. The District Officers were to arrange for the setting apart of inalienable reserves at the

68. NZPD, 1873, vol 15, pp 1368–1370
69. Dr Grant Phillipson, 'The Ten Owner Rule' (Wai 64 ROD, doc K13), no 19
70. Dr M Belgrave, 'Counting the Hectares: Quantifying Maori Land Loss in the Auckland Rangahaua Whanui disitrict 1865–1908', Waitangi Tribunal Rangahaua Whanui Series unpublished draft, 1997, tables 4.4, 4.5
71. Belgrave, table 9.3

ratio of 50 acres aggregate per person (subject to approval of the Governor in Council). They were to compile genealogies and maps of tribal boundaries.

This proposal was crucial to McLean's strategy. It was to provide:

> A permanent home for them, on which they would feel safe and secure against subsequent changes or removal; land, in fact, to be held as an ancient patrimony, accessible for occupation to the different hapus of the tribe: to give them places which they could not dispose of, and upon which they would settle down and live peaceably side by side with the Europeans.[72]

The 'progressive element' could pursue individual titles, if they wished, on their 'surplus land' (in the words of the preamble); or they could alternatively retain the reserves on a hapu basis, the land remaining under 'Native customs and usage' until the restrictions were removed by the Governor in Council (although lists of owners would be entered in the Memorials). The court itself was given no power to restrict alienation until an amendment of 1878. Much then depended upon these arrangements by the District Officers being carried into effect.[73]

Fenton, doctrinaire as always about converting *all* Maori land from customary tenure to Crown title, took immediate exception to the preamble of the Act, and to many of its provisions, including the role of the District Officers. A long memorandum by the judges in 1874 criticising the Act in many particulars, including the cost of the District Officers, was submitted to the Government.[74] This was disastrous for the operation of the law, because McLean had intended that the court, in each district, should support the District Officers and build up knowledge of local tribal right-holding and ensure that the 50 acres per head was reserved. Jennifer Murray has pointed out that in one district, Cook County on the East Coast, Judge Rogan of the Native Land Court and Samuel Locke as District Officer, did put through 31,500 acres of reserves under the Act.[75] For the most part however the requirements of sections 21 to 31 – the District Officers' work – were simply not carried out. Fenton's non-cooperation with the Act became apparent in subsequent Parliamentary enquiries.[76] Part of the problem, however, was that no funds were allocated via the courts or via the Native Department for the District Officers.

With the failure of the most important protections in the Act, Maori were exposed to its more damaging effects. The general restriction on alienation of land under Memorial of Ownership, section 48, was a nullity, considered anomalous by officials in the light of the alienation provisions of sections 59 to 61.[77]

Individualisation of title did not result in individualisation on the ground. It was a pseudo-individualisation, by which customary rights became marketable paper,

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72. McLean, 25 August 1873, NZPD, vol 14, p 604 (cited in J Murray, 'Maori Reserved and Restricted Lands', p 52)
73. Murray, pp 53–54
74. Fenton et al, MA 18/2, 74/3522, NA Wellington, cited in Murray, p 58
75. AJHR, 1886, G-15, pp 59, 65. On p 65 the evidence suggests 39,223 acres in 25 blocks.
76. See, for example, AJHR, 1886, I-8, pp 32, 67
77. See T W Lewis to Bryce, 26 July 1882, on Smith to Bryce, 22 June 1882, MA 13/23, NO 82/1914, NA Wellington

with individual signatures being able to be bought piecemeal. The fractionation of title through succession was compounded, as descendants of grantees multiplied. Partition orders became the favourite device of Crown and private purchasers accumulating majority interests; the non-sellers were frequently left with small, fragmented and uneconomic segments.[78]

The issue of survey costs remained a serious burden to Maori claimants seeking title in the first instance, or in partitions initiated by themselves. Survey costs and other costs associated with court hearings forced the sale of many acres of land. What would have been an equitable contribution by Maori to the costs of survey is difficult to determine (as noted above, Martin and Shortland suggested that surveyors be salaried, and that a fixed percentage of the value of the block be deducted at the time of sale). Certainly Maori paid, via survey liens, a very large proportion of the costs of land transfer, which mainly facilitated white settlement.

7.8 THE LAND COURT; EXECUTIVE OR JUDICIAL ACTION?

The above outline should show that any suggestion that the Crown (that is to say, the Government) should not be held responsible for the operation of the court under Fenton, would be wide of the mark. The constant barrage of criticism recorded in the contemporary parliamentary debates and papers, and the succession of academic analyses since, reveal that it was the whole system put in place by Government and Parliament that was the subject of complaint. The key features of that system were the systematic conversion of customary tenure into fully negotiable titles and the exposure of the individual named owners not only to the full pressure of the market place but to a certain amount of chicanery in the way their signatures were obtained. The most glaring example of this was demonstrated in the evidence of the Hawke's Bay Commission of 1873, but this is only one example. The protective role assumed by the Crown in the Treaty was all but abandoned, save for the restrictions on some titles and the making of some reserves. Although Fenton played fast and loose with the ten owner system it was not Fenton who created the kinds of titles recognised by the 1865 Act or the 1873 Act. That was the legislature. Nor was it Fenton and the court who failed to consult with Maori in advance, or to implement the provisions such as the work of the District Officers under the 1873 Act. The failure was systematic and largely deliberate.

But Fenton and his fellow judges did see themselves also as having executive functions. The point was pursued explicitly and closely in the Owhaoko and Kaimanawa Native Lands Committee of 1886. When asked by F D Bell, Fenton's counsel, 'What were your duties as an executive officer?' Fenton recited a list that runs for a full page of close print in the parliamentary papers.[79] Certainly much of this had to do with convening courts and implementing judicial decisions, but the line is a very thin one. Much of the procedure of the court, including the fixing and

78. Gilling, 'Engine', p 131
79. AJHR, 1886, I-8, pp 15–16

postponing of courts (with the effect of gathering Maori in town for weeks on end to await their case, recognised by discerning politicians and officials at the time as both damaging to their health and financially ruinous) were listed by Fenton himself under his executive capacity. Fenton also reported that Sir Donald McLean, his Minister, said to him, apropos the working of the 1873 Native Land Act 'You are as an executive officer of the Government and I have a right to give you orders'.[80]

The Owhaoko Kaimanawa Inquiry in fact arose from Sir Robert Stout's belief that Fenton was acting improperly in his administration of the land law. The whole tenor of Fenton's responses to several days of cross-examination was that while in court he was a judicial officer, and outside of it a chief executive of the court. The point at issue was in what capacity he declined an application by Maori for a rehearing – Maori who were not able to be present at the original hearing but whom Fenton deemed to have had adequate notice by advertisement of the hearing in the Maori Gazette, the *Kahiti*. This was as an example of the kind of rigid rule-making that caught Maori in a bureaucratic maze as much as a judicial maze, and commonly cost them their interests in land. A modern reading of the evidence in Treaty terms would suggest that Stout succeeded entirely in making his point, although the technical point was so fine that Fenton could not be found to have committed an actual impropriety. The evidence is perfectly clear moreover, on Fenton's own admission, that he did not agree with the 1873 Act and deliberately set out to frustrate it. McLean's anger at the time, like Stout's subsequent concern, was justifiable; Fenton was going well beyond his legitimate judicial functions and his sabotaging of the protective provisions of the Act was not corrected by the Government.

The question of whether the courts (and the Native Land Court in particular) can be regarded as part of 'the Crown' has been considered with considerable care for the purpose of determining the limits of Waitangi Tribunal's jurisdiction under the Treaty of Waitangi Act. The discussion arose out of the Chatham Islands claims and led to a High Court hearing before Mr Justice Heron in 1994. The Tribunal itself and Crown Counsel in the case appear to concur that the judicial decisions of the court per se cannot be subject to review by the Tribunal but that the actions or inactions of the Crown in respect of the outcomes for Maori of Native Land Court findings legitimately come within the Tribunal's scrutiny.[81] Mr Justice Heron seems to have concurred. He said 'Without deciding the matter at this stage there would seem to be a strongly arguable case that this Court's decision [the Native Land Court decision on customary rights in the Chatham Islands] could not be regarded as the actions of the Crown'. Nevertheless a group was entitled to cite a 'series of complaints or grievances' in its statement of claim. 'Simply because a court may have intervened does not in my view preclude the finding that overall injustices

80. AJHR, 1886, I-8, p 4
81. See 'Crown submissions on jurisdiction', Wai 64 ROD, doc E2, and 'Tribunal Findings on Jurisdiction Re: Native Land Court', Wai 64 papers in proceedings, doc 2.67

remain'. The historical narrative had to be deposed, 'to see the way in which they were addressed'.[82]

The argument of this chapter is that the Crown was responsible, among other things, for the kind of court that was established, for the institution of a process that extinguished customary title with its inbuilt safeguards and substituted a statutory title with inadequate safeguards, and for the failure to ensure that the administrative functions of the court (including the crucial role of the District Officers under the 1873 Act) were funded and carried out.

7.9 MAORI RESPONSIBILITIES IN THE SUCCESS OR FAILURE OF THE PROTECTION STRATEGIES

Evidence and argument has been advanced as to the responsibility of Maori themselves in the outcomes of the Native Land Court processes – that land alienation was in effect a result of Maori wishes, not forced upon them by the malignant 'Engine of Destruction' which was the Native Land Court. The question relates to two main issues:

(a) the determination of title; and
(b) the subsequent alienation of the land

In respect of the determination of title, Dr Sinclair has noted that many blocks emerged from the Native Land Court with few names on the title, even under the 1873 Act, as a result of agreement among Maori before the court hearings or during adjournments of it.[83] In that sense the court would, in effect, be acting as many Maori requested – essentially ratifying the decisions of Maori runanga. (What then followed in terms of alienation or distribution of payments was not considered to be the court's responsibility.)

John Hutton has also noted that many of the decisions of the Native Land Court in Hauraki were uncontested, with very little evidence in the Minutes other than the claimants' depositions. Other claims were adjourned to allow claimants and objectors to come to an agreement outside the court. Upon returning they would offer a list of names which the court would record. Indeed this was a very common practice for the next half century and more.[84]

Dr Belgrave's research on land alienation in the Auckland District has disclosed a pattern of the same cluster of names, in each sub-district such as Kaipara or Bay of Islands, being put into the titles of many blocks in the 1880s and 1890s.[85] This is an indication that the leading chiefs of the area were still controlling the process, putting the land through the court, and then (in many cases) selling it.

82. 'Record of the High Court Proceedings on Jurisdiction', Wai 64 papers in proceedings, doc 2.42, pp 6, 13
83. Sinclair, Wai 64 ROD, doc L3, pp 31–32
84. Hutton, secs 3.4 –3.6
85. Belgrave, ch 7

In respect of protection against excessive land loss Maori, in many areas, also showed a strong disinclination to create inalienable reserves, if this constrained their freedom of action. E W Puckey in the Thames area reported:

> I have repeatedly urged upon the Natives in my district the extreme necessity which exists of land being set apart for their future use and maintenance, but so far without avail, owing to the want of unanimity, the local jealousies, and the conflicting interests of the claimants.[86]

Maori suspicion of Crown paternalism was the reason why not more land was vested in official trustees; it was also probably the reason for Maori reluctance to have restrictions put on their titles that required official action to remove.

Dr Sinclair draws from this kind of evidence the conclusion that the Native Land Acts and court on many occasions reflected Maori rights and aspirations accurately, that a general condemnation of the court for Treaty breaches is unwarranted, and that each case needs to be considered on its merits.[87] It is in fact impracticable to review every case; the evidence and the witnesses available today would be insufficient for a useful review in most cases. Moreover we do not know, and cannot know, whether the agreements made before the land reached the court, or during adjournments of the court, involved all interested parties and embodied a genuine agreement. We do know that in many cases they did not, because subsequent protests, petitions and requests for re-hearings did arise. We know also that in most cases, agents, lawyers and creditors were involved in the out-of-court negotiations. How they shaped them, and how far the outcomes were already rigged in favour of land sellers against the wishes of others, we cannot know. Minutes of out-of-court proceedings were not kept, and only the cases subsequently reinvestigated disclose something of what went on.

But this want of knowledge is in itself an indictment of the process. It was altogether too arcane and secretive. One of the key features of Martin and Shortland's proposals of 1865 and 1870–71, sale by public auction only, was not adopted. Had it been at least there would have been publicity about the alienations (and the alienators), and a better chance of securing the full market price.

7.10 SALE RATHER THAN LEASING

A feature of the land alienations in this period, in some districts and particular in the 1880s, is the tendency for Maori to sell rather than lease, or for leases to give way to sales. Most of Poverty Bay, for example, leased directly to settlers during the 1870s, was sold in the 1880s, often to the former lessees.[88] In Auckland District too, Dr Belgrave's report shows only 8.2 percent of all blocks awarded by the court as under lease in 1891. These were 21 years leases about to expire. They were mostly

86. Puckey, 27 September 1877, AJLC, 1877, no 19, p 2 (cited in Murray, p 57)
87. Sinclair, Wai 64 ROD, doc L3, p 34
88. Siân Daly, *Poverty Bay*, Waitangi Tribunal Rangahaua Whanui Series, 1997, ch 5

in large blocks (involving 35 percent of the area of land under court title) but yielded low returns.[89] Most were alienated by 1908.

How far did this reflect genuine Maori preferences? There was a constant general pressure to sell, in the form of Maori indebtedness. Lease rentals commonly did not yield as much as Maori expected – often not enough to cover debts incurred in survey and court fees. Cash or credit was required for the purchase of food, clothing and other consumables, and for the cost of securing titles to the land in the first place. This pressure was exacerbated by the capacity of settlers now to compete with Maori in produce markets, where Maori themselves had once held a monopoly or distinct advantage in the growing of crops, cutting of timber etc. The crowding of names on titles and fractionation through succession, added to the difficulties for Maori who wished to organise farming ventures themselves. The net result of these difficulties was that Maori tended to confine their land use to small patches of food crops, largely for subsistence, and to earn money in wage or contract labour in the expanding pastoral economy. Use of the forest for catching pigs or birds, or the streams and swamps for fishing continued still to be practicable throughout the 19th Century (although increasingly constrained). Land already in lessees' hands was not generally available for Maori owners anyway, and there was a tendency to see it as no longer needed (in contrast to important Papatupu lands near the principal kainga). Some leases had improvement clauses on them or lessees in any case sought payment for improvements. Maori, not having capital to meet these costs, or to restock the land, were inclined simply to sell. Continued population loss in some areas may have contributed to the sense of not needing the land away from the kainga.

The consequence was that in many places like Poverty Bay and Hawke's Bay, lessees of large blocks were generally able to make arrangements with Maori owners for the purchase of the land during the course of the lease. In some cases the lessees had an optional purchase clause in the first place. Sometimes lessees did not pay their rent, and Maori did not have the means to take them to court.[90]

The land laws certainly facilitated the process. Whether or not there were many names in the titles or only few, the owners were seen as having the authority, individually, to alienate their interests. As far as can be determined, the decision was not generally one made by the hapu acting as a corporate group, but by the individual holders of titles. It is undeniable that these owners had a vested interest in securing control of the titles, and subsequently alienating them to secure themselves an income. Moreover, in cultural terms, chiefs were still very hard to resist. Whether the rest of the hapu were happy about it is another matter entirely. Moreover, the chiefs themselves generally became supporters of the growing protest movements leading towards the Kotahitanga demands for return to Maori of mana over their own land.

89. Belgrave, tables 5.4, 5.6
90. See C Marr, *The Alienation of Maori Land in the Rohe Potae (Aotea Block), 1840–1920*, Waitangi Tribunal Rangahaua Whanui Series, 1996, p 199

7.11 MAORI PROTESTS

The parliamentary papers are replete with petitions from Maori about the decisions of the Native Land Court and of alienation by the titleholders, without the consent of all the customary right holders.

Requests for re-hearing of Native Land Court decisions generally had to be lodged with the Government within six months of the original decision. The formalities of the process (like the formalities of the original hearings) were not well adapted to Maori culture: although it is surprising how many did seem to read the official *Kahiti* in which notices appeared. The Governor in Council made the decisions about re-hearings before 1880, after which it was the Chief Judge of the Native Land Court. Grounds upon which the requests would be granted or rejected are not clear, for neither the Governor in Council nor the chief judge was obliged to provide them. Relatively few rehearings were in fact granted and the inference is that this was when serious trouble threatened on the land if the case was not reheard. Otherwise disappointed claimants lost out. Failure to learn about the hearings of the court were generally not deemed grounds for re-hearings; if three (or six) months notice was given in the *Kahiti* it was up to the Maori to get themselves to court.

The likelihood of claims being reheard, or late claims admitted, probably improved with the creation of the Native Appellate Court in 1894. At least there was thereafter a better chance of consistency and due process. Previously there had been considerable scope for the caprices of Chief Judges Fenton and MacDonald and eccentric personalities like Judge Maning.[91]

If aggrieved claimants did not get a re-hearing they commonly resorted to petitioning Parliament. Petitions against the land laws, decisions of the court or alienations without consent flowed at the rate of up to 30 a year between 1870 and 1900. The Native Affairs Committee of Parliament was constantly busy with them. In many cases, because the law had formally been complied with, the committee could make no recommendation, but sometimes a committee or commission of Inquiry ensued which revealed a great deal about cavalier treatment of Maori rights. From about 1880 Government began including clauses in what was sometimes termed a washing up Bill – the annual Bill amending the land law – which could authorise re-hearings not approved or not applied for in time, or otherwise to remedy an obvious injustice. By these means aggrieved Maori sometimes got some kind of rough justice but Parliament was reluctant to intervene in judicial decisions and claims usually needed some evidence of failure of natural justice to get a legislative remedy. Frustration at their powerlessness lead some members of the Native Affairs Committee later to support major legislative remedies.[92]

Meanwhile the levels of Maori protest mounted throughout the country. These have been discussed in the general histories but a notable feature of them is how

91. Dr David Williams, 'Appendices' to the Maori Land Legislation Manual, Crown Forestry Rental Trust, Wellington, 1995; Ward, pp 258, 289

92. For example, R Hogg's speech on the Native Equitable Owners' Bill 1886, cited Phillipson, Wai 64 ROD, doc 23

many former supporters of the Crown, like Major Te Wheoro or Major Kemp, Paul Tuhaere or the Hawke's Bay chiefs, were by the 1880s thoroughly fed up with the loss of land and rangatiratanga and had begun to develop organised protests. The Repudiation Movement based in the Hawke's Bay in the 1870s was one, Paul Tuhaere's 'Parliaments' in Auckland from 1879 another and the Treaty of Waitangi meetings among Nga Puhi a third. In 1880 Kemp actually took up arms over a land dispute in the Murimotu country and set up a 'land trust'. In 1883 the four Maori members, frustrated by their lack of influence over the House of Representatives, wrote to the Aboriginal protection Society in England, proposing that control of Native land be given to an elected body with administrative and legislative functions that was responsible to the Governor.[93] These movements converged in the Kotahitanga which mobilised huge numbers of Maori by the 1890s, seeking a repeal of the land laws and the return to Maori hands of both the determination of title and the management of the land. Meanwhile Te Wheoro had become a leader of the Kingitanga and accompanied Tawhiao to England in 1884 to petition the Queen about Maori rights.

Notwithstanding the fact that many Maori were pleased to secure title to, and then sell, their land, the range and persistence of protests that developed can hardly be discounted as either minority opinion or the result of personal disgruntlement at the outcome of cases. Maori everywhere were clearly aware of the wider impact upon them of the land laws on their society and articulate in expressing their views. The range of speeches delivered to Premier John Ballance when he toured the country in 1884 and 1885 are good examples of Maori leaders' reflections on the previous 20 years' operation of the Native Land Acts.[94]

7.12 Alternative Models: The Thermal Springs Act and Ballance's 1886 Act

In 1877, following the death of McLean, Frederick Whitaker introduced a Native Land Court Bill supporting virtually direct and unrestricted trade in Maori land. This was not accepted by the House partly because the vehement objections of the Maori members of Parliament had some effect.[95] John Bryce, Native Minister 1879–84, tried a third approach. In the 1870s, as Chairman of the Native Affairs Committee, Bryce had seen the confusion and fraud in the existing system. His Native Land Sales Bill 1880 envisaged the Crown acting as agent for Maori and took up Sir William Martin's approach of sale by public auction. Whitaker and the speculator lobby opposed it for fear that leaving it to the Maori to *voluntarily* offer land for sale would 'shut up the country'. For their part Maori were concerned at the proposed 10 percent to 30 percent commission the Government proposed to charge.[96]

93. Claudia Orange, *The Treaty of Waitangi*, Wellington, Allen and Unwin, 1987, p 210
94. AJHR, 1885, G-1; AJHR, 1886, G-2
95. Dacker et al, p 115

Bryce therefore resolved to try in a local area. The Thermal Springs Act 1881 ratified an arrangement between the Government and the Ngati Whakaue, whose Komitinui had resisted land sales up to this point but was willing to consider leasing. The arrangement began well, with tenants taking up blocks at high rentals. But as economic depression set in they began to default on their payments. The Maori owners' debts had accumulated and under pressure, they eventually sold the land to the Crown, amidst acrimony and disappointment.(£16,500 was eventually paid in compensation).[97]

By 1882 the Maori agitation for an alternative approach had gained strength and Henare Tomoana, Member for Eastern Maori, introduced a Bill to empower local Maori committees to determine title and manage land. Bryce responded with the 1883 Native Committees Act which created only a few committees covering very large areas and with power only to advise the Native Land Court.

But the concept of empowering Maori committees and using the Crown as an agent in alienations was gathering strength. On the East Coast the liberal politician W L Rees had entered into cooperation with Wi Pere in a scheme for land settlement based upon dealing with hapu as collective entities who would elect 'block committees' with executive powers. These ideas were the product of the East Coast chiefs' concern at the listing of individual names and dealing in individual interests, and Rees was later to make hapu rather than individual title the main plank of his reform proposals when he was chairman of the 1890–91 Commission of Inquiry into the Native Land Laws.

The concept was also taken up by John Ballance, Native Minister from 1884–7, who toured the country holding public meetings with Maori in 1884 and 1885. The Native Land Disposition Bill 1885 (renamed the Native Land Administration Bill in 1886) gave a prominent role to the Native Committees (block committees) which were to be trustees for the wider owning group. Fenton, before the Native Affairs Committee, acknowledged that the ten owner rule had been 'disadvantageous' to Maori and had created 'mischiefs' and James Carroll (like Wi Pere, an emergent East Coast politician) was concerned that the Maori Committees did not again abuse their authority as the 10 owners under the 1865 Act had done.[98] The 1886 Act empowered the block committees to decide upon the terms of a sale or lease and place their lands with official district commissioners for auction. Direct purchase by settlers was prohibited. But Ballance was to be disappointed. In their meetings with him, Maori had apparently gained the impression that the control over the land would be returned to Maori, but the role of the district commissioners in the Act, who were not accountable to Maori and had full authority over the land when it was vested in them, loomed too large in Maori eyes, as did the percentage Government would take for its agency role. The impression was gained that the Act was in the interests of Government, rather than Maori, that the Government would become the land shark again. This was perhaps a legacy of the distrust created by Crown

96. Ward, p 288
97. See report of the commission of inquiry into the Pukeroa–Oruawhata block, AJHR, 1948, G-7
98. Phillipson, Wai 64 ROD, doc 21

pre-emption in previous decades and in some districts since 1865. The Rotorua scheme had gone sour by this time. Suspicion by rank and file Maori of chiefs like Wi Pere was also a factor; the East Coast Settlement Company which he and Rees had launched caused a lot of land to fall into the hands of the Bank of New Zealand as mortgagees.

In 1886 Ballance, with near unanimous support in the House, secured the passage of the Native Equitable Owners Act which enabled owners excluded from the title under the 10-owner rule to apply to the court for admission to the title of any land remaining. The titles of lands already sold were not affected and neither was any remedy provided for the former Maori customary right-holders of those lands. In 1889 a new Government put a deadline of 1891 for the operation of the Native Equitable Owners Act.

The failure of Ballance's 1886 Native Land Administration Act was unfortunate because, not withstanding Maori suspicions, Ballance had in fact fought hard against settler prejudice to secure Maori the right to manage their land. His support for Maori leasing rather than selling the land was a major election issue and cost the Government dearly in the 1887 election. Three of the four Maori seats were won by candidates campaigning for full Maori control of their own land. But there was an unfortunate double meaning to the concept of 'full control'. It was interpreted by the new conservative Government to mean restoration of direct purchase and the freedom of individual Maori to sell their signatures as before. The former secretive dealings by Crown purchase agents to break into the titles continued, and the purchase of individual interests resumed apace. Restrictions on alienation could now be removed by the court on the simple application of a majority of owners. (See Native Land Act 1888). The falsity of the Government's claim that this returned 'full control' to the Maori owners was denounced by the new Northern Maori candidate, Hirini Taiwhanga (who presented the Kotahitanga movement's alternative Bills) and by Major Ropata Wahawaha in the Legislative Council.[99]

7.13 LAND LAW AND LAND PURCHASE UNDER THE LIBERALS, 1891–99

The Liberal Government's management of land law and policy was driven by their determination to acquire more land for close settlement. Ballance, Stout and others had long held a hearty dislike of land sharks and speculators. That made them highly critical of how Maori land had been acquired in previous decades. It did not, however, make them opposed to the continued acquisition of Maori land as such. In 1891 about 10.8 million acres of the North Island was still owned by Maori, some 2.7 million acres of it in customary title; this was considered to be far more than Maori needed. As Dr Tom Brooking has shown, the Liberals were as determined to 'burst up' (often misquoted as 'bust up') the unused Maori estate as they were to burst up the huge settler estates like Cheviot to support their land settlement

99. NZPD, 1888, vol 43, p 230

schemes. With the invention of refrigeration assisting the overseas sale of dairy produce and sheep meat as well as wool, immigration and demand for land was escalating again.[100]

The prelude to the Liberals developing Maori land law was the Commission of Inquiry into the Native Land Laws comprising W L Rees, James Carroll and Thomas Mackay. The commissioners surveyed the land law of the previous 25 years and took evidence widely. They denounced the 'confusion, loss, demoralisation and litigation without precedent' in the existing system. The individualisation of titles with hundreds of names listed, made it extremely difficult for Maori to organise commercial enterprises on the land. Rees and Carroll recommended (Mackay having died before the committee reported) that Maori committees, representing specific blocks and hapu, should determine title, with the Native Land Court acting as a court of last resort in difficult cases; administration of the land was to be by native land boards, half the membership of which would be elected by Maori. The commissioners noted that Ballance's 1886 Act had failed because the land was to be passed to the control of the district commissioners who were not responsible to the owners and because use of the Act was 'optional and not imperative'. The Liberal philosophy was still that the land had to brought into use and they were prepared to resort to a strong element of compulsion. The native land boards were to have full powers as trustees of vested land. If the owners did not elect block committees, set apart their reserves, and decide what lands should be sold to the Crown or leased to settlers, the boards should do it for them. Via the boards the public would get swift access to land on good titles.[101]

The Liberal Government did not adopt these measures until 1900 but it did meanwhile set about vigorously buying Maori land. This was notwithstanding Carroll's warning in the 1891 report, that the Maori population was no longer declining and possibly increasing.[102]

Between 1892 and 1900 the Liberal Government purchased 2,729,000 acres of Maori land: this total included purchases begun before 1900 but completed after that date. Another 423,184 acres, most of it sold but some leased, was acquired privately, under the Native Land Laws Amendment Act 1895.[103] In short, as a result of purchases completed or begun during the 1890s more than three million acres of Maori land passed into European hands. This represented around 28 percent of the land in Maori hand at the beginning of the decade.[104]

The 2.7 million acres purchased by the Crown cost £775,500: on average around 6s an acre. The Stout–Ngata commission commented that prices of this level 'seemed inadequate'.[105] Certainly this is so by comparison with the price paid for

100. See Tom Brooking, '"Busting Up" the Greatest Estate of All: Liberal Maori Land Policy 1891 to 1910', NZJH, vol 26, no 1, April 1992
101. See D M Loveridge, 'Maori Land Councils and Maori Land Boards: An Historical Overview, 1900–1952,' Wellington, Waitangi Tribunal, 1996, pp 19–20
102. AJHR, 1891, sess 2, G-1, p xxix
103. AJHR, 1907, G-1C, p 5
104. Loveridge, p 10
105. AJHR, 1907, G-1C, p 5

the European land – the great estates – purchased by the Liberal Government during the same decade at an average price of 84s an acre, or 14 times the average price paid for an acre of Maori land.[106] It must be understood, however, that many of these estates were improved lands, some of them highly so.

Much of the Maori land purchased seems to have been good land, from the fast diminishing stock of good land in Maori hands. By 1907, according to the Stout–Ngata commission, the bulk of the Maori land left was 'inferior', suitable only for forest reserves and similar purposes.[107] This loss of quality land available to Maori by 1900 was probably more important than the aggregate loss during the period.

The spate of purchasing was made possible by a series of Acts of Parliament, which, on one hand, streamlined the ways by which Maori land suitable for settler purposes could be identified and prepared for sale and which on the other, substantially restored the Crown's pre-emptive right of purchase.

The major Acts were the Land Purchases Act 1892, the Native Land Purchase and Acquisition Act 1893, the Native Land Court Act 1894, and the Native Land Laws Amendment Act 1895. Other relevant Acts were the Land Improvement and Native Land Acquisition Act 1894, the Public Works Act 1894, the Native Townships Act 1895, and the Native Land Laws Amendment Act 1896. The transfer, in 1892, of responsibility for purchasing Maori land from the Minister of Native Affairs to the Minister of Lands was an administrative step designed to improve the system of Maori land purchase.

Belgrave's research has revealed a streamlined and efficient set of procedures, operating particularly between 1894 and 1895, to acquire the undivided interests of listed owners and then to apply to the court for a partition of the block. The restoration of Crown pre-emption made the process simpler but in other respects too, the complexities and confusions of the previous decades had been smoothed awy in the interests of efficient purchasing. The Surveyor General's Department appears to have been involved in the necessary survey work. [108] The Crown purchase officers were directed to exert their energies determinedly and did so. The situation of the Rohe Potae (King Country) lands are an example. After important preliminary work by the Kawhia Native Committee, in 1886, the Native Land Court, made a fairly careful determination of the *tribal* titles of the Aotea Block (1.8 million acres). The court then required the tribal leaders, in terms of the existing law, to submit lists of individual names. They eventually handed in lists of some 4500 names in all, but with some reluctance on the part of such leaders as Wahanui who feared secretive dealing for individual interests. His fears were justified because the Native Land Court Act 1886 had again legalised the way for Crown, (though not private), agents to buy individual undivided interests. From 1890 the Crown's Native agent at Alexandra, George Wilkinson, began buying signatures in the Aotea Block. Various subdivisions of the block had gone through the court, as individual hapu pursued the control of their own sections. Marr has

106. Brooking, p 78
107. AJHR, 1907, G-1C, p 16
108. Belgrave, ch 8

shown that many of these undivided interests were then bought progressively by Wilkinson, until the Crown was in a position to apply for partition of the block.[109]

By the late 1890s Maori opposition to further land selling had become widespread and well organised. It is likely that the Government was more willing to listen because it had acquired far more land than it could immediately handle. A return of 1898 for example shows that while the Government had obtained 1.6 million acres between 1893 and 1897, only 209,512 acres of this had been settled.[110]

7.14 MAORI LAND ALIENATION UNDER THE NATIVE LAND COURT: CONCLUSION

Over all, the period 1865 to 1899 saw the transference of most of the land and the control of the North Island from Maori to Pakeha hands, and the principal instrument of that transfer was the Native Land Court, just as the legislation of 1862 and 1865 had intended. During the period about 11 million acres transferred to Pakeha ownership under the Native Land Court, about two-thirds by Crown purchases and one third by private purchases. (A further 2.4 million acres had been confiscated and retained, and about 800,000 confiscated, returned and subsequently purchased without going through the Native Land Court as such.) Of the 7.8 million acres (approximately) remaining to Maori in 1900 about one-third was marginal land and another third was leased.

In the various research districts of New Zealand defined for the Rangahaua Whanui programme, alienations under the Native Land Acts (and land repurchased after confiscation and nominal return) to 1899 were in the order of the figures given in the table below. (The figures have been digitally calculated from maps in the 1940 *Historical Atlas* project, Alexander Turnbull Library.)

Small amounts were purchased in the South Island and the Chatham Islands, although all but a tiny fraction of the former had been acquired before 1865.

The greatest impact of purchases under the land court was felt in the Auckland region, Hauraki, Gisborne and the East Coast, the volcanic plateau, the King Country (after 1890), Hawkes Bay and Wairarapa, and Wellington, although there was no district that did not experience some impact. In Waikato, Taranaki, and the Bay of Plenty, considerable areas of the confiscated land that was returned to Maori by the Compensation Court or by commissioners were soon repurchased. The districts left with least Maori land in 1900 (besides the South Island) were Auckland, Hauraki, Waikato, Taranaki, Hawkes Bay/Wairarapa and Wellington. These included districts with the heaviest concentrations of Maori population.

An obvious product of the alienations and the manner of them was the growth of Maori protest, such that by 1895 the Kotahitanga Movement could achieve a reasonably effective boycott, for a year, of the Native Land Court. The Kotahitanga,

109. C Marr, ch 7
110. AJHR, 1898, G-3A

Rangahaua Whanui district	Acres (millions)
Auckland	1.2
Hauraki	0.6
Bay of Plenty	0.7
Urewera	0.3
Gisborne–East Coast	1.3
Waikato	1.0
Volcanic plateau	1.5
King Country	1.2
Whanganui	0.7
Taranaki	0.7
Hawkes Bay–Wairarapa	2.1
Wellington	1.5

the Kingitanga (Kauhanganui) and the emergent Young Maori Party led by Apirana Ngata cooperated in a demand for new land laws which would return to Maori committees, representative of hapu and districts, control both of the determination of title and management of the land, together with a cessation of sales in favour of leasing lands for settlement.[111] Notwithstanding the individual involvement of many of the same men in sales of land, this protest, itself the culmination of a dozen regional movements and hundreds of individual petitions and protests, is hard to gainsay.

In fact political and official bodies had repeatedly not denied but concurred in what Maori were saying. A succession of Ministers, such as J C Richmond 1866 to 68, McLean from 1868 to 1876, Sheehan and Grey then Bryce and Ballance, had admitted much of what Maori were saying about excessive and inequitable alienations. So too had commissioners inquiring into land laws, such as Haultain in 1871, C W Richmond in 1873, and above all Rees and Carroll in 1891. All had expatiated on the 'evils' and 'abuses' of the system. Again and again governments had tampered with the land laws, until they were a maze and a confusion, impossible to negotiate and an arena for speculators and lawyers possessed of capital rather than small farmers seeking secure titles. The system was a trap for inexperienced Maori caught in a tangle of expenses for surveys, court fees, lawyers' and agents' fees, all charged against the land. On the determination of titles through the Native Land Court the Rees–Carroll report was utterly damning. T W Lewis, Native Under-Secretary for more than a decade told the Rees–Carroll commission:

111. See Stout–Ngata survey, AJHR, 1907, G-IC, (cited in Loveridge, p 14)

> The whole object of appointing a Court for the ascertainment of Native title was to enable alienation for settlement. Unless this object is attained the Court serves no good purpose and the Natives would be better off without it, as, in my opinion, fairer Native occupation would be had under the Maoris' own customs and usages without any intervention whatever from outside.[112]

As Lewis said, the kind of title created by the Native Land Acts served the purpose of land alienation, not land development. It was called 'individualisation' but it was in fact a pseudo-individualisation. Every Maori owner's signature became a marketable commodity, but very few Maori owners got individual farms, surveyed and marked on the ground. According to Rees, improvement and tillage of the land remained at least as uncertain a proposition for any owner under land court titles as under customary law:

> If a man sowed a crop, others might allege an equal right to the produce. If a few fenced in a paddock or a small run for sheep and cattle, their co-owners were sure to turn their stock and horses into the pasture. That apprehension of results which paralyses industry casts its shadow over the whole Maori people.[113]

Rees and Carroll reported on the promotion of false testimony by the court's procedures:

> The Natives, being compelled to enter the arena of the Court and contest the title to land, which they could with ease have settled in their own runangas, learned to look upon our method of getting land as merely another form of their old wars. Formerly they fought with guns, and spears, and clubs; now, to accomplish the same end, the defeat of opponents and the conquering of territory, they learned to fight with the brain and the tongue. As in the olden times all means were fair in war, so, pitted by our laws against each other in Courts they held all stratagems to be honest, all testimony justifiable, which conduced to success . . . So utterly unreliable have many of the Maoris become during late years that it is now the fashion amongst some of them not only to spoil the living, but to plunder the dead. Fabrication of spurious wills has, in the words of several witnesses, like the false swearing in the Native Land Court, 'become a fine art'. Natives who, speaking in their own runangas, will testify with strict and impartial truth, often against their own interests, when speaking in the Native Land Court will not hesitate to swear deliberately to a narrative false and groundless from beginning to end.[114]

Another 'insider' view came from Native Land Court judge, George Barton. Referring to the pressure brought to bear by influential land purchasers, he said:

> No one who has not made the endeavour can appreciate how difficult it is for a Native Land Court Judge, without status, without even the protection which publicity of the Court proceedings gives to other Judges – to resist the influences brought to bear upon him.

112. AJHR, 1891, G-1, minutes of evidence, p 145
113. AJHR, 1891, G-1, p 1 (cited in Daly, ch 6)
114. AJHR, 1891, sess 2, G-1, p xi

> . . . A judge subjected to such obstacles and to such influences, not to mention others not alluded to here, must at last in sheer despair let things slide rather than court his own destruction by futile resistance to frauds and wrongs of powerful persons.[115]

Efforts at reform all stopped short of producing necessary protections and security for Maori. For example, proposals to limit the issue of credit to Maori were not adopted; restrictions on sale or mortgage of land were applied with some success in some laws (for example, section 17 of the 1867 Act) and in respect of some places, and upheld by some ministers or commissioners but not others. Amendments to the laws in the late 1880s especially made removal of restrictions relatively easy. In that context much land long deemed inalienable, and meant to be for a tribal patrimony for the future, began to be alienated. Safeguards such as the Native Lands Frauds Protection Act 1870, or the District Officers of the Native Land Act 1873, were administered in a lack-lustre fashion and not at all in some areas. There was almost no enforcement of the minimum area of land to be retained by Maori for future needs, nor a taking up by the Crown of an endowment for Maori purposes as envisaged in some of the instructions to governors of the early 1840s. Measures to ensure that Maori got a fair price (such as sale or lease by public auction as suggested by Sir William Martin in 1865 and 1870) were not adopted (except in Ballance's inoperative 1886 Act). Prior dealings before land passed the court were not illegal until 1883 and even though made illegal then by Bryce (on penalty of a fine) the prohibition was not strong enough to check the trade, and the restriction did not bind Crown agents in any case. Most Maori blocks were subject to some kind of advances, or contracts of sale, before they got to the court.

How much responsibility do Maori themselves bear for this morass?

There is no doubt whatever that many Maori were willing sellers, engaging eagerly in the land trade and living well for short periods. Others did so less willingly, being caught in a sequence of debts, partly created by the costs securing of land titles themselves. The habits, and necessities, of consumer spending, and the cultural imperatives of hospitality, caused many to grow dependent on advances on land sales, resulting in a steady erosion of the tribal patrimony.

It is evident too that many of the chiefs continued to ensure that only their names went onto the titles of land blocks, long after the 1873 Act required the names of all owners to be entered on the memorials of ownership. Part of the reason was no doubt their self-interest and their desire to secure status in the new kinds of land title as in the old. But part of the intention of the more responsible chiefs (like the Ngati Maniapoto leaders who did not want title to go below hapu title) was to stop the uncontrollable loss of land that began with the pseudo-individualisation, the listing of all names.

Then there was the constant flow of requests from Maori for the Government or court to lift restrictions put on alienation, and their reluctance to put land under official trustees or commissioners of reserves at all. Maori (with good reason)

115. AJHR, 1893, G-3, p 19 (cited in Katherine Orr-Nimmo, 'Report for the Crown Forestry Rental Trust on the East Coast Maori Trust', Wellington, 1996, p 58)

distrusted official managers, and did not like being treated paternalistically. Was it then largely their own fault that they did not allow governments (even when they wanted to) to restrict more of the titles and prevent the land being frittered away?

The answer that the Maori leaders themselves constantly gave was that they did not want paternalistic controls, but rather to 'deal with the land as we wish'. What that meant, however, was not a dissipation of individual interests, piecemeal. What it meant was a restoration of the collective, hapu-based authority of the traditional system, with reciprocal rights and obligations of chiefs and people. And this the settler parliaments and governments consistently declined. Almost all plans for returning adjudication of title and management of the land to runanga were rejected. The Native Land Court of 1862 (a panel of chiefs chaired by the local resident magistrate) was changed to Chief Judge Fenton's style of court under the 1865 Act. McLean's 1872 Maori Committees Bill was not proceeded with; only the sprawling and largely powerless committees of the 1883 Act were allowed. True, Ballance's 1886 Act gave more place for block committees, but the committees then had to hand the land over to Pakeha officials for subsequent dealings and Maori declined to do that. Only in 1893 (with the Mangatu No 1 Empowering Act) and 1894 (with section 122 of the Native Land Court Act) did the system of incorporation of owners and elected block committees authorise what the East Coast and central North Island chiefs were seeking. As for the Government's resumption of the purchase of individual interests after the repeal of Ballance's 1886 Act, Major Ropata Wahawaha in the Legislative Council cut through the Government's tendentious claims:

> do not say, or pretend to say, that these clauses [in the Native Land Court Act 1888] do fulfil that [Maori demand] and that they do return to the Maoris the mana of their land . . .[116]

In 1894 in Parliament, in debate with James Carroll, who had referred to Maori land rights under the Treaty, Sir Robert Stout stated:

> It was quite correct what the Honourable Member had said – that bit by bit this Treaty had been violated. Of course, the lands had not been taken away from the Maoris without compensation; but he believed, if they had adopted the Committee system which was provided for in the Act of 1886, they would have had greater control over their lands than they now possessed, or were likely to possess under what was called the individualising of their titles.[117]

This was a not inaccurate summary of the previous 35 years' experience.

Given this level of understanding among many of New Zealand's leading politicians why did they not do more about protecting Maori land and rangatiratanga? Basically they stopped short of every measure which would prevent the freehold of New Zealand's undeveloped land transferring to settlers' hands. This was partly

116. NZPD, 1888, vol 43, p 230
117. NZPD, 1894, vol 85, p 556

because both individual settlers and the Government needed the increased capital value of land. Most immigrants had left situations of tenancy or labouring employment and come to the colony expecting to get land and become farmers in their own right, building a property in which their investment of labour and capital would be secure and able to be passed to their children. There was also a raw level of racial prejudice; few European immigrants were prepared to be tenants of people they called 'the Natives'. This attitude was constantly expressed in the daily press and taken up by settler leaders. In the 1886 election, H A Atkinson, several times Premier, bitterly attacked Ballance's Native Land Administration Act because it proposed Maori leaseholds as well as freeholds:

> I say that no more land should be left to the Natives than is sufficient to provide them with an ample living. That the rest should be bought by the Crown at a fair price . . . I'll never be a consenting party to see a large class of Maori landlords set up in this country.[118]

Ballance, the first settler leader seriously to support Maori leasing since Grey's 'new institutions' of 1862, said that he would not support the setting up of a 'Maori aristocracy' in New Zealand (any more than a Pakeha one) but that he would prefer Maori landlords in New Zealand to absentee white landlords living overseas (of which in fact there were a great many). But Ballance too pursued the freehold vigorously in the opening up of the King Country, indeed hypocritically saying in Parliament that he was going quietly in negotiations with Ngati Maniapoto leaders in order that their suspicions would be disarmed and they would offer the freehold.[119] The Government in fact needed large blocks to resell in order to offset the loans for the main trunk line and other major projects. That was the purpose of the Crown monopoly in the area (via the Native Land Alienation Restriction Act 1884). Much is not most of New Zealand's capital works from 1840 to 1900 were in fact funded through the resale of cheaply acquired Maori land; Maori members of Parliament were well aware of it and opposed the Railway Loan Bill in 1882 (as they opposed most of the land Bills) but they were too few in number to be very effective.

The other main reason for the sluggishness of parliamentarians in reforming the Maori land laws was fear of upsetting titles. In respect of a partition concerning the Maori Land Court's decision in the Maungatautari block, the 1887 and 1888 Native Affairs Committee of Parliament (in an unfortunately undated minute) observed:

> If the discontent of the Natives left out is to be weighed (without a legal rehearing) there is no title in the country worth the paper it is written on. That there has been a great deal of injustice and a miscarriage of justice with regard to Court titles seems to be beyond dispute but the evil would be multiplied many fold if the Government set itself to override the law and to indirectly or directly review titles.[120]

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118. *Waikato Times*, 1 April 1886
119. *Wanganui Chronicle*, 14 January 1886
120. LE 1/1887/8, NA Wellington

In 1886, when Ballance had, in the Native Equitable Owners Act, legislated to allow the court to hear applications from Maori excluded by the ten owner rule of the 1865 Act, there were objections to the cost of re-litigating the multitude of cases involved. One member suggested that a parliamentary committee should look into each case. Another, S Locke, suggested that compensation should be paid from colonial revenues, rather than that each case be re-litigated and land rights restored[121] – essentially the approach that 100 years later is being taken under the Treaty of Waitangi Act 1975.

Notwithstanding, therefore, the biting criticisms of very senior political leaders and officials, governments tinkered with the existing system, rather than radically reforming it. The settler demand for freehold land was very strong, and the Maori population was still believed by many to be declining (although others, including senior politicians and officials believed that it was stable). Having in previous decades frustrated and undermined repeated Maori efforts, under independent-minded and perceptive leaders, to secure control and use of their own land rather than have it converted to negotiable paper titles, the settlers then held Maori in contempt for the outcome that followed, as disillusioned leaders who had engaged optimistically with the Government after the wars struggled to regain some sort of place for their people in the new system. The late nineteenth and early twentieth century was a period when settler racism probably was more virulent than at any other time. But the leaders of the Kotahitanga, and Kauhanganui, East Coast leaders who been developing the system of block committees and incorporated owners, Maori members of Parliament like James Carroll, highly skilled in the processes of government and law, and new leaders like Apirana Ngata, were about to have another attempt at control of the remaining 7.5 million acres of Maori land.

121. Phillipson, Wai 64 ROD, doc 23

CHAPTER 8

RESERVES AND RESTRICTIONS ON ALIENATION TO 1900

8.1 Introduction

Formal equality of Maori with settler in the new nation state depended upon their having the free choice of which of their lands to retain both for their own residence and for farming and commercial development. However, 'free choice' is not a concept which easily applies in a situation where people without capital other than their land, and inexperienced in a money economy, encounter the enormous pressures of modernisation. Two major issues arise in respect of the Crown's responsibilities: firstly, at the very least, ensuring that Maori were able to retain the land which they did wish to retain; secondly, over and above that, whether the Crown had a duty to ensure that Maori retained adequate lands for their present and future needs, even when they were prone to sell it, for one reason or another. Official policy on reserves, and on the restrictions on alienation placed on the titles of Maori land which passed through the Native Land Court, bear heavily on this question. Rangahaua Whanui reports which deal with these issues include Ralph Johnson, A Report on Trust Administration of Maori Reserves, 1840–1913', and Jenny Murray 'Crown Policy on Maori Reserved Lands 1840–1865 and Lands Restricted From Alienation, 1865–1900'.

8.2 Early Reserves Policy

Lord Normanby, Secretary of State for the Colonies, made the first statements concerning land to be reserved for Maori in 1839. He instructed that no land should be purchased from Maori 'the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence'.[1] In 1841, Normanby's successor, Lord John Russell, instructed Hobson to identify Maori land before allowing purchases to take place:

1. Normanby to Hobson, 14 August 1939, BPP, vol 3, p 87 (cited in J E Murray, *Crown Policy on Maori Reserved Lands 1840 to 1865, and Lands Restricted from Alienation, 1865 to 1900*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), 1997, p 1)

> the land of the aborigines should be defined, with all practicable and necessary provision on the general maps and surveys of the colony . . . the lands . . . should be regarded as inalienable.[2]

It should be noted that Russell subscribed to a version of the 'waste land theory', that Maori had valid title only to land they cultivated or used in a fairly intensive way.

Earl Grey was to later outline a slightly more definite reserves policy. He thought that reserves should be 'ample' but confined to providing 'real wants': settlement and cultivations should have priority over land for hunting and gathering. However, Maori were not to be deprived of land used for hunting and fishing without 'providing for them in some other way advantages fully equal to those they might lose'.[3]

The Crown was also influenced by the New Zealand Company 'tenths' scheme.[4] The allocation and administration of the 'tenths' reserves was an important part of the New Zealand Company's colonization scheme. Even before the Company had received Crown agreement for its activities in New Zealand, the Directors had appointed an official, Edmund Halswell, to oversee the allocation and administration of its reserves. In managing the reserves, Halswell was instructed to:

> take into consideration the existing wants of the Native race and to point out those objects to which in your judgement the revenues of the reserves may be most fitly appropriated to the end of promoting the moral and physical well-being of the Native chiefs, their families and followers . . . As the appropriation of land to purchasers proceeds it will become your specific duty to select an eleventh, or a quantity equal to one-tenth of the land appropriated from time to time to purchasers, as Native reserves.[5]

As the Company's acquisitions from Maori were yet to be investigated and confirmed, the Crown began also to watch over the allocation of reserves. In early 1841 Halswell was appointed a Government commissioner for native reserves and a Protector of Aborigines. But there were serious differences between Crown and Company policy and objectives. In 1841, the administration of reserves was removed from Halswell and placed in the care of three individuals: Chief Justice Sir William Martin, George Clarke, the Protector of Aborigines, and Bishop Selwyn. In each area a local agent was appointed to assist the trustees in their duties. Still, 'the administrative arrangements appear[s] to have been haphazard, owing to a general confusion among the trust members, and, . . . the uncertain status of the reserves titles themselves'.[6]

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2. Russell to Hobson, 28 January 1841, BPP, vol 3, p 52 (cited in Murray, p 4)
3. Merivale (Under Secretary for Colonial Affairs) to Beecham (Secretary of the Wesleyan Methodist Missionary Society), 13 April 1848, BPP, vol 6, pp 154–155 (cited in Murray, p 4)
4. See above ch 3
5. New Zealand Company to Halswell, 10 October 1840, BPP, vol 2, p 668 (cited in R Johnson, 'A Report on Trust Administration of Maori Reserves, 1840–1913', Waitangi Tribunal Rangahaua Whanui Series unpublished draft, 1996, ch 2, p 5
6. Johnson, ch 2, p 11

There was confusion too about whether the reserves were for Maori occupation and use, or to be retained in trust and leased to provide a fund for their benefit. Maori owners had their own preferences about allocation of lands. Sometimes they themselves placed land in trust for churches and schools and their preference for land for occupation and use generally included dwellings, cultivations, and sacred places such as burial grounds. However, land that Maori wished to retain was also the land most desired for settlement. Some of the 'tenths' in the Port Nicholson settlement were selected to coincide with Maori pa and cultivations but most were exchanged (with greater or lesser degrees of Maori concurrence) for reserves further out. The outcome was that, except to some extent in Nelson, little land was left for the trustees to raise revenue from for Maori welfare.

In land purchase policy generally there was no accepted standard of what was sufficient land for present or future needs. The Company had thought in terms of a one hundred acre country section and a one acre town section for each of the 'chiefly families. (Other Maori were expected to become labourers, like most of the British immigrants). European settlers in Auckland were being granted 40 or 50 acres per adult and 20 acres per child. Maori would not have been thought to require more. Even a sympathetic observer like Ernst Dieffenbach thought they would need only 10 acres per head.[7] In point of fact,once it became clear that the Crown could not assert a claim to 'waste' lands as Crown demesne, against Maori wishes, the view of settlers and officials was that Maori had land vastly in excess of their needs. The Crown's efforts were directed towards acquiring it, rather than protecting it in Maori hands. Murray states, '[h]ow far particular transactions conformed to Normanby's "fair and equal contracts" depended more on the relative strength of the parties at the time than to consistency of principle'.[8]

In 1844 the Native Trust Ordinance was passed under FitzRoy in an effort to improve reserves administration. A new group of trustees was appointed, in whom all reserves not required for Maori occupation (what few there were) were to be vested, together with the 'Crown tenths' FitzRoy reserved from the pre-emption waiver purchases in Auckland, and perhaps also a percentage of the profits of land sales which Lord John Russell had directed to be made over for Maori education and medical care. The trustees had the authority to lease or exchange land. However, although the ordinance was approved in London, Grey, anxious to control the reserves administration directly, did not gazette it in New Zealand. No further legislation dealing with the administration of reserves was introduced until 1856. Meanwhile Grey sold or took into the general pool of Crown land the 'Crown tenths' in Auckland and no fixed percentage of the land fund was made over for Maori purposes.

In 1848 the former trusts of Native reserves were dissolved in favour of newly constituted 'boards of management'. Behind this decision was the need to acquire some of the remaining tenths reserves for public purposes. As a result a number of these reserves were taken, particularly in Wellington. Claimant research suggests

7. Ernst Dieffenbach, *Travels in New Zealand*, London, John Murray, 1843, p 149
8. Murray, pp 5–6

that boards of management leased much of the Wellington reserved lands at below market rentals, and similar practices occured with the Nelson tenths reserves.[9]

Meanwhile, Crown purchases were proceeding quickly, including the huge purchases in the South Island. In 1847, Grey seemed to understand the need for large reserves for the hunter-gatherer economy.[10] By 1848 however, his stated expectation was that Maori would rapidly assimilate with European society and should be limited to well-defined reserves, principally used for cultivation.[11] The rapidity of Grey's shift of attitude made no allowance for the difficulties Maori might have in making the adjustment, and the time that that would require, or for possible Maori preferences to retain large areas for leasing or to become pastoralists themselves. The miserable allocations of reserves in the South Island are well known.

8.3 The 1850s

In 1850 Grey began to contemplate the issuing of Crown grants over reserves still in Maori hands (as distinct from those under trustees) with a view to their being leased. This was linked to the prohibition of direct lease or sale of land on customary title, debarred by the Native Land Purchase Ordinance 1846. Illegal leasing between Maori and runholders had developed in Wairarapa and Hawke's Bay and in 1850–51 Grey threatened prosecution of the runholders, to add pressure on Maori to sell the freehold to the Crown. But as an incentive to them to sell he envisaged their leasing smaller areas, reserved and Crown-granted after the sale.[12] In point of fact Crown grants were not generally issued to Maori and some direct leasing went on informally. In the case of the McCleverty reserves in Wellington this seems to have been with Crown approval.

Murray believes that the Governor may not have had the legal authority to make Crown grants to Maori but the Government's doubts about this may not have arisen until the 1860s. Some Crown grants were in fact made to Maori after Crown purchases, as in the case of Potatau Te Wherowhero's 'model village' at Mangere.[13] The delay appears to have resulted rather from the dilitoriness of the administrators and from a reluctance in the part of the Crown to make grants except to individuals. In 1854, with the Hua block purchase in Taranaki, McLean instituted the system of having Maori buy back, on Crown title, portions of the land they had just sold, using a portion of the purchase payment. This seems in part to have been a way round the legal difficulty, as well as preventing the vendors from squandering the money.[14] In 1858 McLean reported:

9. Dr Patricia Berwick, 'The Trusteeship and Administration of the Tangata Whenua Reserve Lands of Whanganui-a-Tara', Wai 145 rod, doc e10, p 13 (cited in Johnson, ch 2, p 24)
10. Grey to Earl Grey, 7 April 1847, BPP, vol 6, p 16
11. Grey to Earl Grey, 15 May 1848, BPP, vol 6, pp 24–25 (cited in Murray, p 10)
12. Grey to Colonial Secretary, 25 October 1850, ia 1/1851/509, NA Wellington (see above ch 5)
13. Murray, p 15
14. See above ch 5

> Individualization of title, and the securing of properties on chiefs, has also been attempted and carried out, in connection with the acquistion of native lands in different parts of the country; and about 200 valuable properties, varying from 20 to 2,000 acres in extent, have been secured to individual natives, to be held under Crown grants.[15]

Still the grants were not issued in many cases.

In 1856, with the advent of responsible government, Governor Gore Browne reviewed Native policy. Two of the key matters under review were whether grants of land should contain restrictions and whether there was a danger of Maori selling all their land and becoming paupers. There was a mixed response to the question of restrictions. Paora Tuhaere of Orakei felt that no restrictions were needed:

> The Crown grant should be unrestricted. The natives would not sell the lands granted to them; they would always retain sufficient lands for their own use; they would feel so degraded if they parted with all their land.[16]

Bishop Selwyn was a little more cautious:

> I think the native owners should get Crown Grants, with power to lease, but not to sell; but this I consider a temporary measure, preparatory to their admission to full and equal rights in all respects with ourselves.[17]

These comments are significant in that they reflect the widespread perception of that time, that Maori were very capable of looking after themselves, and did not need the paternalism of Crown-imposed restrictions on title.

The opinion of others consulted in this review, Murray notes, could be 'described, in terms of the Treaty, as shifting very cautiously towards Article 3 rights', that is that Maori grants should be of the same kind of title as settlers.[18]

Gore Browne subsequently outlined a policy whereby instead of relying on sales of land to define reserves (as Grey and McLean had done) the portion of land required by Maori for occupation and use would first be made inalienable under a Crown grant. Remaining land would be held on Crown title and would not be made inalienable. Gore Browne, along with almost all settlers, believed that Crown titles and individual tenure were crucial for Maori to advance in the modern world.

8.4 The Native Reserves Act 1856

The Native Reserves Act 1856 emerged from the struggle then being waged between the Governor the the settler ministry for control of 'Native affairs', and was a victory for the ministry. The Act 'represented an official recognition of

15. McLean memorandum, 13 October 1858, BPP, vol 11, p 65 (cited Murray p 14)
16. 'Report of the Board Appointed by . . . the Governor to Inquire into and Report upon the State of Native Affairs', 29 July 1856, BPP, vol 10, p 555 (cited in Murray, p 10)
17. Ibid, p 546, cited in Murray, p 10
18. Murray, p 10

prevailing inconsistencies and a need to remedy administrative practices' as regards the reserves.[19] The Act applied only to land over which Maori customary title had been extinguished. Title to the reserves was vested in the Governor, but in practice administrative authority over them rested with groups of three or four commissioners of native reserves appointed for each province. These commissioners were to have:

> full power of management and disposition, subject to the provisions of this act; and subject to such provisions may exchange absolutely, sell lease or otherwise dispose of such lands in such manner as they in their discretion shall think fit, with a view to the benefit of the aboriginal inhabitants for whom the same may have been set apart.

Of most significance was the provision to permit the permanent alienation of Maori reserve lands with the consent of the Governor-in-Council. Johnson comments that:

> it is difficult to reconcile the realities of permanent alienation with the professed intentions of beneficial administration of Maori reserves and the Government's fiduciary duty.[20]

The Act did not provide for any Maori input in the administration of reserves or in the allocation of funds received from rentals or sales of reserves. This was the subject of the complaint by chiefs at the Kohimarama conference of 1860.[21] Administration of reserves under the commissioners differed from region to region because of local factors, the very different personal capacities of the individual commissioners and the lack of any centralised supervisory authority. In Nelson, the commissioneer devoted some revenue from reserves towards medical expenses and policing; in Taranaki the commissioners had to be stopped from granting the Otumaikuku block to one of their own number (although it appears to have become Crown land).[22]

8.4.1 The Kaiapoi experiment

A significant experiment occurred at this time in relation to the Tuahiwi (Kaiapoi) reserve in Canterbury. About 2640 acres had been reserved here within the massive Kemp purchase of 1848. Troubled by division of the income from pasturage and sale of timber, and encouraged by the Resident Magistrate, Walter Buller, the Ngai Tahu owners of the reserve agreed to partition the reserve. The divisions were equal, rather than by rank or traditional right-holding, and amounted to only 14 acres per person. Buller, and the local missionary, the Reverend James Stack, and perhaps the Maori owners too, envisaged a series of small farms and individual

19. Johnson, ch 3, p 3
20. Ibid, p 5
21. Tamehana Te Rauparaha, quoted in *Te Karere Maori*, 30 November 1860 (cited in Bill Dacker, Michael Reilly and Leo Watson, 'Te Mamae me te Taumaha: A Report on Maori Representation and the Authority of Maori Bodies', Waitangi Tribunal Rangahaua Whanui Series unpublished draft, 1997, p 32)
22. Johnson, ch 3, pp 39–51

cottages. A decade later, however, all the timber had been sold and the land was let rather than farmed. But the area was far too small to yield an adequate income, and Kaiapoi Maori were experiencing real poverty. The whole ethos of small-holding which was a powerful current in New Zealand life, made for miserable conditions unless the holdings were in fact quite substantial. Murray draws the comparison with the Otago reserves, a considerable portion of which fell to H K Taiaroa, whose family then increased its holdings, while other Maori accepted waged employment or (like Taiaroa's brothers) migrated north.[23]

8.5 The Native Reserves Amendment Act 1862

Partly in consequence of maladministration, all existing commissions were cancelled by the 1862 Act and full authority restored to the Governor. In an effort to bring more land into the formal reserve system, section seven removed the need for Maori assent before including customary lands under the provisions of the Act. The Act again allowed for permanent alienation of vested lands. Johnson sees the amendment Act as a 'decisive shift in the direction of reserves administration – a shift precipitated by the context of continuing war in Taranaki'.[24] It also probably reflects Grey's style. While the Governor retained the ability to delegate authority, reserves administration was more firmly in his control.

8.6 Reserves Administration, 1862–70

The transition to reserves administration under the 1862 Act was uneven and the existing commissioners were not dismissed at one time. In some regions they remained as administrators, and in others Resident Magistrates assumed their authority.

In Wellington, George Swainson had the reserves surveyed and defined better than before and some progress was made in sorting out the categories of land which the commissioner administered, but revenue was swallowed by the costs of administration. Some Crown grants began to be issued, but Premier Fox instructed Swainson not to issue them to 'avowed Kingites'.[25] In Taranaki the number of reserves increased, a few being leased and others simply occupied (by Maori or European). In Hawke's Bay there were few reserves from the vast areas sold, but they included a 7397-acre estate for Te Aute College, most of which had been ceded by Maori under the 1856 Act for educational endowment. (By then, it was Maori who were making the endowment for their own education needs, in contrast to early Crown proposals to set aside lands for this and for other Maori purposes.) In Nelson, the redoubtable James Mackay took charge, abetted by his cousin

23. Murray, pp 15–18
24. Johnson, ch 3, p 21
25. Halse to Swainson, 17 October 1864, ma 4/6, p 441 (cited in Johnson, p 56)

Alexander at Greymouth. Johnson has concluded that the administration of reserves in Nelson and Greymouth was more effective than that in other regions, and that the compendium of documents compiled by Alex Mackay regarding reserves 'demonstrated a degree of efficacy and accountability unmatched in other areas'.[26] Profits from the Nelson reserves increased, supporting medical care and the 'native hostelry'. Mackay also demonstrated a strong commitment to obtaining Maori assent to bringing reserves under the operation of the various acts. In Greymouth, Alex Mackay successfully defended the Maori reserves in the face to the gold rush of 1865.[27]

8.7 The Native Land Court Period Begins

With the introduction of the Native Land Court, the issue of ensuring that Maori retained sufficient land became more complicated. The Native Land Act 1862 signalled the end of Crown pre-emption, at least for some time, although under that Act the Governor could make reserves in land passing through the court. However the Act was not generally brought into effect. The placing of restrictions on titles offered the more usual way for the Crown to continue to act protectively towards Maori land. Under the Native Lands Act 1865, the court could recommend that Crown grants contain the provision that the land was inalienable by sale, mortgage or lease for a longer period than 21 years except with the consent of the Governor. But Chief Judge Fenton was generally opposed to restricting titles. Indeed reserved lands which were not expressly in trust began to pass the court, without restrictions on title.

The Government began to address the issue in the Native Lands Act 1866. Section 5 restricted the title of all land in the formal reserves system. Section 11 required the court to hear evidence on whether or not any other lands passing through the court should be inalienable and attach a report on its decision to all certificates and grants. Fenton was opposed to this: 'I think the Maori will progress the better the more he is exempt from protection or interference to which other citizens are not subject'.[28] Whilst Fenton believed that all the other judges agreed with him on this matter, in practice, Murray argues, they in fact responded very differently to the restriction clause.

In 1867, E W Stafford, Colonial Secretary, outlined what he saw as being the Crown's policy on reserves. To him, reserves were public lands in trust specially set aside for the permanent benefit of Maori when lands were ceded to the Crown. He argued that Maori reserves should be seen as being the same as public reserves. On the other hand, J C Richmond, Native Minister, regarded reserves as a temporary expedient. The aim of the Government's policy, he believed, was to give:

26. Johnson, ch 3, p 30
27. Ibid, pp 55–65
28. Fenton to Richmond, 11 July 1867, AJHR, 1867, a-10, p 5 (cited in Murray, p 30)

> a somewhat longer time and better chance for the adoption of European habits of mind before the Maori settles down to the poverty and necessity for labour to which he must in most cases come.[29]

Nevertheless, Richmond strengthened the provision for restrictions on the titles of land going through the court. Section 17 of the 1867 Act provided that:

> no portion of the land . . . shall until it shall have been subdivided as hereinafter provided be alienated by sale gift mortgage lease or otherwise except by lease for a term not exceeding twenty-one years and no such lease shall contain or be made subject to any proviso agreement or condition for renewal thereof.

This proviso, repealed in the new Act of 1873, provided probably the greatest protection against hasty alienation of land passing through the court of any legislation in the nineteenth century, even though it was avoided in many instances by the judges.

In 1869 Charles Heaphy was appointed commissioner of native reserves, in addition to a range of other duties. He was responsible also for the administration of Native hostelries and for some land taken under the New Zealand Settlements Act 1863 and set apart for Maori. Apart from his jurisdiction in relation to reserves, but intersecting it, he was responsible for laying off roads and for setting aside of land for immigrants. As Johnson points out, underlying these tasks was 'an uneasy combination between managing remaining Maori lands in reserve and opening New Zealand for European immigration'.[30]

Heaphy discovered that the 'Crown tenths' for Maori purposes reserved from the pre-emption purchases under Fitzroy's penny-an-acre proclamation had all been sold by Grey to the private purchasers or included in the general Crown surplus.[31] He also noted the gradual individualisation of what Murray calls the 'historical reserves'. Most South Island reserves and the Wellington tenths passed through the land court in 1868 to 1869. In 1872, Heaphy recorded that Maori in Wellington were rapidly getting the McCleverty reserves surveyed into individual sections in order to simplify the division of rents and sometimes, to obtain Crown grants.[32] Before long Heaphy was recommending the removal of the restrictions on these reserves because the rents were so low. He was also to report, however, that Maori were frequently anxious to 'tie up' their cultivations 'from the risk of temptation to sell in times of pressure or emergency'.[33]

29. AJLC, 1867, p 41 (cited in Murray, p 29)
30. Johnson, ch 4, p 6
31. Heaphy, 10 September 1872, ms notes, McLean ms, micro ms 535/14, ATL (cited in Murray, p 32)
32. Report on Native Reserves, 16 August 1872, Turton, *Epitome*, vol 3, p 82 (cited in Murray, p 32)
33. Ibid

8.8 The Trust Commissioners

In 1870, a parliamentary committee became concerned about the abuses which were creeping into land dealings. Under the Native Lands Frauds Prevention Act 1870, therefore, trust commissioners were appointed whose duties were to include the prevention of landlessness. Their task was to investigate the circumstances of each land transaction and to issue certificates without which no deed could be issued. The trust commissioners had to be satisfied that, among other things, Maori had sufficient land left for their support. As Murray points out, however, the 'Crown's intention was to protect, but not to protect with much rigour'.[34] The commissioners were warned not to throw difficulties in the way of bona fide transactions and not to make their enquiries 'too minute'.[35] In 1885 the trust commissioners' duties were transferred to the judges of the Native Land Court. The 1891 Commission of Inquiry into the Native Land Laws concluded that the trust commissioners had offered very inadequate protection and were expensive to all concerned, including Maori.

The view from Maori witnesses at an 1871 Committee of Inquiry was that not enough land was being restricted from alienation by the Native Land Court. Wi Te Wheoro (assessor of the Native Land Court) and Paora Tuhaere (leading Ngati Whatua rangatira) believed that:

> Sufficient land has not hitherto been reserved by the Court as inalienable; in some cases the wishes of the owners have not been carried out in this respect . . . From 50 to 500 acres should be reserved for each Maori man, woman and child, according to the land they hold. They might be allowed to lease some of it but not to sell it on any account.[36]

This view was repeated by others. Hemi Tautari of the Bay of Islands was prepared to see five acres as adequate, as long as it was of good quality, while others' opinions of how much land should be secured ranged from 50 to 100 acres per individual. Murray notes though that experiences differed. Harawira Tatere from the Wairarapa had put around 3000 acres through the court and had all of it made inalienable. Much, it appears, depended upon the attitudes of the judges and the way in which Maori presented claims.[37] For the period from 1 January 1865 to 31 December 1870, 2,616,414 acres of land had had certificates of title ordered for them. Of this, 637,406 acres was in reserves or restricted from alienation.[38] There is no information regarding the quality of this land or its distribution among Maori.

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34. Murray, p 34
35. Appendix to the report on council paper no 97, 'Being the Report of the Trusts Commissioner for the District of Hawke's Bay, under "The Native Lands Frauds Prevention Act 1870"', AJLC, 1871, p 162 (cited in Murray, p 34)
36. 'Papers Relative to the Working of the Native Land Court Acts', AJHR, 1871, a-2a, p 26 (cited in Murray, p 36)
37. Murray, p 37
38. AJHR, 1871, a-2a, p 50 (cited in Murray, p 37)

8.9 The Dual Commissionership, 1871–79

Johnson has termed this period the 'Dual Commissionership' due to the role of Charles Heaphy and Alexander Mackay. Mackay had retained the management of South Island Trust reserves, in particular Westland, Marlborough and Nelson. During the 1870s Heaphy reported on the reserves at Wellington, Auckland and Hawkes Bay. Other reserves, such as in Taranaki, were not regularly reported on.

Heaphy's 1873 report on the administration of Wellington and Auckland highlighted an earlier absence of active administration. In Wellington, the lack of a commissioner had led to a number of problems concerning lease arrangements, but as confidence increased in Heaphy's management, Maori chose to place a number of reserves in his hands. Similar actions took place in Hawkes Bay. Returns published in 1873 illustrate the benefits of Mackay's effective management. Nelson reserve leases returned relatively high rentals.

Details of the administration of the 'endowment' reserves in the various provinces or districts in the 1870s are provided by Johnson. Broadly they show increasing efficiencies under Mackay and Heaphy, and increasing revenue from leasing of reserves. But later evidence revealed that they were still below the economic rentals that Pakeha landlords expected, or indeed were getting by subletting reserves.[39] The cost of administration continued to swallow a considerable proportion of the revenue and there were indications of mounting pressure from the lessees (at Greymouth for example) that they wanted better terms. Heaphy and Mackay supported their getting longer terms but not perpetual leases. They tried also to retain regular rent reviews but tenants in arrears in rental payments plagued their administration.[40] Portions of some reserves continued to be sold, usually because the trustees hoped for higher capital gains. Consultation with Maori appears to have been erratic, at best.

At the beginning of the 1880s Mackay was administering some 53,762 acres: 39,435 acres in the South Island (of which half were in Marlborough), and 14, 327 acres in the North Island (of which most were in Wellington district) some ceded land in Poverty Bay, about 3552 acres in Taranaki and about 180 acres of special purpose reserves in Auckland.[41]

8.9.1 The Native Reserves Act 1873

The Native Reserves Act 1873 was passed, according to the preamble, because of mismanagement, and lack of definition of the trusts intended to be created. It cancelled existing commissions and provided for the appointment of a 'board of direction' for each district, comprising a reserves commissioner as chairman (Mackay and Heaphy in fact) and three local Maori 'assistant commissioners'. But

39. Debate on Native Reserves Bill, NZPD, 1881, vol 40, p 102 (cited in Johnson, ch 5, p 14)
40. Johnson, ch 4. Johnson also discusses various committees of inquiry, amendment Acts and failed bills intended to improve reserves administration.
41. Alexander Mackay, 'Report on the State and Condition of Native Reserves in the Colony', AJHR, 1883, g-7

the two reserves commissioners did not want to work with Maori assistants. In 1876 Mackay complained that they impeded the flow of customary land into the reserves administration (how is not clear) but failed to provide effective representation for Maori owners. He did appoint two at Nelson and they apparently drew salary until 1883 when Mackay recommended that they be dismissed, 'their services never having been needed'. Their appointment he said 'was the result of popular opinion then prevailing that the Natives should have a voice in the management of their own affairs, but the practical effect of the office has been nil'.[42]

8.10 The Native Land Act 1873

In 1873 McLean oversaw the enactment of a new Native Land Act and a related Native Reserves Act. The preamble of the former declared the purpose of the Act to be the preparation of a 'roll' of Maori land throughout the colony 'with a view to assuring to the Natives without any doubt whatever a sufficiency of their land for their support and maintenance, as also for the purpose of establishing endowments for their permanent general benefit from out of such land'. Sections 21 to 32 of the Act were to give effect to the policy.

For both maintenance and endowment reserves combined, a minimum of not less than 50 acres was to be retained for each man woman and child. District Officers were to be appointed throughout the country to work with the chiefs in the compilation of a 'reference book' of all tribal lands, their boundaries and estimated areas, and to select the reserved lands. These would be inalienable, exempt from the operation of the rest of the Act. This policy was set out in *Te Waka Maori*, which stated:

> No man will be able to sell the land so set apart and henceforward it will not be in the power of the chief to sell all the land of the tribe and leave the tribe without any land; but by the new law every man, woman, and child will be counted, and a large piece of land for the whole of them, in proportion to their numbers, will be kept for them; where they can live, and where they may die, for it will not be lawful for any one to sell that land, or take it from them, or prevent them from living on that land and cultivating it.[43]

Fenton and his fellow judges bitterly attacked the provisions regarding District Officers as a gross infringement of the powers of the court. He also attacked the purpose of the legislation. McLean had envisaged that the reserves could remain under a form of collective hapu title. Fenton railed at 'the omission of all reference to the expediency of extinguishing or converting Maori customary title to land, or to the advantage of clothing these lands with titles derived from the Crown'.[44] Since

42. AJHR, 1876, g-3a, pp 1–2 (cited in Johnson, ch 4, pp 37–38); Mackay to Hamerton, 20 March 1883, pt 83/82, ma mt 1/1b (cited in Johnson, ch 5, p 33)
43. *Te Waka Maori on Niu Tirani*, vol 9, no 16, 29 Oketopa 1873, pp 140–141 (cited in Murray, p 42)
44. 'Remarks by the Judges of the Native Land Court on the Native Land Act, 1873', AJLC, 1874, no 1 (cited in Murray, p 41)

the District Officers were essentially to be assisting the court, Fenton's opposition meant that sections 21 to 32 were largely inoperative.[45] Judge Rogan, at McLean's urging, and Samuel Locke as district officer for the East Coast, did reserve 31,500 acres in the Cook County under section 21 of the Act, but this was exceptional.[46]

Some of the District Officers tried to carry out the Act's requirements while others did not. Locke listed 39,223 acres as the reserves he had recommended under the Act by 1877.[47] In much of his district he thought it was impossible to make reserves since so much land in Hawke's Bay and the neighbouring part of Poverty Bay had gone through the court before 1873. In the far north William Webster reported:

> The Natives have all objected to allow any of their lands to be reserved in the manner required by the Act, and, when strongly advised to secure an inalieneable reserve for themselves and their families as provided by the Act, have uniformly said that the provisions of the Act are very good, but they prefer to have their land left in their own hands, to deal with as they like.[48]

From the Kaipara district, H T Kemp felt that Maori owned sufficient land and that additional reserves were unnecessary. He calculated that 12,632 acres had been reserved which worked out at approximately 216 acres per person.[49] The amount of reserves held by each hapu was not given, nor an analysis of the quality and value of the land. E W Puckey in Thames found it impossible to obtain accurate information about who owned land and to persuade Maori to think about inalienable reserves:

> I have repeatedly urged upon the Natives in my district the extreme necessity which exists of land being set apart for reserves for their future use and maintenance, but so far without avail, owning to the want of unanimity jealousies, and the conflicting interests of claimants.[50]

These comments indicate that it was not only opposition from the court that frustrated the scheme. Maori too, with reason, were highly distrustful of what appeared to be bureaucratic control of their lands. In Hawke's Bay it Heaphy also found it difficult to have them put land under trust, after he discovered that the court was not placing restrictions on titles.

In addition to the sections dealing with District Officers and their powers, section 48 of the 1873 Act required a restriction to be recorded on each 'Memorial of Ownership' issued by the court, limiting alienation to 21-year lease. Yet section 49 permitted sale if all owners agreed, and other clauses allowed for purchasers as well as Maori to apply for partition of blocks so that the non-sellers portion was cut out.

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45. See Fenton's own opinion to that effect, AJHR, 1886, i-8, p 16
46. See Murray, p 44
47. Locke to Clarke, 16 October 1877, AJLC, 1877, no 19, p 4 (cited in Murray, p 49)
48. Webster to Clarke, 29 September 1873, AJLC, 1877, no 19, p 1 (cited in Murray, p 49)
49. Kemp to Clarke, 25 September 1877, AJLC, 1877, no 19, p 2 (cited in Murray, p 50)
50. Puckey to Clarke, 27 September 1877, AJLC, 1877, no 19, (cited in Murray, p 50)

Section 48 was regarded as an 'anomaly' by the officials and was not applied.[51] Arguments over the requirements of the law contiued, however, and eventually went to the superior courts. It was then held, in the case of the Puhatikotiko block near Gisborne, that the general conditions restraining alienation on every memorial of ownership could not properly be called a restriction on title. They were brought to an end by the issue of a Crown grant on partition.[52]

Not until 1878 was the want of a regular system of putting restrictions on title again addressed legislatively, when the court was empowered to make recommendations to the Governor to that effect. This unwieldy system was replaced in 1880 when the court was required to consider the need for restrictions in respect of all land before it and to enter the restrictions on the certificate of title.

Official statistics give only incomplete indications of how frequently restrictions were applied. Of 2,616,414 acres for which certificates of title had been ordered between 1865 and 1870, 637,406 acres was under restriction or reserved.[53] A 1886 return shows that a further 1,230,000 acres had been restricted, including very large blocks in Taupo, Rotorua and Poverty Bay. But that was out of about 12 million acres which had passed throught the court, showing that the rate at which restrictions were imposed had slowed markedly since 1870.[54]

8.11 The 1880s

In the 1880s, political attention fixed on restrictions as a barrier to development and prosperity. Settlers and politicians believed that their districts were being held back and that farmers would not develop the land until they had acquired the freehold. Following the request in 1882 of Robert Hart, a member of the Legislative Council, for a return of all cases in which restrictions on alienation in grants to Maori had been removed by the Governor, printed returns were presented to the General Assembly annually from 1883 to 1891.

These returns provide a range of information about the process of restricting land from alienation. First, the Native Land Court was not the only source of restrictions. Land carried restricted title from Government decisions made outside the court, such as areas of land confiscated and returned. Secondly, it was often Maori who had taken the initiative to have restrictions placed on the titles. Thirdly, as noted above, the attitudes of individual judges differed. Some believed that some form of protection should be exercised over Maori land; others did not. Fourthly, there is evidence of carelessness in the process of recording the court's decisions and transmitting them correctly onto titles. It was claimed on occasions, that clerks had made errors in entering restrictions that no one wanted.[55]

51. This completely puzzled a later Native Minister, John Bryce. See his exchange with Under-Secretary Lewis about it in 1882 (cited in Murray, p 48), and also the discussion in the 'Report of the Owhaoko and Kaimanawa Native Lands Committee', AJHR, 1886, I-8
52. Judgement in the Court of Appeal, 19 October 1993, j-1, 94/173, NA Wellington (cited in Murray, p 94)
53. 'Report on the Working of the Native Land Acts', AHJR, 1871, a-2a, p 50 (cited in Murray, p 37)
54. 'Land Possessed by North Island Maoris', AJHR, 1886, g-15, pp 16–17 (cited in Murray, p 53)

8.11.1 The West Coast Settlement Reserves Act 1881

The West Coast Settlement Reserves Act 1881, drafted by the West Coast Commission investigating the confiscated lands in south Taranaki, vested the West Coast Settlement Reserves, as they were called, in the Public Trustee. Some were to be reserved for Maori occupation and most leased to settlers. Their administration has been reported on at length by the Waitangi Tribunal. The *Taranaki Report* comments that the requirement upon the Trustee to administer the land for the benefit 'of the natives to whom such reserves belong' and at the same time, for 'the promotion of settlement' are 'inherently in conflict'.[56] This is not strictly the case. Leasehold systems can be and are administered by trustees for the mutual benefit of both parties. But there is certainly a tension between the needs and wishes of beneficial owners and of tenants; framing equitable leasehold terms and providing a satisfactory process for keeping them equitable is difficult. The record of the adminisration of the West Coast Settlement Reserves is that it moved increasingly in favour of the settler tenants, as much because of legislation as of maladministration by the Public Trustee.

8.11.2 The Native Land Division Act 1882

The Native Land Division Act 1882 empowered the Native Land Court to impose or remove any restrictions on the new grant issued with the partition of title. The court could issue new grants without restrictions even though they were on the original grant. As Murray states 'This measure has the character of being a deliberate loophole, as it offered an indirect and relatively easy way of having restrictions removed without further scrutiny'.[57]

8.11.3 The Native Reserves Act 1882

With the death of Charles Heaphy in 1881, the reserves dating from 1840 were administered by Mackay alone. A review was already pending and in 1882 a new Native Reserves Act was passed. Not surprisingly it placed the reserves under the Public Trustee. This was in keeping with John Bryce's long-standing objectives to 'end the system of personal government which obtains in the Native Department'.[58]

The advisory Public Trust Office board was widened to include two Maori. They were not salaried officers with actual administrative authority, and consultation with them appears to have been perfunctory.[59] Mackay remained as commissioner assisting the Public Trustee, until his appointment as a judge of the Native Land Court in 1884.

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55. See Murray, pp 55–57
56. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wellington, GP Publications, 1996, p 258
57. Murray, p 77
58. NZPD, 1879, vol 32, pp 350–60
59. Johnson, ch 5, p 18

The new Act abandoned previous efforts to bring Maori customary land under trust; the Public Trustee administered only land over which native title had been extinguished. A very promising feature of the act, however, was that the leases were to be granted by public auction or tender, at 'the best improved rent available at the time' – a provision which was soon to attract the criticism of the tenants.

Whatever the merits and demerits of the act, the Maori members opposed it unanimously and vehemently. From their perpective it removed land from Maori control and denied them the revenue. Hone Mohi Tawhai proposed an alternative model, that of the Orakei Trust, created by private bill which empowered Paora Tuhaere to lease (but not sell) on behalf of his co-owners.[60] Their views, as usual, did not prevail.

The debate is noteworthy for another reason, however. Native Minister John Bryce joined other speakers in expressing the view that the Maori population had ceased to decline and might soon increase. He congratulated himself that the 1882 Bill would go a long way to 'maintain an inheritance of land for them in the country which at one time had solely belonged to them.'[61] An increase did not show on the official census until the 1890s, but in the light of Bryce's statement, the intensification of governments' efforts to buy Maori land in the 1890s and the twentieth century looks all the more irresponsible.

8.12 The Removal of Restrictions

Under the 1882 Act, reserves commissioners or the Public Trustee could apply to the Native Land Court to have restrictions placed on land going before it, 'so as to prevent Natives from so far divesting themselves of their land as to retain insufficient for their support and maintenance'. They, or Maori owners, could also apply to have restrictions removed.[62] The responsibility had thus moved away from the Native Department and the Government to the Public Trustee and the court. Butterworth and Butterworth note that MacKay's departure 'had the unfortunate result of removing the one man who had a larger vision of how the Public Trust Office might have administered the reserves' and gave the Public Trustee 'unfettered discretion in his administration of the reserves'.[63] It was to prove unfortunate for Maori.

Removals of restrictions on land other than reserves (and formally in respect of reserved land also) still lay with the Governor in Council and were usually considered in the first instance by officers of the Native Department. Requests to have a restriction removed were supposed to come from the Maori owners, however it often became apparent that a lawyer had been involved and that some form of alienation had already taken place. A list of guidelines was drawn up in the Native

60. NZPD, 1882, vol 43, pp 504–10, 650–54
61. NZPD, 1882, vol 42, p 652
62. Section 29(3) of the Native Reserves Act 1882
63. G V Butterworth and S M Butterworth, *The Maori Trustee*, Wellington, 1991, p 19

Land Court in 1882 to advise Native Minister John Bryce. Before advising removal of restrictions the officials had to be satisfied that the Maori concerned had:

> amply sufficient other land for the maintenance of themselves and their successors, or that from the unsuitability of the land to be alienated, for native occupation, or other considerations, if it is to their interest to dispose of it.

The owners of the land proposed to be alienated were to be unanimous in their desire to sell, and that the price was to be '*prima facie* fair and reasonable'.[64]

While there was no common understanding of how much land was 'sufficient' for an individual's needs, there were cases, according to Murray, where it was recognised that any remaining land should be strictly inalienable because so little was left in Maori hands, but increasing fragmentation and numbers of owners in the title made this almost impossible to assess. The Native Office relied on the Government agents in the field for information. Murray has concluded that the system:

> seems to have been at its least protective when very large areas were involved . . . When it came down to individuals, with clearly defined property, officials held the line, insisting that land must be retained.[65]

Decisions about whether land was unsuitable for Maori occupation also rested on advice from officials in the field. 'Unsuitable' lands might include areas which owners could not cultivate because they were located some distance from where the owners lived. It was thought to be better to sell swampy land and rugged bush covered areas which the owners could not develop. In rural areas, land surrounded by European owned properties was sometimes seen to be unsuitable for Maori, and this was occasionally argued by the Maori owners themselves. On the matter of ownership, there was again a reliance on officials in the field. Some applications for removal, launched by a section of the owners, came to a halt when the owners of more substantial interests objected.

T W Lewis, Secretary of the Native Department, described the approach that he believed was being taken by the Native Department:

> It has always and I think fairly been presumed by the Native Department that when restrictions are imposed it is not intended that the land should be alienated unless very good reason is shown. It is difficult to make the purchasers and even the natives see the question from this point of view, the former simply looking at it from the standpoint that they desire to obtain the land and the natives that they want to satisfy their present desire for money or what it will procure. The latter never I think considering the requirements of succeeding generations in view of which the restrictions are no doubt specially imposed.[66]

Murray believes that the officials themselves did not have 'a very extended sense of the "requirements of succeeding generations"' and that this was one of the major

64. Lewis to Bryce, 9 December 1882, RDB, vol 126, p 48,638 (cited in Murray, p 58)
65. Murray, pp 58–59
66. Lewis to Bryce, 9 December 1882, RDB, vol 126, p 48,638 (cited in Murray, p 60)

weaknesses in the criteria they used: 'Questions were seldom asked about the long-term interests of Maori as a social and economic community when restrictions were removed from large blocks'.[67]

Murray provides some case histories which illuminate the process of the removal of restrictions. The most straightforward removals involved individuals and families who were economically secure. 'I do not think that we need to maintain the restriction on this. The Nicholls family are quite able to take care of themselves,' was the comment written on one such application.[68] With this type of application the usual reason given for wanting to alienate land was to invest the funds in another property. Similarly, Maori soldiers who had served with the Crown's forces were likely to have their applications recommended. Refusals to allow people to exchange land they had been awarded for more suitable land were, Murray states, more difficult to understand. Although they were occasionally permitted, exchanges were generally regarded as being troublesome and inexpedient. Applications from Canterbury Maori to alienate land reserved from the sales of the 1840s and 1850s usually received a firm rejection, highlighting the general recognition that no further land could be alienated in Canterbury. Applications for mortgages were usually turned down too.

A common reason given by owners for wanting to alienate restricted lands was that funding was required for the development of other lands. These applications were likely to be approved; it was argued in reports from local officers that some land should be alienated because the development of the whole block was beyond the financial resources available to Maori. Murray notes that the most complicated applications came from Maori who were in debt and wanted to draw on their inalienable lands. Often in these cases, some pre-arrangement would be detected: settlers who had already invested in the land or storekeepers with lists of debts.[69]

The major concern of the 1880s, Murray highlights, is that while the Government had the final word on the removal of restrictions, it was the Native Land Court's duty to impose restrictions upon titles. The court thus controlled the process at the outset. As far as removal of restrictions is concerned, while the Native Office had limited resources it had, according to Murray, a tradition of checking applications. The court, however, had no extra staff to take on the role of checking applications. Furthermore, 'concern for the wider consequences of land alienation was limited by its [the court's] preoccupation with the interpretation of the law'. The question of how thorough the court could be in establishing that all owners had sufficient land elsewhere before agreeing to remove restrictions is a serious one. Judge Alexander Mackay for example, required documentary evidence of ownership of other land from applicants. Other judges did not seem to be concerned about with this requirement. Such inconsistencies call in to question the Crown's exercise of its obligations of protection under the Treaty of Waitangi.[70]

67. Murray, p 60
68. Head Office memo, 13 June 1877, ma 13/22, no 77/4384, NA Wellington (cited in Murray, p 61)
69. See Murray, pp 60–67
70. Murray, p 67

8.12.1 The Barton commission, 1885–86

In 1885, G E Barton was commissioned to investigate pending applications for the removal of restrictions. His brief was to determine whether the Maori concerned would be left with sufficient land, if the intended buyers were acting in good faith and if the price to be paid was fair. Some 85 blocks were involved, in a number of areas. Barton's appointment seems to have been the result of Government disquiet about some recent transactions at Tauranga, and he was apparently asked to give priority to eight applications concerning land in this district.[71] Eventually Barton recommended in favour of four of these particular applications, but only 'with great hesitation', since he found himself 'unable to say . . . in any of these cases' that they had been dealt with properly.[72]

Barton, however, did more than make particular recommendations – his report was critical in the extreme of the general way in which the private purchase of Maori land was being conducted in the Tauranga district. The land agents were defrauding both their Pakeha employers and the Maori owners. Restrictions had been lifted in favour of land speculators. There were irregularities in the payment of purchase money and the obtaining of signatures. All in all, what the Barton commission showed about Tauranga was that the Crown, having made the land inalienable, had then relaxed the restriction. When it very belatedly took action, this amounted to investigation of only a handful of cases.[73]

Barton held inquiries at a number of other North Island locations besides Tauranga, and investigated many applications to lift restrictions. According to Murray, there was no single reason why Maori sought to sell restricted land. Some wanted to raise capital, to develop other properties. Those in debt had creditors to pay. Others wanted to use their land as kind of cash cow, to provide their daily living expenses. In many cases, had the Crown rigidly upheld the restrictions on the alienation of land, it would have been 'against the apparent wishes of . . . owners'.[74] Nonetheless, the cumulative effect, whether the result of Pakeha pressure, or Maori choice, was land alienation.[75]

8.13 The Shift to Perpetual Leases

The Government at first tried to maintain the tradition of fixed term leases and rent revision. The South Island Native Reserves Act 1883, for example, fixed all leases at 21 years. Tenants protested vigorously and lobbied for the freehold. With the economic depression deepening, they began to default on rental payments, putting

71. V O'Malley and Alan Ward, 'Draft Historical Report on Tauranga Moana Lands', CCJWP, 1993, pp 83–84
72. 'Report of Commissioner Barton on the Removal of Restrictions on Sale of Native Lands', AJHR, 1886, g-11a, p 4
73. O'Malley and Ward, pp 88
74. Murray, p 74
75. Ibid, p 76

more pressure on the trustees and the Maori owners. The Kenrick commission which followed, was highly sympathetic to the tenants and, though it stopped short of recommending that they get the freehold, did recommend a right to perpetually renew their 21-year terms. This was granted under the Westland and Nelson Native Reserves Act 1887. Although initial leases were still auctioned, collusion among the Greymouth tenants apparently led to fair rents not being offered.[76]

A similar story unfolded with regard to the West Coast Settlement Reserves. Various committees and commissions had been critical of the cost and inefficiency of the Public Trustee's administration. Returns to Maori had come down to an annuity computed for 30-year periods based on the unimproved value of the land. But rather than improve the lease terms for Maori, the Liberal Government in 1892 passed a West Coast Settlement Reserves Act granting the perpetual lease to the tenants. Criticisms by Maori members focused less on the revenue aspect of the system than on the failure to made adequate provision to return land to Maori owners' control when they wished. (Taranaki Maori had been petitioning for some time for the return of the land.)[77] Boasting the success of the 1892 measure, however, the Liberals extended the principle to all administered reserves.

A case had been argued for the perpetual lease, as providing a tenure which would satisfy the market and provide for a secure flow of revenue to the owners ir the trustees.[78] The need for this might be true in periods of sustained economic stagnation. But it is a self-defeating argument from the point of view of owners; when normal growth resumes they are locked out of getting economic rentals, unless frequent rent revisions are also provided for. This was not the case with the reserves under the Public Trustee, with revisions only at 21-year intervals at best. For further discussion of the administration of the Public Trustee and Maori Trustee see below, chapter 18.

8.14 Further Legislation, 1880s and 1890s

By the late 1880s, the law relating to Maori land had become extremely complex and the correct procedures for removal of restrictions very difficult to determine and to follow. About 1.8 million acres of about 14 million that had gone through the court were under restricted titles, some 700,000 acres of them in Auckland and 500,000 acres in the Gisborne/East Coast district.[79] Governments' efforts from the this time focused on trying to sort out the confusion and on 'validating' titles that were technically flawed but were considered (on somewhat dubious bases) to be equitable (see ch 9).

76. A Ward, 'Report on the Historical Evidence in the Ngai Tahu Claim', Wai 27, t-1, pp 326–327
77. Johnson, ch 5, pp 41–49
78. Don Loveridge, 'The Adoption of the Perpetually-Renewable Leases for Maori Reserved Lands, 1887–1896', Wai 145, rod, doc c-2; Johnson, ch 5, pp 40ff
79. 'Return of Lands Possessed by Maoris, North Island', AJHR, 1885, g-15

The Native Land Act 1888 had a huge impact on the removal of restrictions. It provided for an order of the Native Land Court to annul or vary any restrictions imposed by the court if the majority of owners applied. Previously this process could only be initiated if there was a specific transaction to be considered, but under this Act owners could decide to free up inalienable land with no transaction in mind. Returns for 1889 to 1891 show that this provision led to many successful applications to remove restrictions on alienation.[80]

This effectively placed more responsibility on the Native Land Court along with measures such as the provision that after 1 July 1885 the judges of the court were to be the only trust commissioners, and that from 1889 the court was to deal with *all* investigations of applications for the removal of restrictions.

Dr David Williams has listed a over 15 legislative provisions in the late 1880s and 1890s generally making it easier to vary or remove restrictions on alienation. This was part of their drive to a streamline the land-purchase system and eliminate many of the technicalities which had led to titles becoming extremely confused. The effect all the same was to remove many of the protections intended to slow or stop the alienation of land.[81] Among these provisions the Native Land Court Act 1886 Amendment Act 1888 provided for restrictions to be applied only when the court considered that owners had not already a sufficiency of inalienable land for their support. Under section 3 of the Native Land Laws Amendment Act 1890 it was no longer necessary for all the owners to agree to the removal of restrictions under section 6 of the aforementioned Act. Acts in 1892 and 1893 made special provision for removing restrictions on land for sale to the Crown. In 1893 the Native Land (Validation of Titles) Act gave the court the power to validate any informalities that had arisen in the removal of restrictions. As Murray concludes, 'All these undermined the principle of inalienability'.[82]

Section 52 of the Native Land Court Act 1894 had a major effect on the pace of the removal of restrictions. The court was able to remove restrictions if at least one third of owners agreed, replacing the requirement that it should be with the decision of the majority. A 1905 return showed the working of this Act until that date; of the 690 applications considered, all but 126 were approved. This represented 95,372 acres remaining inalienable and 452,453 acres becoming alienable.[83]

Other legislation tightened state control over reserves such as the remaining Wellington Tenths. An example of the extraordinary limits to which settlers and governments would go was the inclusion in the Native Reserves Amendment Act 1896 of authority to compulsorily vest the 10-acre burial reserve at Taupo (Porirua) in the Public Trustee and to allow him to disinter the dead and rebury them within one acre of the reserve. Rentals from the letting of the remaining nine acres would fund the disinterments and the beautification of the acre 'in the European style'.[84]

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80. AJLC, 1889, no 5; AJHR, 1890, g-3; AJHR, 1891, g-9 (cited in Murray, p 88)
81. D Williams,(comp), The Maori Land Legislation Manual, CFRT< Wellington, (not dated) pp 26–28
82. Murray, p 91
83. AJHR, 1905, g-4 (cited in Murray, p 92)
84. Native Reserves Amendment Act, 1896, ss 2, 7, 8 (cited in Johnson, ch 5, p 52)

Even the Maori dead were not to be left in peace if more land could be taken over and 'used' in Pakeha terms.

8.15 The Twentieth Century

The 20th century saw the introduction of an entirely new legislative regime, removing all restrictions on title and relying on the Maori land boards to check on Maori landlessness before approving transactions. About four million more acres were alienated before the Second World War (see ch 15).

8.16 Conclusion

The Rees–Carroll commission, reporting in 1891, revealed the enormous confusion in the land law, including provisions relating to removal of restrictions on alienation. Murray has shown that, notwithstanding the Liberals' efforts to simplify the law, confusion continued, notably between the role of the land court and that of the minister. There was considerable variation in the experience of different districts too, according to when the land passed through the court and under which judge. In general though, the trend was steadily towards easier removal of restrictions and the alienation of more Maori land.

The dilemma noted at the beginning of this chapter ran through the whole period. Formal equality with settlers implies that Maori should be free to deal with their land as they saw fit, including sell it. The trusteeship responsibility of the Crown, however, suggests that a substantial proportion of the land should remain locked up against sale – that it should be alienable by renewable lease at most, and some not alienable at all. The Crown's position was made the more difficult because Maori owners themselves constantly pressed for removal of restrictions and for the right of sections of owners (usually majorities) to partition off and sell their share of a block. Maori would state before the court that they were agreed and that they had interests in land elsewhere. It was difficult for the court to enquire behind such statements. Responsible officials sometimes agonised over whether to refuse a request of someone who wanted to sell a portion in order to develop the remainder, or to pay debts to the doctor and hospital, for medicine for sick children or for tangi expenses and coffins when family members died, for rent, for butchers' and bakers' bills, for a headstone for a grave.[85] Ordinary human needs, including cultural obligations, created strong pressures on Maori to sell.

When this was coupled with the incessant settler clamour for more Maori land, it is perhaps not surprising that governments increasingly veered towards removal of restrictions on title. In view of John Bryce's 1882 statement to the contrary, they

85. Murray, sec 6.7

cannot easily plead, however, that they still believed Maori to be dying out, and hence needed less and less land.

The prevailing attitude throughout the period (even amongst Maori leaders like Carroll and Ngata, by the early 20th century) was that Maori land which was unoccupied and undeveloped was of no benefit to anyone, including the Maori themselves, and that it might as well be alienated to settlers, some by lease and some by sale. The notion that some land would be retained by Maori, as industrious settlers, and the rest alienated, underlay the work of the Stout–Ngata commission 1906–08. As Murray points out, little had changed since 1840. The 'use it or lose it' philosophy was dominant.

Two approaches to the reserved lands and restrictions on title never did make much headway. One was to make some areas absolutely inalienable. McLean's 1873 proposal to leave 50 acres per person under customary tenure, or the provision for papakainga (or papatupu) lands in the Maori Councils Act 1900, approached this goal, but were never seriously implemented.[86] The other approach was to tie up land in trusts administered by the hapu leadership, rather than by officials. Constant Maori districts of putting lands under officials was quite understandable, since they usually saw little money from the administered reserves, and on the contrary saw them sold or put under perpetual lease at peppercorn rental. But Government made little effort to foster Maori trustee administration under tribal control. The desire to break up tribal title was too strong, either from the paternalistic belief that Maori would only advance in the modern world through individual title or because settlers wanted the land too much. The system of 'incorporated owners', commenced on the East Coast in 1893 and very grudgingly recognised by the settler parliament, came closer to recognising a customary king of trusteeship. Although in the 20th century the law facilitated dealing with incorporations for lease or freehold, the limitations on the management committees to deal with the land, without the approval of a general meeting, meant that land under incorporated owners was usually retained.

The whole question of reserves and restrictions on title reflects the ambivalence between the view of Maori as individuals having full control over their property (including the right to sell it) and that of Maori as inheritors of a tribal patrimony, much of which (at least) should have been preserved under article 2 of the Treaty for future generations. Maori themselves were not entirely consistent in their thinking or their actions on this most fundamental issue, but the Crown overwhelmingly favoured the former view (and took full advantage of the land-selling propensities of individual Maori), while the Maori leadership, through the Kotahitanga and other movements, strongly supported tribal control. The preferred Maori model, as expressed by leaders on the East Coast from the late 1870s the Rohe Potae leaders in the 1880s and by the Kotahitanga and related organisations in the 1890s, was not to create titles based on individual owners in the first place (and then try to restrict them) but rather to create a tribal title with individual rights of

86. See evidence of T W Lewis, AJHR, 1891, g-1, p 156 (cited in Murray, ch 7)

occupation or lease for Maori villagers or farmers, and leases and joint ventures with settlers by tribe (hapu) as a body corporate.

It is also relevant to note that several witnesses to the Commission of Inquiry into Native Land Laws in 1890 (T W Porter, E Harris, Wi Pere, Hamiona Mangakahia) expressed the view that simply setting apart reserves was of little benefit to Maori; they should be assisted with the use of the land, which meant assistance with tile questions, grants or loans for fencing and stocking, and technical advice.[87] This was not in fact seriously attempted until the 1920s.

87. AJHR, 1891, g-1, pp 12ff

CHAPTER 9

THE VALIDATION COURT

Note: This chapter draws on research of Ms Aroha Waetford prepared for an LLM degree but derived from the Rangahaua Whanui programme of research topics and on a report written for the Crown Forestry Rental Trust by Ms Katherine Orr-Nimmo on the East Coast Maori Trust.

9.1 The Problem Emerges

The 'validation' of imperfect titles, and the creation of a special court for the process, arose out of the confusion of laws relating to Maori land that had developed since 1862

In many cases, settlers seeking to purchase Maori land, had entered into transactions but failed to observe one or more of the requirements of the law. Some of these requirements were little more than technicalities but others involved mechanisms, such as restrictions on title, put in place to protect Maori from inequitable, hasty or excessive land alienation. The failure to complete a purchase correctly might not mean that actual fraud was attempted (although it could mean that), but rather that the protection mechanism had been side-stepped or overridden in some way.

A series of cases in the superior courts resulted in attempted purchases being found to be void, if not illegal. The most important of these cases was *Poaka v Ward* in 1890. This concerned the purchase of undivided interests in a block granted under the Native Land Act 1873, without partitioning out of the interests of the non-selling minority, the failure of the purchaser to get a certificate from a trust commissioner under the Native Lands Frauds Prevention Act 1881, and an argument that it was not necessary to do so in terms of sections 24 and 25 of the Native Land Administration Act 1886. On appeal by the Maori owners the Court of Appeal found that the intention of the 1886 Act was to further restrict dealings with Maori land, not open them wider, and ruled the transaction invalid. The case threatened to overturn a great many purchases of this nature around the country and intensified a growing outcry from settlers whose titles were threatened.[1]

1. Aroha Waetford, 'The Validation Court of New Zealand', draft LLM thesis, Wellington, Victoria University of Wellington, 1997, ch 3

9.2 The Edwards–Ormsby Commission, 1890–91

The legislative response was the appointment under the Native Land Court Amendment Act 1889 of a commission of inquiry, comprising W B Edwards, a lawyer, and John Ormsby, a prominent mixed-race leader of the Kawhia district. The commission was empowered to inquire into all circumstances of alleged alienations or acquisitions of land made before July 1887 which would 'otherwise be barred or invalidated by any law now or previously in force'. Section 27 of the Act empowered the commissioners to validate transactions 'entered into in good faith and not contrary to equity and good conscience'.

Fourteen claims were submitted to the commission in the Gisborne district. Only one case, Whatatutu no 1, was reported on fully. It was found that the purchase money had been paid and there were no Maori objections. But it was also discovered that, when executed, the purchase deeds had blank spaces for particulars of the parties involved, and of the purchase money. The commission therefore found that, although non-observance of legal formalities might not injure the Maori parties 'it was the duty of the commissioners to administer the law as it stood, and not strain it in order to cover cases of real or supposed hardship'.[2] The commission did not validate the Whatatutu purchase.

In reporting, Edwards commented that it was highly unlikely that the *Gazette* notices of the hearings would have reached all interested Maori. He also proposed wider powers for the commissioners to settle claims equitably.[3] However the Edwards–Ormsby commission was abruptly wound up in 1891 by the Ballance Government.

9.3 The Native Land (Validation of Titles) Act 1892

The growing outcry from settlers with incomplete titles, and a recommendation from W L Rees (of the Rees–Carroll commission of 1891), led to the establishment of a special tribunal to be called the Validation Court, although it would be staffed by Native Land Court Judges. The Act empowered the court to consider any transaction to that date, and validate if it was judged to be 'fair and reasonable', 'not contrary to equity and good conscience', and not injurious to the Maori parties. Irregularity or doubt caused by misapprehension of the law need not prevent validation of a transaction. Partitions of the block concerned could be ordered.

The Bill was opposed by the Maori member Taipua (Western Maori) because it clearly served settler interests but appeared to do little for Maori. He noted that it concerned land under restricted title. Kapa (Southern Maori) thought it was a bill designed 'to deprive Natives of their land'. Both members proposed that the cases be considered by a joint Maori-settler committee.[4] H K Taiaroa sought to delay the

2. Judgement report, AJHR, 1891, h-13, pp 64ff
3. Waetford, pp 21–23
4. NZPD, 1892, pp 516–517

Bill in the Legislative Council, but most members of Parliament supported it, seeking 'finality' in land transactions. The judges' recommendations, however, were to be laid before parliament for final approval.

The Act as finally passed authorised the court to excuse a whole range of irregularities in respect of the powers of the Native Land Court when it made orders, including the removal of restrictions on alienation (s 9). The validations could not occur if there was evidence of fraud or malfeasance, or of intention to evade the law (an impossible category to prove), or if the transaction was contrary to equity or good conscience or 'injurious to the true interests of the [Maori] owners of the land' (s 10). Presumably the judge would determine what was in the Maori owners' true interests.

9.4 Judge Barton in Gisborne

George Barton, the first Validation Court judge appointed to the Gisborne district, took a very broad view of his jurisdiction; 'the chief object of the legislature in passing validating statutes has been the validation of all honest and straight forward purchases, whether they are legal or illegal in their inceptions'. The 'uncertainties and insecurities' of the Native Land Acts:

> forced men into making illegal purchases . . . it was not in human nature to expect that men so situated should sit still while others bought over their heads the fruits of their industry and capital. The day when the first illegal purchase was allowed to pass through the Land Transfer Office inaugurated the scramble of illegal purchases which necessitates these validations.[5]

Although he would not gloss over fraud or dealings not in good faith, Barton considered it the duty of the courts to 'uphold men's rights and not to sacrifice them to worthless technicalities'. If the Validation Court's recommendations went beyond the distinct letter of the statute, Parliament could nevertheless act on the recommendation of the judge if they thought fit. The 1892 statute was unique. If illegal transactions were 'honest and straight-forward in themselves . . . it is our duty to bend its provisions to meet the circumstances of such transactions'.[6] These somewhat dubious propositions caused Sian Daly, writing on Poverty Bay, to wonder if the rights of Maori would be upheld also.[7]

In Gisborne the settler John Tiffen submitted 35 applications before Judge Barton in respect of the Puhatikotiko blocks. Messers Rees and Day, counsel for Maori owners, objected on the basis of the findings in *Poaka v Ward* arguing that the Validation Act 1892 could not validate illegal transactions. Barton dismissed the objection, saying that the legislature, if it chose to accept his recommendation, could override the findings in *Poaka v Ward*. Barton also considered it might be

5. Barton memorandum, AJHR, 1893, g-3, pp 6–7
6. Ibid
7. Siân Daly, *Poverty Bay*, Waitangi Tribunal Rangahaua Whanui Series, 1997, sec 6.22

appropriate to overlook the fact (which Day demonstrated) that the deeds had been tampered with after the event. However improper or illegal it was to tamper with the deeds, if the 'transaction of sale and purchase' was 'honest' it could be still be validated, wrote Barton.[8]

But, having recommended Tiffen's claims for validation, Barton discovered that the 1892 statute did not bear the construction he had tried to put upon it. In introducing the Bill, the Native Minister had stated expressly that he intended to give no relief to powerful people who had broken the law openly and knowingly, 'trusting their influence or some change of Government would put the matter right'.[9] Despite this, Barton tried to defend his decision and Tiffen's claim for special consideration. He argued for a much wider discretion for the Validation Court judges than the statute allowed. James Carroll, visiting Gisborne, considered his approach 'judicious'.[10]

The exchange suggested that the whole validation process was a very slippery slope, and that the Government was willing to walk on it. This is further indicated by the fact that, not withstanding the extraordinary features of Tiffen's case, that case (along with eight others heard by Native Land Court judges in other districts) were confirmed by Parliament under the Native Land Court Certificates Confirmation Act 1893.[11] One of these was a case heard in Auckland concerning Moehau number one, also known as the Waikawau reserve, of 5823 acres. The Kauri Timber Company had bought the interests of some of the owners. Judge Gudgeon considered it was unlikely that the purchaser would get the signatures of the others, who were 'rabid kingites'.[12] Gudgeon had ordered validation of the deed and partition of the block.

Waetford has analysed seven other cases in Auckland, Wanganui and Wellington districts. In each case the judge recommended validation, notwithstanding the irregular and incomplete nature of the purchases. In one case, (Waiakake) a sale was validated when the title at the time of the transaction was restricted to a 21-year lease.[13] It seemed as though where money had been paid and accepted, by some of their owners at least, short of actual fraud purchasers would get most transactions validated.

9.5 The Native Land (Validation Of Titles) Act 1893

The principal features distinguishing this Act from its predecessor were that the Validation Court was made distinct from the Native Land Court, and that its orders were to be final and conclusive. The Act gave the Validation Court a very wide discretion. It was empowered to validate any deed, agreement or contract between

8. Barton's memo, AJHR, 1893, g-3, p 9
9. NZPD, 29 September 1892, p 503 (Cadman)
10. AJHR, 1893, g-3, p 19
11. See list in Waetford, ch 5, p 1, footnote 2
12. AJHR, 1893, g-3, pp 2–3 (cited in Waetford, ch 5, p 28)
13. Waetford, pp 28–32

European and Maori, or Maori and Maori, relating to land, 'that would otherwise be unenforceable because it did not comply with, or was forbidden by, a repealed statute. This was provided that the agreement or contract would have been binding on the Supreme Court if it were made between Europeans, was not contrary to equity and good conscious the land was fully understood at the time it was entered into by the parties involved, and provided that the land was exchanged for a sufficient and lawful consideration.

Section 10 of the Act said the court may (not 'shall') refuse the title if the agreement was not 'fair and reasonable' or if it was 'tainted with actual fraud or improper dealing'. Voluntary agreements that met the criteria of the Act could be confirmed by the court. The court was vested with the powers of both the Supreme Court and the Native Land Court. By section 16 the court was required to lay its decision before parliament but they would stand unless Parliament expressly negated them.

In debate Seddon claimed that the 1893 Bill had even stronger safeguards than the 1892 Act against transactions 'in the inception of which there has been absolute wrong doing and illegality'.[14] However, in debate on an amendment to the Act in 1894, Seddon stated that the important question was 'whether the dealings had been fair and honest between the parties', but that the judge 'had to act where there had been a violation of the law; otherwise if the transaction was legal, there would no judge of a validation court required at all'.[15] Despite the confusion of the minister, it was clear that illegal transactions were to be validated if, in the opinion of the judge, they were 'fair and honest'.

Barton was reappointed under the 1893 Act as judge in Gisborne, with Atanatiu Kairangi as assessor. In 1894, 37 more applications were submitted in the Gisborne district relating to 85,361 acres. All of them were validated by Barton. Some of the orders involved partitions dividing blocks between Maori sellers and non-sellers, many resulted from voluntary agreements between the parties, assisted by the court. As Waetford remarks:

> the burden of proof weighed heavily upon Maori objectors if they wished to disprove the validity of any contracts that were allegedly made between settler applicants and Maori owners. If Maori did not appear before the Court to raise their objections, then their absence was regarded as an indication that the transaction had been *bona fide*.[16]

It is likely that many owners would not have seen *Gazette* notices of the hearings, or were deterred by the heavy fees (about which the Gisborne legal profession complained on behalf of Maori).

A Validation Court was established in Auckland in 1895, with George Davy as judge and John Ormsby as assessor. Only seven applications were filed that year in Auckland district, but applications continued to pour into the Gisborne court, many to do with the activities of the former New Zealand Native Land Settlement

14. NZPD, 1893, vol 81, p 565 (cited in Waetford, ch 5, p 10)
15. NZPD, 1894, vol 86, p 939 (cited in Waetford, p 6)
16. Waetford, p 17

Company of Rees and Wi Pere (see vol iii, ch 5). Barton validated most of these applications. Nevertheless, petitions began to reach Parliament from Maori owners of blocks which were brought into the Carroll Wi Pere Trust (the successor of the Native Land Settlement Company) to support its mortgage to the Bank of New Zealand. Some of the petitions received favourable consideration from the Native Affairs Committee and two of the Poverty Bay cases were eventually referred to the Native Appellate Court, created in 1894. There was clearly concern at what was happening in Gisborne.[17]

Nevertheless, Barton's successor in Poverty Bay, Thomas Gudgeon, validated an increasing number of transactions. Between 1895 and 1897 he allowed 152,000 more acres to be brought into the mortgages of the Carroll Wi Pere trust, compared with Barton's 34,000 acres. (Mortgages were formally brought within the scope of the Validation Court by section 23 of the Native Land Laws Amendment Act 1896). Catherine Orr-Nimmo's research indicates that Gudgeon's court was a little more than a rubber stamp for the arrangements being made by Carroll, Wi Pere and solicitor W L Rees.[18] At their suggestion, for example, additional Maori trustees and block committees were dispensed with by Gudgeon in respect of blocks coming into the trust.

In 1896 Maori petitioners from the East Coast telegrammed parliament opposing Wi Pere's activities: 'all Validation Court's work has been most irregular', they stated.[19] Their opinion seems to have been shared by Judge Batham, who succeeded Gudgeon in Gisborne in 1897. He wrote in 1907, 'the intended scope of the Validation Act has been far exceeded' by the court in respect of the Carroll–Wi Pere trust lands.[20] Batham accepted the arguments of the young Maori lawyer, Apirana Ngata, who objected to the Ngamoe block, and a number of Ngati Porou blocks still under customary title, being brought into the Carroll–Wi Pere Trust. Batham accepted Ngata's argument that the Validation Court powers did not extend to land that had not passed through the Native Land Court, and the flow of blocks to support the Bank of New Zealand mortgage to the Carroll–Wi Pere Trust ceased.[21]

9.6 The Later Years of the Validation Court

By December 1897, perhaps as a result of Batham's stance, the politicians James Carroll and Wi Pere, seem to have changed their views about the Validation Court. Whereas they had previously been using the court to validate early transactions of the New Zealand Native Land Settlement Company, and more recent agreements reached with block owners, they now complained of the court meddling in the Trust's affairs. The Native Affairs Committee of Parliament, considering the 1897

17. AJHR, 1896, i-3, p 21 (petitions regarding Mangaheia and Mangapoike)
18. Katherine Orr-Nimmo, 'Report for the Crown Forestry Rental Trust on the East Coast Maori Trust', (draft report), December 1996, pp 96–102
19. NZPD, 1896, vol 94, p 279
20. Batham, confidential memo, ma series 1, 1907/816, 8th para (cited in Orr-Nimmo, p 19)
21. Orr-Nimmo, p 59

petition of Wiremu Pokiha and hundreds of Ngati Porou signatures, were concerned at the authority of the court for other reasons – the bringing in of so many blocks into the trust.[22] Meanwhile, Batham continued to raise doubts in his judgements as to whether his predecessors had correctly interpreted the 1893 Act. In 1899, with regard to Mangapoike and Tahora blocks he doubted that any liability existed over the block when the Validation Court had ordered them in to support the Carroll-Wi Pere Trust's mortgage.[23] Finally, in 1901, when asked by the trustees, at the court's behest, to remove a caveat from Tahora 2C3, Batham denied that the 1893 Act created 'an arrangement for retaining for all time, the Validation Court to supervise and control . . . a number of minor Trust Estates or of a gigantic amalgamated Trust'.[24] The Government ratified the decisions of the court in section 21 of the Native Land Claims Adjustment and Laws Amendment Act 1901, but Batham had signalled that the court had no jurisdiction other than to validate prior transactions, acording to statutory guidelines. By this time the Liberal goernment had been strengthening the powers of the Native Land Court and Native Appellate Court. Once again, from 1894, the Validation Court judges were chosen from the Native Land Court bench.

The court was considered useful still in sorting out the mess of the East Coast, but after 1902 in more of an ancillary role to the East Coast Native Trust Board set up by an Act of Parliament in that year to take over the Carroll-Wi Pere Trust lands. By means of further sales of land the board extinguished the debt to the Bank of New Zealand in 1905 and then embarked upon a long exercise (completed in 1954) of distributing the internal debts of the East Coast Trust (as it now became), between various blocks. This complicated task was ratified by the Validation Court in 1907.

Maori petitioners in the Tahora 2A block, affected by the Carroll-Wi Pere Trust's operations, were given some relief when a royal commission appointed under the Maori Land Claims Adjustment and Laws Amendment Act 1904 acknowledged that the owners would not have received adequate notice of the Validation Court's partition of that block, and therefore annulled the partition.

Meanwhile, Validation Courts had been set up in the Auckland, Thames, Taranaki, and Wellington districts. The extent of their business seems to have been much less than that of the Gisborne court, though no doubt of equal importance to the parties concerned.[25]

9.7 The Demise of the Validation Court

The Native Land Act 1909 consolidated some 69 statutes affecting Maori land passed between 1871 and 1908, and greatly simplified the law. Among the statutes

22. Waetford, p 110
23. Orr-Nimmo, p 130
24. Validation Court mb 7, p 300 (cited in Orr-Nimmo, p 131)
25. Waetford, p 121

repealed were the Native Land (Validation of Titles) Acts and their amendments. Section 437 of the 1909 Act transferred the former powers and jurisdiction of the Validation Court to the Native Land Court. Since the personnel of the two courts had been integrated since 1894, the change caused little comment.

There are still some mysteries about the sudden rise and even more sudden demise of the Validation Court. The thousands of cases which W L Rees in 1892 had expected would come before the Validation Court simply did not eventuate. To a large extent the reason is that the Native Land Court itself was given increased powers in the 1890s to make adjustments to titles.

The process of validating transactions which were void or illegal, by reason of non-compliance with the law in force at the time of the contract is a very dubious proceeding, especially as the section of the law that were evaded (restrictions on alienation, requirements to be met before the granting of partition orders) were put in place to protect Maori owners from hasty or excessive alienation. In terms of the original intentions of the legislature, it was not enough that actual fraud was not involved; the law had been seeking to go beyond that. Whether the Maori parties concurred in the original transaction or its subsequent validations is also somewhat beside the point, if the intention was to guard against Maori landlessness. Moreover, the comments of Judge Batham and the Native Affairs Committee on the Maori petitions, suggest that, under judges such as Gudgeon, the Validation Court exceeded its already considerable powers.

But the court had been created in an era when the Liberal governments were none too scrupulous in shaping the law and administrative machinery to remove impediments to white settlement. It was of a kind with other legislation of that era streamlining the land purchase system. Whether flawed transactions were validated by the special Validation Court on by the Native Land Court was left largely to the sense of equity and fairness of the judges concerned. How far that had regard to the then and future interests of Maori would probably have varied widely between the individuals concerned.

CHAPTER 10

GOLDFIELD AND OTHER MINING POLICY AND LEGISLATION

10.1 The Common Law Tradition of Ownership of Gold and Precious Metals

The right to 'royal metals' was one of the Crown's prerogative rights that the Government in New Zealand has assumed existed as soon as English law was received with the proclamation of sovereignty in 1840. The assertion of this prerogative in Elizabethan times had a pragmatic function, in that it allowed the developing English state to control the coinage and to finance an army, and a philosophical foundation in the supremacy of the monarch. In New Zealand, the early assertions of Crown right in minerals were in reference to lands already acquired from Maori. The first explicit assertion of the prerogative over precious metals came in the royal instructions of 1846, in clause 30 of chapter 13 'On the Settlement of the Waste lands of the Crown'. Private agreement with Maori in respect of the mining of minerals was also prohibited in the 1846 Native Land Purchase Ordinance. Later the Gold Fields Act 1858 typified the developing tradition by providing for the statutory regulation of mining while explicitly acknowledging the prerogative rights of Her Majesty the Queen in respect of the colony's gold mines and goldfields on lands already acquired by the Crown.[1] Section 43 stated that, 'Nothing in this Act shall be deemed to abridge or control the prerogative rights of Her Majesty the Queen in respect of the gold mines and gold fields of the colony.' The 1858 Act did not address the question of Crown access to minerals on land still under customary title. In 1873, the Crown also claimed the power to resume privately owned lands required for the purposes of mining, under the Resumption of Land for Mining Purposes Act 1873. No compensation would be paid for the gold itself; a prerogative which is preserved today under the Crown Minerals Act 1991.

This approach can, however, be compared to that of the United State of America, where no mineral prerogative operates and where it has been accepted that, until surface rights are acquired, a Native American tribe's rights in the land extends to all elements that make the land valuable.[2] Canada also, in the past 15 years, has allowed increasing recognition of indigenous rights to sub-surface resources, de-

1. Dr Robyn Anderson, *Gold Mining Legislation and Policy*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), 1996, pp 1–4
2. *United States v Klamath and Moadoc Tribes of Indians*, (1938) 304, us 119, 123 (cited in Anderson, p 5)

spite their earlier acceptance of the principle of the royal prerogative.[3] Certainly , British common law attitude to minerals, as transferred to New Zealand, 'ran directly against the grain of Maori tikanga which . . . demonstrated a deep spiritual and cultural affinity with the land in all aspects'.[4] Maori did not generally use metals, such as gold, either for tools or decoration (although they used pounamu for these purposes) or as a measure of wealth. They did, however, dig below the surface for ochre and presumably would not have made a categorical distinction between surface and subsurface resources in doing so.

Two cases in New Zealand in the 1890s, *Aitken v Swindley* and *Chambers v Busby*, make it clear that land granted to Maori by the Crown (having passed through the Native Land Court) was under title which did not convey to the Maori grantees the right to the Royal Metals on their land, nor debar the Crown from mining or authorising mining on that land.[5] A third case in the 1890s, *Re Application by Beare and Perry*, challenged the Crown's right to extend its jurisdiction to Maori reserved land, and demonstrated that Maori were still able at that time to withhold reserved lands from the jurisdiction of the Government (according to the judgement of Chief Justice Stout).[6]

10.2 Goldfield Negotiations, Agreements, and Legislation, 1850–75

As the following sequence of events shows, while earlier agreements with Maori in respect of goldfields tended to take into account the Treaty of Waitangi, Government tactics became increasingly aggressive, based on arguments of public interest and equal right under the law (meaning that access to Maori land was to be comparable to European, as with rating also). This was disadvantageous to Maori whose ability to withhold lands and negotiate satisfactory terms was undermined.

The Coromandel Agreement in 1852 followed the first discovery of gold on land still held under Native title in the Coromandel (see vol iii, ch 2). The New Ulster Government had previously recognised that Maori interests would have to be negotiated under circumstances such as these. Wynyard, as Acting Governor, noted the need to assure Maori that he had 'on the part of the Government, their interests, their rights and their welfare at heart' in all negotiations.[7] The Native Secretary, Nugent, was responsible for conveying this message to Maori at the Kapanga site in the Coromandel, where there were indications of a payable field. He emphasised that Maori and Government must act together in the management of the gold.[8] The

3. Among other developments is the recognition of native ownership identified within the Nisga'a Treaty of British Colombia (February 1996), which states that the Nisga'a Government will own all mineral resources on or under the surface, although its ability to develop such resources is constrained by obligations to provincial and federal govenments.
4. Anderson, p 4
5. 15 NZLR 517, and 16 NZLR 253 (respectively), (cited in Anderson, p 4)
6. *Re Application by Beare and Perry* (1899–1900) 2 GLR 242 (cited in Anderson, p 3)
7. Wynard to Grey, 25 October 1852, inward correspondence from Lieutenant-Governor to Governor, dispatch 121, g-8/8 (cited in Anderson, p 9)

minutes of the Executive Council indicate an awareness also of a balance required between maintaining the confidence of Maori in the good faith of the Government without abandoning the Royal prerogative to minerals. In particular it was noted that:

> Although the Crown is entitled to all gold wherever found in its natural state the Council is unanimously of the opinion that it would be inexpedient to attempt fully to enforce Her Majesty's Royal Prerogative Rights in the case of gold found on Native land because it would be impossible to satisfy the owners of the particular land in question – or the Natives of New Zealand generally, that such a proceeding on the part of the Government is consistent with the terms of the Treaty of Waitangi which guarantees to them the undisturbed possession of their lands, estates . . . [9]

The Executive Council was not willing, however, to abandon the royal prerogative to the extent of allowing Maori to manage the resource themselves. Instead, it was resolved that arrangements would be made for the Government to manage the goldfield and for Maori to receive 'a fair proportion of the proceeds', namely, one third of the licence fee to be imposed.

With the increasing prospect of further exploration and rushes by miners, Maori were anxious for mutually agreed arrangements to be established in relation to further exploration.[10] At a subsequent meeting held at Patapata intended to secure such an agreement, representatives form a number of Hauraki iwi emphasised that they wanted a limited opening of their lands to mining, and that they expected the Government to provide proper protection of those lands Maori wished to exclude from explorations. Acting-Governor Wynyard emphasised the Crown's protection of Maori interests and property in his opening address, saying:

> I come to offer the protection of the Government . . . to protect you from all and every annoyance, you might otherwise be exposed to from the strangers that may come here . . . and to preserve good right to your land and property, as subjects of the Queen.[11]

An agreement was subsequently signed on 27 November 1852 at Patapata between Wynyard and Ngati Whanaunga, Ngati Paoa and Ngati Patukirikiri which opened up the land belonging to the signatory tribes (calculated at about 17 square miles) and emphasised that the *land was to remain with the Native owners*, although the compact was sketchy in its administrative detail. In consideration for opening up their lands, Maori were to receive a rate dependent on the number of miners involved, which Wynyard himself considered an 'insignificant' sum in relation to

8. Nugent to Colonial Secretary, 23 October 1852, despatch 121, encl e, g-8/8, Wynyard to Chiefs, 18 October 1852, despatch 121, encl b, g-8/8 (cited in Anderson, p 10)
9. Extract of Minutes of Executive Council, 19 October 1852, despatch 121, encl d, g-8/8 (cited in Anderson, p 10)
10. Ligar to Colonial Secretary, 6 November 1852; Lanfear to Heaphy, 3 November 1852, despatch 125, encl d, g-8/8; Wynyard to Grey, 13 November 1852, despatch 127, g-8/8 (cited in Anderson, p 15)
11. Wynyard's address, encl in Wynyard to Grey, 25 November 1852, despatch 128, g-8/8 (cited in Anderson, p 12)

the revenues generated by the licence fee. He therefore offered Maori an additional two shillings' tax on every licence issued as reward for their faith and confidence in the Government. These measures were hoped to induce others to open up their lands also.[12] Maori who objected to the Government's terms and did not open up their lands, argued (amongst other things) that the entire licence fee should be handed over to Maori and the Government should be reimbursed for administrative expenses only.[13]

Despite clause 9 of the Patapata agreement guaranteeing that tribes would not be intruded on until they had consented to the opening up of their land, secret prospecting on Te Matewaru lands (outside the 'Government district') indicated rich gold deposits. Compensation paid to Maori for these diggers apparently encouraged the reopening of the discussion of the extension of the mining district[14] albeit unsuccessfully, due to Maori demands which the Government refused to accept, and the behaviour of diggers who resented abiding by those demands. The Government made only limited responses to trespass onto closed lands, partly because of its fundamental objective of opening the area up to European miners. Action was, however, taken against miners when the Government felt that failure to do so might dissuade other Maori from opening up their lands.

The first major gold rushes in New Zealand took place in Otago and Canterbury on land already purchased by the Government. Consequently, in 1858, the first statute for the management of goldfields was explicitly confined to Crown land and did not deal with mining on *land still under native title*. The Gold Fields Act 1858 did, however, assert a prerogative right by stating that the Governor could proclaim a goldfield under the Act (s 2). The policy governing the management of goldfields, on the other hand, continued to require negotiation with Maori right-holders before their lands could be brought within the operation of the Act. The 1858 Act also established the rudiments of a regulation system which would persist and expand over the next fifty years.[15] Section 40 of the Act allowed the Governor to make and prescribe all rules and regulations pertaining to goldfields. The Goldfield Act 1862, which repealed the 1858 Act, still made no provision for the inclusion of customary land within a proclaimed field.

The 1858 Act was still in force when gold was found on Maori land at Taitapu in Nelson in 1862. The area concerned was an 88,000 acre reserve (from a sale in 1855) under the control of Ngati Rarua, Ngati Tama and Te Atiawa. Maori objected to the working of the land unless they received revenues similar to those received by the Crown on the Collingwood goldfield in Nelson. James Mackay, as Assistant Native Secretary, moved to ensure that the Crown's right to regulate the minerals was maintained and that Europeans would not occupy lands where Native title had not been extinguished.[16] Having met with local Maori who expressed their interest

12. Minute from Wynyard for the Executive Council, 24 November 1852, despatch 128, encl d, g-8/8 (cited in Anderson, p 13)
13. 'Speeches of Native Chiefs at . . . Patupatu', despatch 128, encl c, g-8/8 (cited in Anderson, p 14)
14. Gold commissioner's report, 26 April 1853, ia 1853/1108 (cited in Anderson, p 15)
15. For discussion of this system see Anderson, p 18

in opening the land to mining, dependent on certain conditions, Mackay acceded to Maori demands and entered into a formal agreement with Ngati Rarua on 10 February 1862. The agreement of Ngati Tama and Te Ati Awa, and other groups with possible interests at Taitapu, was not sought. Despite the promising potential of the terms of the agreement, Ngati Rarua were to lose immediate control of the block and eventually the complete freehold, over the next 20 years.[17] This was the result of the final clause of the deed which conveyed to the Governor, or those appointed by the Governor, the power to make other rules and regulations for the Taitapu goldfields.[18]

In 1861, anxious to open up the Coromandel lands for mining, the Government pursued the purchase of lands at Coromandel. However, with the mining of the area a priority, officials were instructed to assure those Maori unwilling to part with their lands that arrangement would be made by the Government which would not involve the alienation of territory or the sanction of mining activity beyond that required for prospecting.[19] The Government also accepted that compensation would be payable to Maori. Despite these terms, Maori control of their subsurface resources was undermined because the Government had assumed that Maori had no choice but to agree to full-scale mining. Furthermore, by not paying royalties to Maori in direct relation to the value of the field, later governments were able to argue that they had never conceded the right to the gold itself.

On 2 November 1861, McLean signed a deed with Ngati Paoa, Ngati Whanaunga and Ngati Patukirikiri representatives which enabled the immediate opening up of lands from Waiau to Moehau (Cape Colville) while also affirming the tribes' ownership of that area (as the 1852 agreement had done). The agreement acknowledged Maori concern that they retain a measure of control of the mining process. The Government agreed to 'adopt measures to preserve order among the Europeans and Maories'[20] in the event of an influx of diggers. A final condition of the agreement was that Maori would not receive payment until valuable quantities of the gold were found, even if gold was carried off the land in the interim.

Maori continued to offer reasonable co-operation to Government provided that they retained ownership of their lands. In reality, however, the Government could do little to protect Maori interests. Maori, in turn, were forced to make concessions to European demands in order to maintain peace in their region. In particular, miners protested and challenged the provision within the agreement which excluded land at Koputauaki, under the control of Paora, which was suspected to contain rich sources of gold. In response to this pressure, the Government began to arrange the opening of that land, unbeknown to the Maori proprietors and contrary

16. 'Mackay to Native Secretary', 12 February 1862, in Mackay, *Compendium*, vol 1, p 321 (cited in Anderson, p 20)
17. Anderson, p 21
18. 'Deed of Agreement', 10 February 1862, in Mackay, *Compendium*, vol 1, pp 322–333 (cited in Anderson, p 21)
19. 'Fox to McLean', 21 November 1861, *New Zealand Gazette*, 22 November 1861, p 300 (cited in Anderson, p 23)
20. 2 November Agreement, *New Zealand Gazette*, 22 November 1861, p 302 (cited in Anderson, p 24)

to the agreements made with Maori. According to Anderson, H Hanson Turton, who accompanied diggers to Paora's land, attempted to protect Maori interests while at the same time working to bring the block within mining operations,[21] presumably to satisfy the Government's objectives and the diggers' demands. Government incentives for diggers increased, as did the number of diggers coming to the Coromandel. Maori continued to reject offers of purchase and began to patrol the boundaries of their reserved lands as reports came in of diggers sneaking across boundaries in the night. Governor Grey arrived unexpectedly at Coromandel in June 1862, announcing that he wanted Paora's land opened up. Maori leaders called on the support of the King movement, placing the district under the mana of the King in response to Grey's assertions. Against the advice of his ministers, Grey pushed ahead with his 'divide and rule' tactic by obtaining the consent of one party of right-holders to the freehold of the land at Tokatea.[22] His actions encouraged a false sense of satisfaction amongst Pakeha and the Government that the problem had been satisfactorily resolved, as well as creating a lasting impression that Maori in the area had been 'unduly influenced by the Maori King'. Furthermore, his actions created lasting divisions within the hapu Te Matewaru between those who had, and had not, supported the agreement.[23]

In 1862 the Coromandel was proclaimed a goldfield under the Gold Fields Act 1858. Because the Act did not deal satisfactorily with land still held under Native title, the Coromandel field, for the purposes of the Act, was defined as being 'Wastelands of the Crown' and the boundaries of the field were provided. Within these boundaries were lands still under negotiation according to the 1861 agreement, for which Maori right-holders had not received payment, including the Tokatea block. A second agreement, reached over land at Kapanga, Ngaurukehu and Matawai, failed to adequately distribute revenues amongst the various Maori proprietors. Disputes constantly arose over the terms of agreements between Coromandel Maori and Turton, who was administering the fields, over issues such as rent and public works takings. According to Anderson, Turton favoured the public interest and 'refused to countenance Maori efforts to participate in the profits generated by the field.'[24] For example, when Maori attempted to charge ground rent for tent sites and for the removal of timber from their lands, Turton accused them of making 'extortionate' demands.[25] With respect to public works takings for roads and bridges to which Maori objected, Turton reasoned that 'the natives by agreeing to our occupation and working of the Gold Field necessarily give up the right of road to it . . . [and the] right of all suitable landing places leading to them'.[26]

21. Turton to Attorney-General, 27 January and 30 June 1862, Coromandel Resident Magistrate's outward letterbook, bacl, a-208/634 (cited in Anderson, pp 25–26)
22. BPP, vol 13, p 155 (cited in Anderson, p 28)
23. Anderson, p 28
24. Ibid, p 32
25. Turton to Pollen, 28 August and 12 September 1862, bacl, a-208/688; Turton memo, February 1863, bacl, a-208/634 (cited in Anderson, p 32)
26. Turton to Pollen, 28 August 1862, Coromandel commissioner of Crown lands outward letterbook, bacl, a-208/688 (cited in Anderson, p 33)

Following a lull in gold strikes at Coromandel (as fields were vacated because of the outbreak of war), and news of finds in Otago and other goldfields elsewhere, miners began to return to Coromandel in 1864. Maori proprietors who had not received payments for mining undertaken previously from 1861 to 1863, began strongly to demand compensation. Meetings to resolve this matter revealed that there had been little consultation between Maori and Government as to the terms of the earlier agreements and no records were kept as to how many diggers had worked the field. Mackay concluded that a fresh agreement was required and, in spelling out the terms of the agreement, he admitted that compensation payments to Maori were necessary in light of the failure of the Government to keep correct accounts and in order to satisfy the demands of Maori for payment without further delay. In doing so, he emphasised that a breach of faith on the part of Government could prevent the working of other fields in the district.[27]

In 1864, gold was also discovered south of Coromandel at Ohinemuri, Kauaeranga and subsequently Te Aroha. Mackay signed preliminary deeds with Ngati Tamatera, Ngati Maru, and Ngati Whanaunga, which opened up agreed lands to mining (except for burial grounds, cultivations and places of residence). It is arguable that consent was only won after the commencement of war, as adherence to earlier principles of holding onto the land started to break down. The final deed of 'cession' was signed in March 1869 by 80 signatories from Ngati Maru and Ngati Whanaunga. The deed was similar to the earlier Taitapu agreement in that it set out the respective entitlements of Maori and miner, and established a system (albeit rudimentary) for administering licencing revenues. Gold was also reported to have been found at Puriri in 1867, and in July 1867 Mackay managed to negotiate a very limited opening of Kauaeranga (Thames). At every opportunity, the Government sought Maori co-operation with statements such as:

> If we unite together in this way we shall have treasures and riches, become a great people, and have everything that the heart can desire . . . This requires co-operation, mutual aid and assistance . . . Your children will be benefited, our children will be benefited . . . [28]

Under the Gold Fields Act 1866, the Government first moved to bring Maori-owned land within the control of mining legislation by extending the definition of 'Crown lands' to include any land leased or otherwise obtained by the Government for mining purposes. The Amendment Act in 1868 more fully described the parameters of Government power over customary land. Section 8 allowed the Governor the explicit authority to make, alter or revoke regulations for gold mining in the case of lands upon which the Governor had obtained 'power by lease agreement or consent of the Native owners thereof to authorise mining', whether that area was still held under native title or a certificate of title issued under the Native Lands Act.

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27. 'Letter Mackay to Native Minister', 19 October 1864, AJHR 1869, a-17, encl e, p 17, (cited in Andersn, p 34)
28. *Daily Southern Cross*, 5 June 1867

The mining of the foreshores was awarded a degree of statutory recognition also. In particular, section 9 of the Gold Fields Act 1868 stated the need for Government to negotiate with Maori for the opening of the foreshores for mining (see ch 13 below). With respect to the Kauaeranga foreshore, the Government initially relied on negotiation with Hauraki Maori, finding that some Maori agreed to hand over management of the foreshore to Government, while others wished to continue to lease the more valuable land north of the Karaka Stream themselves. The Crown responded by pushing through the Thames Sea Beach Act in 1869 (against the advice of the Select Committee which investigated the Act), establishing Crown pre-emption over the area.

In October 1868, all former regulations referring to leases were revoked and new lease conditions less favourable to Maori were introduced.[29] When doubts arose as to the status of Maori land under the operations of the Gold Fields Act (in particular whether it was not in fact private land once it had passed through the court, and therefore exempt from the Act), the Auckland Gold Fields Proclamations Validation Act was passed in 1869 which stated that agreements previously negotiated with Maori were valid and binding even though native title might have been subsequently extinguished. The lands were deemed 'so far as mining purposes for gold is concerned but not further or otherwise to be Crown lands and not private lands.'[30] Maori protested the fact that the Act had not mentioned reservations agreed to, and further protested the lack of consultation with respect to the proclamation. They confirmed their acceptance of the previously negotiated agreements, but objected to subsequent developments and insisted on consultation regarding further developments.[31] Evidently, Mackay supported Maori in their rejection of the 1869 measure, and anticipated that it would lead to a reduction in the revenues paid to right-holders. He stated that:

> the leasing regulations . . . are likely to cause considerable injustice to the Native owners of the gold field, as entailing a certain falling off in the miners' rights fees received, and a consequent diminution in the amount payable to them by the Crown.[32]

Consequently, section 111 of the Gold Mining District Act 1871 tacitly acknowledged the injustice of reducing revenue to Maori and amended the provision relating to payment of revenue, a provision which was also entrenched in section 173 of the Gold Mining District Act 1873. Maori were accordingly entitled to receive revenues from licenses and for battery and machine sites.

In the 1870s, Government policy in respect of goldfields changed from the negotiation of agreements (whereby Maori ceded the right to mine on their land) to the purchase of the land itself in order to obtain gold and other resources. Between 1870 and 1875 a number of blocks outside the ceded goldfield district went through

29. *Auckland Provincial Government Gazette*, 29 October 1868, p 485 (cited in Anderson, p 53)
30. S 2 of the Auckland Gold Fields Proclamations Validation Act 1869
31. 'Petition of Certain Natives at Hauraki . . . Relative to the Thames Goldfield', ma 13/35c (cited in Anderson, p 54)
32. 'Report by Mackay on Thames Gold Fields', 27 July 1869, AJHR, 1869, a-17 (cited in Anderson, p 54)

the Native Land Court and were purchased on behalf of the Government and proclaimed within the goldfield. Anderson comments that the Government deliberately sought to obscure the full value of those lands from Maori.[33] By 1885, the Government had also purchased the majority of the area opened by cession agreement in 1868 and 1869.

By way of example, from 1868 to 1875, the Government pursued new tactics in their attempts to open up Ohinemuri for mining. Mackay is reported to have scattered money amongst those Maori whose consent he sought 'like maize to the fowls',[34] making payments amounting to over £15,000 to individuals, although title to the block was undetermined. Mackay also encouraged certain Ngati Tamatera to accumulate debt against their lands at Waikawau and Moehau on the peninsula. In short, the policy was described by a later Under-Secretary of the Native Department as:

> an attempt to break down the opposition of the Natives by gradually purchasing interest by interest in the land and thus bring about by dealings with individuals that which could not be accomplished with the Natives in a body.[35]

Certain Maori elements continued to resist Government demands, eventually agreeing to the alienation of the freehold of Waikawau and Moehau, but restricting the Ohinemuri transaction to a lease arrangement only. The Government agreed to leasehold, but imposed harsher conditions on Maori by using the leverage it had acquired from mounting debt against the land. For example, while Maori would receive all rents, royalties, moneys and fees, the Government would retain payment of such until debt against the land had been cleared. Maori ability to repay debt out of mining revenues was diminished by Government policy and legislation governing the goldfields administration and within two years, the purchase of freehold interests in the block had resumed.[36]

Te Aroha, land which had been reserved from a previous sale, was opened up despite the lack of complete Maori consent. Wilkinson, the Government's agent at the time, stated that:

> as it was now apparent that the bold but necessary stroke of opening the field, whether some of the Natives were willing or not, could be carried out without any real danger, it was decided to do so; and . . . arrangements were made for the opening, which took place by Proclamation, . . . [37]

Later in this statement it was noted that dissenting Maori 'seemed quite taken aback and were unable at first to realise the position' although they subsequently accepted the agreement as a fait accompli. The Government gained the right to mine for all minerals at Te Aroha through this agreement.

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33. Anderson, p 40
34. Rawiri Taiporutu at Te Paeroa meeting, 21 May 1882, ma 13/54a (cited in Anderson, p 41)
35. Under-Secretary to Solicitor General, 30 August 1937, ma 1 19/1/193 (cited in Anderson, p 41)
36. Anderson, p 42
37. 'Wilkinson to Gill', 28 May 1881, AJHR, 1881, g–8, p 10 (cited in Anderson, pp 44–45)

10.3 Goldmining Legislation and Policy, 1875–1900

Throughout the latter part of the nineteenth century, Hauraki Maori expressed increasing dissatisfaction with the implementation and administration of goldfield agreements, and petitions relating to many aspects of the agreements were lodged by Maori with increasing frequency. According to Anderson, such complaints were generally explained away by officials as demonstrating Maori greed or confusion as the revenue from fields declined. It is possible, Anderson argues, that Maori grievances were actually the result of the declining revenues received by them as (amongst other things), their freehold interests were alienated and new fields were brought into operation under tougher terms.[38] Abuses in the administration of goldfields in the 1870s were later acknowledged by officials and it was admitted that 'many errors were made some owners not receiving what they were entitled to'.[39] One official commented that:

> much must be left to the discretion of the officers in the field – upon whose report the revenue is allocated. When taking over the allocation of this revenue I found the grossest abuse if this discretionary power had been permitted to grow up.[40]

At Taitapu, for example, the Government altered the regulation of the field at will and acknowledged no obligation to consult with Taitapu owners in doing so. Subsequent legislative developments only served to diminish further Maori control over their lands. For example, the Reserves and Endowments in Mining Act 1882 enabled the Minister to bring under the jurisdiction of the Act any Native reserves he saw fit to include, and to authorise mining on them.

The Mining Act 1886 altered the organisation and fee structure of various goldfields in Hauraki to bring them into line with fields operating in the South Island. Despite the fact that the changes proposed in the legalisation were in violation of agreements already in existence, the Government pressed ahead. The absence of discussion in the House of the cession agreements and Maori ownership of a section of the Hauraki field has been noted by Anderson.[41] The Act greatly reduced the income Maori received from all sources (in addition to other damaging amendments) and revenues were further reduced in the following year. Maori protested and again found support and sympathy within the Government, this time from Wilkinson who argued that the Government had not lived up to the underlying commitment of its original agreement with Maori, estimating that they would only receive a fraction of their former revenues under the new system. Wilkinson acknowledged also that the Government had sacrificed Maori interests for those of the mining community. In particular, he pointed out that in offering gold diggers better and cheaper facilities than agreements had stated, the Government had

38. Anderson, p 46
39. Jorlasse to Receiver General, 23 February 1898, t 1 40/71 (cited in Anderson, p 49)
40. Kenrick to Under-Secretary, 1 May 1884, md 1 84/497 (cited in Anderson, p 49)
41. Anderson, p 56

benefitted the gold digger at the expense of Maori revenue and thus, in Wilkinson's words 'in a measure broke faith with them.'[42]

As mining came to a halt in various fields, Maori discovered the Government was unwilling to release its grip on leased lands, despite the fact that they now lay idle with respect to mining. With the passage of the 1887 Mining Act (no 2), it became increasingly difficult for Maori to control their lands and minerals. The Act provided that 'where the Natives have ceded their lands for mining purposes, and had made a contract and conditions as to the ceding of that land, the Governor was to have the power to alter and vary the terms of that contract without the consent of the Natives'. Even Seddon, who had appeared to disregard the interests of Maori in advocating the interests of mining, opposed this provision, calling instead for consent and 'mutual give-and-take between the two parties.'[43]

The revival of mining in the 1890s saw a revival also in the Government's attempts to ensure access to mineral resources, in particular those on Maori reserved lands. While the Government conceded that Maori were justified in their grievance regarding the reduction of revenues, it was not prepared to budge on other matters such as rents. To compensate for the loss of revenue, the Mining Act 1891 was passed which required wages-men and tributers to take out miners' rights for claims on native land, thereby increasing the potential revenue paid to Maori. As miners protested this provision and Maori continued to protest other aspects of mining legislation, the purchase of the land in question was increasingly raised as the only viable solution to the problem.[44] At the same time, Seddon, as Minister of Mines, was able to restrict the application of the aforementioned clause in determining that it was not intended to work retrospectively, thereby reducing its remedial effects for Maori.[45] Maori petitioners complained in 1893 and 1894 that this interpretation of the clause contributed towards their loss of revenue, which they calculated at over £3000 since the introduction of the legislation in 1886 and 1887. In 1894, the Goldfields and Mines Committee accepted the petitioners' claims and recommended that the Government take steps to ascertain the extent of the loss in order to recoup the petitioners.[46] The Government made no response.

In 1892 an attempt to remove the legislative requirement for the consent of a majority of Maori land owners to the opening up of their lands for mining was thwarted. The requirement remained until it was removed in 1910 (see below). An amendment to the Mining Act in 1896 declared that any lands reserved from cessions for residences, cultivations or burial grounds were to be made available for mining purposes 'in the like manner in all respects as if they had been ceded.'[47] Maori protest to this provision described it amongst other things, as the 'first step

42. 'Report on the question of miners' rights . . .', 30 May 1889, no 89/1255, j 1 96\1548 (cited in Anderson, p 56)
43. NZPD, 1887, vol 59, p 280 (cited in Anderson, p 62)
44. See *Thames Advertiser*, undated extract, md 1 89/85 (cited in Anderson, p 58)
45. Reid to Minister of Mines, 13 May 1892, md 1 89/85; Seddon minute, 8 September 1892, md, 1 93/513 (cited in Anderson, p 58)
46. 'Gold Fields and Mines Committee Report', 31 August 1894, md, 1 94/2887 (cited in Anderson, p 58)
47. S 56, Mining Amendment Act 1986

towards confiscation'. The speaker in this instance continued that 'he could not believe that such an alteration had been made with any desire to benefit the Natives.'[48] Section 16 of the Act also allowed the Native Land Court, on investigation of title or partition, to declare land ceded for mining purposes on application of the Governor and consent of a majority of owners.

The Government increasingly held firm to the position that the Crown had always held rights to minerals and that at no point had it purchased these from Maori.[49] This stance was opposed, however, by Robert Stout and others who questioned the application of British common law to the New Zealand situation raising, amongst other things, the Treaty of Waitangi as a matter to be considered. The member for Northern Maori, Hone Heke, argued that the Treaty 'shows completely that the land property and every other property contained thereon . . . belonged to the Natives.'[50] Opponents also reminded the House of the agreements made with Maori as early as 1852 which, they suggested, clearly indicated that the Government had at that time acknowledged Maori interests in sub-surface resources.[51] For the most part, however, supporters of the Act were of the opinion that the Treaty had no part in a progressive society and was not recognisable in law.[52]

10.4 Twentieth-Century Developments

In 1900, the system by which revenues were paid out was altered. Anderson observes that 'With the fragmentation of holding, and the much reduced returns on gold field lands still in Maori hands, distribution of revenues broke down.'[53] Amongst other things, only those owners who actually applied to the paying officer were paid, in a development which Treasury officials later admitted was a 'retrograde step' for Maori.[54]

Legislative provisions relating to Maori land remained largely unchanged in the first two decades of the twentieth century. One major exception, initiated without opposition or comment in the House, was an amendment in 1910 to the Mining Act which dropped the requirement for majority consent from Maori for land to be opened to mining once it had passed through the land court. Through other legislative developments, by 1926, Maori land was governed by a more complicated set of rules and provisions pertaining to mining than was general land.

In the 1930s, renewed petitioning by Hauraki Maori led to the establishment of a commission of inquiry headed by MacCormick, chief judge of the Maori Land Court, to look into the payment of revenues under the goldfields agreement and the

48. NZPD, 1892, vol 78, p 429 (cited in Anderson, p 63)
49. NZPD, 1896, vol 95, p 43 (cited in Anderson, p 64)
50. Ibid, p 312 (cited in Anderson, p 65)
51. Ibid, p 285 (cited in Anderson, p 66)
52. Ibid, pp 280, 305 (cited in Anderson, p 65)
53. Anderson, p 69
54. 'Hauraki Goldfields Native Reserves: Treasury Statement Relative to the Petitions', ma, 13/35c (cited in Anderson, p 70)

transfer of the freehold of goldfield blocks to the Crown. Having been denied access to the records on which their claim was based (on the grounds that this might give rise to 'a lot of allegations that might be fanciful but very difficult to answer'), Maori argued two things.[55] First, that the rights in revenues had not passed with the freehold as the goldfield blocks were sold and should have continued to be received by Maori. Secondly, they argued that the Crown had breached a 'fiduciary trust' by buying these blocks. The latter argument was rejected by the Crown because the law would not recognise a 'fiduciary trust' except that set up by specific statute. The Crown, in presenting its defence, concentrated on strict accounting of payments to individuals in the case of the blocks under scrutiny. The commission found no legal wrong-doing on the part of the Crown in this respect but did express a measure of unease about the nature of the goldfield transactions. It recommended that the Government make a limited payment to Maori in light of the fact that Maori in the district were so 'badly off' and found themselves with very limited land suitable for development.[56] The sum of £30,000 to £40,000 was suggested. For the next 50 years, Hauraki Maori attempted to win Government acknowledgement of this recommendation. According to Anderson, the Government was reluctant to open the doors to many similar complaints regarding the equity of its early transactions.[57]

10.5 Sub-surface Resources other than Gold

While the Crown initially focused on the ownership and extraction of gold, records indicate that silver was mined also from 1869 although it is unclear under which authority this was carried out.[58] Furthermore, in agreements in 1875 and 1881 the Government established control over all sub-surface properties, including kauri gum. The Mines Act in 1877 reflected the expanding definition of minable substances from 'gold' to 'gold, or any other metal or mineral other than gold'. The Coal Mines Acts Compilation Act 1905, brought together all legislation previously passed which related to Coalmines. The Bauxite Act and the Steel Industry Act, both passed in 1959 asserted Crown ownership of uranium and sole right of access to iron sands, and the right to take land for bauxite mining (with compensation payable).

Prior to 1937, 'treaties' had been entered into between some East Coast Maori landowners and oil companies that were prospecting for petroleum below their land. A 'royalty' was payable to the owners if petroleum was discovered in payable quantities.[59] In 1937, however, the petroleum resource was nationalised and brought within the Government's ownership under the Petroleum Act 1937, which 'virtu-

55. Native Under-Secretary to Crown Solicitor, 14 February 1938, ma 1 19/1/193, vol 2 (cited in Anderson, p 73)
56. 'Notes of Hauraki Goldfields Inquiry', 6 March 1939, g1–3, p 7 (cited in Anderson, p 76)
57. Anderson, p 78
58. AJHR, 1901, c-2, p 12 (cited in Anderson, p 85)
59. Ben White, 'The McKee Oilfield', report commissioned by the Waitangi Tribunal, November 1995, Wai 145 rod, doc m17, p 8

ally confer[red] upon the Minister of Energy an absolute discretion as to the granting of licences without any special consideration for private property rights or objections'.[60] While landowners would be compensated for damage to the surface of the land, the licencee was under no compulsion, according to the Act, to notify the actual owners or occupiers of the land before entering the land, if those owners or occupiers were Maori. Instead, the licencee was to give notice of their intention to do so to the registrar of the Maori Land Court, and to any non-Maori occupiers of the land (according to section 24(1) of the Act).[61]

During the Bill's debate in the House, Apirana Ngata, opposition Member for Eastern Maori asked:

> Did the Maori know there was oil under their lands when they signed the Treaty of Waitangi in 1840? No. Nor did they know there was gold or coal under their land, or that the timber which grew on their lands had a greater value than for making canoes and carvings for their houses, and so on. Is the argument now, that, because the poor savage was ignorant of these things that have been made possible by pakeha, he is to have no benefit or advantage for them today? If so, it will not hold water.[62]

His argument was supported by William Bodkin, Member for Central Otago, who said that:

> the Treaty of Waitangi guaranteed those rights to the Maori people at Common Law, and now the Parliament of New Zealand is seeking to take away those rights and vest them in the state.[63]

The supporters of the Bill, however, argued that a different notion of equality was established under Article 3 of the Treaty, which meant that Maori should not be treated any differently from Pakeha with respect to oil.[64]

The 1937 Act remained in place until it was replaced by the Crown Minerals Act 1991. This Act required all persons acting under the Act to have regard for the principles of the Treaty of Waitangi. It also identified petroleum, gold, silver and uranium existing in its natural condition in land to be the property of the Crown.

The issue of the sub-surface rights under the Treaty is also raised in respect of geothermal power. Three phases of legislative control have been identified affecting the ownership and use of geothermal resources in New Zealand.[65] From the 1880s to the 1950s, legislation protected and controlled thermal areas largely for tourism purposes. For example, the Thermal Springs Districts Acts 1881 and 1883 (see vol iii, ch 7) gave the Crown a monopoly over the acquisition of Maori land in

60. K Palmer, *Planning and Development Law in New Zealand*, Sydney, Law Book Company, 1984, vol 2, p 973 (cited in White, p 11)
61. Anderson, p 88
62. NZPD, 1937, vol 249, p 1044 (cited in White, p 9)
63. Ibid, p 1048 (cited in White, p 10). Note that the Common Law position is that the Crown acquired radical title along with sovereignty in 1840 subject to Maori customary title.
64. NZPD, 1937, vol 249, p 1039 (cited in Anderson, p 90)
65. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, Wellington, Brooker and Friend Ltd, 1991, pp 121–133

Taupo and east of Taupo. Also, the Scenery Preservation Act 1903 extended the Crown's power of compulsory acquisition in thermal areas for the purpose of scenery preservation to include the entire country.

A second phase began with the Geothermal Steam Act 1952 which stopped short of vesting the ownership of the resource in the Crown, instead vesting the sole right to take, use and apply it for the purpose of generating electricity. The Act allowed the Crown to enter land to test for geothermal activity and to compulsorily acquire land under the Public Works Act 1928 through which the resource could be accessed. Full compensation was payable for the damage or loss of land. Soon after the Act was passed, the Crown sought to widen its control with the Geothermal Energy Act 1953, which vested 'the sole right to tap, take, use and apply geothermal energy on or under the land . . . in the Crown, whether the land has been alienated from the Crown or not' (s 3(1)). The Act recognised and protected Maori and others' uses of geothermal energy which could be served by a shallow bore (not exceeding 61 metres in depth). The Crown retained the right to enter and compulsorily acquire land, as set out in the 1952 Act, with compensation payable only if the energy was of actual benefit to the owners or occupiers of the surface land (s 14).

In the third legislative phase, the Water and Soil Consevation Act 1967 vested the sole right to use all 'natural water' – which included geothermal water, steam or vapour – in the Crown, and required users of the resource to be licensed in an attempt to promote the conservation of the resource. Finally, the Resource Management Act 1991, which repealed the 1967 Act and most of the Geothermal Energy Act 1953, maintained the Crown's existing rights to resources.

10.6 Conclusions: Treaty Issues Arising

The Crown in New Zealand initially modified the Royal prerogative in respect of its access to gold in recognition of the guarantee made to Maori under the Treaty of Waitangi that they would retain possession of their lands and taonga, for as long as they desired. Accordingly, early assertions of the prerogative respected Maori desires to withhold from mining certain lands still held under customary title. As early as the 1850s, however, pressure mounted from miners to open up this land also. While the Government continued to acknowledge the restrictions the Treaty placed on the application of the Royal prerogative, and often assured Maori that their rights would be protected, it very soon not only attempted to bring land under Native title within the State's mining jurisdiction (to appease miners' demands), but also refused to relinquish control and management of the fields to Maori (even after mining activity on the land had ceased), as they had requested. Instead, Maori were paid an increasingly small percentage of the revenue generated by mining.

Despite Maori continuing to offer the Government reasonable cooperation in its efforts to open up further fields for mining, from 1869, the Government's kawanatanga authority was asserted, through legislation, over Maori attempts to retain

control of gold resources, and the land on which they were mined. Therefore, although the Crown can argue that it had no legal obligation to acknowledge Maori Treaty rights in respect of gold-bearing land, in the 1850s and 1860s it in fact did so. The progressive diminution of Maori rights over the land (and hence of rights in respect of gold mining) which the Crown had initially acknowledged, has elements of bad faith. Moreover, the disturbance to Maori surface rights by mining was severe, and equity alone suggests that it should have been amply compensated by a generous share of mining revenue.

In respect of sub-surface resources other than gold, in a recent finding in the *Ngawha Geothermal Resource Report*, the Waitangi Tribunal found that:

> the Crown's obligations to manage geothermal resources 'in the wider public interest' must be constrained so as to ensure the claimants interest in their taonga is preserved in accordance with their wishes.[66]

The Tribunal has also affirmed a 'development right' in respect of resources which Maori were using in 1840, meaning the right to use lands, forests and fisheries in new ways, taking advantage of new technology after 1840 as before it. Thus the *Ngati Tahu Sea Fisheries Report 1992* acknowledges that Maori could expect a 'treaty development right to a reasonable share of the [resource]' – in this case fisheries at great depth or hundreds of miles offshore.[67]

The application of the 'taonga' principle (together with the 'development right' principle) to sub-surface resources that Maori were not using before 1840 is problematic. On the one hand Maori did not apparently use gold, petroleum or coal, nor did they 'mine' the sub-surface to any great depth. On the other hand, they did use the 'upper' subsurface for geothermal waters, ochre, and a variety of stones used for implements and ornaments. As Ngata's statement implies, Maori had a wholistic view of the rohe they controlled, not sharply distinguishing surface and sub-surface any more than they distinguished a sharp boundary between land and sea or lagoon. Rangatiratanga and kaitiakitanga extended throughout the rohe. On the other hand, the assertion of prioritory rights to commodities from a previously unprecendented and undifferentiated sub-surface may owe as much to European notions of property as to Maori law. But in this context, the common law definition of 'land'does include the sub-surface. This was acknowledged in many early land purchase deeds. More recently the Court of Appeal, in *Tainui Maori Trust Board v Attorney-General* (1989), held that coal-mining rights were 'interests in "land" and hence subject to the State-Owned Enterprises Act 1986'.[68]

Attempts to resolve this issue by logical extension of one set of these arguments or the other is less helpful than seeking a reasonable balance of kawanatanga and rangatiratanga Treaty principles. It is arguably not in the public interest to encourage the further privatisation of the sub-surface for the benefit of the surface right-

66. *Ngawha Geothermal Resource Report*, p 137
67. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992, p 303
68. *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513–515

holders. On the other hand, the Crown would be acting unreasonably if it did not recognise the disturbance of the lifestyle of surface right-holders as deserving of generous compensation by a share in the development of the resource, as joint-venture partners wherever possible.[69] Moreover, the manner of the Crown's access to sub-surface (via aquisition of rights to the surface) ought to have strict regard to the Treaty principles. Thus, in respect of the geothermal resources at Ngawha, the Tribunal found that the Crown had 'acted in breach of article 2 of the Treaty in not ensuring that the onwers willingly and knowingly alienated Parahirahi C block and the hot springs toanga located on the block.'[70] In this sense too, the manner of the Crown's access to the gold reserves in Hauraki and Taitapu in the nineteenth century showed less than scrupulous regard to the Treaty obligation of active protection of Maori interests.

69. It should be noted that the governments of Papua New Guinea and Vanuatu both carefully re-examined the principles by which sub-surface rights would be managed given the very strong assertion of claims by the villagers who held the surface rights. Both opted firmly for a continuance of the British legal inheritance, whilst negotiating generous shares of compensation (or 'royalties') for both the local district governments and the villagers. It might be suggested that the war on Bouganville demonstrates the injustice of the state's denial of private ownership of the sub-surface. That would, however, in the opinion of this author, be a misconception. The Bougainville provincial government was happy with the revenue arrangements in the 1980s, as were the village elders. The rebellion on Bougainville was launched by a group of young and ambitious men discontented with the distribution of the revenue within the local community and jealous of the elders.

70. *Ngawha Geothermal Resource Report*, p 74

CHAPTER 11

PUBLIC WORKS TAKINGS

11.1 The British Crown and Public Works Takings, 1840–60

In 1840, New Zealand inherited the centuries-old English tradition of the right of the state (or the Crown) to take private land for public purposes in exchange for the payment of full and equivalent compensation and the assurance that takings would only be made under legislative authority. While private enterprise had been willing and able to promote and develop public works in England, the same could not be said for New Zealand after 1840. This meant an early modification of the English tradition in New Zealand towards central, provincial and local government responsibility for public works. In addition, the prior rights of the Maori people to (amongst other things) possession and rangatiratanga of their land had been recognised by the British Crown in the Treaty of Waitangi. This encouraged further modifications of the English model in its application in New Zealand.

From 1840 to the end of the 1850s, there was practically no legislation regarding compulsory public works lands takings in New Zealand. In late 1841, the Surveyor-General, Felton Mathew, did lay out roads and public reserves in Port Nicholson before the purchase of the land had been completed by the New Zealand Company and the Crown. Governor Hobson seems to have relied upon the Crown's claim to prerogative rights to the foreshore, and radical title to land, in authorising these arrangements. The Municipal Corporations Ordinance 1842 authorised the government to make over the public roads and reseves to local government. Governor Grey, in the late 1840s, sought to increase the protection of Wellington, the Hutt Valley and Porirua districts by extending roads to link up these areas; thereby providing a public service and fulfilling a military purpose also. It is doubtful if he had the chiefs' consent to build the road.

Generally, however, the Crown purchased land ahead of settlement needs and made provision for public works from it, thereby avoiding the taking of either Maori or Pakeha land for such purposes. Generally speaking, public works related legislation during this period, such as the Public Roads and Works Ordinance 1845, was concerned with works at a local level. It encouraged local responsibility for the construction and, most importantly, payment for works programmes in an effort to save money. While the legislation did not provide provincial government or local bodies with the authority to take land, it did allow for the levying of rates to pay for the cost of construction and maintenance of works on land already acquired and settled.

When compulsory takings did start in the late 1850s, these were generally to improve amenities within settlements or on land which had already been purchased from Maori, as in the South Island. During this time, Maori were encouraged to believe that meaningful accommodation of their customary rights was possible. Furthermore, keen to pursue participation in trade and economic growth, some Maori 'gifted' land for public works in these early years.

The 1852 Constitution Act, however, allowed increased control of land taking to the settler government (rather than the Governor). Furthermore, it confirmed a distinction between Crown granted and customary Maori land where none had previously existed in local law, and exempted customary Maori land from takings under the Act. It stated that Provincial Councils were not able to legislate regarding Crown land and unextinguished Maori land. The Act reserved Native Affairs to the Governor. Subsequent public works provisions, such as the Wellington Province Roads Act 1853 and the Taranaki Province Public Works Ordinance 1855, determined public works at a provincial level only, and increasingly afforded protections (rangatiratanga) to customary lands only, while Crown granted Maori land was subject to the same provisions as general land. For example, the New Plymouth 1855 Public Works Ordinance only exempted aboriginal land which was 'the common property of a tribe or community' (s 43) while the 1858 Roads and Bridges Ordinance excluded land from rating that was owned or occupied by aboriginal Natives except where title was derived from the Crown (s 50).

11.2 1860–80: Settler Government and Public Works Takings

The possibility of war prompted debate in the early 1860s about the settler government's rights in respect of Maori land. Settler politicians clearly felt that Crown granted Maori land, which was formally subject to received law and statute law, could be taken for public works. However, they sought advice on their right to take to take land over which Native title had not been extinguished. In response, Attorney-General Henry Sewell advised in November 1862 that the Crown had the right to make roads through all lands because it was sovereign.[1] Assistant Law Officer, Francis Fenton (responding in late 1862), felt that Sewell was wrong and argued that by virtue of the Treaty and the 1852 Constitution Act, 'aboriginal land' was admitted to be the distinct property of Maori.[2] On the other hand, Sewell's successor, Frederick Whitaker, was in agreement with Sewell and advised in early 1863 that in terms of the Treaty, a positive enactment of the legislature would prevail over the terms of the Treaty if there was any conflict.[3]

All three opinions were sent to the British Colonial Office for legal advice, during which time the Colonial Office resigned control of Native affairs to colonial

1. Opinion of 22 November 1862, AJHR, 1863, e-3, s1, p 6
2. Opinion of F Fenton, 28 November 1862, AJHR, 1863, e-3, s1, pp 13–16
3. Opinion of F Whitaker, 21 February 1863, AJHR, 1863, e-3, s1

government, expressing the hope that the colonial government policy towards Maori would be 'just, prudent and liberal'.[4]

In the Native Land Act 1862, provision was made for the governor to take five percent of land *purchased* from Maori, for the purpose of roading. Arguably this did not impinge directly on Maori. However, following the resumption of warring in 1863, the settler politicians' public works legislation empowered provincial governments to undertake the work required on confiscated lands to make them attractive for settlement. Despite its relinquishment of responsibility for 'Native policy' in New Zealand, however, the Colonial Office disallowed the Provincial Compulsory Land Taking Act 1863 (which authorised the provincial councils to take any land for public works) saying that it was 'repugnant to the spirit of English law' in that it applied to Native land over which customary title had not been extinguished.[5]

The Public Works Lands Act 1864 provided the first specific legislative authority for central government to take both *customary* and Crown granted Maori land for public works purposes. Criticisms were made of the Bill when it was first introduced to the House that it flew in the face of established legal principles and the guarantees of the Treaty. Ministers themselves admitted that administrative convenience was being put before not only the Treaty, but also ordinary legal rights. For example, Mr G Graham opposed the Bill because it would infringe the Treaty of Waitangi and in addition it would be manifestly unjust to make roads through land used by Maori as urupa.[6] However, majority opinion supported the Bill. In particular, Mr Weld rejected concerns about the Treaty in respect of wahi tapu (such as urupa) saying that the Treaty gave sovereign rights to the Crown to take land, and 'even of taking a road through a graveyard'.[7] The terms of the Act, once it was passed, meant that there was little practical difference between punitive confiscations and compulsory takings of land for public works, particularly as public works takings at this time were of a military nature. Under section 5 of the Act, the compensation for the compulsory taking of Native Land was to be in accordance with the New Zealand Settlement Act 1863 (in other words, available only to those Maori not in 'rebellion'). The Act provided few of the protections found in English public works legislation (on which the legislation was supposedly based). For example, the Governor was not required to give notice or application to the land owner prior to the taking and holding of the land. Furthermore, the Act offered no protection to land in use or occupation, or for wahi tapu, neither was there a first right for the return of surplus lands to the former owners. Although in principle the Act applied equally to Maori and Pakeha land, Maori land would ultimately be most affected by it.

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4. Despatch from Newcastle to Grey, 26 February 1863, BPP, vol 13, pp 120–128
5. Cathy Marr, *Public Works Takings of Maori Land: 1840–1981*, Report for the Treaty of Waitangi Policy Unit, Wellington, December 1994, p 47. In 1866, the Act was passed in a revised form which included Maori land held by Crown grant and Maori reserves, while native land over which customary title was unextinguished was still exempt.
6. NZPD, 1864–66, p 154
7. Ibid

The Native Lands Act 1865 (which established the Native Land Court) made it lawful for the Governor to make reserves for roads, not exceeding 5 percent of any land over which a Crown grant was issued (s 76). The Act removed from Maori customary land the protections insisted upon by the Colonial Office and exposed it to the obligations and duties relating to all Crown granted land. It also extended the 1862 provisions to apply to all Maori land investigated by the Native Land Court and Crown granted, whether sold or not. The Act differentiated between Maori and general land in that the right to take Maori land extended for ten years after the date of the Crown grant – significantly longer than for other Crown granted land. Also, the Act made no provision for compensation to be paid for some types of Maori land taken (identified as 'outlying' land) which clearly contrasted with the requirement for public works takings of general land at that time.

The Immigration and Public Works Act 1870 and the Public Works Act 1876 were key pieces of legislation during the 'public works boom' of the 1870s, intended to encourage sustained economic development, while at the same time 'pacifying' and 'civilising' those Maori attracted to employment on public works. The former Act has been described by Marr as discriminatory in its apparent 'lack of concern for special Maori interests'.[8] For example, orchards and gardens on land under private title were offered protection while cultivations, urupa, and other wahi tapu on customary land were not identified for special consideration. Under section 7 of the Act, no compensation was payable for taking water from rivers, streams, or natural watercourses. Under section 22, confiscated land was declared waste land of the Crown. In 1872, an amendment to the Act (s 36) extended the right to take Maori land for roads without compensation to include land for railways also.

The Public Works Act 1876 attempted to consolidate the public works legislation for central government. The newly established counties and boroughs (which replaced the provincial councils) as well as the central government, were empowered to take Maori land. Under the Act, certain areas were not to be entered onto for the purposes of public works without the written consent of the owner. Such areas included gardens, vineyards and pleasure-grounds but did not mention sites important to Maori, such as urupa and other wahi tapu (s 15) although surveyors were prohibited from entering upon Native land without the consent of the Minister (s 78). The Act retained, and in many cases strengthened, earlier protections for most lands required for public works (with the exception of certain land for railways) while all roads being used by the public were considered vested in the Crown (s 79). This last provision included roads established by Maori prior to 1840 along which Europeans had been allowed right of passage. According to section 38 of the Act, all persons suffering damage under the Act with an interest in land taken were entitled to compensation, to be determined by the Compensation Court. Although not discriminatory against Maori specifically, the bureaucratic nature of

8. Marr, p 71

the process and the complexity of Maori title would have made it difficult for Maori to secure compensation, especially for customary land.

Other relevant legislation in the 1870s includes, the Highway Boards Act 1871, which sought to remove the restrictions imposed on provincial councils under the Constitution Act 1852, including those over lands where aboriginal title had not been extinguished. The Act allowed customary Maori land to be rated 'if in occupation of any other than an aboriginal Native'. Also, the Native Land Act 1873, and its amendment in 1878, continued the Governor's power, under the 1865 Act, to take up to five percent of the land granted under the Native Land Act for roads. Under the 1873 Act, this was possible for up to 10 years after the date of the Crown grant. This was extended to 15 years under the 1878 Act (no 2). Compensation was payable.

During most of the 1870s the Crown (in particular Donald McLean, Minister of Native Affairs) continued to negotiate with Maori on public works takings. For their part Maori generally co-operated with public works requirements and continued to 'gift' land for roading and other requirements. However, it was clear that McLean's objective was to facilitate European settlement and cater for European needs. Official reports, for example, consistently described roads in terms of their suitability for European settlement needs rather than their advantages for Maori. Furthermore, according to Marr, the Crown sometimes offered Maori an unreasonably low purchase price, backed up with threats that the land would be compulsorily purchased under the Railways Act (see next section) if the price was rejected.[9] Some local authorities, on the other hand, used the confusion arising from the mass of legislation which related to Maori land to their best advantage by avoiding consultation and negotiation with Maori in favour of compulsory purchase. Marr provides the example of the pressure brought to bear on a District Road Board to avoid obtaining agreement from Maori for a road when the provision existed for the road to be taken without compensation.[10]

The matter of rating as it relates to public works takings was also a major local issue because rating was intended to pay for and maintain public works (see ch 19 below). Maori saw no services on customary land, and Crown granted land proved difficult to rate because title had been fragmented by the Land Court and many owners did not even live in the district. Maori opposition infuriated local authorities who used the non-payment of rates as an excuse to further neglect Maori rights in respect of public works takings. According to Marr, the Crown had to take some responsibility for allowing this situation to develop because it created the circumstances, such as the discriminatory legislation discussed above, under which local bodies targeted Maori land for public works. Furthermore, settler government accepted, with little regard for differences in land tenure and culture or the lack of access by Maori to capital, that 'property had its duties as well as its rights'. They interpreted Article 3 of the Treaty to mean that wherever Pakeha subjects were affected by public works and ratings provisions, Maori should be treated similarly.[11]

9. Ibid, p 83
10. ap 2/2, 1873/1716 (cited in Marr, p 83)

Maori members of Parliament, on the other hand, suggested that Maori objections to rating could be taken into account (without undermining the purpose of rating per se) by allowing Maori the opportunity to provide an equivalent to rating, such as the provision of materials and labour. While such requests generally fell on deaf ears, in 1875, James Mackay (Civil Commissioner in the Thames District) wrote to McLean recommending that Native lands (Crown granted or other) be exempted from rating under any Highway Act because many Maori had sought guarantees in granting land for roads that they not pay rates on the road because they were often simply unable to pay.[12] Under-Secretary H T Clarke endorsed this view and added that Maori should be relieved of these taxes and should not be subject to them if they chose to hold onto their lands. In the end, however, settler demands for public works which suited their needs overwhelmed attempts by the Native Department to give some protection to Maori. Native Minister McLean's response to other suggestions was that it would not do for the Native Department to be seen to be 'opposing the opening up of the country'.[13]

Many legislative provisions were seriously criticised by Maori, particularly once Maori received representation in Parliament (with the four Maori seats created in 1867). The fact that Maori land was generally taken in preference to European land was opened admitted by the Minister of Works (who considered it 'decidedly unfair') in 1888 and commonly complained about by Maori.[14] Despite some amendments to legislation, Maori landowners continued to encounter problems with Councils illegally taking land without a response from Government departments who failed to display any real political will to remedy admitted injustices. For example, in the late 1880s a local authority wanted to take the land of Matene Tuwhare, when European land was obviously better located for roading purposes. The land was taken from Matene and the road built, despite his complaints to the Native department. Despite further evidence supported by a judge that the local authority's lawyer had acted in a questionable manner, the government refused to interfere in the local issue.[15]

11.3 1880–1900: Public Works Policy and Law

By the late 1870s and early 1880s, as Europeans came to perceive Maori as less of a threat (the number of settlers having greatly increased) the government's policy regarding public works takings became more hard-line. Maori in Taranaki responded to the pushing of roads and surveys though their rohe with non-violent protest. Government in turn responded with force, in particular at Parihaka in 1881, when the people living there were forcibly dispersed and their leaders arrested.

11. NZPD, vol 10, 1871, p 384 (cited in Marr, p 86)
12. Marr, pp 88–89
13. H T Clarke to McLean, 2 November 1874, McLean papers, ms 32, folder 218, no 74
14. NZPD, 1888, vol 61, p 609
15. ma 1 92/2163 and attachments

Subsequently, the Public Works Act 1882 began a new pattern of separate provisions for taking Maori land, described by Marr as 'harsh and vindictive'.[16] The Act, in particular, introduced distinctly different provisions for land takings and the compensation paid for Maori land as opposed to general land; Maori land attracted penalties rather than the protections guaranteed in the Treaty, a legacy which lasted well into the twentieth century. The 1882 Act allowed the Crown to take any Maori land whatever title it was held under, for a government work by order of the Governor in Council 'without complying with any of the provisions hereinbefore contained' (s 24). In terms of compensation, while Maori land held by Crown grant was treated the same as European land, the provision for customary Maori land was that the Minister (not the owners of the land) 'may' make application for compensation. Such legislation took away from Maori many of the protections hitherto theoretically available to all landowners in the 1870s and still available for European-owned land under the 1882 Act, while increasing the Crown's power to take Maori land without prior consultation and agreement.

Amendments to the Public Works Act in 1885, 1887, 1889 and 1894 did little to improve protection for Maori land, instead extending the powers of local authorities. For example the 1889 Amendment allowed for land taken by the government for railways to be vested in a local authority for a road. The Public Works Act 1894 allowed up to five percent of land to be taken for roads from land which had not had its title investigated by the Native Land Court. Compensation was not payable, and land occupied by pa, village, cultivation, burial grounds (etc) could be taken with the consent of the Governor in Council. In addition to these general legislative developments, Maori lands were also taken under Acts such as the Tongariro National Park Act 1894.

Other legislation relating to public works was passed in the late 1880s, including the following Acts.[17] The Counties Act Amendment Act 1883 gave powers to County Councils to control and supply water for irrigation purposes for farming. Drainage rights were extended by means of the Land Drainage Act 1893. The Native Land Administration Act 1886, allowed roading costs to be deducted from the purchase money or rent before it was distributed to owners. The Native Land Court Act 1886 allowed the Governor to lay off public roads from up to five percent of land granted under any Act relating to Native land or held by Naitves under Certificate of Title or Memorial of ownership. This power was to cease fifteen years after the grant was issued, although under the 1888 amendment to the Act, this was reduced to ten years, and at the same time it was stated that where a road was to run between native and European land, land should be taken equally from both sides. Under the Native Land Court Act in 1894, the time frame was again extended to 15 years after the first issue of title.

Maori petitioned repeatedly about public works takings and criticised the lack of consultation with them on the part of taking authorities. For their part, taking authorities claimed that it was impossible to serve notice on all appropriate Maori

16. Marr, p 91
17. David Williams, The Maori Land Legislation Manual, pp 77–78

land owners because of the number of individual owners listed with each block (as a result of the breakdown of customary title by the Land Court). Maori also expressed concern regarding the lack of legislative protections for their land when compared to general land, a situation which encouraged the taking of Maori land. They argued that in the absence of such protections, financial considerations and administrative convenience along with other imperatives, were taking preference over their special rights as land owners.

11.4 1900–28

The myriad of Acts and amendments pertaining to the taking of Maori land continued into the twentieth century. The Otago Heads Native Reserve Road Act 1908 (with compensation paid), referred to takings in local areas, while the Scenery Preservation Act 1903 was a more general piece of legislation used to facilitate land takings in the volcanic plateau and other districts. While Maori freehold land was excluded from the operations of the Scenery Preservation Act 1906, the Public Works Amendment Act 1903 provided that land could be taken for scenery preservation purposes under the public works provisions.[18] Substantial and important mahinga kai could be taken under these provisions. Other Acts included the Public Works Act 1905, the Native Land Act 1909, and the amendments to these Acts. According to the Native Land Settlement Act 1907, Maori land boards were able to lay off roads in lands vested in them for settlement (s 12). The Act also stated that no land was to be offered for sale or lease by the boards until it was satisfactorily roaded and bridged, with these costs (plus four percent interest) to be repaid out of revenue received from the land (s 39). The Native Land Act 1909 allowed the Native Land Court to lay out roads when partitioning lands (s 117). It also allowed the Governor, without the consent of any person and without the liability to pay compensation, to lay out and proclaim roads over customary lands (s 387, repealed in 1927).

The sheer quantity of these Acts and amendments created confusion in respect of the status of Maori land which could be taken for roads and railways under the main public works provision (discussed earlier) or under the Crown right to take certain lands without compensation. This, it has been argued with much justification, 'encouraged evasion of compensation even when it was due and the confusion surrounding various provisions provided a tempting means of evading what little protections and restrictions applied [to Maori land]'.[19]

In respect of rights over water, the sole right to use water in lakes, falls, rivers or streams for the purposes of generating or storing electricity was vested in the Crown in the Water Power Act 1903. The Land Drainage Act 1908 and the Swamp Drainage Act 1915 authorised drainage activities which destroyed traditional Maori

18. Tom Bennion, 'The Aotea Maori Land Board and Scenery Preservation', a supplement to the Whanganui River Report, Wai 167 rod, doc a-19f, p 12
19. Marr, p 62

fisheries and encroached on disputed foreshores areas. Under the 1908 Act, section 17(f), a Board of Trustees (as constituted under the Act) was expected to pay 'reasonable compensation' determined by a Magistrate (if the parties could not agree to an amount themselves) and owners had one month to lodge an objection to proposed action with the Clerk of the Board (s 21). The 1915 Act, on the other hand, noted that 'land used exclusively for the purposes of Native settlement shall not be so taken or purchased unless its acquisition is, in the opinion of the Governor, necessary for the successful conduct of the drainage operations' (s 7(1)). While compensation or purchase money was payable in respect of land taken or purchased (s 7(2)), the Act made no mention of an appeal process.

Ongoing legislative developments, in roading in particular, consistently failed to require central government to ensure basic protections for Maori. For example, taking authorities were not required to show that compulsory takings for roading without compensation were essential and in the best interests of the whole community. Consultation with Maori suffered as a result and was replaced, for the most part, with taking by compulsion without the protection of the right to notice which was afforded to general land. In 1927, the Native Minister admitted that previous legislation relating to public works had discriminated against Maori.[20]

11.5 Public Works Acts and Related Legislation, 1928–81

The Public Works Act 1928 (and its frequent amendments) became the principal legislation for public works until it was replaced in 1981. Under the Act, Maori land was dealt with under separate provisions from general land and continued to receive less protection especially customary Maori land, although the right to take 5 percent of the land without compensation was removed in the 1928 legislation. The Act confirmed that both the Crown and local authorities had the power to take land (including Maori land under any title) for public purposes. The taking of land could be by agreement or compulsion. Maori customary land generally fell into the latter category. Crown granted Maori land was distinguished from general land by the provision that Maori land interests were not required to be published in the gazette. This diminished the opportunity for Maori to be informed about their land and cloaked from public scrutiny the extent of taking of Maori land.

Provisions for compensation were also significantly different for Maori land under the 1928 Act. While compensation was payable in relation to general land it was not a mandatory requirement for Maori land, either customary or Crown granted. Instead, the onus for making a claim for compensation fell on the taking authority (most often the Minister) who according to the Act, 'may at any time' make a claim (as with the Public Works Act 1882), though with no limit on how long application could be delayed. Compensation claims were heard by the Maori Land Court in the case of Maori land, as opposed to the Land Valuation Court

20. NZPD, vol 216, 1927, p 537

which heard claims for compensation for general land. The expertise of the Maori Land Court in assessing complex compensation law was often called into question by Maori (discussed further below).

Furthermore, while the 1928 Act provided for the return of surplus lands taken but not required for public works, later amendments excluded Maori land from the offer back provisions and allowed it to be used for 'secondary purposes' when no longer needed for its original purpose. For example, an amendment in 1948 provided that land taken for a public work could be used for a secondary pupose under certain conditions (s 37). The offer back provision was not fully restored in legislation until 1981. Up until 1945 at least, Maori were also disadvantaged by the requirement for special legislation to revest their lands.

The Public Works Act 1981 was passed in response to criticisms that protections to owners of general land had been eroded over the years and that too much power was now in the hands of the taking authority. For example, the provision was reintroduced that land could be taken only for 'essential work' (s 22). Many Maori concerns were inadvertently addressed and resolved in this process also, although there was still no recognition of specifically Maori interests in the 1981 legislation. During the debate about the Bill the Legislature was reassured that 'provision is made in the Bill to give extra protection to our Maori friends.'[21] Despite this, the member for Western Maori criticised the lack of consultation with Maori in the drafting of such a controversial and important Bill for Maori and the member suggested that the Bill should be considered by more Maori groups. The member was assured that problems in identifying owners of Maori land affected by the Bill could be referred to the Maori Land Court for resolution and the matter was dropped.[22]

Aside from the central public works Acts, other legislation containing general or specific taking provisions continued to impact on Maori land from 1928 to 1981. Legislation regulating the ownership and management of natural resources followed a similar history to that of public takings, as did drainage and river control.

11.6 Public Works Taking Policy and Procedure: 1928–81

11.6.1 Land-taking decisions and the application of taking procedures

The Public Works Department ('Works') was the main Government department responsible for public works takings from 1928 to 1981 (and Lands and Survey to a lesser extent), with the exception of Railway and other business oriented state services such as State Coal. Local authorities were also major players in public works takings with close links with central government, although they were more independent in setting policy and procedures. Of greatest concern for Maori in the relationship between central and local government with respect to land takings, was

21. NZPD, 1981, vol 438, p 1484
22. Ibid

central government's refusal to 'interfere' in the actions of local authorities, even when Ministers were advised of, and had recognised, Maori concerns regarding the protection of their lands.

Maori land was the prime target for takings and most often this was the result of Crown policies such as the fragmentation of Maori land title which allowed taking authorities to abandon the procedures routinely applied for general land, such as negotiation and consultation with owners. Maori land which lay 'idle' once title had been established was also a tempting target for taking authorities who presumed that because the land was not properly kept it was of little concern to the owners and could be used for public purposes. For reasons explained below, it was also generally easier to avoid paying compensation to Maori.

Maori complained that public works takings not only diminished their total holdings of freehold land, but also contributed to the loss of remaining ancestral land which was culturally, politically, and socially important to iwi or hapu. According to Marr, local authorities had more regard for financial advantage than the interests of Maori land owners, sometimes using public works provisions simply to shift Maori out of town. For example, in Kaikohe in 1947, Maori owners complained that a proposed taking for a hospital site would be generally detrimental to Maori. Some officials even pointed out that there was ample European land more suitable for the purpose, but the land was taken regardless. Taking authorities also seemed unconcerned when their own interests conflicted with longstanding Maori interests to develop the land in question. This situation was not helped by the lack of consultation between taking authorities and Maori. Furthermore, official documents reveal that non-Maori were able to bring considerably more influence to bear on taking authorities than were Maori. In particular, takings involving wahi tapu and urupa have been a source of major concern and resentment for Maori, who have claimed that taking authorities used legal technicalities to avoid requirements regarding burial sites. Maori also claim that inaccessible or marginal land reserved from sales for their own purposes (such as hunting game or gathering flora for a variety of purposes) was often later subject to public works takings because of its scenic and recreational value for Pakeha. Traditional fisheries were also lost in this manner. In other cases, remaining Maori land was effectively landlocked by takings.

The terms upon which Maori land was relinquished for public works requires consideration. As there was no viable alternative for Maori other than consent, even takings described as a 'willing agreement' must be treated with suspicion. There is evidence that Maori were obliged to sell land because it was made clear to them that if the owners did not agree to a purchase, the land would be taken.[23] It also appears that the government was willing to apply pressure to reach an agreement or settlement with Maori, or to apply legislative pressure in order to force agreement from Maori. Although mechanisms (albeit limited ones) had been in place since the Native Land Act 1909 for contact with Maori owners when purchasing land; it

23. Marr, p 165

appears that the taking authorities themselves appeared reluctant to use these provisions. As late as the 1970s, it was common for Works to ignore all the normal protections for landowners when dealing with Maori land under the guise that it was necessary to use compulsory provisions because of the complications of multiple ownership.

While conditions showed some signs of improvement for Maori in the 1970s, the change in attitude lacked legal backing. Earlier attempts to improve procedures for the taking of Maori land, as in 1952 when Works attempted to coordinate better communication between departments involved in Maori land administration, were similarly haphazard in their application. As a result, by the 1960s and 1970s it was still common for Works to undertake smaller public works assignments (such as road alignment) without consultation with the Maori land owners.

11.6.2 Compensation: policies and procedures

Full and prompt payment of compensation in keeping with the tradition of English law theoretically separates land 'takings' from land 'confiscations'. In practice however, the principle of compensation for public works takings was eroded by legislative rules and case law.

In terms of compensation, Maori land owners were affected by discriminatory legal requirements (including weaker notification requirements), the dispersion of compensation payments when they were made due to multiple ownership (making reinvestment more difficult for Maori) and the assumption that the payment of compensation (when this did occur) overruled any objections which might later have been made. Maori land which was marginal and undeveloped appears to have been valued at very low rates for compensation purposes by valuers with European perspectives toward land value. Maori owners were often not even aware that land had been taken and that compensation had been awarded. There were certainly occasions on which Maori felt aggrieved at the levels of compensation (sometimes none at all) paid for their land. From the 1960s the Maori Trustee was required under statute to negotiate compensation for Maori land taken for public works which was held in multiple ownership. While the Trustee was often deeply involved in challenging compensation payments on behalf of Maori landowners, and threatened at times to take the matter through the Courts (much to the frustration of the taking authorities) the office of the Trustee was limited in its usefulness because it often did not know of a taking until long after it had occurred.

The issue of royalties for material taken from land also illustrates that compensation assessment rules were often applied most harshly to Maori land. The otherwise reasonable principle that compensation would not be made to the owner of land containing material (such as raw metals) if there was not a ready-made market for the material (other than the taking authority) was an unduly harsh penalty for Maori land owners. Despite the fact that Maori were aware of the resource, and possibly could have found a market for it, they encountered problems in raising the capital and getting licences for a venture such as a metal quarry. Also more generally, due

to their shortage of funds and inexperience in such matters, Maori were less able to pursue the matter of compensation through the appropriate channels. Generally speaking, taking authorities were able to evade compensation payments without Maori being able to enforce such payments.

Delays in compensation payments were also problematic. First, there were often delays between the beginning of a work and the formal taking of the land. In addition, in the case of Maori land, there would also be delays before application for compensation would be made by the taking authority. There are many examples of cases where Works made no attempts to start proceedings until the department was pressured by the owners. Furthermore, negotiations between the Maori Trustee and Works regarding levels of compensation could take decades to reach an agreement. The Maori Trustee was hesitant to take the matter to court for fear of incurring costs that would have to be paid if Works won. Finally, once (and if) compensation was awarded, there were often further delays in the taking authority paying out to Maori. In many cases such delays resulted in clear financial advantage to the taking authority. While this was a common criticism from all land owners, Marr remarks that the delays with Maori land seem to have been inordinately long and protracted.[24] As with other aspects of public works takings, the matter of compensation was improved in the 1970s as public opinion and complaints from Maori leaders came to bear on Works.

11.6.3 Policies regarding the control and disposal of land no longer required for public works

The options on first purchase by original owners of land no longer required for public purposes, and the assumption that land would only be used for the purposes for which it was taken, were both gradually weakened by legislative developments (after the 1928 Public Works Act). While this affected all land owners, it typically had a greater impact on Maori who were less well placed to challenge disposal decisions and whose interests were generally of a low priority in the decision making process of taking authorities (again raising the question of the responsibility of taking authorities under the Treaty of Waitangi). In fact, financial gain or administrative convenience of the taking authority often appeared to have been given higher priority than the needs or rights of the Maori land owner. Also, in practical terms the fragmentation of Maori title by the Land Court made it much more difficult to return land or vest land in Maori owners which was no longer needed than it was to do the same for general land. Time, energy and administrative convenience made it more likely that taking authorities would not attempt to return or revest Maori land. Furthermore, there appears to have been no particular legislative or policy requirement to give priority to land of special significance to Maori (such as urupa) in revesting land. Land that was returned was offered back to the original owners at the current market price (and at the improved value), which was

24. Marr, p 186

often impossibly high for the previous Maori owners to afford given their generally limited access to capital. The Public Works Act 1981 required that the land be offered back at the current market price where it was practical, reasonable and fair to do so, but the amendment in 1982 introduced the discretion of the Commissioner of Lands or the local authority to offer a lower price if it was felt reasonable to do so.

11.6.4 The application of town planning processes

The application of planning designations and processes such as zoning and making of public reserves requirements appear to have had a detrimental impact on Maori rangatiratanga over Maori land and resulted in further loss of such land for public works purposes. The hearing process itself has been a difficult and expensive barrier for Maori in conjunction with a general lack of communication between Maori and government departments. Maori generally encountered difficulties in getting local bodies to respond to their needs in respect of planning issues, particularly in the area of proper provision of roading, due to the reluctance of Councils to take responsibility for roading on Maori land as a result of old difficulties with rates (discussed chapter 9 below).

In more recent years, especially since the Town and Country Planning Act 1977 which required that Maori interests be taken into account, there have been improvements in the use of planning processes from the perspective of Maori.

11.7 Legislative Development of the Concept of 'Native Lands'

A brief review of the history of the terms identifying the status of Maori land reveals the state of confusion created by legislative developments. In 1862 (Native Lands Act) 'Native Land' meant land over which customary title was unextinguished. In 1865 (under the Native Lands Act) the term 'hereditaments' was introduced to refer to land held under title derived from the Crown. In 1881, (in the Native Succession Act) 'Native Land' meant land owned by Natives under their customs or uses, the title of which had been determined by the Native Land Court, while in 1888, according to the Native Land Court 1886 Amendment Act, 'Native land' was that for which title had not been determined by the Court. Under the Public Works Act 1894, Native land was 'land held by Natives under their customs or usages, whether the ownership thereof had been determined by the Native Land Court or not.' The Native Land Court Act in 1894 introduced the term 'customary land' which referred to Native land under customary ownership the ownership of which had been determined by the Court (although the title had not) while 'Native land' had not been investigated by the Court. The next year the meaning of 'Native land' was changed again in the Native Townships Act 1895 to include all Native land whether or not it had passed through the Court. The confusion continued with the Native Land Act 1909 which differentiated between 'customary land' and

'Native freehold land', the latter referring to land owned by a Native under an award of the Native Land Court and subsequently Crown granted. Native land, on the other hand, meant either customary land or Native freehold land. Obviously the confusion in definition created by this legislation would have only added to the complex management of Maori land at the time.[25]

11.8 Public Works Takings and the Waitangi Tribunal

The Waitangi Tribunal has identified certain principles which attempt to balance the Article 1 right of the Crown to exercise kawanatanga (governance) with Article 2 protection of Maori rangatiratanga, as well as the guarantee to Maori of all the rights and privileges of British citizens under Article 3. These general overarching Treaty principles have at times been specifically applied to public works related claims. For example, in the Mangonui Report 1988, the need to take account of Maori interests in carrying out public works projects was specifically identified in the comment that:

> It was a condition of the Treaty that the Maori possession of lands and fisheries would be guaranteed. The guarantee requires a high priority for Maori interests when works impact on Maori needs or particular fisheries, for their guarantee was a very small price to pay for the rights of sovereignty and settlement that Maori conferred.[26]

In earlier reports, the Tribunal also asked whether compulsory takings of Maori land for public purposes were in themselves a breach of the Treaty. While it did not say that they were absolutely breaches in all cases, the Tribunal stated that takings had to be clearly justifiable, perhaps as a 'last resort' or where there were clearly issues of peace, security and good order involved, and with due regard for the obligation of prior consultations and negotiations and payment of compensation (for compulsory takings). For example, in the Orakei Report 1987, the Tribunal commented in respect of the taking of land for defence purposes:

> the Crown's actions in compulsorily taking this land appear to be in breach of article two of the Treaty which requires the consent of the Maori proprietors to any disposition of land. At the same time, the Preamble to the Treaty speaks of the anxiety of the Crown not only to protect the just rights and property of the Maori but also to secure peace and order. It is arguable that the sovereign act of the Crown in taking land for defense purposes with a view to securing peace and good order is acting for the benefit of all citizens, Maori and European alike, and is not inconsistent with the principles of the Treaty.[27]

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25. See David Williams, *Appendices to the Maori Land Law Manual*
26. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Mangonui Sewerage Claim*, Wellington, Department of Justice, Waitangi Tribunal, 1988, p 60
27. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 3rd ed, Wellington, GP Publications, 1996, p 167

While the Tribunal was willing to concede on this occasion that the taking of land for defence purposes might not constitute a breach of the Treaty, it argued with regard to the taking of land for the purposes of housing that:

> The Crown prejudicially affected . . . [t]hose Ngati Whatua owners whose land was compulsorily acquired against their wish and without their consent and thereby acted inconsistently with the principles of the Treaty which guaranteed the Maori families and individuals the undisturbed possession of lands they wished to retain.[28]

The Tribunal found, in this report, that the Crown had an obligation to protect the papakainga and especially the site of the marae from the deleterious effects of a public work (without reference to the Article under which the Crown is obliged to do so).[29] The Tribunal also referred to the 1912 taking of land for a sewer under the Auckland and Suburban Drainage Act 1908, which resulted in the loss of shellfish beds and flooding, as being contrary to the Treaty.[30]

In both the Ngati Rangiteaorere and the Mohaka River claims, the Crown acknowledged that, while there was a general public benefit in a road or railway for which land was taken, there was also a related issue of Crown failure to negotiate with Maori owners before using compulsory provisions. In the Mohaka River Report, the Tribunal stressed that Maori rights of rangatiratanga were being ignored.[31] In the Ngati Rangiteaorere Report, the Tribunal expressed doubts as to whether the Crown could properly assert its kawanatanga over Ngati Rangiteaorere's rangatiratanga by compulsorily acquiring their lands for roads, and advised that the Crown had failed to consult about the need for a road and had failed to genuinely negotiate over the purchase of the land. On this basis, the Tribunal concluded that the Crown 'therefore had no right to proceed to compulsory acquisition' and that the taking of the land without compensation (which was without justification) was clearly in breach of Article 2 of the Treaty.[32]

The *Te Maunga Report* was specifically concerned with a public works land taking and the return of the land to the former Maori owners when it was no longer required for public purposes. The Tribunal felt that there was no need for the Crown to take freehold land because other alternatives, such as leasing, could have been negotiated. Leasing, the Tribunal advised, means that when the land is no longer required for a particular use, it can more easily be returned and the status of any improvements negotiated. The Tribunal recommended that the Public Works Act 1982 be amended to require policy consistent with the Treaty of Waitangi. Also, that legislative provisions were required to enable the lease of land, rather than the transfer of full freehold title and return of Maori land no longer required for any public purpose.

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28. Ibid, p 162
29. Ibid, p 158
30. Ibid, p 3
31. Waitangi Tribunal, *The Mohaka River Report 1992*, 2nd ed, Wellington, GP Publications Ltd, 1996, p 70
32. Waitangi Tribunal, *The Ngati Rangiteaorere Claim Report 1990*, 2nd ed, Wellington, GP Publications, 1996, pp 46–48

In reviewing the Crown Counsel's submission in the Turangi Township Report 1995, the Tribunal found that the submission contained a fallacy. It explained that:

> It does not follow that, because under the Treaty the Crown has the authority to govern, such authority is unqualified. Plainly it is not. It is limited by and subject to, the provisions of article 2. To determine whether the Crown 'had all the authority to legislate in terms of the Public Works Act 1928 and the Turangi Township Act 1964', it is necessary to determine whether these provisions can be reconciled with the guarantee in article 2.[33]

In determining whether the Public Works Act 1928 and the Turangi Township Act 1964 (described by the Tribunal as 'draconian measures') were inconsistent with Treaty principles, the Tribunal advised that:

> the cession by Maori of sovereignty was in exchange for protection by the Crown of Maori rangatiratanga. The confirmation and guarantee of rangatiratanga in article 2 necessarily qualifies or limits the authority of the Crown to govern. In addition, under article 2, the chiefs gave the Crown a pre-emptive right to purchase land as they might be disposed to sell at such prices as may be agreed upon.

The Tribunal concluded on the strength of such reasoning that:

> Statutory powers giving the Crown a right to ride rough-shod over the solemn rights guaranteed to Maori by article 2 could be justified only, as we earlier indicated, in exceptional circumstances and as a last resort in the national interest.[34]

The Tribunal went on to say that:

> The Tribunal considers that [the various statutory measures] are not merely inconsistent with the terms of the Treaty and relevant Treaty principles; they are tantamount to a unilateral abrogation of article 2 in that they deprive Maori owners of any protection of their Treaty rights under article 2. Far from actively protecting the Maori owners' right not to be deprived of their land without their consent and at an agreed price, they have been denied such protection by the powers vested in the Crown in the Public Works Act 1928 and the Turangi Township Act 1964.[35]

In the Ngai Tahu Ancillary Claims Report 1995, the Tribunal stated that the circumstances of each public works taking has to be considered independently in order to come to any conclusions about a breach of Treaty principles. The Tribunal found that:

> we have found that the Crown's compulsory acquisition of this land above the owners objection to be in breach of article 2 of the Treaty, given the subsequent revocation of the scenic reserve status and sale of much of the area'.[36]

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33. Waitangi Tribunal, *The Turangi Township Report 1995*, Wellington, Brookers Ltd, 1995, p 296
34. Ibid, p 300
35. Ibid, p 302
36. Waitangi Tribunal, *The Ngai Tahu Ancillary Claims Report 1995*, Wellington, Brookers Ltd, 1995, p 363

The Tribunal then turned its attention to the recurring grievance regarding the failure of the Crown to return lands once they are no longer needed for the purpose for which they were taken. Having cited examples of this occurring with respect to Ngai Tahu lands, the Tribunal commented that:

> Such actions, we feel, display an arrogance on the part of the Crown agents and can hardly be reconciled with the Crown's duty to both act in good faith and protect Ngai Tahu's rangatiratanga over their lands . . . Ngai Tahu . . . are well justified in objecting to the Crown's failure to return such land once that public interest has been served.[37]

With respect to notification of Maori land owners prior to the taking of their land, the Tribunal found that:

> the statutory shortcomings in the notification given to Maori landowners of the taking of their land in no way recognise or protect Ngai Tahu's rangatiratanga over their lands. Such provisions also fly in the face of the Treaty principle of partnership which requires the Crown to act towards its Treaty partner with the utmost good faith. The fact that Maori landowners were not afforded the same rights as non-Maori owners' can also be viewed as a breach of article 3.[38]

For discussion of the Crown's policy on Treaty claims involving public works acquisitions, see volume i, appendix v.

37. Ibid, p 365
38. Ibid, p 364

CHAPTER 12

SURVEYS

Note: A report on surveys and survey costs is being compiled by the Crown Forestry Rental Trust. It was expected to be completed in time for the writing of this chapter but was not available at the time of writing. The research and drafting of this chapter was undertaken by Dr Keith Pickens.

12.1 Introduction

During the first two decades of settlement it was apparently not always the practice to survey land before it was purchased. The area to be purchased would be described by reference to the features of the landscape which formed its boundaries. The parties might walked around these boundaries. Holes might be dug, or posts erected. Where the area being purchased was very large, the boundaries might be pointed out from a position on some higher ground. Sometimes rough maps were sketched, and attached to the deed of sale.[1] Later proper surveys would be made, at the expense of the new owners.

This way of doing things ceased in the 1860s, with the coming of the Native Land Court. Thereafter Maori land was surveyed prior to a hearing of the Court, although section 71 of the 1865 Act did allow the Court to proceed without a survey if it wished to do so. However, according to the Native Lands Acts 1862 (s 13) and 1865 (s 25) a survey was required before a certificate of title could be issued.

If the land, having passed through the Court, was then partitioned, further survey was necessary before new certificates could be issued. The sub-division of land among the heirs of the original owners required yet more surveys to be made, and more certificates issued.

The underlying purpose to all of this was to replace tribal or customary tenure with individualised tenure, so that for all practical purposes Maori land titles would become indistinguishable from European land titles. At every stage of this process, the issuing of a certificate of title could lead immediately to alienation, and very often land was surveyed and passed through the Court so that a prior agreement to buy or sell could be given legal effect. Yet while there was a close association between surveys and the issuing of titles, and between the issuing of titles and alienation, it was not a necessary association: land could be surveyed, passed

1. AJHR, 1891, sess 2, g-1, pp 31–33, paras 421–436; Waitangi Tribunal, *The Te Roroa Report 1992*, Wellington, Brooker and Friend Ltd, 1992, p 51

through the Court, and not be alienated. At the same time, the intention was that the new system of Maori land titles would facilitate land alienation, and over subsequent decades these expectations were more than satisfied.

The system of individualised land titles, which was the end result of the process that began with surveys, was also intended to assist Maori agricultural progress, and did so to some extent. But the complexities of the titles created under the Native Lands Acts (see ch 7), and the lack of development capital, often frustrated Maori efforts at farming.

Evidence presented to the 1891 Native Land Laws Commission suggested that before the 1860s the cost of surveys was borne by the purchasers. After 1865, however, the Maori owners generally paid.[2] But not always: the Crown paid for the 1872 survey of the Kukutauaki block, to the south of the Manawatu River, for example.

12.2 Legislation

The two requirements, that there must be a survey before land could be passed through the Native Land Court, or dealt with in any way by the Court, and that ordinarily the Maori claimants or owners must pay for these surveys, were repeated from one piece of Maori land legislation to the next, along with a variety of different provisions designed to ensure that the survey costs were paid.

The Native Lands Act 1865 (s 68), for example, provided that:

> it shall be lawful for the Court to order that the Crown Grant issuable in pursuance of such certificate shall be delivered into the possession of such surveyor who shall have a lien thereon and may detain the same until his lawful charges as aforesaid shall have been paid.

A similar provision, allowing the crown grant or certificate of title to be withheld until survey fees had been paid, was repeated in the Native Lands Act 1867 (s 34). The Native Land Court Act 1880, contained the same provision in section 42. Withholding the certificate, of course, prevented the owners from leasing or selling the land, and thus provided them with a strong incentive to pay the survey charges. By the 1880s, however, far more stringent methods of ensuring that survey charges were paid were in force.

At various times after 1862 there was authority for the Government to pay survey charges and to recover the money from the owners.[3] One method was by way of a mortgage over the land.[4] This technique was refined further in 1886 (s 86) by the

2. Native Lands Act 1865, sections 38, 68, 71
3. Native Land Act 1862, section 28; Native Land Act, 1865, section 77; Native Land Act, 1873, section 69; Native Land Court Act 1880, section 40; Native Land Court Act 1886, section 84; Native Land Court Act 1894, section 65.
4. Native Lands Act 1867, section 35; Native Land Court Act 1886, section 85; Native Land Court Act 1886 Amendment Act 1888, section 25; Native Land Court Act 1894, section 65; Native Land Laws Amendment Act 1895, section 56; Native Land Laws Amendment Act 1897, section 4

addition of interest to the capital amount owed. Between 1888 and 1894, possibly because of the economic depression, mortgages were for a term of only one year.

From 1873 (and according to section 39 of the Native Land Act 1873), Maori had to guarantee that the survey costs would be paid, either with cash, or by transferring land to the Crown. The Native Land Court (under section 73) was also permitted to order that land be transferred to the Crown in payment of survey costs.

> If the [Native Land] Court shall see fit, it may, on the application of the Inspector of Surveys, order that a defined portion, to be ascertained and agreed upon between the Inspector and the Native owners of any land so surveyed as aforesaid, shall be transferred by the Native owners to Her Majesty in satisfaction of any advances as aforesaid made for such owners either in respect of the same or any other land, and may include in the amount of money so to be satisfied all fees payable under this Act in respect of the same land or any other land owned by the same persons or tribe.

Section 7 of the Native Land Act Amendment Act, 1878, extended this power, allowing the Court to award land to private surveyors in payment of survey costs. A similar provision was contained in section 65 of the Native Land Court Act 1894.

12.3 Survey Regulations

Detailed regulations concerning how surveys of Maori land were to be conducted were set out in the rules of the Native Land Court and in the regulations relating to the survey of land issued by the Survey Department. In 1880, for example, the rules of the Native Land Court specified (rule 43) that surveys were to be in 'strict accordance with the New Zealand system of survey', as set out in the Regulations and Instructions of the Survey Department 1879. Some requirements that were specific to the survey of Maori land were then laid down. These included a provision (rule 44) that all boundary lines had to be 'distinctly marked on the ground'. This was to be done, when in forest scrub or fern, by cutting a clear line four feet in width. Ridge lines were to be marked, and large trees standing near the boundary lines and corner pegs blazed or 'conspicuously marked'.[5] The Maori names of any natural features were to be ascertained, and placed on the maps, along with the locations of Maori villages, eel weirs, and the sites of battles or other locations of particular importance or significance to Maori.

The rules and regulations relating to the survey of Maori lands appeared to have been relaxed as the nineteenth century progressed. From 1886, where triangulations were available, it was not necessary to chain long lines.[6] From 1897, while the external boundaries of a block were still to be distinctly marked, the boundaries of sub-divisions could be dealt with in the same way as section lines on Crown land.[7]

5. 'General Rules of the Native Land Court', *New Zealand Government Gazette*, 1880, vol 2, p 1705
6. 'Survey Regulations under the Land Act 1885', *New Zealand Government Gazette*, 1886, vol 1, pp 634–642
7. 'Regulations for Conducting the Survey of Lands in New Zealand', *New Zealand Government Gazette*, 1897, vol 1, pp 223–235

The rule that maps prepared for the use of the Native Land Court contain information about Maori cultural topography was retained from one set of regulations to the next, although by the 1890s it seems that less information of this kind was required in satisfaction of this provision than had been the case in the 1870s.

12.4 Commission on Native Land Laws 1891

The 1891 Commission on Native Land Laws uncovered many defects and abuses in the laws relating to the surveying of Maori land. Most of those who gave evidence accepted, in principle, that surveys needed to be made, but argued that some surveys were unnecessary and that others might have been carried out in less expensive ways. Everyone agreed, in particular, that the cost of sub-divisional surveys often exceeded the value of the land being sub-divided.[8] Yet while sub-divisional surveys were singled out for most criticism, no one disputed the legitimacy of sub-dividing land on the basis of hapu rights or boundaries. Sub-divisions based on family or individual rights were, however, a different matter. Witnesses questioned not only the economics of these kinds of surveys, but also their underlying rationale, namely the desire to individualise Maori tenure. This was not in accordance with Maori custom.[9] It was an entirely new thing.[10] It was something that Fenton had invented.[11]

Some of the witnesses felt that surveyors fees in general were too high, and Paratene Ngata wanted the employment of private surveyors, by factions of owners, stopped.[12] He mentioned cases where some of the owners of a block had commissioned a survey, and accepted a 'kick-back' from the surveyor. The surveyor then inflated his costs accordingly. In due course, the survey became a charge on all of the owners, some of whom may have been opposed to a survey, or even unaware that a survey was being made. Another common practice was for so-called 'native agents to act on behalf of surveyors. Their task was to persuade Maori owners to have their land surveyed, taking a fee from the surveyors when they were successful in doing so.[13]

The surveyors and others with experience of surveying who appeared before the commission did not dispute that costs had been high in the past. This was because surveyors experienced great difficulty in getting paid for their work, and so they charged high fees, in the hope that at least some of the money would eventually be paid. But now, according to Harris, there was a Government scale of fees, and surveyors had no need to charge excessively.[14]

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8. AJHR, 1891, sess 2, g-1, p 1, para 12; p 9, para 105; p 30, para 412; p 44, para 586; p 66, para 873
9. Ibid, p 2, para 17–23; p 9, para 105
10. Ibid, p 76, para 1016
11. Ibid, p 31, paras 427–428
12. Ibid, p 1, para 10; pp 19–20, para 246
13. R Daamen, P Hamer, and B Rigby, *Auckland*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), July 1996, p 284
14. AJHR, 1891, sess 2, g-1, p 1, para 9; p 30, para 412; p 33, para 461; p 67, para 891; p 69, para 940

The major Maori criticism, however, was that survey charges were simply another Native Land Court expense, all of which forced Maori into debt, and that Maori were then obliged then to sell land, or transfer it to the Crown, in order to discharge this debt. Pepene Eketone and Tokena Kerehi went further, and complained to the 1891 commission that the Crown was taking advantage of its pre-emptive rights in the Taupo district, in a way that prevented Maori from paying for surveys other than by the sale of land.[15] This claim, that the Crown was manipulating the situation to its advantage, is supported by other evidence. First, Grace, who was very knowledgable about the situation in the King Country and Taupo districts, said the same thing in his evidence to the commission.[16] Second, there is ample proof that the creation of debts was, from a very earlier stage, seen by both Maori and Pakeha as a device that could be used to force the sale of land. Using survey liens in this way would have simply been a variation on a very well-known theme.

12.5 Survey Costs

There is general agreement that surveying was an expensive business, and a good deal of evidence to suggest that surveying costs were often excessive. But there seems to be no way of determining exactly how much money Maori paid out for the survey of their lands after the 1860s, or how much land was taken in settlement of survey fees, or whether the legislation provided any real protection against exorbitant charging, except by a block by block study.

While there is a good deal of data available about the costs of individual surveys, often on a per acre basis, simple comparison is not always possible.[17] This is because survey costs were primarily determined by the terrain: it was always more expensive to survey hilly and rugged country than flat land. Whether Maori obstructed or supported a survey influenced costs as well.[18] Before scales of fees were set by the Government, surveyors were apparently free to charge whatever they liked. According to evidence before the 1891 commission, they were inclined greatly to inflate their charges, since they often found it difficult to recover their costs, or so they claimed.[19]

There was provision in the legislation for Maori to challenge a surveyor s accounts.[20] When Paora Tuhaere disputed the fees Edward O'Meara sought for the surveys of a numbers of blocks in the Auckland district, the matter was referred to the Native Land Court. The result was that the overall total was reduced by more than half, and in some individual cases by as much as two thirds.[21] O'Meara may or

15. Ibid, minutes of meetings, pp 3, 7, 13, 21, 47
16. Ibid, p 23, para 292
17. AJHR, 1879, sess 1, h-19; AJHR, 1886, c-1A; AJHR, 1888, c-1A
18. AJHR, 1879, sess 1, h-19, p 7
19. AJHR, 1891, sess 2, g-1, p 1, paras 9, 12; AJHR, 1891, sess 2, appendix to G-1, 'Minutes of meetings with Natives and others and correspondence', p 14
20. Native Land Act, 1865, section 69
21. Daamen et al, pp 282–283

may not have been typical of surveyors: there seems to be no easy way of finding out how often Maori discontent about survey charges led to actions under section 69, or with what success.

The normal method of claiming survey costs was to make application to the Native Land Courts for a lien to be registered against the title, and the gazettes of the period show that Government and private surveyors made many applications of this kind. Whether the Court subjected these applications to any kind of examination, or simply accepted them, is not known. Nor is it known how often the Maori owners objected, or what the results of these protests were likely to have been.

The strong impression is, however, that during the 1860s and 1870s there was little Government regulation of surveyors fees, and that as a consequence the fees charges were often excessive and sometimes exorbitant. This is not to suggest, however, that when Government scales came in survey charges ceased to be a burden. Several of the witnesses to the 1891 commission seem to regard Government scales as a worthwhile reform, but still felt that surveying charges were too high.[22]

Surveying of the external boundaries of blocks prior to taking them through the Native Land Court appears to have involved, relatively speaking, moderate surveying costs. Arguably, these kinds of surveys were of most benefit to Maori. None of those who gave evidence before the 1891 commission felt that surveys of this kind were unnecessary; no one could see any way to reduce the costs. It seems that the Crown did sometimes pay for surveys of this kind, and it also appears that it sometimes paid for surveys of blocks which it particularly wanted to purchase.[23] At this stage it is impossible to say what proportion of the total cost of the original block surveys may have been borne by the Crown. No doubt it varied from district to district.

Because tribal domains differed in size, because survey costs related to issues like accessibility, and because the information about surveys is far from complete, it is not possible to make fine judgements about the impact of survey charges on one tribe compared to another. For example, the Stout Ngata commission reported that Ngati Maniapoto had lost nearly 40,000 acres in survey costs, presumably a reference to land ordered by the Court to be given up in settlement of survey charges.[24] This was a quite small portion of the total Ngati Maniapoto domain, but there were probably other Ngati Maniapoto lands sold ‘voluntarily’ as well, in order to obtain the money to pay off survey and other Native Land Court debts. The quality of the land that went to pay survey charges is a factor as well. Apart from land, if the tribe had any cash reserves, or rental income, this would have had to be dipped into as well. There seems to be little hope of every establishing exactly what Ngati Maniapoto, or any of the other tribes, paid for the benefits of having expensive and not always very accurate surveys made, so that their titles to land might be converted into a European form.

22. AJHR, 1891, sess 2, g-1, p 1, para 9
23. AJHR, 1892, c-1, p 34
24. AJHR, 1907, g-1b, p 10

Research on the cost of surveys with respect to Tuwharetoa land, around Taupo, produces a similar picture. The acreage of land taken for survey charges is more or less known, but how much other land had to be sold during the course of the century to meet sub-divisional survey charges cannot be determined.[25] From examples given to the 1891 commission, up to 50 percent of a block might have to be sold to meet survey and other Native Land Court charges.[26] What is also obvious from this research is that little if any notice was taken of Maori grievances concerning survey liens, or of Maori suggestions as to how a fairer system might be developed. There is also evidence to suggest that some 'creative' accounting went into the calculation of the Taupo district survey liens, possibly to the advantage of the Maori owners.[27] It is difficult to say for certain since the basis on which decisions were made cannot now be determined. It may not have been apparent at the time either. There seems to have been little real consultation with Maori over these matters. Yet while apparently arbitrary decisions were being made about the amount of land that would be taken for survey changes, the surveys themselves were either incomplete or inaccurate. Maori still had to pay for them nonetheless. Apart from the expense, the need to re-do surveys greatly delayed the issuing of titles. Secure title was the singular advantage, according to the legislation, that a survey and Native Land Court hearing was meant to confer. In the case of Pouakani and some of the other Tuwharetoa lands, the whole process, from the conducting of a survey to the eventual issuing of a certificate, producing mainly delays, uncertainty, and extra expense.

Some undifferentiated data on survey costs for the period 1910 to 1930 was given to the House by Ngata in 1932.[28] According to the information he supplied, the Crown had incurred £611,480 in survey charges over the 20 years in question, of which £321,212 had been recovered via deductions from rents or purchase monies. Of the £290,268 balance outstanding (£199,044 principal, £91,244 interest) it had been decided to write off about £82,000, comprising principal and interest, and another £33,000 was to be satisfied by transferring Native land to the Crown, leaving an amount of around £115,000 outstanding. Ngata gave no breakdown of these figures by tribe or district, although the amounts written off related to North Island districts, where consolidation schemes were in place.[29] Nor was any information provided about the purpose of the surveys in question, but most of them must have been sub-divisional surveys of one kind or another. The salient fact, however, is that Maori had been charged over £600,000 in survey costs between 1910 and 1930, of which half had been paid by 1930. The Crown's contribution was to write off about 14 percent of the total amount, or about 28 percent of the amount left outstanding in 1930.

25. Waitangi Tribunal, *The Pouakani Report 1993*, Wellington, Brookers Ltd, 1993, ch 12
26. AJHR, 1891, sess 2, g-1. minutes of meetings, p 13
27. *The Pouakani Report*, pp 211, 215
28. NZPD, vol 234, 1932, p 664
29. AJHR, 1932, g-7, pp 1, 3

12.6 Remedies

Land first came before the Native Land Court for original investigation of customary title or ownership. Because the history of the land was the main sort of evidence that the Court took into consideration when determining ownership, the Court required that the survey maps contain as much information as possible about Maori place names and historical sites, anything that would help the Court determine the pattern of tenure in the past, or at least from 1840. No doubt the surveyors built the cost of this extra map work, which supplemented the oral evidence given to the Court by claimants, into their fees.

Apart from the question of ownership, a central issue in these kinds of hearings was where the boundaries between one tribe s land and that of another lay or, possibly more often, where hapu boundaries ran. Before the 1860s, Maori land was held on a tribal basis, and the boundaries of the tribal domains, let alone the internal boundaries between different sections of each tribe, changed with shifts in tribal politics, allegiances, and movements. After 1862, the thrust of the legislation was to clearly fix the outer boundaries of these rohe, and then to progressively cut them up into defined areas, each of which would have a list of known owners. Hence the requirement that survey lines be physically cut on the ground, at considerable expense if the country was very rugged or covered with bush or scrub. Each stage of this sub-division process ordinarily meant that new maps had to be prepared, and more boundaries cut. The ultimate objective was to be complete individualisation: one owner, one surveyed plot of land. But only seldom, perhaps even rarely, (except in the case of the smallest blocks), did sub-division reach this final stage. Mostly it was a pseudo-individualisation, by which individual interests in an undivided block were defined. These interests were negotiable. Commonly, the Crown would buy them up and eventually ask for its accumulated interests in a block to be defined on the ground. This would necessitate a survey, and partition of the block between the Crown and the remaining Maori owners. If the Crown had no interest in making further acquisitions in the block, any later sub-division (and surveying) would be driven by the Maori owners.

How were tribal and hapu boundaries determined? The practice after 1865 was simply for rival groups to argue about them in the Native Land Court, using the survey map as their text. If after the Court had made its decision the existing map needed revision of some kind, this work would have to be put in hand before a certificate of title could be issued.

Many of the witnesses before the 1891 commission felt that proceedings of this divisive and expensive kind could be done away with if questions of boundaries and ownership were settled by Maori among themselves, before the block was taken through the court.[30] Once boundaries had been settled they could simply be drawn on maps, without any need to go to the expense of cutting them on the ground. Creagh (a surveyor) gave as an example the Kinehaka East block, where, he said, ‘they ought to run their subdivision . . . by trigonometrical work, so as to incur only

30. AJHR, 1891, sess 2, g-1, p 32, para 436; p 52, para 679; p 60, para 820

a trifling expense. Of course, in making such a recommendation I am speaking against my own interests'. Drawing lines on a map was said to be the way things had been done during the first few decades of European settlement. Rogan reported that something like this had been done on the East Coast within recent memory, at a time when the Government could not afford to carry out full surveys. Gwynneth, another surveyor, felt that marking boundaries on the ground was necessary only when Maori land was acquired for settlement purposes. Otherwise, paper boundaries would suffice.[31]

There were some, however, who expressed doubts about the idea that boundary matters, and possibly those relating to ownership as well, could be left to runanga to settle. Preece, for example, considered that while in the past Maori had been able to resolve matters of this kind themselves, the ability to do so had been lost because of the way in which the Native Land Court operated.[32] Pepene Eketone, who claimed to be speaking on behalf of the Tuwharetoa chiefs, also had doubts about the feasibility of a return to the past.[33] Hiraka Ti Rongo provided the commission with a practical example of the difficulties involved in getting even closely related hapu to settle disagreement over land among themselves, although he seemed to see some merit in the suggestion nonetheless.[34] Mary Tautari, Wi Katene, and Aperahama Te Kune, on the other hand, were just some of the Maori witnesses who felt that Maori would do a better job of defining boundaries than the Native Land Court.[35]

The suggestion that possibly tribal boundaries, but certainly hapu or sub-divisional boundaries, could be represented inexpensively by drawings lines on maps was not taken up by the Government in 1891. But it is possible to see what might have happened if this practice had been adopted. During the early part of the 20th century the legislation in operation did allow subdivision orders to be based on sketch maps. The results were not always satisfactory. For example, the acreages awarded by the Court could not always be found when the land was eventually surveyed, and complicated adjustments had to be made.[36] The lesson was plain enough: subdivisions based on map work alone had to be verified on the ground by survey. It might be possible to delay a full survey, but in the end it was an unavoidable expense, and one that had to be incurred if titles were to be settled and secure.

What was found to be the case in the 1910s would have been doubly so in the 1890s, when far more land was in the process of being sub-divided, and the potential for paper boundaries to give rise to conflict, confusion, and complications was, accordingly, much greater.

When the commission reported, its principal recommendation was for a Native land board, supported by local committees, that would take over the leasing and

31. Ibid, p 30, para 412; p 60, para 820, p 72, para 983
32. Ibid, pp 115–116, paras 1557–1560
33. Ibid, minutes of meetings, p 8
34. Ibid, minutes of meetings, p 54
35. Ibid, p 76, para 1065; minutes of meetings, pp 21, 50
36. AJHR, 1913, g-9, p 3

management of Maori land. Questions of boundaries and ownership would be left to Maori committees and runanga to settle, with only intractable cases going to the Native Land Court for hearing. Tribal and hapu boundaries would be defined by natural features, thus avoiding the need for expensive and elaborate surveys. Sub-divisional surveys would be much simplified as well. Money for surveys would be advanced to the Board by the Government, and recovered by the Board from the rental income it would administer.[37]

12.7 Surveys after 1891

Judging by the legislation that followed, few of the 1891 commission's recommendations found favour with the Government; certainly none of the proposals that would have allowed Maori to have a major role in determining the ownership of land and the boundaries between tribes or among hapu. Surveys continued to be conducted basically in the same way, and Maori continued to pay, or at least be liable, for surveys required by the Native Land Court.

The problems that had been evident from the beginning persisted, and new ones emerged. For example, in the 20th century the question of road access became one of the issues that had to be considered when sub-dividing land. Legislation in 1909 provided for what amounted to a prior survey to determine where roads should be made, before land was sub-divided. Maori, however, were disinclined to pay for these kinds of surveys in advance, and moreover, if the results of the roading survey did not suit them, they were inclined to abandon the application to sub-divide.[38]

Another new problem was the basis upon which sub-divisional surveys would be made. The Native Department wanted Maori blocks subdivided in a way that suited the contours of the land and the need for road access: the owners wanted the land divided according to traditional claims and rights.[39] According to an interdepartmental conference in 1930, the Court seems to have favoured the Maori viewpoint. The result was a large number of sub-divisions too small to be economical farming units, and often of awkward shape as well, and so difficult to fence.[40] No doubt the processes of individualisation and alienation worked to produce this outcome as well.

Another difficulty was that the passage of time had produced undivided blocks, with many owners, all of whom would need to have their interests defined by the Court, and their portion surveyed, before titles could be issued, and the land alienated, leased or otherwise dealt with. The costs involved exceeded the value of the land, so nothing could be done; the land remained locked up, unable to be used by either Maori or Pakeha.[41] In due course, the systems of trusts and incorporations

37. AJHR, 1891, sess 2, g-1, pp xxiv–xxv
38. AJHR, 1913, g-9, p 3
39. Ibid, p 3
40. AJHR, 1932, g-7, p 4
41. AJHR, 1913, g-9, p 3

overcame this problem of multiple title or ownership to a large extent, by removing the necessity for each individual owner to be involved in decisions about the land or for sub-divisional surveys.

12.8 1930 Interdepartmental Conference

By 1930 the policies of individualising titles, and requiring Maori to pay for the pre-requisite surveys, had produced, in a number of districts, heavy Maori debts, and many small, widely dispersed and uneconomic individual or family sections. There were also undivided blocks of land which could not, under existing law, be dealt with in a cost-effective way. In these districts, the land remaining to Maori was of such poor quality that it could not support the burden created by survey liens, a burden which increased year by year, as interest charges accumulated. As Treasury put it to the Minister of Finance, security for the survey liens, that is to say, productive, and/or valuable Maori land, was 'partially non-existent', which mean that any legal remedies the Crown might have were in practice 'unenforceable. In the opinion of Treasury, the Native Land Settlement Act, 1909, was defective. This legislation had allowed substantial sums, advanced to cover survey costs, to be secured against assets of little value. The Native Land Court was also to blame: it had acted in ways 'divorced from commercial responsibility' and had not taken ordinary precautions, such as to require deposits. Nor had it had taken the 'economic capacity' of the land with which it was dealing into consideration.[42] In future, Treasury advised the minister, the Crown s financial exposure must be adequately protected before land was surveyed for partition. The Land Department's suggestion was that all surveys should be paid for in advance.[43]

An interdepartmental conference considered the situation, and recommended that the Crown take over part of the survey debt. Treasury supported this recommendation on the grounds that the economics of the situation allowed no other option. It was also justifiable on other grounds. On one hand it would promote land development and settlement. On the other, it was a measure of 'Native welfare'. But Treasury did recommend that the write-off should not 'be regarded as a precedent with respect to areas yet remaining to be dealt with.[44]

12.9 Native Land Act 1931

The Native Land Act 1931, contained provisions intended to deal with some of the difficulties that had emerged since 1909. Section 144 directed that the Court should avoid the creation of sub-divisions of unsuitable size or shape. Section 117 allowed the Native Land Court to lay out road lines when considering partition applications.

42. AJHR, 1932, g-7, pp 1–2
43. Ibid, p 7
44. Ibid, p 1

Section 494 allowed surveys for roading purposes to be charged against the land. There were several provisions that allowed the Court to award land to the Crown in satisfaction of survey charges. Section 500 provided that survey charges were to bear interest. Other sections directed that all surveys of Maori land were to be made by the Crown, and that existing survey liens were to remain in force.

Fundamentally, this legislation continued the position that had existed since the 1860s: land would continued to be individualised; there would be surveys; Maori would pay for them; land would be an acceptable form of payment.

12.10 Conclusion

The question of surveys cannot readily be separated from the issue of the operation of the Native Land Court. If Maori wanted to assert or protect their interest in the Court, they necessarily incurred survey charges. From 1865, any claimant or group of claimants, often prompted by a purchaser, could bring a claim in the Court. The 'objectors' (who might in fact be the customary right holders) were obliged to defend their interest. Sometimes they went to the expense of hiring their own surveyor. Survey costs, moreover, were usually made a charge on the land, and all of the owners had to bear their share, even if the survey had been carried out without their knowledge or consent.

Maori themselves, of course, as time went on, saw the need to define their interests for farming or other developments. The movement to sub-divide land into whanau interests sometimes derived from disputes and arguments over the distribution of rental income. These Maori-initiated surveys also served the interest of the Crown and private purchasers. Lacking other revenue Maori commonly had to sell or give up more land to meet their obligations. Moreover, the law facilitated constant partitioning of blocks for piecemeal purchase, following acquisition of a sufficient number of undivided interests. This was a divisive and underhand practice itself, much of the time, and the survey charges involved, especially in steep bush clad country, were often very high, and might be more than the land was worth. In the twentieth century the various agencies controlling Maori land (and the owners themselves) continued to charge the land with survey costs when it was often uneconomical to subdivide at all. The Crown's regular use of partitioning for the purpose of purchasing underlay much of the expense of surveys.

Generally, Maori did not object to surveying as such: rather they challenged particular surveys from time to time, to assert a claim. They objected, regularly, however, to the cost, and the way the Crown took land in lieu. Surveying was an essential step in the Crown-mandated process by which land held under Maori customary tenure was to be converted into Crown grants. As such, it was a requirement imposed on Maori, in the same way as the Native Land Court was imposed. Arguably, since it was the Crown, (and private purchasers) who insisted on this conversion, and who obliged Maori to resort to the Native Land Court accordingly, the Crown (or private purchasers) should have paid all or most of the survey costs

involved, especially when the immediate (and intended) outcome was alienation of the land involved. Even if the legal requirement to survey land is seen as a legitimate expression of Kawanatanga serving the public interest, the settler government presumably should have shouldered most of the cost.

There seems to be no easy way of determining how much land was taken to pay survey charges, or was sold to pay for surveys. The issue would also be more clear cut if the Crown had not sometimes paid for surveys, or written off survey charges. It is possible that close examination of the circumstances of these cases may help define more cogently what the Crown's treaty responsibilities were with respect to surveying. In the meantime, the issue is best seen in the context of the Crown policy to do away with customary tenure, the operation of the Native Land Court, and the alienation of over 94 percent of the land.

CHAPTER 13

FORESHORES

Note: What follows is largely a summary of *The Foreshore*, a report prepared by Dr Richard Boast for the Waitangi Tribunal Rangahaua Whanui Series.

13.1 Definition

The seashore, foreshore, or sea beach (in legal parlance, these are generally synonymous terms) is that portion of the realm of England that lies between the high-water mark of medium high tide and the low-water mark, but it has been said that all that lies landward of the high-water mark and is in apparent continuity with the beach at the high-water mark will normally form part of the beach, and it has been held on special facts that 'foreshore' means the whole of the shore that is from time to time exposed by the receding tide.[1]

13.2 The Importance of the Foreshore

The tidal zone was important to Maori because it was a source of food; not only sea food but also birds. In *In re Ninety Mile Beach*, it was submitted that the beach area was a place of recreation as well.[2] It is certain that the beaches were important as walkways or highways, by which coastal Maori travelled from one part of their domain to another. In some districts, they also served as battlegrounds. For all these reasons, but especially because of their value as food resources, the possession of, and access to, foreshores was a jealously guarded right. Where there were many claimants, these rights could be, as they were with respect to desirable areas of land, complex, overlapping, and contestable.

13.3 Maori Rights

There is no doubt that before 1840 Maori had rights over the foreshore, in the same way that they had rights over the land inland of the foreshore. From time to time since the establishment of the Maori Land Court, Maori customary rights to the

1. *Halsbury's Laws of England*, 4th ed, vol 49, p 187 (cited in Boast, p 6)
2. *In re Ninety Mile Beach* [1963] NZLR 461

foreshore have been conceded or confirmed by the court, although to particular foreshores rather than to the totality of the foreshore as such. This does not necessarily mean, however, that aboriginal title rights do not exist in the foreshore. Maori rights to foreshore fisheries continued after 1840 and were to some extent recognised in statute law, although not as exclusive possession.[3]

As far as the Native Land Court is concerned, Maori claims to sections of the foreshore were, in fact, considered provable on the same basis as claims to land: proof of descent, exclusive or dominant use, customary management or control. If there was a difficulty to be surmounted before a certificate of title could be issued, it arose from two sources: the common law assumption that the foreshore was Crown property and Chief Judge Fenton's view that a tribe had to prove exclusive possession before he would award title.[4]

13.4 The Position of the Crown

For Maori, there was no difference between the ownership of land, the possession of inland fishing sites, and the control of foreshore areas. These were all forms of tribal property, governed by customary practices. It was the Pakeha who drew a distinction between the ownership of land, which was conceded to be Maori property, and the ownership of the foreshore, which eventually came to be considered Crown property.

There is some evidence that initially the Crown considered the foreshore to be Maori property, which had to be bought and paid for like any other property. In 1874, referring to the earliest alienations of Maori land, McLean stated that:

> it had been held that when the lands were ceded, all the rights connected with them were also ceded such as rivers, streams and whatever was on the surface of the land or under the surface. Almost all the deeds of cession contained a clause to that effect.[5]

It is true that many of the early deeds do contain wording that seems to indicate that lakes, rivers, and seashores were part of the property that was being acquired, although, as Boast points out, often the 'the language used is somewhat allusive and imprecise, making it far from clear exactly which water bodies are being referred to'.[6]

An earlier statement by J Mackay, however, supports the opinion that during the first few decades of settlement the foreshore was not automatically considered to be Crown property:

> I believe the general custom with the Native Land Purchase Department, respecting lands between high and low water-mark, has been to consider that when the Native

3. For discussion, see Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992, pp 154–183
4. A Ward, 'Overview', report commissioned by the Waitangi Tribunal (Wai 27 rod, doc aa26), p 18
5. NZPD, vol 16, p 853 (cited in Boast, p 30)
6. Boast, p 30

> title is extinguished over the main land, then any rights which the Natives have over the tidal lands have ceased . . . I am not aware of any cases having arisen in which the Government have required to make use of tidal lands previous to the extinguishment of the Native title over the main land.[7]

Moreover, there are instances where the Maori Land Court had indeed granted foreshore titles and the Crown had gone around afterwards to buy them up.[8] In the Kauwaeranga judgment of 1870, however, Fenton came out strongly against foreshore titles: 'evil consequences . . . might ensue from judicially declaring the soil of the foreshore . . . vested absolutely in the natives'.[9] Thereafter, the court seems generally not to have granted titles of this kind, although the question of whether it had the right or the power to do so still remained, as did the question of whether the foreshore was Maori customary land. In 1872, the Crown invoked a section of the Native Lands Act 1867 in order to suspend the operation of the Maori Land Court in the Auckland district in the portion of the province 'situated below high water mark'.[10] This was to prevent any possibility of the court issuing titles to the foreshore around Thames, where gold had been discovered. The implication is that the Government did recognise that the court had the power to investigate foreshore claims and issue titles. If so, this can only have been on the basis that the foreshore may have been found to be customary land. When Crown counsel advised the court of the proclamation suspending its operation with respect to foreshore claims, he said that the claims had been:

> deferred, not refused; and that the Government have not the wish, as they have certainly not the power, to deprive the natives of any just rights they have to the foreshore.[11]

Further research may be needed on this point, but if Mackay and, in particular, McLean were confused as to the nature of the early land alienations vis à vis the foreshore areas, then it is likely that no one did.[12] For the moment, at any rate, the preliminary data suggest that, during the early decades of settlement, up to perhaps as late as the mid-1870s, the Crown did not consider that it owned the foreshore until Maori title to the adjacent land above the high-tide line had been extinguished. It may also have been considered necessary to include in the sale deeds a reference to the fact that the foreshore was part of the alienation. This appears to be the sense of the explanation McLean provided to Parliament in 1874.

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7. AJHR, 1869, f-7, p 6 (cited in Boast, p 31)
8. Boast, p 33
9. Cited in Boast, p 32
10. *New Zealand Gazette*, 1872, vol 187, p 347 (cited in Boast, p 33)
11. Cited in Boast, p 33
12. For a discussion indicating the confusion surrounding the 'ownership' of the foreshore, see Ward, pp 22–23.

13.5 Statutes Affecting the Foreshore

The Harbours Act 1878 (revised 1950) provided that no part of the foreshore was to be granted or given away other than with the authority of a special Act of Parliament. Boast comments that there was no indication at the time that this legislation was intended to do away with Maori claims to the foreshore and nothing in the Act seemed to prevent an application of this sort to the Maori Land Court.[13] On the other hand, the underlying assumption must surely have been that the foreshore was not Maori land. No reference to compensation for Maori was raised in the Act.

The Native Lands Act 1909 made it clear that customary title did not prevail against the Crown; Maori had to convert customary titles into Crown titles if they wished to obtain the protection of the law. Could the Maori Land Court issue titles to the foreshore? In a series of cases over the next 50 years this point was argued in the courts.

13.6 Twentieth Century

Whatever the position may have been in the nineteenth century, by the early twentieth century the Crown's position on the foreshore was that the Crown had owned the foreshores since 1840, according to common law.

In 1916, a Crown law opinion stated that 'the limits of Native customary titles are high water mark'.[14] In 1917, another opinion attempted to limit customary rights even above the high-water mark:

> Native title is not universal. It is not true that the whole of New Zealand . . . is necessarily the subject of Native title except so far as such title had been extinguished by cession . . . or otherwise . . . There may be areas of land in which no Native title can be shown to exist, No Man's Land . . . If no claimant can prove his title it is not Native land at all.[15]

Government thinking was also based on the assumption that customary titles had no legal standing in themselves; they became enforceable in law only when given statutory recognition, and the standard way for this to occur was via a Crown grant issued under one of the Acts relating to native land and following an investigation of title by the Maori Land Court. The inference is that, if no title to the foreshore had been issued as a result of this process, then no valid title existed. There was also an official belief that Maori custom did not permit the ownership of large bodies of water, essentially because an idea of this kind was beyond Maori conception:

> The larger the water . . . the more probable it is that Native custom did not recognise it as part of the land but as distinct from the land just as the sea is and not the subject of exclusive possession and ownership like the land. . . . Natives on the

13. Boast, p 34
14. Salmond to Under-Secretary of Land, 28 August 1916, copy on l1 29057 (cited in Boast, p 39)
15. cl 174/2, NA Wellington (cited in Boast, pp 39, 83)

> shores of Lake Taupo did not think that they owned the Lake anymore than Natives on the shores of the sea thought they owned the Pacific Ocean.[16]

On the other hand, the Crown submitted, the smaller the area of water, the more likely it was that Maori would have regarded it as incorporated into the adjacent land and so covered by the same customary title.

The Crown also drew a distinction between land (and water) and fishing rights, based, it was claimed, on the distinction made in the Treaty of Waitangi: the right to fish did not involve ownership of the water, or of the land under the water.

In the end, of course, the Crown had to make its case in the courts. By the 1930s, it appeared that the Crown's legal advisers were becoming less and less certain that the courts would uphold the Crown's position. In 1932, the Crown Law Office prepared an opinion on a case involving the Northland foreshore. It was considered that the argument of the claimants – which was that, while the foreshore might be vested in the Crown, it was still customary land – had some merit. It was also considered likely that the claimants could establish a customary title to the satisfaction of the Maori Land Court. In short, 'the Crown had little hope of success in the present case'.[17] That the Crown was in a weak legal position seemed to have been the consensus with respect to other foreshore cases as well.[18]

According to Boast, the Crown kept this assessment to itself and continued to assert in the courts that the foreshore was, by common law, vested in the Crown.[19] In the case of Awapuni Lagoon (1928), the Maori Land Court appeared to accept this argument. In the long drawn out case of the Ngakororo mudflats (1926–41), however, the Maori Land Court decided in favour of the Maori claimants: the area was found to be Maori customary land. This decision was reversed by the Native Appellate Court, but not on the grounds advanced by the Crown. The Maori Land Court could issue title to foreshore land, but it had to be on the basis of a convincing claim. In the case before it, the appellate court concluded that the applicants had not proven their claim to the degree of 'particularity required'.[20] The Herekino case (1941) followed the same course as the Ngakororo case: a decision for the Maori claimants in the Maori Land Court was reversed by the appellate court, but this time on the basis that the area involved was accreted land and, as such, outside the jurisdiction of the Maori Land Court.[21]

13.7 Ninety Mile Beach

In 1957, the Maori Land Court accepted arguments by Maori that Ninety Mile Beach was customary land. The matter was then referred to the Supreme Court to

16. Cited in Boast, p 40
17. Cited in Boast, p 42
18. Boast, pp 41–43
19. Ibid, pp 43–44
20. Cited in Boast, p 60
21. Boast, p 61

determine whether the Maori Land Court had the power to conduct title investigations with respect to the foreshore. The Crown argued that the Maori Land Court had never had jurisdiction: the foreshore had been Crown property since 1840. The Supreme Court thought that this might be an 'acceptable' argument but decided the case on the basis that sections of the Harbours Act 1950 and the Crown Grants Act 1908 effectively prevented the Maori Land Court from issuing foreshore titles. That was the situation at that time; what may have been the case in the past was not the concern of the Supreme Court.

The dispute was then taken to the Court of Appeal. The Maori submission was that the Maori Land Court existed to investigate customary titles. If it were possible to make a case for customary titles to the foreshore, then the Maori Land Court would have jurisdiction. Additionally, while the Harbours Act was a difficulty, it was contended that the legislation was in itself insufficient to deprive Maori of their property rights. The Crown case was the same as before. English common law had applied in New Zealand since 1840, and under common law the foreshore was vested in the Crown.

While the Court of Appeal decided for the Crown, it did not entirely accept the Crown's argument that the Maori Land Court had never had jurisdiction over the foreshore. Nor did it follow the same line that had been taken by the Supreme Court. If Maori were to be deprived of rights over the foreshore by legislation, the legislation would have to state that explicitly; such an outcome could not be simply inferred from legislation, like the Harbours Act, that had been passed for some other purpose entirely. There had to have been an 'express enactment': Maori could not be deprived of their customary rights incidentally, by a 'side wind'.[22] The Court of Appeal, however, held that the Maori Land Court had, since 1865, investigated all the Maori land along the coast. This overlooked the fact that many coastal areas were alienated before the advent of the Maori Land Court. Moreover, if the Maori Land Court, in issuing titles to these blocks, had not stipulated that the foreshore was included in the title, then Maori rights to this area must be treated as having been extinguished. The Court of Appeal accepted that in the past the Maori Land Court had been able to deal with foreshore claims; this can only have been on the basis that the foreshore was, or could be, customary land. But the court also seemed to have a belief that the foreshore was Crown property – unless the Maori Land Court had explicitly decided otherwise.

The Court of Appeal had said that Maori rights could not be done away with in an indirect way, simply by the application of general law. Yet the court held that Maori rights to the foreshore had been extinguished. Boast says that the court's arguments (cited in the previous paragraph) on this point are 'not tenable' and that it is unlikely that a contemporary court would accept that Maori property rights in the foreshore had been abolished in the manner accepted by the Court of Appeal. Lastly, Boast warns not to lose sight of the factual problems of the case. He says, 'The Court of Appeal contructed its analysis on a factual supposition – that is, that

22. The opinion of T A Gresson, *In re the Ninety-mile Beach* , p 477 (cited in Boast, p 68)

all the coastal blocks must have been investigated at some stage by the Native Land Court – which is quite incorrect.'[23]

13.8 Harbours and Lagoons: A Case Study

The Waitangi Tribunal had reason to consider the ownerhship of the Te Whanganui-a-Orotu Lagoon (Hawke's Bay) in 1995. The claimants contended that they had never knowingly or willingly relinquished their tino rangatiratanga over this taonga and that the Crown was in breach of the principles of the Treaty in vesting the lagoon in the Napier Harbour Board by statute. On the other hand, the Crown contended that the lagoon was included in an 1851 purchase or, alternatively, that it was vested in the Crown through the 'arm of the sea' legal rule, whereby areas of water that form part of the sea are the property of the Crown.[24] On these matters, the Tribunal concluded, first, that the sellers had no reason to believe that Te Whanganui-a-Orotu was included in the purchase and that, while the Crown had believed it was included, there was not the necessary 'meeting of minds'. Secondly, on the matter of whether Whanganui-a-Orotu was an 'arm of the sea', the Tribunal concluded that the lagoon contained large quantities of fresh water and a very restricted link to sea water, which distinguished it from harbours like Manukau. It was therefore not possible to accept the Crown's presumption that Te Whanganui-a-Orotu was part of the sea, which meant also that the bed of the lagoon was not, as a matter of common law, vested in the Crown.[25]

13.9 The Current Position

It appears to be the situation that no New Zealand court has ever entirely accepted the Crown's submission that it owns the foreshore by virtue of the common law. In particular, in *In re Ninety-Mile Beach*, the Court of Appeal did not accept that this was the position.

The legislation that currently operates with respect to the foreshore area – the Conservation Act 1987, the Foreshore and Seabed Endowment Revesting Act 1991, and the Resource Management Act 1991 – does not explicitly vest the foreshore in the Crown, and it seems doubtful that the (now repealed) Harbours Act 1950 would be construed by any latter-day court as having extinguished Maori customary title over the foreshore. In short, the Crown's claim to the foreshore seems to have no statutory basis.

The argument advanced by the Court of Appeal in 1963 – that Maori Land Court investigation of titles to the adjacent land extinguished Maori titles to the foreshore unless the foreshore was specifically included in the certificate of title – seems

23. Boast, p 69
24. Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, Wellington, Brooker's Ltd, 1995, p 204
25. Ibid, pp 205–206

tenuous if not 'simply wrong'.[26] If it is wrong, then any unmentioned foreshore areas remained customary – that is to say, Maori – land. They did not somehow 'revert' to being Crown land – unless, of course, the Crown's assertions about the application of the common law are in fact correct.

The best claim the Crown has to foreshore land appears to be the one advanced by McLean in 1874: namely, that the Crown purchased the foreshore when it purchased the coastal blocks. In Boast's opinion, 'it makes . . . sense to think of the Crown as owning today those areas of foreshore which it clearly and unambiguously purchased by pre-emption era deed of cession',[27] or where it expressly extinguished customary title by statute. If these areas could be identified, then by implication all the remaining foreshore area could be assumed to be Maori customary land. However, while investigations of titles might be made in the usual way, provided it was accepted that the jurisdiction of the Maori Land Court extended below the high-water mark, any attempt to do so would almost certainly lead to a revisiting of the legal ground covered by the Court of Appeal in 1963. This would be a long, expensive, and probably divisive process. On the other hand, attempts to pursue the matter via the ordinary courts, perhaps on the basis of prescriptive rights, would seem to be blocked by a 1993 amendment to the Limitation Act 1950. This prescribed that action to recover Maori customary land must be begun within 12 years of the date 'on which the cause of action accrued'.[28]

It appears to be the case that, while the validity of the Crown's title to the foreshore is uncertain, no easy avenue of legal redress is available to Maori. The best way forward may be for some kind of negotiated settlement to be reached, to be followed by legislation of some kind.

This legislation would deal with the matter of ownership and with the issues of management. As Boast points out, ownership and management are two different things, and the reality seems to be that, no matter who owns the foreshore, the Crown will manage it. In Boast's view, management laws can reduce the 'rights of ownership to an empty shell'.[29] Given the management regime currently in place, it seems to be Boast's opinion that to return foreshore lands on a piecemeal basis would serve no conceivable purpose and be of very little practical benefit to Maori. Maori views have yet to be ascertained.

In respect of sea fisheries, there is little doubt that inshore fisheries were effectively under the control of the hapu adjacent to them and to their kin. The 200-mile economic zone recently recognised by the law of the sea is attributed to New Zealand as a nation state, rather than as an extension of the development right of adjacent hapu (which could hardly be said to be 'adjacent' to fisheries 200 miles out and several miles deep). Offshore fisheries would seem therefore appropriately to be at the disposal of the Government for the benefit of the whole New Zealand

26. *Te Whanganui-a-Orotu Report 1995*, p 69
27. Ibid, p 31
28. Cited in Boast, p 28
29. Boast, p 71

community or to sections of it, as is exemplified in the grant to New Zealand Maori in the 1992 Sealord settlement.

This report has not had time to encompass seabed issues as distinct from foreshore issues. A preliminary view would be that, where aboriginal title rights existed at 1840, they were protected both under common law and by the Treaty. Their most usual expression was likely to have been fishing over rocks and reefs, well offshore and locatable only by fishing families who knew the bearings. In terms of Fenton's position in the Kauwaeranga judgment, they would have merited recognition as fisheries and an easement would have been granted, possibly exclusively to the user family, but not 'title to the soil'.

It would be the view of this report that, as in offshore fisheries of a more general kind, so also with the general seabed below the low-water mark: rights to it appertain to New Zealand as a nation state by operation of international law. A development right in 'adjacent' hapu, based on improved technology since 1840, might be valid but can scarcely be seen as an exclusive right.

CHAPTER 14

INLAND WATERWAYS

Note: A report on inland waterways has been commissioned for the Waitangi Tribunal Rangahaua Whanui Series but was not available at the time this chapter was written. The research and drafting of this chapter was undertaken by Ben White.

14.1 Introduction

The historical importance of New Zealand's inland waterways to Maori cannot be overstated. Although having an obvious economic significance as a food source and in terms of transportation, it would be a mistake to think of the importance of New Zealand's rivers and lakes solely in instrumental terms. For Maori, as with their perception of the environment more generally, inland waterways were the physical embodiment of atua – their topography often being explained in terms of the actions of ancestors. Importantly, the physical and metaphysical aspects of waterways in Maori world views are inseparable, giving rise to their status as taonga.

It was not until around the end of the nineteenth century that Maori began to seriously press claims to the ownership of rivers and lakes. Prior to that, it appears that the Crown had gradually assumed rights of control over inland waterways; rights that it believed it had acquired through royal prerogative at common law, supported by colonial statutes. In the late nineteenth century, Maori began objecting to the interference to waterways from public works and private drainage schemes, and in the early twentieth century, began pressing claims to the Native Land Court for the title of lakes to be determined.

Central to these cases, as with land tenure in New Zealand generally, was the nature of the interface between colonial principles of tenure and Maori customary tenure, and the extent to which the colonial system of tenure accommodated the latter. For, although the Crown strenuously argued that Maori customary law did not recognise the ownership of lakes, the outcome of so much litigation shows that there can be no doubt that Maori society had its own body of rules and customs relating to the ownership and management of rivers and lakes.

While pressing its perceived rights at common law to New Zealand's lakes, the Crown nevertheless had to concede pre-existing Maori rights. But in the case of rivers, the Crown was somewhat more successful in denying the rights of Maori. To a large degree, however, this was a result of legislation being passed which vested the beds of navigable rivers in the Crown. This reflects a policy of successive

governments that Parliament, rather than the courts, was the appropriate forum in which such matters should be resolved. Also it suggests that the rights the Crown assumed it held at common law, were in many instances, somewhat tenuous.

Today it is agreed by various commentators that the legal situation vis-à-vis rivers and lakes – especially as to their ownership – is at best indeterminate, if not 'unfathomable'.[1] It is clear, however, that with the exception of a number of North Island lakes, Maori rights to New Zealand's inland waterways have been ignored or expropriated. Purchase deeds for Maori land sometimes explicitly mentioned waters on the land. Generally, however, the Crown and settlers assumed that ownership of non-navigable streams (at least) transferred to the purchasers adjacent land, according to law principles. To that extent, payment for land was intended to include water, though this was not necessarily understood or accepted by Maori when they sold the land. With the exception of the twentieth century settlements in respect of the major North Island lakes, compensation has not generally been paid for the loss of rights to lakes and navigable waters.

14.2 Inland Waterways at Common Law

The contest for the control of New Zealand's rivers and lakes can be typified by the attempts of successive governments to secure rights for the Crown based upon English common law. It must be asked, however, how applicable precepts of English common law were to the colony of New Zealand where Maori customary tenure was explicitly recognised as a burden upon the Crown's title. This is particularly so in regard to the separation that is made at common law between the ownership of the bed of a river or lake, and its waters. In many court cases concerning the ownership of lakes and rivers, the Crown argued repeatedly that the ownership of the bed of a lake or river was a concept foreign to Maori customary law, and that therefore such beds could not be owned by Maori. In regard to this contention, Judge Acheson, in his 1929 decision as to the ownership of Lake Omapere, observed that:

> The bed of any lake is merely a part of that lake and no juggling with words or ideas will ever make it other than part of the lake. The Maori was and still is a direct thinker and he would see no more reason for separating a lake from its bed (as to the ownership thereof) than he would see for separating the rocks and the soils that comprise a mountain. In fact in olden days he would have regarded it as a rather grim joke had any strangers asserted that he did not possess the beds of his own lakes. A lake is land covered with water, and it is part of the surface of the country in which it is situated, and . . . it is as much part of that surface and as capable of being occupied as is land covered by forest or land covered by a stream.[2]

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1. Property and Equity Law Reform Committee, 'Background Report on Ownership of River Bed' in *Interim Report on the Law Relating to Water Courses*, Wellington, 1983, p 9; see also James P Ferguson, 'Maori Claims Relating to Rivers and Lakes', research paper for indigenous peoples and the law (laws 546), Victoria University of Wellington, 1989, Wai 167 rod, doc a-49(d), pp 266–313

It seems incredible to contend that if, in traditional Maori society, a lake or river were to become dry land, that land would not then be rightfully claimed by those who had held rights in the surrounding area.

14.2.1 Rivers

In considering the ownership of rivers, a distinction must be made between those parts of a river that are navigable, those that are tidal, and those that are neither tidal nor navigable.[3] At common law, there are two sets of rights pertaining to rivers: riparian rights and the presumption of *ad medium filum aquae*; and those rights accruing to the Crown as an extension of its prerogative rights in relation to the sea. It would appear, however, that it is only the *ad medium filum* rule that confers ownership rights. The rights of the Crown to a riverbed extend only to the point that the river is tidal – beyond that it enjoys only the rights of the general public to fish, bathe, and travel upon the river.[4]

Above the point in a river where the tide ceases to ebb and flow, ownership of the bed is divided between the adjacent riparian landowners – the rights of each extending to the mid-point of the riverbed. Consequently, at common law the beds of rivers are privately owned but subject to the public's fishing and navigation rights. Unless expressly excluded, the conveyance of riparian lands includes the riverbed.[5]

14.2.2 Lakes

Where a lake is situated within a single block of land, at common law the ownership of the lake bed resides with the owner of the surrounding land. Where there is more than one riparian landowner, the legal situation is somewhat less certain. There appear to be two possibilities: ownership is determined by the *ad medium filum* rule – that is each contiguous landowner owns the lake bed to the centre point of the lake; or that the ownership resides with the Crown.[6] The latter position does not seem to be widely held. The currency it does enjoy in New Zealand seems to have come about largely as the result of an Australian case (*Southern Centre of Theosophy v South Australia,* (1979), 21 SASR 399). In that case, the *ad medium filum* rule was considered to be inappropriate given its origin in English common law and the long history of settlement that had given rise to that doctrine. The Supreme Court

2. *Judgement of Native Land Court in the Matter of an Application by Ripi wi Hongi for an Investigation of Title to Omapere Lake*, 1 August 1929, London, Coward, Chance and Co, p 6
3. G W Hinde, D W McMorland, and Sim, *Introduction to Land Law*, Wellington, Butterworths, 1986, p 195
4. See Waitangi Tribunal, *The Pouakani Report 1993*, Wellington, Brooker's Ltd, 1993, pp 459–462 (Graeme Austin, 'Legal Submissions on the Beds of Navigable Rivers, Section 261 of the Coal Mines Act 1979', submission to the Waitangi Tribunal, Wai 33 rod, doc a41). Austin suggests that at common law the Crown enjoys some prima facie rights to a river above the point at which it ebbs and flows, if it satisfies the legal criteria of 'navigability'. While it is unclear in his text what exactly this definition is, he is adamant that such rights are not proprietary.
5. Property and Equity Law Reform Committee, p 3
6. Ferguson, p 20

thus ruled that the lake bed was the property of the Crown by virtue of it having always been the proprietor of the 'wastelands' of the Colony. In relation to New Zealand, Professor Brookfield contends that 'saving where the Maori customary title in a lake bed is found by the Maori Land Court to exist . . . or has been lawfully extinguished under statute, the bed in such cases generally remains the allodial property of the Crown'.[7]

14.2.3 Water rights

At common law water is vested in no one, being a common property resource like air. According to the doctrine of riparian rights, riparian landowners can take and discharge water in accordance with their own needs. At common law, the whole flow of a river could be taken if it is to be used for domestic purposes on the riparian land. Other rights emanating from the ownership of the bed are essentially those of any landowner. These include rights to take shingle and other minerals, and rights of navigation and fishing. However, the exercise of these right must not 'injuriously' interfere with the flow or with the rights of the public.[8]

14.3 Legislative Interventions Prior to 1903

As the number of Pakeha settlers increased through the mid-nineteenth century and a new economic order based largely upon new ways of exploiting New Zealand's natural resources was established, numerous legislative provisions were made affecting inland waterways to assist development. These measures reflected a tacitly assumed set of proprietary and usufructuary rights on the part of the Crown in relation to rivers and lakes that were justified in terms of national development in the interests of an unquestioned 'public good'. This development was in many cases to the detriment of Maori.

14.3.1 Fisheries

In the 1860s, trout and salmon were introduced to several of New Zealand's rivers and lakes with a view to establishing recreational fisheries. In 1867, the Salmon and Trout Act was passed, which empowered the Governor to make regulations with a view to preserving and propagating stocks of salmon and trout. This included the powers to impose penalties for the breach of any regulations established under the Act.[9]

For Maori, the introduction of exotic fish species and the concomitant legislation to manage the new resource were disadvantageous in two respects. First, trout and

7. F M Brookfield, 'Wind, Sand and Water Accretion and Ownership of the Lake Bed', *New Zealand Law Journal*, no 11, August 1981, pp 365–366
8. Ferguson, p 36; Property and Equity Law Reform Committee, p 4
9. Salmon and Trout Act 1867, s 2

salmon preyed upon indigenous fish species, in many cases seriously depleting stocks of fish and eel that were valuable food sources for Maori. Secondly, possession of salmon or trout caught by Maori while attempting to catch their traditional target species made them liable for prosecution by virtue of using 'unauthorised' fishing methods and by being unlicensed.

A parliamentary debate on the Maori Land Laws Amendment Bill in 1908 sheds light on the problems Maori encountered as a result of the colonial fisheries regime. Wi Pere, the member for Eastern Maori, complained on behalf of the Arawa people that their fishing rights, which they had held 'from time immemorial', had been disturbed by the introduction of exotic fish. Pere said they were aggrieved that the exotic fish were depleting stocks, and that they were required to obtain fishing licences for fish 'that are absolutely no good, because they are unpalatable'.[10] Similarly, some Ngai Tahu were prosecuted for catching trout when they were attempting to catch eels.[11]

14.3.2 Timber Floating Act 1873

In 1871, a Thames Maori successfully prosecuted a case for compensation against a Pakeha settler who, as a result of floating timber down a creek, had destroyed the plaintiff's eel weirs. The Government consequently passed the Timber Floating Act 1873.[12] Essentially, the Act required a licence to be obtained before timber was floated down a waterway and provided for compensation to be paid to riparian landowners whose properties were damaged as a result of activities carried out under the Act (see ss 3, 4). While the law was still in Bill form, several petitions were sent to Parliament by Maori expressing the fear 'that their rights over those [affected] streams would be taken by the Queen or by the Government' as a consequence of the legislation. Despite Maori members speaking of the possible catastrophic effects the practice could have upon Maori eel weirs, the Bill was passed into law. During the Bill's passage, Karaitiana Takamoana, the member for Eastern Maori, recounted how the water necessary to run a Maori-owned sawmill had been diverted by Pakeha for the purposes of timber floating and, as a consequence, the mill had become inoperative.[13]

The 1873 Act was repealed by the Timber Floating Act 1884. Although this legislation again included provisions for compensation for downstream river users affected by the floating of timber, it is doubted that these provisions were made available to Maori, especially because the Act was never translated into Maori.[14]

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10. NZPD, 1908, vol 145, p 1159
11. Anake Goodall and David Palmer, *Water Resources and the Kai Tahu Claim*, Wellington, Ministry for the Environment/Resource Management Law Reform, 1989, p 7. The Waitangi Tribunal in its *The Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd 1992 (at p 135) considered that the Salmon and Trout Act constituted a clear encroachment upon the Treaty rights of Ngai Tahu.
12. Alan Ward, *A Show of Justice*, Auckland, Auckland University Press/Oxford University Press, 1973, p 305
13. NZPD, 1873, vol 15, pp 1006–1011
14. CFRT Maori Land Legislation Database, Timber Floating Act 1884

14.3.3 General legislative provisions divesting Maori of control of rivers

From around 1880, a raft of legislative provisions came into effect that vested in the Crown, or its delegated authority, powers over waterways that further eroded Maori rights to their inland waterways. The question of actual ownership, however, remained untested. In 1881, the Railways Construction Act was passed. Section 34(4) of that Act vested in companies engaged in railway construction the power to alter the course or level of any non-navigable river or other watercourse or stream. This and similar provisions appear to be the beginning of the gradual displacement of Maori rights in New Zealand's waterways. The Counties Act 1883 vested in county councils the power to control and supply water for irrigation purposes. Land could be compulsorily acquired (under public works legislation) for the purposes of constructing dams to divert water into water races. These powers were later extended under the Counties Act 1886 and the Water Supply Act 1891.[15]

As well as vesting powers in relation to waterways in existing authorities, the legislature passed the Rivers Boards Act 1884 that provided for the establishment of specially constituted river boards who had powers to control rivers within defined river districts.[16] Under section 18 of the Public Works Act 1889, the power was vested in river boards to declare rivers and streams public drains. In the case of the Wairarapa Lakes and the actions of the South Wairarapa River Board, the board was constituted primarily of Pakeha farmers anxious to bring more land into agricultural production, and acted in breach of the law, causing injury to local Maori. In the report of his inquiry into the Wairarapa Lakes in 1891, Alexander Mackay described the actions of the river board as 'an attempt by a side-wind to violate the Native rights under the Treaty of Waitangi.'[17]

Under the Public Works Act 1894, rivers could be brought under the 'control' of local authorities, although the Act stopped short of explicitly extinguishing title. The extent and nature of local authorities' control was tested in the 1901 case of *Taranaki Borough Council v Brough*, in which Justice Conolly ruled that such control of rivers could not deny 'ownership which at common law extends to the centre of the river bed in non-navigable rivers'.[18]

As well as the powers that existed within the main public works legislation enabling land to be drained, special land drainage legislation was enacted. In a similar fashion to the River Boards Act, the Land Drainage Act 1893 provided for the establishment of drainage districts over which specially constituted boards were empowered to drain lands (such as swamps) to enable them to be brought into agricultural and pastoral production. As well as such general legislation, specific Acts were passed to enable the drainage of particular areas such as the Hauraki

15. Cathy Marr, *Public Works Takings of Maori Land, 1840–1981*, Report for the Treaty of Waitangi Policy Unit, Wellington, December 1994, p 105
16. River Boards Act 1883, s 74. Under section 76 boards were empowered to compulsorily acquire land under the Public Works Act for the purposes of river works.
17. AJHR, 1891, G-4, 'Report on Claims of Natives to Wairarapa Lakes', pp 5, 14
18. *Taranaki Borough Council v Brough* (1901) 2 GLR 160, cited in Austin, p 464

Plains Acts of 1908 and 1926 and the Ellesmere and Forsyth Reclamation and Akaroa Railway Trust Act 1876.[19]

Such legislative measures can be seen as statutory modifications of the rights to the use and control of rivers that riparian landowners and others enjoyed at common law. The question of the actual ownership of New Zealand's rivers, however, was left open – the Crown having simply assumed the right to legislate to the derogation of Maori rights. But by the turn of the century, the Government was forced to confront the issue more squarely.

14.4 The Ownership of Riverbeds in New Zealand

14.4.1 The coal mines legislation

In 1903, the beds of navigable rivers were vested in the Crown by section 14 of the Coal Mines Act Amendment Act 1903. This provision arose as a consequence of the decision of the Court of Appeal in the case of *Mueller v The Taupiri Coalmines Ltd*, which concerned the rights to mine the bed of the Waikato River. This case involved consideration of the proposition that the vesting of riverbeds in riparian owners *ad medium filum aquae* is rebuttable if the river is navigable. The plaintiff, the Auckland Commissioner of Crown Lands, sought a declaration that certain lands beneath the Waikato River that the defendants had been mining were in fact Crown lands. The defendants had justified their actions by virtue of being the riparian landowners *ad medium filum*.

Although the rights of the Crown were upheld by the majority of the judges, Chief Justice Stout issued a vigorous dissenting judgment to the effect that the navigability of a river did not detract from the riparian owner's proprietary rights in the riverbed. In arriving at their decision rebutting the common law position, the remaining judges stressed: that in New Zealand the Crown has a role as a trustee over lands of such public importance as those in question; the historical circumstances of the original Crown grant; and the fact that the section of river in question had been navigated for commercial purposes.[20]

In the 1900 case *Re Beare's Application,* the rights of the riparian owners were upheld against the Crown's contention that the bed of the Arahura River was Crown land. The case resulted from the question as to whether or not mining licences could be granted for a section of the river that ran through a native reserve. In upholding the rights attaching to the riparian owners, Chief Justice Stout made much of the fact that for all intents and purposes the river was neither 'a public highway or such [a] navigable river as makes the bed of the river Crown lands'.[21] This decision, as with that in *Mueller v Taupiri,* suggests that, prior to the enactment of the Coal Mines Amendment Act 1903, the Crown lacked prima facie rights to the beds of non-tidal rivers.[22]

19. Marr, p 106; Goodall and Palmer, p 15
20. *Mueller v the Taupiri Coal Mines Ltd* (1900) 20 NZLR 89, cited in Austin, pp 462–464
21. *Re Beare's Application* (1900) 2 GLR 242, cited in Austin, p 463

Section 14 of the Coal Mines Amendment Act was an addition to a controversial piece of legislation pertaining to the rights and working conditions of miners, and it appears to have received scant attention in the parliamentary debates concerning the Bill. The provision was re-enacted in the Coal Mines Acts of 1905, 1908, 1925, and 1979. Although those Acts are now repealed, anterior vestings pursuant to the coal mines legislation are preserved by section 354 of the Resource Management Act 1991. An important issue is whether section 14 of the Coal Mines Act 1903 and its subsequent re-enactments were declaratory of the situation under common law or confiscatory. It has been asserted that, when compared to common law, the provisions appear to be confiscatory'.[23] This raised the question of entitlement to compensation for riparian owners' rights – recourse that it appears Maori did not seek at the time the provision was enacted. In a 1993 decision concerning claims to dams on the Wheao and Rangitaiki Rivers by Te Runanganui o Te Ika Whenua, the Court of Appeal stated that the:

> vesting of the beds of navigable rivers in the Crown provided for . . . [in] 1903 and succeeding legislation might not be sufficiently explicit to override or dispose of the concept of a river as taonga, meaning a whole and indivisible entity, not separated into bed, banks and waters.[24]

In connection with the coal mines legislation, much attention has necessarily centred around definitions of 'navigability' under the Acts. In various cases brought before the courts concerning this question, definitions employed have tended towards a narrow construction of the term to mean navigation for commercial purposes. In the Court of Appeal's 1955 decision in *Leighton's Case*, the Supreme Court's earlier narrow definition of what by then was section 206 of the Coal Mines Act 1925 was upheld. Justice Fair, in delivering the decision, justified taking such an approach in terms of the provision being confiscatory and 'as such should be construed no wider than was strictly necessary to achieve its object'.[25] The Property and Equity Law Reform Committee alerted attention to further problems in the definition of 'navigability' caused by the advent of modern forms of water transport (such as jet boats). These, they suggested, have extended the vesting provision 'at least in theory, far beyond what was possible at 1903' when the section was originally enacted.[26]

In 1903, pursuant to the Water Powers Act 1903, the sole right to generate electricity using water power was also vested exclusively in the Crown.

22. Austin, p 464
23. Ibid, p 466
24. *Te Runanganui o Te Ikawhenua Incorporation Society v Attorney-General* (1994) 2 NZLR 20, 21
25. Austin, p 465
26. Property and Equity Law Reform Committee, p 7

14.4.2 The Whanganui River

A major determinant in the jurisprudence vis-à-vis the ownership of rivers in New Zealand is the Maori claim to the Whanganui River. Conflict concerning rights in the river first came about in the nineteenth century as a result of the destruction of eel weirs upon the river by the Wanganui River Trust to improve its navigability. The trust was later to be empowered by statute to improve and maintain the navigability of the river.[27] While this legislation is suggestive of an assumption of ownership on the part of the Crown, it is not, in itself, considered to be expropriatory.[28]

The actions of the trust precipitated vigorous protests by various Whanganui River Maori. A 1927 petition to Parliament by Pikikotuku in which a claim for damages totalling £300,000 was made was referred to the Native Land Court for investigation under provisions contained within the Native Land Amendment and Native Land Claims Adjustment Act 1930. But before the petition had been investigated, the claimants abandoned the petition and in 1938 applied to the Native Land Court for the actual title to the river to be investigated.

During the court's investigation, the Crown argued that there was no Maori custom recognising the ownership of riverbeds and that the Whanganui River was merely a public highway used by various iwi. In the face of extensive evidence from the applicants of exclusive navigational and fishery rights, however, Judge Browne issued a preliminary finding in 1939 that, at 1840, the bed of the Whanganui River was customary Maori land.[29] The Crown immediately appealed this determination, but because of the Second World War, the hearing of it was delayed until 1944. When the Native Appellate Court did sit to consider the Crown's case, the appeal was unanimously dismissed.

Before the Native Land Court could continue its investigation of the river's title, the Crown challenged the jurisdiction of both the land court and the appellate court to proceed with their investigations, applying to the Supreme Court for writs of certiorari and prohibition. The Crown contended that by selling their riparian lands Maori had lost their title to the riverbed as a consequence of the *ad medium filum* rule and that the bed was vested in the Crown pursuant to section 206 of the Coal Mines Act 1925. The Supreme Court did not bother to determine the first issue, finding in favour of the Crown upon their second contention.

Implicit in the court's decision was the notion that, were it not for the Coal Mines Act, the river would still be Maori customary land. This raised the spectre of compensation for the expropriation that the coal mines legislation had effected. To determine whether or not the river – were it not for the Coal Mines Act – was Maori customary land, and whether consequently Whanganui iwi were eligible for compensation, the Government established a royal commission chaired by Sir Harold Johnston.[30]

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27. See Wanganui River Trust Act 1891. The powers under this Act were extended in 1920 and 1922. Ferguson, pp 4–5
28. See Ferguson, p 4, n 12
29. Ibid, p 5

Reporting to Parliament in 1950, the commission found that, in selling riparian lands, Whanganui Maori did not surrender their rights to the bed of the river. Thus the doctrine of *ad medium filum* was rebutted by evidence supporting Maori customary use and ownership. In arriving at this conclusion, Johnston drew on the common law principle that the owners of several fisheries (which, in the case of the Whanganui, eel weirs were held to be) are the owners of the riverbed at that point, and that this prevails over the *ad medium filum* rule.[31] Although finding in favour of the river's Maori owners, the commission has been criticised for the way in which the mere existence of eel weirs was deemed to accord with principles of English common law without any reference to or consideration of the wider physical and cultural significance and values associated with the river.[32]

The Government left in abeyance the findings of the royal commission, the matter eventually being referred to the Court of Appeal.[33] In 1954, the Court of Appeal ruled, that at the time of the signing of the Treaty of Waitangi, the bed of the river was in Maori customary ownership. However, the Court declined to decide upon the Crown's contention that Maori had lost their right to the riverbed as a consequence of having sold their riparian lands, without first obtaining more evidence. Thus legislation was passed so that the Maori Appellate Court could receive further evidence upon Maori customs and usage relating to the Whanganui River. In June 1958, the appellate court found that there was no Maori custom upon which the issuance of a tribal title to the river could be justified when the riparian lands had been granted individually.[34] What the court would have found had the lands abutting the river been vested tribally remains unclear.

The matter was finally disposed of by the Court of Appeal in 1962. It adopted the 1958 findings of the Maori Appellate Court and held that the titles issued for the river's riparian lands included a title to the riverbed *ad medium filum*. Although leave was applied for by the Maori claimants to take the matter to the Privy Council, the application was abandoned in July 1962, presumably due to the prohibitive expense.[35]

The result of this protracted litigation was the conclusion that there was no Maori custom supporting the tribal ownership of rivers upon which the Maori Land Court could issue a title to an entire river in the name of a tribe. In arriving at their conclusions, the various courts involved in the matter of the title to the Whanganui River, eschewed matters of mythology and spiritual connections with the river, focusing on evidence that indicated a custom comparable with common law concepts of property.

30. Ferguson, p 6
31. AJHR 1950, g-2, 'Report of Royal Commission on Claims made in respect of the Wanganui River', p 9
32. For example see Ferguson, p 8
33. Section 36 of the Maori Purposes Act 1951 was enacted to enable the matter to be referred to the Court of Appeal.
34. Ferguson, p 10
35. Ibid, p 62

14.4.3 Marginal strips

Another consideration in respect of the ownership of rivers (and lakes) is the existence of marginal strips, more commonly known as the 'Queen's chain'. The strips came about as a result of the Land Act 1892, which provided that, upon the sale of lands owned by the Crown with a natural water boundary, a 66-foot strip would be reserved along the foreshore, around the margins of lakes larger than 50 acres, or along the banks of rivers and streams with an average width of more than 33 feet.[36] This provision was continued by section 58 of the Land Act 1948. Although not expressly recognised by statute, marginal strips may include title to the bed of the waterway they adjoin, *ad medium filum*. This gives rise to the possibility that many more rivers may be vested in the Crown than just those that are navigable.[37]

14.5 The History of Lake Ownership in New Zealand

Unlike rivers, where common law principles have been applied as to the ownership of their beds, claims by Maori to the ownership of lakes have been dealt with on an ad hoc basis. Despite claims to Maori ownership having been strenuously denied by the Crown, in many cases the Crown was forced to concede these claims and to secure negotiated settlements with the owners, which were subsequently given effect to by statute.

14.5.1 Wairarapa lakes

Subsequent to the sale of lands abutting the Wairarapa Lakes in the 1850s, settlers taking up occupation began to pressure the Government to keep the outlet of the lower lake permanently open to prevent the flooding of their lands each winter.[38] Local Maori had a vital interest in the annual flooding as it presented an optimum opportunity for the capture of huge amounts of eels – a commodity that it would appear was a mainstay of the local economy. Beginning in 1874, the Crown began a campaign to acquire rights in the lake sufficient to enable it to control the outlet of the lake. In 1876, the rights of 17 Maori were acquired by the Government for £800. This purchase, however, was later deemed to have secured the Crown only the fishing rights of the 17 individuals and not the entire title to the lakes, as the Crown initially claimed.[39]

Upon applications being made to the Native Land Court by both Maori and the Crown, investigations were undertaken as to the title of the lake, the court issuing

36. Land Act 1892, s 110
37. Ferguson, p 15
38. Lake Wairarapa lies to the north and Lake Onoke to the south abutting Palliser Bay. The lakes are sometimes referred to as the northern and southern lakes respectively.
39. A G Bagnall, *Wairarapa: An Historical Excursion*, Masterton, Hedley's Bookshop for the Masterton Trust Lands Trust, 1977, pp 378–379

its decision in 1883. A list of 122 owners was issued by the court which, in conjunction with the 17 interests acquired by the Crown, brought the total number of interests to 139.[40] Subsequently, Crown officials continued unsuccessfully in their attempts to acquire rights to the lake.

Precipitated largely by complaints by Maori that the South Wairarapa River Board had assumed the right to open the lake mouth at will, a royal commission was established in 1891 to investigate their grievances. Commissioner Alexander Mackay found that Maori were indisputably the owners of both the lakes, but that they were not justified in exercising those rights in such a way as to allow the adjacent lands they had sold to the Crown to periodically flood. Mackay recommended a solution whereby Maori allowed the lake mouth to be opened in the face of an impending flood, a concession for which they were to be compensated.[41]

The river board kept up its pressure on the lakes' Maori owners, even opening the lake mouth in the face of a Maori physical presence.[42] In 1896, largely as a consequence of the river board's pressure, the Crown managed to negotiate the purchase of the lake owners' interests. The agreement, given effect to in 1908, saw the owners receiving £2000 and a reserve of 30,486 acres in the Pouakani block near present-day Mangakino.[43]

14.5.2 Lake Horowhenua

Subsequent to a royal commission in 1896 into the status of various subdivisions of the Horowhenua block (including block 11, which included Lake Horowhenua[44]), legislation was passed that, inter alia, vested Lake Horowhenua and a one-chain strip of land around its margin in the Muaupoko tribe.[45] The Native Appellate Court then proceeded to determine the owners of the lake block, eventually vesting it in trustees for the benefit of Muaupoko.[46]

As a result of demands from increasing numbers of Pakeha settlers in the Horowhenua that the lake be made available for recreational purposes, the Lake Horowhenua Act 1905 was passed, which declared the lake to be a recreational reserve 'for both races, in as far is possible to do so without unduly interfering with the fishing and other rights of the Native owners'.[47] Under the Act, a board was created to administer the reserve, a third of whose members were to be Maori of Muaupoko descent. Furthermore, the free and unrestricted access and fishing rights of the Maori owners were protected, so long as the exercise of such rights did not interfere with the full and free use of the lake for recreational purposes.

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40. Wairarapa mb 4, 8–11 November 1883, fol 117–132
41. AJHR, 1891, G-4, 'Report on claims of Natives to Wairarapa Lakes', p 11
42. Bagnall, pp 381–382
43. Ibid, p 377
44. Keith Pickens sets out the history of the ownership of Lake Horowhenua in Dr Robyn Anderson and Keith Pickens, *Wellington District: Port Nicholson, Hutt Valley, Porirua, Rangatikei, and Manawatu*, Wellington, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), August, 1996, pp 271ff
45. Horowhenua Block Act 1896
46. Reserves and Other Lands Disposal Act 1956
47. Lake Horowhenua Act 1905, preamble

Tension between Muaupoko and the Government arose in the 1920s as a result of drainage work associated with the lake. During this period, the lake level was lowered, damaging freshwater shellfish beds around the lake's margin and destroying many eel weirs in the Hokio Stream, the lake's main outlet. This work apparently was illegally carried out by the local drainage board. Rights to the reclaimed land that resulted from the lowering of the lake were contested between the Muaupoko and Pakeha members of the lake board. Another source of irritation for Muaupoko was that farmers were grazing the lake's one-chain marginal strip, thereby destroying flax that grew along the lake's margin.[48] Consequently, a committee of inquiry was established at the request of the domain board to investigate, inter alia, the rights of Muaupoko to the lake. The committee was chaired by Judge Harvey of the Native Land Court and received submissions from the domain board, the Levin Borough Council, Muaupoko, and various Pakeha individuals and interest groups. Reporting to the Minister of Lands, Harvey listed clear evidence in support of Maori ownership up until the legislation of 1916 and 1926 affecting the lake, observing that 'it may be that these amendments have taken away the Native's title if so they have done it in a subtle manner mystifying alike to Domain Board and Natives'.[49]

Throughout the later 1930s and 1940s, various unsuccessful attempts were made at settling the impasse that had developed. Matters were made more difficult by the fact that by the late 1930s, the domain board had ceased to function owing to the fact that no Maori were willing to accept nomination. The 1950s saw further meetings and representations to the Government in an attempt to settle the issue of the lake's ownership and associated rights.[50] In 1956, legislation was passed that confirmed Maori owned the lake bed, the one-chain marginal strip, and the Hokio Stream, and vested these areas in trustees appointed by the Maori Land Court. The surface of the lake was declared to be a public domain along with 13 acres of lake frontage. The domain board was also reconstituted. The Act required that half of the board's eight members be of the Muaupoko tribe.[51]

14.5.3 Rotorua lakes

In 1880, Ngati Whakaue negotiated an agreement with the Crown whereby they could retain their lands under customary ownership and lease them to the Crown. However, the Native Land Act 1909, with its extensive provisions for the extinguishment of customary title, saw Ngati Whakaue become somewhat anxious as to the security of their tenure in relation to the powers of the Crown.[52] Thus, an application was made to the Native Land Court by Ngati Whakaue for the title to the Rotorua Lakes to be determined.[53] But because the Surveyor-General refused to

48. Anderson and Pickens, pp 278–279
49. 'Judge Harvey's report to the Honorable Minister of Lands', 10 October 1943, ma accession, w2459 5/13/173, p 3, cited in Anderson and Pickens, p 279
50. Anderson and Pickens, p 281
51. Reserves and Other Lands Disposal Act 1956, s 18(2–12)
52. Ibid, p 109

supply the necessary plans required for the investigation to proceed, in 1912 the applicants removed the matter to the Supreme Court.[54] In the case that ensued, *Tamihana Korokai v Solicitor General*, the court ruled in favour of the applicants, holding that it:

> is a question for the Native Land Court in the first instance to determine upon proper evidence whether any particular piece of land is Native customary land or not, and in ascertaining this it may determine whether or not the Maoris were the owners of the bed of any lake or part thereof according to Native custom, or whether they had not merely a right to fish in its waters.[55]

An application was immediately made to the Native Land Court for the title to the Rotorua lakes to be investigated. The court's inquiry though was delayed because of the First World War, finally getting under way in 1918. But before proceedings had been completed, the judge adjudicating in the inquiry, T H E Wilson, died. Rather than continue the investigation, the Government entered into negotiations with Te Arawa. In 1922, an agreement was reached whereby the beds of Lake Rotorua and 13 other nearby lakes, along with the right to use their waters, were vested in the Crown. In exchange, Te Arawa had reserved to them certain fishing rights and were to be paid an annuity of £6000.[56] The agreement was given effect to by section 27 of the Native Land Amendment and Native Land Claims Adjustment Act 1922.

The Act was carefully worded so as not to be an admission that lakes generally were subject to Maori customary title, referring only to the lakes as being 'freed and discharged from the native Customary title, if any'. It is apparent though that the Crown would have been faced with 'a formidable task in proving otherwise'. In the face of extensive evidence of use and occupation by the applicants, the Crown's case was based primarily upon the forbearance of the local Maori towards European activities on the lake.[57]

14.5.4 Lake Waikaremoana

By the early twentieth century, it is evident that the Crown was prepared to go to extreme lengths to prevent title to any more lakes being awarded to Maori. In November 1912, the Solicitor General, John Salmond, advised that 'under no circumstances should Natives obtain freehold titles' to lakes and rivers, and that section 100 of the Native Land Act 1909 (which he had drafted) should be invoked to prevent the land court from making such investigations.[58] Subsequent to the repeal of section 100 in 1913, Salmond advised that were the Native Land Court to

53. For a fuller discussion of the history of the Rotorua Lakes, see Tania Thompson, 'Interim Report: Rotorua Lakes Research', report commissioned for the legal firm of O'Sullivan Clemens Briscoe and Hughes, March 1993.
54. Ferguson, p 21
55. *Tamihana Korokai v Solicitor General* (1912) 15 GLR, 95
56. Ferguson, p 22
57. Ibid, p 22

find in favour of Maori in relation to inland waterways, Parliament should be asked to pass legislation vesting such lakes in the Crown and to provide compensation for the applicants in lieu of the actual issue of freehold titles to the waters in question.[59]

It was in this political context that the Native Land Court investigated the claims of Tuhoe–Ruapani and Ngati Kahungunu ki Wairoa to the title of Lake Waikaremoana. Between 1915 and 1918, the court received a large corpus of evidence concerning traditional associations and uses of the lake. Interestingly, the Crown did not appear during any of these hearings. In 1918, Judge Gilfedder ruled that both claimant groups had interests in the lake. This precipitated immediate appeals from the Crown, who disputed that the lake bed was Maori customary land, and Tuhoe–Ruapani, who objected to Ngati Kahungunu's inclusion on the title to the lake.[60]

In a memorandum to cabinet, the Attorney-General, Sir Francis Dillon Bell, drew attention to the implications of Gilfedder's decision in the matter of Lake Waikaremoana, expressing concern as to the status of the Crown's rights to generate electricity from the lake's waters. He stated that:

> By the Treaty of Waitangi the whole fee simple of the land of New Zealand became vested in the Crown, subject to the Native right. The Native right in respect to these waters was the exclusive use by certain tribes and hapus, but as in the case of the shores of the sea and navigable rivers of New Zealand, the bed of the waters was in no sense vested in the tribes and hapus, which have the rights over the waters. The contrary view confuses the question of Maori right which is a matter of custom determinable by the Native Land Court, with the legal result in England of ownership of fishing rights and marginal occupation.[61]

Subsequent to Gilfedder's decision, the Crown continued to act as the legal owner of the lake, issuing fishing licences, further developing tourist services, and expanding the hydro-electric scheme which used the lake's waters.

The Crown's appeals finally came before the Native Appellate Court in 1944. Its case centred around its contention that it was outside the Native Land Court's jurisdiction to inquire into the title of Lake Waikaremoana and that its 1918 decision had been made upon improper evidence. It was suggested that, at most, this evidence supported the existence of Maori fishing rights in the lake. Given the Crown's contention that the 1918 land court decision was a nullity, the Crown argued that the appeal was therefore outside the jurisdiction of the appellate court. On 20 September 1944, the Native Appellate Court handed down its decision, dismissing the Crown's appeal and upholding the Native Land Court's 1918 decision. In doing so, the court observed that there existed 'an abundance of authority that in New Zealand the rights of Natives are safe-guarded without reference whatsoever to the incidence of English law'.[62]

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58. Solicitor General to Attorney-General, 4 November 1912, cited in Emma Stevens, 'Report on the history of the title to the lake-bed of Lake Waikaremoana and Lake Waikareiti', Crown Forestry Research Trust research report for the Wai 144 claim, p 21
59. Salmond to Under-Secretary of Lands, 11 June 1917, in Crown Law Office opinions, vol 6, LINZ
60. Stevens, p 2
61. Attorney-General to Cabinet, 21 March 1922, cl 196/10

Although the Crown decided to apply to the Supreme Court for writs of certiorari and prohibition in connection with the Waikaremoana decision, these had not been proceeded with by 1954, by which time the statutory 10-year period in which decisions of the Native Appellate Court had to be challenged had passed. The Government then decided to seek a negotiated settlement. Deliberations and negotiations concerning a settlement began in the late 1940s, continuing throughout the 1950s and 1960s. Because of tenacious opposition from the lake's owners, the Government was forced to abandon its hope of acquiring the freehold of the lake and had to settle instead for a lease arrangement.[63] In 1970, an agreement was reached between the owners and the Government whereby the lake was to be leased to the Crown for a period of 50 years with a perpetual right of renewal, backdated to 1967. The rental was to be set at 5½ of the lake's value and there were to be 10-year rental reviews. The Lake Waikaremoana Act was passed the following year, giving effect to the lease agreement. The Act vested the lake in the Tuhoe–Waikaremoana and Wairoa–Waikaremoana Trust Boards, to whom the rent was to be paid on behalf of the lake's owners.[64]

14.5.5 Lake Taupo

In the 1890s, trout were introduced to Lake Taupo. The fish soon became important to Ngati Tuwharetoa both as a source of food and because they attracted tourists, who Maori were able to charge for the right to fish in their streams and camp on their land. Problems arose, however, when fisheries regulations were enforced, and Maori fishing without a licence were prosecuted. In an effort to resolve the problem, the Native Minister was authorised by statute to consult with Tuwharetoa with a view to reaching a settlement.[65]

The Native Minister, J G Coates, subsequently undertook negotiations on behalf of the Government. While the initial negotiations were not concerned with the ownership of the lake bed (the owners being apparently more interested in securing a financial return from the trout fishery), the final agreement vested the waters and the bed of Lake Taupo in the Crown.[66] Other terms of the agreement included a provision that the Government would pay a specially constituted trust board an annuity of £3000 along with half of the revenue generated over £3000 from fishing licence and camping fees. In addition, the owners of land bordering tributaries to the lake would be eligible for compensation for income they had previously derived from fishers and campers. The agreement was given effect to by the Native Land Amendment and Native Land Claims Adjustment Act 1926. Although the Act

62. Stevens, pp 30–34; cl 200/16, cited in Stevens, p 37. The Appellate Court convened again in 1946 to hear the Tuhoe-Ruapani appeals against the inclusion of Ngati Kahungunu in the title to the lake. The appeals were dismissed, again the Native Land Court's 1918 decision being upheld.
63. Stevens, pp 43–51
64. Ibid, pp 42–45
65. Native Land Amendment and Native Land Claims Adjustment Act 1924, s 29
66. Brian Bargh, *The Volcanic Plateau* Wellington, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), November 1995, pp 111–116

included provision for compensation to be assessed, it was not until further legislation was passed in 1946 that a commission of inquiry was held. The Lake Taupo Water Claims Compensation Court duly sat and awarded a total of £45,600 'in full satisfaction of the claims advanced' by Maori for compensation in respect 'of certain rivers and streams in the Taupo district'.[67]

14.5.6 Lake Omapere

Lake Omapere, situated in a basin midway between the Bay of Islands and the Hokianga, has for centuries been an important eel fishery and site of habitation for sections of the Ngapuhi iwi. It appears that the rights of Maori in the lake were tacitly acknowledged throughout the nineteenth century. But shortly after the turn of the century, increased pressure from Pakeha for pastoral lands meant that there were incessant demands made upon the Government for control of the lake to be wrested from Maori so as that its level could be controlled and the flooding of lands abutting the lake in winter prevented. Such moves were opposed both by local Maori, who feared the effect lowering the lake would have upon their eel fisheries, and by some Pakeha, who were concerned with preserving the lake's scenic values.

Possibly as a consequence of this perceived threat to their rights, in 1913 local Maori applied to the Native Land Court for the title of Lake Omapere to be investigated. This obligated the Crown to seriously consider the nature and extent of its rights in the lake. Initially, the position forwarded by the Crown Law Office was that, by virtue of owning riparian lands, the Crown had rights *ad medium filum*, which it shared with Maori who had retained some land contiguous to the lake. However, it was considered that, if for reasons of public policy Maori should be prevented from establishing title to the lake, the Government should consider exercising its powers under the Native Land Act 1909 to prevent the Native Land Court from investigating title, or to simply proclaim the lake to be Crown land.[68] In 1914, the Solicitor General expressed the opinion that 'the matter is far too doubtful to express any confident conclusion on it one way or the other'. Although doubting that Maori custom recognised the ownership of lakes such as Omapere, he similarly expressed the opinion that there was insufficient authority to extend the *ad medium filum* presumption. He was confident, however, that the riparian rights accruing to the Crown as a consequence of it owning lands abutting the lake gave the Government sufficient authority to prevent private landowners from interfering with the lake's level.[69]

Although the provisions of the Native Land Act were not invoked to prevent the land court's inquiry, its investigation was obstructed by the refusal of the North Auckland Commissioner of Crown Lands to supply the requisite survey plan.[70]

67. 'Annual Report of the Department of Internal Affairs for the Year Ended 31 March 1949', AJHR, 1949, H-22, p 26
68. Assistant Law Officer to Under-Secretary of Lands, 11 July 1913, ls 1 22/2679
69. Solicitor General to Under-Secretary of Lands, 22 July 1914, ls 1 22/2679
70. North Auckland Commissioner of Crown Lands to Under-Secretary of Lands, 21 October 1921, ls 1 22/2679

Subsequent to the Minister of Native Affairs' ordering that a survey plan be prepared,[71] the Native Land Court's investigation of Lake Omapere finally got under way in 1929.

The court sat first sat in Kaikohe, where extensive evidence as to the customary ownership of the lake was presented by the applicants. The court then reconvened in Auckland, where the substantive legal issues were considered. The arguments presented by counsel for the Crown against the Maori claim to the lake were that: the rights of Maori in Omapere were limited to fishing rights; that the Treaty of Waitangi vested in the Crown the radical title to all land; that rights of navigation accrued to the Crown in the public interest; and that it was incumbent upon Maori to demonstrate that they had exclusive proprietary rights in the lake bed.[72]

On 1 August 1929, Judge Acheson issued his decision as to the title of Lake Omapere, ruling incontrovertibly that the lake was Maori customary land. The decision is notable in that much of Acheson's reasoning underpinning the decision was based on the guarantees extended to Maori under the Treaty of Waitangi. It was held variously: that Maori custom recognised the ownership of lake beds; that Omapere was effectively and continuously occupied and owned by Ngapuhi; that their title had never been legally extinguished and therefore could not be disregarded; that precedents existed for the Crown's recognition of Maori ownership of lake beds; and that the Native Land Court was bound to take judicial notice of the Treaty of Waitangi – article 2 of which was held to guarantee Maori ownership of lakes.[73]

Although the Crown immediately lodged an appeal against Acheson's decision, it was never prosecuted. Finally, on 27 October 1953, the Crown announced that it was abandoning its appeal. On this occasion, the Crown was censured by the presiding judge of the Maori Appellate Court, who suggested that the appeal had been used as a lever by the Crown to effect a settlement, and that such an action was 'reprehensible and an abuse of the process of the Court'.[74]

In 1940, at the request of the owners, Lake Omapere had been constituted as a tribal reserve pursuant to the Native Purposes Act 1937. Subsequent to the passing of the Maori Affairs Act 1953, the trust was converted to a tribal reserve under section 438 of that Act.[75]

As a consequence of a proposal by the Kaikohe Borough Council to take water from Lake Omapere for domestic supply in the 1970s, the legal status of the lake's ownership and waters was reconsidered. In relation to this, Judge Nicholson of the Maori Land Court opined that Omapere was not a lake as understood in English law but rather Maori customary land. Further, he considered that, although the Crown

71. Addendum (7 September 1922) to Memorandum to the Native Minister from Private Secretary, 6 September 1922, ls 1 22/2679
72. Bay of Islands mb, no 11, 19 June 1929, pp 19–22 (pagination is that of a transcription of proceedings in LS 1 22/2679, not that of the original)
73. *Judgement of Native Land Court in the Matter Title to Omapere Lake*, pp 6–23
74. Auckland Appellate Court mb, no 12, 28 October 1953
75. Bay of Islands mb, no 18, 31 July 1940, ff 98–105; Bay of Islands mb, no 29, 22 February 1955, fol 112; Bay of Islands mb, no 30, 8 March 1955, fol 202

by virtue of the Water and Soil Conservation Act 1967 had the sole right to use the lake's waters, the Crown did not own the water as such, and was legally required to defer to the lakes' owners in order to gain access to the lake to draw water.[76]

14.5.7 Lake Rotoaira

Lake Rotoaira is a relatively small lake situated between Lake Taupo and Tongariro. Traditionally a highly prized eel fishery, the lake became an internationally renowned trout fishery with the introduction of trout to the central North Island in the late nineteenth century. From the mid-1920s, it appears that Rotoaira was considered for inclusion in various proposed hydro-electric developments. Finally, in 1964, the Tongariro River development – which included Lake Rotoaira – was approved. The scheme was completed in December 1973.[77]

In 1937, an application was made to the Native Land Court for the title to Lake Rotoaira to be investigated. The Crown, at the time embroiled in proceedings concerning Lakes Omapere and Waikaremoana, deliberately obstructed the inquiry. Eventually, in 1943, the Crown allowed the inquiry to proceed, while at the same time seeking to make the proviso that the outcome of the investigation would not set a precedent for the ownership of the beds of other inland waterways.[78] In 1956, the court found the applicants to be the customary owners, later vesting the lake in 11 trustees under section 438 of the Maori Affairs Act 1953. The trustees were vested with the authority to utilise and develop the resources of the lake and regulate fishing activity. Further, the trustees were deemed to be the group with which the State Hydro-Electric Department was to treat in relation to negotiating for the use of the lake's waters for electricity generation.[79]

John Koning records that, as the Tongariro power scheme proceeded, it became apparent that the Lake Rotoaira trout fishery would be much more seriously affected than had first been anticipated. Consequently, it was feared that this could give rise to large claims to compensation from the lake's owners. In 1970, the Ministry of Works was authorised to enter into negotiations with the Lake Rotoaira trustees for the purchase of the lake. In negotiations with the Crown from 1970 to 1972, the owners remained vehemently opposed to the sale of the lake.[80] Eventually an agreement was signed in November 1972, by which the trustees were divested of the power to do anything that could jeopardise the power scheme and the right to compensation under the Public Works Act. In return, the Crown agreed not to

76. Judge Nicholson to Secretary, Northland Catchment Commission, 6 July 1973, Wai 22, doc b8; 'Local Bodies Rebuked by Maori Court Judge', *Northern Advocate*, 16 November 1974
77. John Koning, *Lake Rotoaira: Maori Ownership and Crown Policy Towards Electricity Generation 1946–1972*, Wellington, Waitangi Tribunal Research Series, 1993, no 2, pp 2, 5–6
78. Ibid, p 4
79. Ibid, pp 4–5
80. Heads of agreement, Ministry of Works and Ngati Tuwharetoa, 30 November 1972, Waitangi Tribunal masterfile, Wai 178/0

compulsorily acquire the lake under the public works legislation.[81] Under this agreement, no compensation was paid.

14.6 Conclusion

There can be no question as to Maori Treaty rights in respect of inland waters, whether as fisheries in the English version of the Treaty, or 'taonga' in the Maori version. Maori invariably lived close to the coast or inland waters and commonly had access to both. Ancestral and spiritual associations with inland waterways were, along with those with mountains, key determinants in Maori tribal identity.

The Crown was reluctant, in the colonial period, to recognise such rights as being real or compensable. Governments either assumed prerogative rights in respect of larger bodies of water or applied the principles of riparian rights in respect of smaller streams, lakes, and swamps, which were considered to have passed with the land when it was purchased. Maori did not share these views –particularly in respect of lakes. In the litigation that arose from the late nineteenth century, and in settlements made in respect of Lakes Taupo, Rotorua, Horowhenua, Waikaremoana, Omapere, and Rotoaira, there appears to have been a recognition of Maori rights to lake beds and fisheries, and the principle of negotiating for such rights seems clearly to have been established. (Water appears to remain at common law a common property resource with various restraints upon its use.)

In respect of rivers, the *ad medium filum* presumption has been discussed by the Waitangi Tribunal in the *Mohaka River Report* – where the purchase deeds to the land seem, in some instances at least, to extend to the banks and not to the middle of the river – and is currently being considered in respect of the Whanganui River. In its *Whanganui-a-Orotu Report 1995*, the Tribunal regards lagoons and wetlands as being taonga.

The loss of mahinga kai and damage to rivers regarded as wahi tapu by a range of development works is complained of in many claims. Certainly, the public works legislation and related legislative provisions affecting swamp drainage and the diversion and control of streams, together with the principle of riparian rights, caused Maori rights to be increasingly overridden after 1870. Countless drainage and diversion schemes affected the waterways, as did countless acts of pollution, wittingly or unwittingly. For such acts, compensation was rarely thought to be payable. In hindsight, the economic returns from much of this effort was limited. Maori farmers were more inclined to leave swamps and eeling streams intact, though they too had to drain land to run stock and cultivate crops.

In that the Crown generally treated the ownership of non-navigable streams and swamps as passing with the title to the land, the issue of rights to such waterways is bound up with any settlements made in respect of the land. However, some explicit regard should be had to the specific ecological and other associations Maori

81. Heads of agreement, pp 14–18

undoubtedly had with inland waters and the flora and fauna they supported. Undoubtedly, the loss to Maori of their rights to many waterways has been very heavy over the past 150 years of settlement – heavier in some respects than the loss of land. The question of public access to waters is, however, of the highest importance to the community generally, whether the owners of adjacent lands are now Maori or Pakeha. In settlements yet to be reached, such public rights will need to be protected through the upholding of the Queen's chain or other modes of access. This, to some degree at least, need not be incompatible with respect for and restoration of Maori customary fishing and other rights, and Maori involvement by right, in controlling authorities, in recognition of customary mana over inland waters.

CHAPTER 15

MAORI LAND ADMINISTRATION IN THE TWENTIETH CENTURY

PART I

Maori Land Boards and Councils, 1909–30

The main authority controlling and administering Maori land in the first half of the twentieth century was the system of Maori Land Councils, created by legislation in 1900 and drastically modified from 1905 to become the Maori Land Boards. About 500,000 acres of Crown purchases begun under legislation of the 1890s were completed between 1900 and 1909, a further 300,000 by the Crown under the Maori Land Settlement Act 1905, and a further 200,000 acres of private purchases between 1900 and 1909. The Native Land Act 1909 and its 1913 amendments then became the legal instruments under which about 3.5 million acres of remaining Maori land were purchased.

15.1 Precedents and Motivations

There were a number of significant steps leading to the 1900 legislation:

15.1.1 The 1886 Act

The concepts underlying the Maori Land Councils Act 1900 can be traced back to Ballance's Native Land Administration Act 1886. This measure was a response to the confused and uncertain state of titles that had developed under the Native Land Act 1873, and to the strong Maori pressure to control both the determination of title and the management of land through local runanga. Direct dealings in Maori land were suspended; the owners of a block of land were to elect committees which would decide what portions of the land would be sold or leased and on what terms; the land would then be handed over to a district commissioner, a Crown official, who would carry out the instructions of the block committee and distribute the proceeds, less costs. But Maori were reluctant to hand land over to Crown officials, even as agents for themselves, many still believing that they would get better

returns from direct dealing. Among these was James Carroll, who won the Eastern Maori seat partly on the strength of his opposition to the 1886 Act.

15.1.2 The 1891 royal commission

The 1891 royal commission report, mainly the work of W L Rees and James Carroll, recommended (as many Maori wanted) that block committees undertake the determination of titles, with the Native Land Court ratifying their decisions and deciding disputed cases. The block committees would also decide upon the area of land to be reserved and instruct a 'Native Land Board' to sell or lease the rest. The issuance of titles and management of the land would be through the Native Land Board, a national body comprising three Crown appointees and three Maori members elected by 'tribal committees'. The board was also to act as an appellate court and deal with the stream of petitions about the decisions of the Native Land Court which reached the Native Affairs Committee of Parliament each year. If the block committees did not 'perform the duties incumbent upon owners', the board would 'step in and do it for them'. This element of compulsion was characteristic of the Liberals' approach towards Maori land. They were interested in a more efficient process than the previous mishmash of laws, and one more equitable to Maori; but they were not prepared to see Maori land idle and unused.[1] In fact, few of the recommended machinery provisions were implemented by the Government until 1900, the Native Land Court system continuing (with an Appellate Court added in 1894), together with the purchase of undivided individual interests in titles under a restored system of Crown pre–emption (see ch 7).

15.1.3 The Urewera District Native Reserve Act 1896

A partial precedent was provided in the Urewera district. Following Tuhoe resistance to surveys and to the land court, in the early 1890s, Carroll negotiated arrangements for an Urewera commission, comprising five Tuhoe and two official members, to determine hapu boundaries in the district.[2]

15.1.4 Maori protests, 1890s

The Kotahitanga movement and the Kingitanga gained wide-spread influence by the 1890s and presented strongly-supported petitions and draft Bills to Parliament opposing the Native Land Court and Native Land Acts, and seeking the return of authority over Maori land to Maori organisations. In 1895, a national boycott of the land court was attempted through the Maori Parliament but was eventually defeated because Crown officials could always find someone to lodge an application for

1. See AJHR, 1891, g-1, pp xxii–iv and discussion in Donald Loveridge, 'Maori Land Councils and Maori Land Boards; an historical overview', Waitangi Tribunal Rangahaua Whanui series, September 1996, pp 17–21
2. See A Miles, *Urewera*, Waitangi Tribunal Rangahaua Whanui Series unpublished report, chs 5, 6

blocks that the Crown was interested in buying.[3] In 1897, the Maori Parliament petitioned Queen Victoria in her jubilee year, seeking a cessation of any further purchase of Maori land, though expressing a willingness to lease it.[4]

15.1.5 The Government's response

Carroll had supported the Maori preference for leasing rather than sale but for most of the 1890s this found no favour with Ballance, Seddon, and the rest of the Liberal Cabinet, who pressed ahead vigorously with Crown purchases. The very success of this programme (which saw nearly two million acres of land purchased by the Crown between 1891 and 1899) resulted in a level of landlessness which threatened to make Maori a burden on the state. Cathy Marr argues, however, that this was not so much a concern to officials as the continued difficulty of purchasing under the existing system, with confusion of titles, constant litigation, and long delays in the land court to separate out the undivided interests which the Crown was buying in numerous Maori blocks. The proposals of the 1891 commission offered the possibility of more expedient settlement of Maori land, if only by lease.[5] Seddon made it clear to Parliament, however, 'that the Maori lands shall not remain as they are at present, a burden to certain districts, keeping back the progress of the whole colony'. He anticipated that the present difficulty in settling 'large tracts' of Maori land would be overcome, although he estimated that not one million acres of the five or six million still in Maori hands (disregarding land already leased) would be 'fit for settlement'.[6]

Seddon and Carroll presented to Maori hui in 1898 elements of their proposals based on block committees and district land boards. This led to intense debate within the Maori parliament and the kingitanga and between leaders of these organisations and the Government. The Maori leadership wanted stronger powers over the land for their organisations than the Government proposed. Generally speaking, the East Coast leaders, Carroll, Wi Pere, Paratene Ngata, and his able young son Apirana, supported an amended version of the Government's Bill. Like Carroll in 1891, Wi Pere agreed that if Maori owners did not work the land or gain revenue from it within a specified time, the boards should have power to take it over and administer it on the owners' behalf. The Government re-introduced its Bill in 1899 but held it over for a further year because of division among the Maori members. In the interim, section 3 of the Native Land Laws Amendment Act 1899 stopped *new* purchases of Maori land by the Crown, (although it allowed the completion of purchases where agreements had already been made, which allowed officials such as Wilkinson in the Rohe Potae considerable scope to continue buying undivided individual interests). Dr Loveridge believes that this concession,

3. C Marr, *The Alienation of Maori Land in the Rohe Potae (Aotea Block), 1840–1920*, Waitangi Tribunal Rangahaua Whanui series, 1996, pp 197–198
4. Testimony of Wi Pere to the Native Affairs Committee, AJHR, 1899, i-3 A, p 19 (cited in Loveridge, p 13)
5. Marr, pp 203–205
6. NZPD, 1899, vol 110, pp 743–744 (cited in Loveridge, p 15)

along with the appointment of James Carroll as Native Minister in December 1899, tipped the balance within the Maori Parliament away from 'home rule' and in favour of working through the national Legislature.[7]

15.2 The Legislation Enacted

15.2.1 Compulsory or voluntary process?

The Maori Lands Administration Bill introduced in 1900 had still not finally decided the question of whether the district boards would automatically – compulsorily – assume control over the land in their districts, or whether it would be placed under them voluntarily. In the Native Affairs Committee, it is was clear that Maori members did not support a compulsory system and so it was decided. Seddon said that, unlike Ballance's 1886 Act, this Bill was strongly supported by Maori and that there was therefore no danger of land not being vested in the Councils. Carroll, who in 1891 had noted the failure of Ballance's Act because it was not obligatory, did not object to a voluntary provision in 1900. Neither did Apirana Ngata, although he later said the Bill was doomed to failure because of the voluntary principle.[8] Perhaps all of them had tactical reasons for accepting a voluntary system. But the voluntary principle had only narrowly got by; clearly if the Government's intention that the land would be vested and settled was frustrated, the voluntary principle was likely to come under attack.

15.2.2 The Maori Land Administration Act 1900

The preamble stated the desire of Maori owners to retain possession of their remaining five million (sic) acres of land, and the need for a better administrative system to see that it was used. Six 'Maori Land Districts' were created each with a 'Maori Land Council' of between five and seven members: the president and two or three members appointed by the Government (one at least to be Maori) and two or three elected by adult Maori of the district (by open declaration as with the election of Maori members of Parliament), virtually guaranteeing a Maori majority.

First, the councils were to determine what land Maori in the district needed for their own occupation, and to set it apart as papakainga, absolutely inalienable.

Remaining Maori freehold land could be leased directly by its owners for terms of up to 50 years, with the consent of the land council, who were to see proof that sufficient papakainga land (for the owners use and occupation) remained and that other conditions securing equity were met.

Approval of sale was not by the councils but by the Governor in Council, but new sales in practice remained suspended.

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7. Loveridge, pp 15–16
8. Loveridge, pp 28–30

Section 9 of the Act – in theory – gave the councils 'all the powers now possessed by the Native Land Court as to the ascertainment of ownership, partition, succession, the definition of relative interests and the appointment of trustees for Native owners under disability'. They would be assisted in determining ownership by the 'Papatupu Block Committees', who would provide a written report identifying boundaries, family, and individual interests, and relative shares. However the councils were not to exercise these powers until directed by the Chief Judge of the court.

The councils were given power (by section 30) to incorporate the owners of specific blocks. By a majority decision, incorporated owners could then vest their lands in the council in trust for leasing, managing, and improving (but not selling) on agreed terms. An amendment of 1901 allowed lands held by over 11 owners, not incorporated, to be vested in the councils by majority decisions or simply put under them for administration.

15.3 Administration of the Act

Seven Maori land districts were created between 1900 and 1902. This involved new negotiations with the kingitanga leaders, which resulted in the appointment of King Mahuta to the Legislative Council and of Henare Kaihau, a member of the House of Representatives, to the Waikato Maori Land Council. The councils were administered by a new Maori Land Administration Department, formally within the Justice Department. Effectively they were run by James Carroll as Native Minister, and Patrick Sheridan, a former Native Department official, as Superintendent from 1901 to 1906. Te Heuheu Tukino complained in 1905 that the officials stifled the autonomous development of the councils.[9] Four councils were headed by present or former Native Land Court judges.

Difficulties and delays were immediately encountered because of the complexity of securing deeds of trusts for vesting land and the lack of credit available to the councils for surveying, roading, subdividing, and preparing the land for lease. Even more seriously, very little land was vested in the councils in the first years: 48,135 acres in 1902 and 50,528 acres in 1903, 96 percent of it in the Aotea land council.[10] Maori suspicion of handing land over to official bodies, even with Maori majorities, was apparent and their complaints were numerous. By 1906, although 286,184 acres had by now been vested in the councils, only 56,333 acres had been leased through them. Dr Loveridge notes, however, that the rate of vesting had picked up, that the block committees had worked very effectively in title determination (with astonishing results in Taitokerau in Stout and Ngata's view) and had approved *privately* arranged leases totalling 139,441 acres by 1906. Loveridge therefore concludes that it was rather Pakeha impatience and the manoeuvring of politicians of both races than complete dissatisfaction by the owners that prevented the system

9. AJHR, 1905, i-3b, p 15, cited Loveridge, p 43; see also S Katene, 'The Administration of Maori Land in the Aotea District, 1900 to 1927', MA thesis, Victoria University of Wellington, 1900
10. Loveridge, p 49

getting a fair trial. The system allegedly 'created a deadlock and a block in a settlement of the unoccupied lands' in the view of Stout and Ngata, but, as Loveridge points out, the councils had overseen the leasing of 190,000 acres by 1907 and the Crown had completed purchase of another 398,302 acres: 'there are grounds for suggesting that the problem was as much one of perception as reality'.[11]

15.4 Retreat from Voluntarism and Self-Determination, 1903–08

15.4.1 Compulsory provisions commence

Early steps were taken to get more land vested in the councils and alienated.Under the Maori Land Laws Amendment Act 1903, Land Councils could, on their own authority, vest in themselves land which was governed by the 1895 Native Townships Act (previously a majority of owners had to request this). The Native Minister could vest blocks in the councils to administer, with payment of survey liens being a first charge on the land. (This was an alternative to a portion of the block being sold under an order of the Native Land Court to pay for surveys). Also, by the Native Land Rating Act 1904, where the Court had made an order against Maori land for non-payment of rates, the Native Minister could similarly vest it in the councils.

Loveridge rightly notes that, although involving compulsory vesting for leasing, these last two measures were intended to rescue land from the alternative of forced sale.[12]

15.4.2 The Maori Land Settlement Act 1905

By the Maori Land Settlement Act 1905, the Government seriously began to take control of Maori land again, and the agencies administering it.

(1) *Compulsory vesting*

In 1905, Carroll told the House that too much Maori land remained undeveloped and unprofitable; he introduced, late in the session and with limited consultation with Maori, the Maori Land Settlement Bill. Section 8 empowered the Minister to compulsorily vest land in the Land Councils (now renamed boards) which in his opinion was 'not required or is not suitable for occupation by the Maori owners' for lease, not sale, for up to 50 years. This, said Carroll, would provide 'a ready and quick method' for dealing with lands owned by a large number of Maoris, who can not utilize them, and that consequently for years passed these areas have remained unprofitable.[13] Carroll wanted this applied to all the North Island but came up against William Herries, shadow minister of Native Affairs for the Reform Party. Herries wanted to resume Crown purchasing everywhere. The compromise in the

11. Loveridge, pp 51–53. (Note that Willan calculates that the completion of purchases begun before 1899 was 467,898 acress pass to the Crown between 1900 and 1905. See below, chapter 11.)
12. Loveridge, pp 55–57

Act was that the Crown would resume purchasing in five of the seven land districts and that compulsory vesting for leasing (but not Crown purchase) would apply in Taitokerau and Tairawhiti districts until 1 January 1908. It must be appreciated that the context of this legislation was fierce pressure from the settler community to 'open up' remaining undeveloped Maori land, led by the Opposition and including a campaign in 1905 by the *New Zealand Herald*. Sections 20 to 26 of the Act even the allowed the Crown to buy a block on a basis of the majority in value of the owners signing, and to pay the minority's share to the Receiver-General.

Amendments to the Maori Land Settlement Act in 1906 provided for compulsory vesting for non-clearance of noxious weeds, and for land suitable for Maori occupation 'but not properly occupied by the Maori owners', which could be leased to other Maori.

Dr Loveridge's analysis shows that 153,891 acres were compulsorily vested in the boards between 1906 and 1909, being 96.4 percent of all lands vested in this period. About 136,471 acres of this was vested under section 8 of the 1905 Act.[14]

(2) *The councils are restructured*

The 1905 Act also lopped off most of the Maori representatives of the land boards leaving only the president and two appointed members, one a Maori. Carroll argued that there was a 'prejudice in the public mind' against the councils, and suggested that 'better men' could be got by appointment rather than election.

The change was protested by a substantially-signed Tainui petition. The historian John Williams noted that by this change 'the pretence of the 1900 Act that the Maoris were being granted a measure of self–government was all but dropped'.[15]

(3) *Removal of restrictions on leasing*

The 1905 Act also removed most of the conditions on the boards' approval of leases of Maori land. Previously, restrictions on alienation could only be removed by the Governor in Council but now the boards themselves could approve alienations. The Act itself provided that the rent be not less than five percent of assessed capital value, and that the lessors had sufficient other land or income for their maintenance. The result was a spurt of direct leasing, totalling 905,947 acres by March 1909 – over 2000 individual leases. Stout and Ngata, however, considered that the gathering of the individual owners' agreements was mainly the work of a select group of agents, and recommended lease by public auction, as with the vested lands.[16]

(4) *Carroll's stance*

In Dr Loveridge's view, Carroll was not reluctant to see compulsory measures taken that would cause undeveloped Maori land to be leased and yield revenue. He was

13. NZPD, 1905, vol 135, p 703 (cited in J L Hutton, 'A Ready and Quick Method': the alienation of Maori land by sales to the Crown and private individuals, 1908–30' (report for the Crown Forestry Rental Trust in negotiation with the Waitangi Tribunal Rangahaua Whanui series Wellington, 1996) p 23)
14. Loveridge, pp 59–61
15. John A Williams, *Politics of the New Zealand Maori*, p 127 (cited in Loveridge, p 80)
16. Loveridge, pp 82–84

opposed to sale, unless the owners clearly wanted to sell and the land was really surplus to needs, but as far as leasing was concerned, and the provision of a swift and effective machinery to assist leasing, Carroll did not need much pushing from the settler hue and cry to shift away from the principles of the 1900 Act towards the more mandatory provisions of 1905, with the boards dominated now by Crown appointees. Carroll remains something of an enigma in this time of intense concern about Maori land.[17]

15.5 Crown and Private Purchases, 1900–10

15.5.1 Crown purchases, 1900–05

Meanwhile, although no new Crown purchases had been initiated since 1899, the 'completion' of purchases already initiated saw a further 467,898 acres pass to the Crown between 1900 and 1905.[18]

15.5.2 Crown purchases under the 1905 Act

Crown purchases between 1905 and 1910 resulted in 294,858 acres being acquired, mostly under the 1905 Act, with some still being 'completed' under previous legislation.[19]

15.5.3 Private purchases, 1900–09

Private purchasing was still heavily restricted but private persons could buy if the land was owned by not more than two owners (prior to 1895) or, (if owned by more than two owners), by removal of restrictions on the recommendation of a Maori land board. Willan remarks that 228,042 acres was acquired by private purchasers between 1900 and 1909.[20]

15.6 Assistance Proposed for Maori Farming

As part of the trade off for renewed purchasing, Ngata at last secured some support in principle for financial assistance for Maori farmers. Section 18 of the 1905 Act provided that advances could be made to Maori from the Land for Settlements Account to help their farming ventures. Policy statements in 1906 for the first time included the intention to 'give the Natives a "start" to farm their lands (set aside for

17. Loveridge, pp 97–90
18. AJHR, 1911, g-6, p 2 (cited in Rachel Willan, 'Maori land sales 1900–1930', report for the Crown Forestry Rental Trust in association with the Rangahaua Whanui programme, Wellington, 1996, p 7)
19. Willan, p 9
20. Return of Native Lands, 20 October 1900 to 30 June 1909, NA 16/1 (cited in Willan, p 10) See also Hutton, 'A Ready and Quick Method', p 26

their maintenance) and to guide them in making the land productive'. Hutton's view is that the loan provision was 'not well promoted or entirely successful' among Maori communities.[21]

An effort was also made to define in the Acts the minimum area of land necessary for maintenance of Maori: the equivalent of either 25 acres of first class land, or 50 acres of second class land, or 100 acres of third class land for each man, woman, and child.[22]

15.7 The Stout–Ngata Commission

Carroll continued to try to steer between seeing Maori land retained and developed by Maori, and the relentless pressure by settlers to secure it for themselves. The political reality for Carroll (and perhaps also his own conviction to some extent) was that Maori land could not remain 'idle': if Maori did not develop it then it had to be made available for settlement. Moreover the settlers wanted the freehold not the leasehold: 'Maori landlordism' remained a very negative term in the settlers' vocabulary.

The Liberal Government thus moved towards a 'stocktaking' or inventory of remaining land. In 1906, it set up a royal commission comprising Sir Robert Stout and Apirana Ngata, to appraise all remaining Maori land. A sufficiency of land was to be set apart to be occupied and farmed by the Maori owners; the balance was to be opened to settlement by Crown purchase, by vesting in the land boards for leasing, or by the owners leasing it themselves under the supervision of the land boards.[23]

The commissioners' terms of reference suggested that land set apart for Maori might be for individual occupation and farming, or by the owners as a tribe or village, or by other Maori (before alienation to settlers). Prompt and detailed reports were expected, including recommendations for compulsory acquisition.[24]

Of the 4,975,444 acres of remaining land, the commissioners ultimately investigated 2,791,190 acres (the balance being already under lease) and made recommendations on 2,040,084 acres before the commission was terminated. They met almost every hapu involved and, by their own account, with few exceptions their recommendations reflected the wishes of the majority – albeit wishes which involved recognition of the guidelines under which the commissioners were working. Their recommendations also reflected a sharp appreciation of how little good land was left to Maori in many districts. Recommendations for sale were therefore for only 66,000 acres, 19.1 percent of the area ear-marked for 'general settlement', in the first half year of the commissioners' work, and 280,000 acres (80.9 percent) for leasing.

21. AJHR, 1906, b-6, p. xiv, (cited in Hutton, 'A Ready and Quick Method', p 17)
22. AJHR, 1907, g-1c, p 8
23. Joseph Ward, financial statement, 28 August 1906, AJHR, 1906, vol 2, pp xiii–xiv (cited Loveridge, p 64)
24. AJHR, 1907, g-1, pp i–ii

15.8 The 1907 Act

But the commissioners were overtaken by the impatience of the legislature. Part ii of the Native Land Settlement Act 1907 provided for the administration of leases *to* Maori by the land boards. This could potentially have affected 867,479 acres of the land ultimately covered by the commissioner's recommendations. Under Part i of the Act, however, the land boards were by order-in-council to receive the land recommended by the commissioners to be not required for Maori occupation. By section 11, the boards were to divide this approximately 50 percent for lease (for up to 50 years by public tender) and 50 percent for sale (by public auction subject to an upset price).

The matter of the 50:50 split was strongly debated in the shaping of the Act. Carroll and Ngata had to give way to Herries and his allies in the Native Affairs Committee, Carroll gaining a minor concession in the form of Maori being able to lease to Maori and provision for Maori farmers to mortgage their land to pay for stock and improvements.[25] Not only did the Government gain the power to vest land compulsorily in the boards, but for the first time the boards were directed by statute to sell half of it. Although sale under this Act was no longer by secretive purchasing for trivial prices, the compulsory aspect was a heavy intrusion into the free choice of the owners – choices which the owners were expressing in detail to the Stout–Ngata commission.

The Act was also an overriding of the trend of the Stout–Ngata recommendations. Of the 346,000 acres they had so far recommended for general settlement, only 66,000 acres or 19.1 percent was ear-marked for sale. Eventually they would recommend nearly 700,000 acres for general settlement; but now 50 percent of that would be sold. Stout and Ngata themselves commented in 1908 that the provision amounted to confiscation, and was not a provision which could be applied to European land.[26] This would appear to be a clear breach of the Treaty.

By January 1910, some 317,098 acres was actually vested in the boards under Part i of the 1907 Act and 187,489 acres under Part ii. (Dr Loveridge gives an alternative figure of 328,882 acres under Part i from another return.[27]) According to Dr Loveridge little was done with this land before the boards came under the virtually identical provisions of Parts xiv and xvi respectively of the Native Land Act 1909.

Much more land was recommended for compulsory vesting by Stout and Ngata (or by Stout and Jackson Palmer, Ngata's successor through 1909): 943,521 acres for general settlement and 869,481 acres for Maori settlement. But, confusingly, at least 135,000 acres of this (from both categories) was subject to timber agreements, another 222,000 was land being put under incorporated owners, and 20,000 sold.[28]

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25. Hutton, 'A Ready and Quick Method', p 24
26. AJHR, 1908, g-1f, pp 1–2, 4. See discussion Loveridge, pp 71–73 and Barbara Gilmore, 'Maori Land Policy and Administration during the liberal period, 1900–1912', MA thesis, University of Auckland, 1969
27. ma 16/1, Native Department reports on Native Land Commission recommendations (cited in Loveridge, p 76)

A 1908 amendment of the Native Land Settlement Act added to the boards' responsibilities the control of the Native Townships and the leases under the Thermal Springs District Act 1908. The amendment Act also made the boards responsible for confirming all alienations of free–hold land in the North Island.

15.9 The Native Land Act 1909

15.9.1 The Act

A consolidation of the endless stream of legislation affecting Maori land had been proposed by the 1891 Commission. In 1909, urged by Carroll, Stout, and Ngata, the Government began the consolidation. Carroll and Ngata played major roles in shaping the law; otherwise Maori opinion was not systematically consulted in the drafting.

Principal provisions of the Act were as follows:

(a) The Act retained the Maori land boards as restructured in 1905

(b) Part xiv of the Act dealt with lands vested in the boards under Part i of the 1907 Act, as a result of Stout–Ngata recommendations. This was the category of which 50 percent was to be sold and 50 percent leased. That requirement remained. As Dr Loveridge remarks, the Government did not, in 1909, take advantage of the opportunity to drop a measure which might force sales against the real wishes of the owners.

(c) Part xv of the Act took over the provisions of earlier legislation for the administration of land vested in the boards *leasing* only (whether vested voluntarily or compulsorily). This restriction (to leasing only) on the vested land remained, although the terms and conditions agreed with owners under the 1900 Act were unilaterally replaced by the terms and conditions of the 1909 Act itself. But the 1905 provision for compulsory vesting of 'idle' Maori land in Taitokerau and Tairawhiti was dropped. Hence it was to be 'the initiative of the assembled owners' that land would be vested in the boards, in any district.

(d) Part xvi took over the provisions of Part ii of the 1907 Act, relating to land reserved for 'native occupation' under the Stout–Ngata recommendations. This land could be leased by the boards (but not directly by the owners) for up to 50 years. The main change in 1909 was that the 10 owners of the land could now take it out of Part xvi – with the possibility that it could be sold.

(e) Part xvii provided for the incorporation of owners (the only good part of the Act according to Wi Pere, member for Eastern Maori). Alienation by incorporated owners (like alienation of unincorporated owners under Part xviii) had to be approved for the Maori Land Board or Public Trustee, who would deduct costs of the alienation and outstanding rates and taxes and pay over the balance.

28. Loveridge, pp 76–77

(f) Section 207 swept away all the previous web of restrictions on alienation of Maori land and stated simply that:

> a Native may alienate or dispose of land or any interests therein in the same manner as a European, and Native land or any interests therein may be alienated or disposed of in the same manner as if it were European land.

A lessee or purchaser no longer had to concern himself with the effect of some 40 other Acts or visit Wellington to get a removal of restrictions by Order-in-Council. Unless there was a restriction in the 1909 Act itself he or she could deal with the land. The removal of previous restrictions extended to the papakainga land defined under the 1900 Act – a category which was no longer formally restricted.

(g) Section 220 laid down what the new restrictions were. The main ones (in a list of eight) were: that the instrument of alienation had to be promptly executed and witnessed; that the alienation could not, in the opinion of the board, be 'contrary to equity or good faith or the interests of the Native alienating'; that no native could be made 'landless' by the alienation. A 'landless' native was defined as one whose 'total beneficial interests in Native free–hold land . . . are insufficient for his adequate maintenance'. The minimum acres defined in the 1905 Act as necessary for Maori to retain for maintenance was dropped. Finally, payment had to be 'adequate', by the reference to the valuation of land to the Land Act 1908.

(h) Under section 217 the land boards had to confirm all alienations, having first satisfied themselves that the criteria of section 220 had been met. Dr Loveridge notes that, in effect, this extended the system of direct leasing with control by the boards, adopted in 1907, to all alienations, with the likely expectation that a greater flow of alienations would follow.[29]

(i) Part xviii introduced perhaps the most important provision of all – alienation via a meeting of assembled owners. Carroll introduced the provision in parliament as follows:

> Where the owners exceed ten the bill proposes a new method of dealing with land, which is practically a rescusitation of the old runanga system, under which from time immemorial the Maori communities transacted their business.[30]

The assembled owners could choose (subject to the approval of the land board) to: vest the land in the Maori Land Board for lease or sale; to form an incorporation under an order of the Native Land Court; to effect a sale or lease to a particular individual; and to sell the lands to the Crown.

29. Loveridge, p 102
30. NZPD, 1909, vol 148, p 1102

The meetings were to be called by the relevant land board and chaired by its president. A resolution was deemed carried if a majority by 'aggregate share' in person *or by proxy* voted for it.[31]

(j) Under section 363, in respect of land for which it proposed to negotiate, the Crown could prohibit for one year (extendable to three years) all other dealings – sale, lease, licence, mortgage, and so forth – affectively imposing a form of pre–emption on the land concerned.

15.9.2 Character of the 1909 Act

Prime Minister Joseph Ward stated, in supporting the Bill, 'it is proposed to purchase from the Natives as large an area as possible'.[32] Carroll, who saw the Bill through the House, considered that 'ample protection' had been included 'against the improvidence of the average Maori'.[33] Notwithstanding the safe-guards, Loveridge considers that the Act was one 'which more than anything else facilitated further sale in Maori land'. Both Crown and private purchasing was facilitated. Carroll and Ngata did not apparently press hard to put under the boards the land recommended by the Stout–Ngata commission for *Maori* occupation but not yet vested. Pakeha settlement of Maori land then proceeded swiftly from 1910. Loveridge concludes:

> This was probably the outcome that James Carroll expected from the 1909 act – easier alienation of Maori land, but alienation without the injustices which had marred such transactions in the past. He may also have thought that owners would give priority to leasing over sale. If this was the case though, he and Ngata seriously under-estimated the amount of land which would actually be lost to Maori over the following years.[34]

15.9.3 Status of Maori land, 1910

Statistics of Maori land holding varies somewhat according to the various official returns compiled around this time. The Stout–Ngata commission estimated total Maori holdings on 20 December 1908 as 7,465,000 acres of which 2,675,177 were leased directly by the owners, a further 247,489 leased through Maori land boards with 150,000 under the East Coast Trust and Mangatu Incorporation.[35] By October 1911, the total had reduced to 7,137,208 in the North Island.[36]

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31. Briefly a system of 'precedent consent' was used. A party to a transaction could ask the land board whether a meeting of assembled owners was required. The board could decide whether the transaction was in the of public interest and the interest of the Maori owners without the need for a meeting of assembled owners. If consent was given the purchaser would proceed as if the land was owned by fewer than 10 owners. The provision was abolished in 1912 (Bennion, p 3).
32. Financial statement, 10 November 1909, AJHR, 1910, b-6, p xxii (cited in Loveridge, p 106)
33. NZPD, 1909, vol 148, p 1103 (cited in Loveridge, p 107)
34. Loveridge, p 107
35. NZPD, 1910, vol 150, p 339
36. AJHR, 1911, g-6, p 3, 'Statement showing the position of Native lands in the North Island'.

15.9.4 Management of vested land, 1910–27

(1) *Sales*

Dr Loveridge's reading of the official returns shows some 775,320 acres of Maori land vested in the seven Maori land boards under various categories of the 1909 Act – about one tenth of the land remaining in Maori hands in the North Island. Most of this was in the Tokerau, Waikato–Maniapoto, and Aotea districts. The figure grew to 861,155 acres by 1927.[37] About 147,000 acres of vested land were sold during that period, mostly in the Waikato–Maniapoto land board district.[38] In Rachel Willan's view, this vested land was mainly bought by the Crown, including many sections in the Native Townships. Dr Loveridge points out that the proportion of vested land sold by the boards amounted to about the same proportion of Maori land alienations generally; and this suggests that the protection to owners offered by vesting was not great.[39] Vesting under the 1907 Act had been largely for the purpose of opening 'idle' land to settlement, and for this purpose seems to have been carried through under the 1909 Act. The years of most sales after 1909 were in the decade following, that is, 1910 to 1918.

(2) *Leases*

The boards were equally active in letting vested land in the decade after the passage of the 1909 Act. Between 1910 and 1928 they leased 180,107 acres. Yet Dr Loveridge points about that this amounting to only about a third of the vested lands available for leasing. In 1928, some 200,000 acres were as 'idle' as they had been when vested.[40]

15.9.5 Alienation by owners through the Maori land boards

Under Part xvi of the Act, only 214,720 acres were placed under the boards between 1907 and 1927, for lease to lessees from among the beneficial owners themselves, and only 12.3 percent of this (26,508 acres) was so leased.[41]

Part xviii was the provision whereby in respect of blocks with *more than 10 owners*, a meeting of 'assembled owners' could lease or sell the land directly to the Crown or private individuals, with the boards checking the conditions for approval of the alienation and carrying it into effect. The provision was used extensively. By 1930, almost one million acres (962,186) had been sold and 536,346 acres leased under Part xviii. Again the first decade after the passage of the Act saw the most activity.

Blocks with 10 *or fewer owners* could be sold or leased directly to the Crown or to private parties (without a meeting of assembled owners). Alienation to private

37. Loveridge, pp 113, 119
38. For a detailed analysis of very complex statistics, see Loveridge, pp 119–128. Willan gives the figure of 147,788 acres (Willan, p 26).
39. Loveridge, p 129
40. Ibid, p 132
41. Ibid, pp 133–135

parties required the board's approval. Even more land passed in this way in the period to 1930: 1,196,096 acres by sale (including 44,549 acres of land in the South Island) and 1,080,504 acres by lease. In the first five years of the Act's operation, an average of 225,000 acres a year was alienated and 120,000 per year for the next five years.[42]

15.9.6 Total sales and leases through the Maori land boards, 1910–30

In all categories of their responsibilities under the 1909 Act, the Maori land boards carried out, or over–saw, the sale of 2,305,203 acres of Maori land between 1910 and 1930 and the leasing of 1,823,465 acres. A further 70,514 acres were sold in 1930 to 1933 (under which categories of the Act not being differentiated in the statistics), and a further 106,194 acres leased. By Dr Loveridge's calculations, this gives totals of 2,375,717 acres sold and 1,929,659 acres leased between 1910 and 1933 through the boards, or 4,305,376 acres altogether.[43]

15.9.7 Crown and private purchases, 1911–30

Rachel Willan has made a separate study of Crown purchase data, both through the land boards and outside of them, for the Rangahaua Whanui programme. She began with the annual returns from the Government's Native Land Purchase Board (not from the Maori land boards) which showed 1,536,716 acres of Maori land purchased by the Crown between 1911 and 1930.[44] Only 360,138 acres of this were shown as being through Maori land boards, approved under Part xviii (involving 10 or more owners). Willan then notes various other categories of Crown purchases which make up the balance of 1,176,578 acres:

(a) Purchase of lands vested in the Maori land boards. The minutes of the Native Land Purchase Board show that this frequently occurred but totals are not available and it is not clear how much of the 147,788 acres of vested land sold was bought by the Crown and how much by private parties.

(b) Purchases from the Native Trustee. Again figures are not complete, but AJHR returns show 77,733 acres including 56,541 acres in Taupo–Tokaanu and 26,000 acres of West Coast Settlement Reserves.

(c) Urewera District purchases. From 1914 to 1921, 263,485 acres were purchased by the Crown in this area, prior to the Urewera acquisitions being included in the purchase board returns.

(d) Maori land with fewer than 10 owners sold to the Crown and land under Maori incorporations, did not have to pass through the land boards for confirmation. Willan estimates that between about 592,000 and 771,000 acres was acquired by the Crown by this means.[45] Willan concludes there-

42. Loveridge, p 1–39
43. Ibid, pp 141–143
44. Willan, p 25
45. Willan, pp 35–41

fore that 2,282,299 acres was purchased through the Maori land boards between 1910 and 1930 (Loveridge has 2,305,203 acres) both by the Crown and private purchasers; and that, in addition the Crown purchased 1,211,167 acres by processes that did not involve board approval, a combined purchase total of 3,578,065 acres between 1911 and 1930.[46]

Thus, the 7,137,205 acres owned by Maori in the North Island in 1910 had, by 1930, been reduced by sales totalling about 3.5 million acres.[47] Between 2.5 and 2.7 million acres of this had been leased over that period and much of that leased land eventually purchased. About 3.6 million acres remained in Maori title at 1930.

15.9.8 Location of most sales

Sales which came under a form of approval of the Maori land boards, 1910 to 1930, were distributed as follows, by digital calculation according to Rangahaua Whanui districts:[48]

District	Acres
Auckland	549,648
Hauraki	88,229
Bay of Plenty	151,307
Urewera	590,096
Gisborne–East Coast	353,289
Waikato	256,808
Volcanic plateau	501,351
King Country	806,107
Whanganui	258,749
Taranaki	252,640
Hawke's Bay–Wairarapa	704,170
Wellington	427,532

15.9.9 Crown advantages in purchasing

The 1909 Act contained a number of provisions which favoured the Crown over other purchasers, if it chose use them. It could restore Crown pre–emption over

46. See Willan, p 33 for the breakdown of categories. Willan has focused on sales; her figure of 1,260,479 acres leased between 1900 and 1910 and 938,494 acres leased 1911 to 1930 did not correspond well with Loveridge's figures of 905,947 acres and 1,823,465 acres respectively for those two periods. Further work is required on the basic data in various official returns which are confusing and difficult to analyse.
47. See Loveridge, pp 137–143 and Willan, pp 32–33. (Willan's return is inadvertently headed 1900 to 1911 instead of 1900 to 1930; her sub–heading 1900 to 1910 should read 1911 to 1930.)
48. Table prepared by Dr Keith Pickens from AJHR tables identified by Dr Loveridge.

particular areas or a particular time. It could purchase any land vested in the Maori land board over which the board had power to sell, without auction or public tender, on terms agreed with the board. (This further shut out the beneficial owners from involvement in the disposal of their land). The Crown could purchase from an incorporation without the board's confirmation and could also purchase undivided interests. (This meant that, as in the nineteenth century, the Crown could treat with some shareholders, increase its ownership and apply for partition in due course. This provision undermined the capacity of the owners as a whole, or a block committee, to control the alienation.) Finally, the Crown could purchase any Maori not vested in boards in the same manner as the European land, without confirmation being required.

15.9.10 Prices paid by the Crown

The Crown purchased heavily along the line of the Napier–Wairoa railway, in the King Country (Rangitoto, Rangitoto Tuhua, Wharepuhunga, and Tauwera blocks) and on the East Coast.[49] The Crown also bought in the West Coast Settlement Reserves, the Native Townships of Te Kuiti, Taumarunui, and Otorohanga and at Orakei in Auckland, not for new settlement but to provide a better tenure for existing lessees.[50] This cost the Crown rather high prices in the post World War I boom. Ngata suggested, however, that Maori were still being paid pre–war prices, at 1909 valuations, in the order of 12s 6d to £1 an acre. Maori in 1921 were pressing for independent valuation. Bennion feels unable to guage the accuracy of Ngata's remarks.[51] Nevertheless he cites the comments of the Under-Secretary of the Native department in 1932, in respect of criticism by the National Expenditure Commission of poor returns from the Government's land purchase policy generally: the Native Department should not be blamed, said the Under-Secretary, as it was 'undoubted' that the Native Land Purchase Board had purchased at prices much lower than others were willing to pay Maori and that Maori were obliged to sell to the Crown at Government valuation because of the Government's capacity to impose pre-emption over any block for which it was negotiating.[52] This seems to support Ngata's accusation.

15.9.11 Reform Government policy: tightened Crown control

(1) *William Herries*

William Herries, member for Bay of Plenty, shadow minister for Native Affairs during the Liberal regime, had never liked the bureaucratic controls and slowness of the Maori Land Board procedures, limited though those controls were. His

49. NZPD, 1920, vol 187, p 1293 (Herries). Many blocks and prices are given. See also Bennion, 'Maori Land and the Maori Land Court, 1909 to 1953', Rangahaua Whanui Series unpublished draft, 1996, p 24.
50. Bennion, p 25
51. NZPD, 1921, vol 190, p 156 (cited in Bennion, pp 25–26)
52. Under Secretary to Native Minister, 5 August 1932, ma 1/19/14 (cited in Bennion, p 49)

preference was for direct dealing, with the Native Land Court rather than the boards approving the transactions. As Native Minister from 1912, he immediately took steps to simplify the procedures for administering Maori land.

(2) *The court and the boards merged*

By the Native Land Amendment Act 1913, Herries, in his own words, 'practically made the Native Land Court and the Maori Land Board the same'.[53] Apart from his general dislike of the boards, which he considered 'not strong enough' to move the land quickly, Herries was concerned that different decisions were being made over the same land by the Court and by the boards. By the 1913 Act, in each Native land district a judge would hence forth constitute the court, and the judge and registrar of the court would together constitute the land board. The judge would sit either as court or board. Judges and registrars were appointed by normal public service procedures. None had to be Maori. In other words, the 'Maori' land boards had become Pakeha institutions; Maori no longer had any direct involvement in the decision making affecting land vested in the boards. Carroll strongly criticised the change, especially as it was made without serious consultation with Maori owners.

(3) *Increased powers for the Crown to purchase*

The 1913 amendment Act also required the presidents of land boards to report annually on Maori freehold land 'not actually used' by the owners, and gave the boards power to order the court to partition the land (ss 42–62). Furthermore, it gave the Crown power to acquire any interests in Maori land, including freehold land, reserves vested in the public trustee and lands vested in the Maori land boards (including undivided shares of blocks owned by more than 10 persons).

This extended the piecemeal purchase of individual interests, to land held in trusts. Ngata and Carroll bitterly condemned this provision as it enabled the Crown to buy land in trusts and facilitate the acquisition of the freehold by Pakeha tenants of Maori landlords.[54] Herries claimed:

> What I want to do is give the Native himself a chance of cultivating his own land. I want to allow him to sell his own useless land, and use the money to buy ploughs and horses to enable him to cultivate his own land that is cultivable.[55]

This of course begs lot of questions about why the land was allegedly 'useless' to Maori but apparently not useless to Pakeha, and whether the sale of individual interests in multiply-owned land would enable the capital to be used by the vendor in farming any remaining portion. Herries was articulating the usual popular ideology without confronting the practical difficulties in the way of Maori farming. Loveridge notes that the 1913 amendment Act had little measurable effect on the total sales of Maori land.[56] But it is unlikely that the piecemeal acquisition of Maori

53. NZPD, 1913, vol 167, pp 35–36
54. Ibid, p 400 (Ngata) and pp 838–839 (Carroll) (cited in Loveridge, p 150)
55. NZPD, 1930, vol 167, p 388 (cited in Loveridge, p 151)
56. Ibid

interests – about which most Maori in modern New Zealand can tell a story – did not contribute both to the steady diminuation of the Maori freehold estate and to the freeholding of Maori leasehold by Pakeha tenants, (sometimes via an initial acquisition of the Crown, as with the Native Townships for example).

15.9.12 Maori land shortage recognised at last?

The willingness of governments to continue acquiring Maori land well into the twentieth century is astonishing from the perspective of 1975 onwards. Dr Loveridge has shown that Carroll and Ngata too were among the principal architects of the 1909 Act which facilitated Crown and private purchasers. Loveridge cites Ngata's reference to 'the acknowledgedly large remnant of surplus Native land' even as he criticised Herries' 1913 Bill.[57] Ngata and Carroll were, of course, bearing the brunt of settler pressure to bring 'idle' land into production and they tried to facilitate Maori farming first, then leasing and last of all sale. 'Surplus' in Ngata's sense probably meant surplus to what he thought Maori could actually farm themselves, and both he and Carroll genuinely thought it did Maori no good at all to have land in their possession which was not developed and yielding them a revenue.

It was not until 1920, however, that C B Jordan, Under-Secretary of the Native Department, carried out an inventory of Maori land remaining: 4,787,686 acres out of the 7,137,205 acres they had owned in 1911, by his calculation. About 3 million acres of that was leased out, and 380,000 acres occupied by Maori owners. Of the 1.6 million acres remaining Jordan deducted half a million as unsuitable for settlement (a considerable under–estimate probably) which left an average of 19 acres per head for the 47,000 Maori of the North Island and their descendants. He concluded, 'instead therefore, of there being a huge area of Native land available for general settlement, it would seem that there is barely sufficient for the requirements of the Natives themselves'.[58]

15.9.13 Leases tend to become freeholds

Jordan believed that the three million acres leased would 'never return to the occupation of the Native owners'; this was largely correct, because neither the Maori land boards nor the private Maori lessors ever accumulated enough savings from rentals to pay off the tenants for their improvements (as the boards were supposed to do under the 1909 Act); this constituted a powerful pressure either to renew the lease or to sell the freehold. Despite Ngata's warning in 1913 that Maori in many districts might be 'almost homeless', and despite Jordan's warning, another half million acres were purchased by the Crown and private interests with the boards' approval, between 1920 and 1932.[59]

57. NZPD, 1913, vol 167, p 400
58. Herries reported in 1920 that only 15,000 acres remained in customary title (NZPD, 1920, vol 187, p 1290).

15.10 Adequacy of Protection of Maori Interests

15.10.1 Assessment of Maori land requirements

The purchase of close to half of the remaining Maori land (more than half of the readily usable land), when the Maori population was beginning to grow rapidly again, raises even more acutely than before the question of the Crown's obligations to Maori under the Treaty. There can be no doubt whatsoever that in the 1890s (as in the late 1850s) the principal Maori leadership was opposed to any more land-selling whatsoever. The protests, petitions, and alternative laws proposed by the Kotahitanga movement and by the Kahunganui of the King movement vehemently argued that too much Maori land had already been purchased, that the Maori people were threatened by this and that the Crown purchases should stop. The statements of Maori members of parliament reflected the same concerns. Members like Hone Heke (northern Maori) were adamant that 'the balance of the land which remains to us is not sufficient for our maintenance and support and for the maintenance and support of our descendants'. Heke believed that 4 million farmable acres remaining in 1900, amounted to not more than 50 acres a head. 'And let us suppose that the Natives are beginning to increase in any one part of the country: what are they going to live on'.[60]

In response, Carroll, Ngata, and their allies put in place the 1900 legislation, proposing to define inalienable papakainga lands and to lease voluntarily to settlers most of the remainder, via the Maori land boards. It soon emerged, however, that Maori were in no hurry either to lease or sell. There were many good reasons. Stout and Ngata listed several. They include the objection of Maori owners to being 'deprived of all authority and management of their ancestral land', their anxiety that the new policy 'was only another attempt to sweep into the maw of the State large areas of their rapidly dwindling ancestral lands', the preference of Maori owners for direct negotiation, and the acute title problems affecting remaining lands. 'So long as the title was in an abeyance and they were immersed in the joys of litigation, the settlement of the country could wait', noted Stout and Ngata somewhat petulantly.[61] Settler impatience with the slowness of Maori to vest land in the boards led to a number of provisions for compulsory vesting, and then to the 1909 Act which allowed direct dealing by both Crown and private purchasers, with only a cursory check against 'landlessness'. Settler demands, and what was considered by successive governments to be the national interest, over-rode the aspirations expressed by Maori leaders around 1900. But there is evidence also in support of Dr Loveridge's view that leaders like James Carroll believed that holding land in any undeveloped state did nothing for Maori. When he introduced the 1909 Act Carroll did so on the basis that it was restoring to Maori communities, via block committees (which Carroll likened to traditional runanga), the power of decision over their land, including the right to alienate it. In short, he claimed to be recognising rangatira-

59. NZPD, 1920, vol 187, p 1290
60. NZPD, 1900, vol 114, p 511 (cited in Hutton, 'A Ready and Quick Method', p 19)
61. See Hutton, p 13

tanga, not weakening it. The old rationale that it would benefit the Maori themselves to alienate land they were not farming was believed in by Carroll himself and possibly by Ngata too.

But Carroll and Ngata had a clear preference for leasing, not selling; they struggled against the settler drive for the freehold, and resentment of 'Maori landlordism'.[62] Another difference between the attitude of the settler politicians and the Maori leaders was their attitude towards multiple title. Men like Seddon and McKenzie harped away about 'putting a stop' to Maori 'communal' life, the 'non-subdivision of land, and the communal titles which forced them into idleness, carelessness and neglect'.[63] Herries too persistently pressed for individualisation of tenure. Carroll and Ngata on the other hand, East Coast leaders as they were, supported the system of block committees and incorporation of owners, partly because that recognised the traditional rangatiratanga of hapu in respect of land, and partly because most remaining Maori land was unsuitable for sub-division into smal holdings anyway.

15.10.2 Assembled owners

How equitable and representative was the system of dealing through block committees and meetings of assembled owners in any case? Recent writings are divided on the question. Messrs Butterworth and Young are inclined to accept to a considerable degree, Carroll's claim that the power granted in 1909 did return to Maori runanga a collective control of their own lands; it 'gave rangatiratanga a legal recognition' and was 'a very important provision because it was at these meetings that the tribal leaders could exercise their influence to stop the improvident sale of land'.[64] Richard Boast is sceptical: 'The collectivity here being, however, [in the 1909 Act] not any of the natural units of Maori society but the accidental and artificial one of block owners'.[65]

Who were these block owners? In the great blocks held by incorporated owners on the East Coast, they commonly involved large sections of hapu living on or near villages which had grown out of traditional kainga. The public block committee elections, supervised by the Maori Land Court, reflected the dynamics of Maori whanau and hapu relationships, and of factions within them. Moreover, as Butterworth and Young say, the tribal leaders in many areas, seem to have kept a pretty tight control over alienations. More recently, the success of the Puketapu incorporation in the King Country or the Mangatu blocks on the East Coast and many of the properties formerly administered by the East Coast trust, testify to the value of incorporation under strong leaders.

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62. See T Brooking 'Busting Up the Greatest State of All: Liberal Maori Land Policy, 1891–1911', *New Zealand Journal of History*, vol 26, no 1, 1992, p 95
63. NZPD, 1900, vol 144, p 511 (Seddon)
64. G V Butterworth and H R Young, *A History of the Department of Maori Affairs*, GP Books, Wellington, 1990, p 67
65. P Spiller, J Finn, and R Boast, *A New Zealand Legal History*, Wellington, Brooker's Ltd, 1995, p 161

However, the meeting of assembled owners provision commonly meant that the owner group as a whole was not consulted. By section 343 of the 1909 Act, decisions of such meetings were deemed carried if the owners voting in favour owned a larger share of the land, by value,than those who voted against.[66] Only five persons constituted a quorum and proxy voting was allowed Unrepresentative or irresponsible block committees and meetings of assembled owners therefore had power under the 1909 Act to alienate the land of the community, provided they could get a majority by value out of those who managed to assemble on the night. Giving meetings of assembled owners full power to deal with the land, even by sale, may be seen as a part-fulfilment of Treaty rights; but it also by-passed the need for a full consensus of the owners (or even a clear majority of owners), and ignored or over-rode the wishes of owners not present at crucial meetings.

There is the added complication that not all sales of Maori freehold land were foolish or ill-considered: there were, and are still, many parcels of Maori land, fragmented by partition over many decades, and almost useless in economic terms on their own, which could well be grouped with other lands. Ngata's drive for consolidation of title reflects this. So too, do many individual decisions of block committees or trustees who could sell a fragment to a Pakeha farmer who wanted to add it to adjoining land, while the Maori vendors could buy general land to improve their own estates. This is the period when the ownership of general land by Maori starts to become significant, though usually in quite small areas. It is thus difficult to say that every sale of Maori land was prejudicial in its effect, notwithstanding its contribution to the totality of Maori land loss.

Yet the sheer scale of the alienations makes it incredible that all or even most of the land sales were beneficial in their effect, leading to purchases elsewhere or to wise investments of the price paid. That was the theory, or the politicians' justification, for what was being done. In practice, Maori were selling in the twentieth century for the same reasons as in the nineteenth: they needed revenue, and the familiar problems of confused and fragmented title encouraged sale. By now too, the fact was that the land would support only a few commercially viable farms. Owners at most could normally hope for small dividends. Meanwhile the usual personal debts pressed upon them. The pressures and temptations to sell were therefore enormous.

The system of proxies at meetings of assembled owners was also abused, with lawyers representing the purchasers of Maori land collecting the proxies, attending meetings of assembled owners, and out-voting those owners who attended and opposed the alienation. Maui Pomare, in debate, said that a private purchaser could 'pocket a lot of proxies, cram the meeting with owners who wanted to sell – to sell to him – and he got the land'.[67] A trade developed in proxies among competing purchasers. Herries tried to improve the proxies system in 1913 by requiring the intention of the giver of the proxy to be written on the form before the meeting, but

66. J Fisher, 'Native Land Act 1909', *New Zealand Yearbook 1910*, p 714 (cited in Hutton, 'A Ready and Quick Method' p 41)
67. NZPD, 1913, vol 167, p 408 (cited in Bennion, p 12)

this did not necessarily stop a buyer rounding up proxies in his favour. In 1916, Herries admitted that 'a certain amount of abuse had crept in with regard to proxies under earlier regulations'.[68] But one must doubt whether the situation had really been remedied, and in any case about one million acres of land had already been sold.

The process of notification of dealings with Maori land under the boards was also inadequate. The law generally required only putting a notice in the *Kahiti*. Herries, in 1916, admitted 'that there was a chance of abuse' in giving no notice, to the owners, of meeting where their land might be sold. Indeed he tacitly admitted that there had been abuses, but claimed that the problem had been rectified and that there was 'now' no very serious complaint. But by 1916 over half of the land that was going to be sold under the 1909 Act had been sold.[69] In any case, doubts must remain about the adequacy of the *Kahiti* notices. Herries thought the owners would 'probably' hear of the meeting if they did not read the *Kahiti* themselves. No doubt some Maori were avid readers of this journal, looking for mention of blocks in which they had interests, but they were almost certainly a minority, perhaps a very small minority. With increased fragmentation of title through succession, and increased mobility of the population, many Maori simply never heard of advertised meetings of land board or assembled owners. They joined an increasing mass of people who felt that the whole thing was beyond them, and were thus prone to consent to sale of their interests when a buyer or his agents sought them out.

15.10.3 Partitions

The system of partitioning out alienators' shares of a block imposed a serious burden upon Maori groups trying to retain land. They constantly had to show a completely united front to prevent partition. The ease with which the Crown, in particular, could secure partition of a block (through the land boards), as in the nineteenth century, presented a remorseless pressure. which effectively discouraged efforts to develop land, and instead, as before, encouraged land selling amongst sections of the owners. It was also a secretive process. As Pomare said 'while the Maori is having his breakfast the Judge is partitioning without his knowledge'.[70]

Bennion suggests that the power of meetings of assembled owners to hold on to the land was largely illusory. Meetings were called at the request of one owner (or seller) and 'the mere fact of a meeting being held was almost a guarantee that some land would be purchased and pressure placed on the remaining estate which, if the partition was a significant one affecting fertile areas in the block, made it less economic as a consequence'. The only way to avoid sale, some Maori concluded, was never to assemble. Partitions could bear very hard on those who did not turn up to meetings, however, and help shape the decision. Even their homes and gardens

68. NZPD, 1916, vol 177, pp 737–738
69. Ibid, pp 737–738 (cited in Bennion, p 14)
70. NZPD, 1913, vol 167, p 386 (cited in Bennion, p 112)

could be affected. 'Innumerable petitions' flowed into the Maori Appellate Court about the partitions.[71]

15.10.4 Leases

The tendency for leases to lead to sales of the freehold has been noted by several analysts. This was partly because, as Loveridge noted, the boards did not enforce the creation of sinking funds from rents received, to pay for the improvements at the end of the lease, as the 1909 Act envisaged.[72] There remained also, as always, the inability of Maori to raise adequate finance to restock the land once the lease fell in. The Crown's buying of undivided shares in blocks exacerbated the problem, as mentioned above. The Waipiro block in the Ngati Porou rohe, of 35,000 acres, was a celebrated case in point.[73]

15.10.5 Checks on landlessness

The available evidence casts serious doubt on the adequacy of the processes for checking on Maori landlessness. Ngata and others complained in 1907 that no machinery had been provided to enforce the minimum acreages to be retained by Maori according the 1905 Act.[74] The provisions of section 373 of the 1909 Act requiring the Crown to ensure that no Maori would become landless (in terms of the definition in the Act) was weakened by subsection three, which provided that a breach of the condition would not of itself invalidate the transaction.[75] A clause in the 1913 amendment Act (section 91) provided that the 'landlessness' provision of the main Act did not apply if the land being sold would not, in any event, provide sufficient support to the Maori owner, and where another form of income would be an adequate alternative. (This probably explains why the Waikato– Maniapoto board approved some transactions while noting that the vendor would be landless).[76] In respect of private purchases, the onus was on the *purchaser* to show that the Maori he was purchasing from was not landless. 'It is his business to find that out' said Herries in 1916.[77] This opened a window to sharp practice and it is difficult to see how, without making its own independent checks, the boards could be sure of the facts alleged.

Dr Loveridge doubts that the checks required before confirmation by landlords could have been adequate in view of the sheer number of transactions passing through them or through the Native Land Purchase Board. Hutton, who studied the

71. Bennion, pp 18–21
72. Loveridge, pp 172–173
73. NZPD, 1921, vol 190, pp 156–157 (Ngata) (cited in Bennion, p 22)
74. NZPD, 1907, vol 140, pp 142 (Ngata), 387 (Fraser)
75. Hutton, 'A Ready and Quick Method', p 36
76. J L Hutton, 'The Operation of the Waikato–Maniapoto District Land Board', report for the Crown Forestry Rental Trust in conjunction with the Twentieth Century Maori Land Administration Project), May 1996, (bound with Hutton 'A Ready and Quick Method'), pp 16–17
77. NZPD, 1916, vol 177, pp 737–738

Waikato–Maniapoto board in some depth, considers that the 1909 Act created a huge load of work for the boards which were given few additional resources. He notes that there is little evidence in the minutes of the Waikato–Maniapoto board of questioning about the reasons behind the sales. Although there was commonly a check that alienators had land elsewhere – the information to be supplied by the Native Land Court staff – there was little evidence of checks on its quality, the revenue it yielded, the debts it carried, or the needs of the heirs (the family of the alienator). With a steady schedule of meetings, and upwards of thirty applications for alienation to be considered at each meeting, 'it is difficult to see how the board could have properly guaged whether or not the sale was not "contrary to equity or good faith or to the interests of Natives alienating"'.[78]

Hutton's analysis suggest that boards rarely declined to approve an alienation. The most common reason for declining was under-evaluation of the land concerned. Submission of deeds with the purchase price to be entered later was also a ground for rejection.[79] The dilemmas of the nineteenth century remained as sharp as ever: Maori groups and individuals wanted to control the alienations of land with minimal interference by boards and Government officials, largely because they wanted cash in hand. Some wanted it for development purposes, some for consumer spending, many to pay off debts. Bennion cites the case of a Wairarapa chief who:

> at one time had no fewer than three motor–cars running. He was living upon his capital, and today he is heavily in debt all over the place, and continually representations are made to the Native Land Court, when sitting at Greytown, to permit this man to sell even the last remnant of his property in order to pay his debts. Judge Gilfedder, to his credit be it said, has declared that he will not make the transactions of the Native Land Court a method of paying the debts of Natives, and he has set his face against these men doing anything further to dispossess themselves.[80]

The root of the dilemma is of course that governments had created the possibilities for individual Maori to secure an interest in the title and alienate that interest in what had been a tribally controlled patrimony.

15.10.6 Relation of the boards and court with the Government

Hutton is of no doubt that the Maori land boards were agencies of the Crown: 'The Board was created by the Crown and followed Crown policy.'[81] Bennion notes that the boards were not under the direct administrative control of the permanent head of the Native Department, and had power to govern their own proceedings. But the Government's legal advisers (such as John Salmond) argued that the Government could intervene very directly in the boards' decisions:

78. Hutton, 'Waikato–Maniapoto District Land Board', pp 16–17
79. Ibid, pp 18–28
80. Bennion, p 32
81. Hutton, 'Waikato–Maniapoto District Land Board', p 33

> when it really mattered the government in reality had control over the boards . . . not only were they in their internal operations variously agents for Maori, trustees for Maori and sometimes it seems, agents or more directly servants of the Crown, but the legislative changes such as the 1913 legislation and legislation after 1934 were to alter their external relationships, further complicating their internal responsibilities and duties. And while the land court remained somewhat more distant from government simply because it was a court, in the period until 1932 when some further distinction was made, the court virtually was the board, and it was also very much tainted with the confusion over roles and status.[82]

In Tairawhiti, Judge Jones was for many years a Native Land Court judge, the president of the Maori Land Board, and a district land registrar, a not unusual situation apparently.

Efficiencies in administration were gained in one sense by this conflation of roles in one person, but possible conflict of roles or even of interest certainly existed. Bennion notes evidence that boards assisted Government land purchase officers with cash advances at times, acted administratively to facilitate leasing, and became caught up in ambivalent roles in the distribution to Maori of revenues received (indeed they commonly sought the Under–Secretary's direction). The trustee aspect of the boards' role appears to have suffered under the pressure of their other duties.[83] Bennion cites a letter of resignation from the administrative officer of the Ikaroa board in 1918 listing a range of matters suggesting carelessness of the interests of Maori owners of land for which the board was responsible. In 1932, the National Expenditure Commission noted that 'the functions of the Maori land boards have so changed in recent years that they are in reality branches of the Native Department, and this should be recognised'.[84] This was a reference to the boards' role in development schemes but it reflected an earlier tendency.

15.11 Conclusions on Maori Land Administration, 1900–30

The period 1900 and 1930 (or more particularly the period 1910 to 1930 when the 1909 Native Land Act came into effect) was a period of very rapid land alienation, rivalling that under the Liberals in 1891 to 1899. Some 4.5 million acres was acquired by the Crown and private purchasers between 1900 and 1930. About three million acres were leased between 1900 and 1930, much of it subsequently freeholded. The rate of alienation was high – over 250,000 acres a year during the heaviest period of purchasing between 1911 and 1915. Although the law and administrative structures were supposed to assist Maori to retain and develop their land and sell only that which was surplus to their needs, there was relatively little developmnet in fact, due to the complexity of titles, fractionation of the land into uneconomic holdings, and lack of development capital. After 1909 (or even after

82. Bennion, pp 26–27
83. Ibid, pp 28–30
84. AJHR, 1932, d-4a, p 400, para 37

1907 or 1905) the system operated mainly to facilitate alienation of the land for pakeha settlement. As Dr Loveridge comments, in respect of alienation through the Maori land boards:

> it is very difficult . . . to see how the interests of Maori were served by a land administration system which facilitated the permanent alienation of more than two million acres of their land within 20 years.[85]

The campaign of almost all the national Maori leadership before the 1900 legislation was to stop further sale of Maori land altogether, restore administration of land to Maori hapu and alienate only by leasing. But new sales commenced under the 1905 and 1907 Acts (with elements of compulsion) and, in the Native Land Act 1909, the barriers to piecemeal purchase were all but dropped, with dramatic results. At the same time Maori themselves were virtually excluded from the Maori land boards. From 1913 the land boards comprised only the Judge and Registrar of the district Maori Land Court. The 1913 Native Land Act Amendment Act also gave the Crown power to acquire any interests in Maori land, including lands vested in trust, and undivided interests in blocks with multiple owners. Mr Parata (Southern Maori), commented on the legislation: 'all along the line the Natives have been robbed, and the government is proposing to make robbery of the Maori easier by this legislation'.[86]

The arguments of Native Minister James Carroll that the 1909 Act returned power of decision to local Maori runanga via the 'meeting of assembled owners', or of William Herries that Maori were free to sell or not sell as they pleased, are only partly valid. The machinery provisions of the 1909 Act favoured partition and piecemeal alienation by simple majorities of assembled owners (not of the totality of owners). Though some communities remained united and opposed to the sale, the system was open to manipulation, especially through the use of proxy votes. The Crown could buy individualised interests and secure a partition with relative ease. The checks and control by the land boards against Maori landlessness were limited. The pressures to sell the freehold rather than to lease were strong, as were the temptations of the boom in prices around the First World War.

At bottom was the issue of whether individual Maori or sections of Maori should ever have been given the power to alienate the freehold of what had been a tribal patrimony. In the light of the almost unanimous demands of the Maori leadership before 1900, a strong case can be argued, in Treaty terms, that even if it was the wish and inclination of individuals and small groups to see the freehold, the duty of active protection of the Maori people at large meant that sales of the freehold should have been approved very rarely, if at all, after 1900 and then only on the basis of full hapu involvement. The period 1905 to 1910 was very late in the day for governments to be launching a new campaign to acquire the freehold of Maori land. Even though it was not yet clear that the Maori population was fast rising it was certainly

85. Loveridge, p 56
86. NZPD, 1913, vol 167, p 811 (cited in Hutton, 'A Ready and Quick Method', p 20)

known to be stable. Many precious acres, saved from the great periods of land buying in the nineteenth century were acquired between 1910 and 1930. When Ngata finally secured finance to launch the development schemes from 1928, there was precious little good land left on which to launch them. By 1938, it was realised that the Maori people could no longer be supported on rural lifestyles alone.

PART II

Maori Land Administration, 1945–74

Note: Constraints of time and funding have prevented a full research report into post-war Maori land administration. This section will therefore only mention features of the period, for possible future consideration. A discussion of Maori land development schemes may be found in chapter 17 and a discussion of the Maori Trustee in chapter 18.

15.12 The Situation at the End of the War

The period just before and during World War II had seen a remarkable concentration of control over Maori land in the hands of a coterie of officials based in, or directed from, Wellington. The Maori land board presidents were also the judges of the Maori Land Court and district land registrars; the registrars of the court were also local officers of the Native Department; they both reported to the Secretary of the Department who was also usually the Native Trustee and at one time was also Chief Judge of the Land Court. The whole system was overseen by the Board of Maori Affairs, a committee of heads of several Government departments chaired by the Minister of Maori Affairs (or by the secretary of the department in his stead).

The success of the Maori War Effort Organisation, (see also chapter 20) which captured great support and respect from the Maori people, had been viewed with some jealousy by the Department of Native Affairs. The Maori Social and Economic Advancement Act 1945, while giving important opportunities for local and district level Maori responsibility, did not place Maori in the top levels of Government administration as the progenitor of the Act, Eruera Tirikatene, had hoped. The control of the Native Department, the Board of Maori Affairs and the Maori Land Court over the lives and lands of Maori remained very strong. Their administration was paternalistic and often genuinely caring of Maori interests. Maori recognised this and many have warm recollections of that period. But they also resented the strait-jacket controls and began, from 1945, increasingly called for the repeal of laws which they saw as denying them responsibility over their own land and equality with Pakeha under the Treaty. In this context, Bennion notes the important challenge of the Tuwharetoa people to the Aotea Maori Land Baord over forest laws, which resulted in the seminal Privy Council decision of 1941, denying the Treaty, as such, legal effect.[87]

87. Bennion, p 61

It should also be noted that all of the senior officials of the Maori administration were Pakeha, the pattern being broken only in 1948 wih the appointment of T T Ropiha as Under-Secretary of the Department and member of the Board of Maori Affairs. Mr M R ('Mick') Jones had provided a Maori voice though, as private secretary to successive Ministers of Maori Affairs since 1940.

15.13 The End of the Maori Land Boards

Although the law officers of the Crown held that is was not especially irregular for several offices to be held by one person (even when he was reviewing in one capacity an action that he had carried out in another) the legislation had become confusing, and irregularities arose. For example, many leases had been given by Maori land boards since 1936, and Maori Land Court judges had made recommendations at the behest of the Board of Maori Affairs without the formal confirmation required from the boards. Presidents of boards (the Maori Land Court judges) were not apparently kept abreast of the boards' routine work, which was directed by the registrar. Retrospective validation was made in the Maori Purposes Act 1949.

Bennion's evidence shows how matters were generally arranged between the President and the Registrar without formal sittings:

> the Board is flexible with the Registrar in the Office and the President round the district. Some matters come to the Office and are dealt with by the the Registrar, some are dealt with by me in the district and some are dealte withy by us after conference in Auckland. In many cases we confer by telephone. A large proportion of of the decisions of the Board are on questions involving knowledge of the law and on them Maori members would be unable to assist. Fixed meetings (say monthly) would restrict the movements of the President who (as Judge) already has difficulty in fitting in all the sittings necessary.[88]

In 1948, most judges denied the need for Maori members of the boards, saying that their duties were largely administrative.[89] The ambiguous role of the judges, having both administrative and judicial powers, was discussed between 1949 and 1951, with the Under-Secretary advocating that the boards be abandoned and their functions transferred to the Maori Trustee.

The case was strengthened by the evidence from a 1949 legal commission into leases of land vested in Maori land boards, which revealed sloppy administration: the sinking funds for payment for lessees' improvements not made; lack of inspection of leases to see that lease terms were met; lack of detailed records.[90]

In 1952, the minister of the day, Ernest Corbett, decided to eliminate the duplication of functions by dissolving the boards and placing the vested land under the Maori Trustee. Dr Loveridge notes that one member of Parliament, Murdoch,

88. Pritchard to Under-Secretary, 8 September 1949, MA 28 31/29 (cited in Bennion p 68)
89. Bennion, p 69
90. AJHR, 1951, g-5

congratulated the Minister and hoped that by the legislation 'the taihoa policy will be a thing of the past and that we will never hear that word again'. Mr Paikea then defended Carroll's policy as being 'responsible for saving most of the Maori land from being sold to the pakeha people'.[91] The terms of the debate of 1900–09 were still alive in 1952.

Bennion notes that when the boards were wound up they held £335,500 in Government securities, over £300,000 in mortgages and £1,305,500 held for distribution to beneficiaries.[92] The only serious protest from Maori at the board's demise came from Ngati Whakaue, who felt strong associations with the Waiariki board.

15.14 New Compulsory Laws of Alienation

Characteriscally (in that it represented the Pakeha rural vote) the National Government in 1952 had taken the opportunity to legislate for further compulsory powers for alienating Maori land which was unoccupied, not properly cleared of weeds, or owing rates. But, for the following year, under the new consolidated Maori Affairs Act 1953, Maori began to take advantage of section 438 and form numerous trusts to forestall compulsory action against their land. At the same time, the Maori Trustee began a booming business through land leases, timber leases and an increasing number of sales.[93]

15.15 Prichard–Waetford Report, 1965

In 1965, the report of the Committee of Inquiry into the Laws Affecting Maori Land and the Jurisdiction and Powers of the Maori Land Court was published. This document, known as the Prichard–Waetford Report, argued that urgent and drastic action was needed to deal with the effects of Maori land title fragmentation, and to prevent any worsening of the problem. It recommended, among other things, that Maori should be given every opportunity to realise any interests that might have, that reserved land should be made alienable, that in general there should be no appeal against orders amalgamating or partitioning Maori lands, that the limit for conversion (that is, compulsory purchase) of uneconomic interests in Maori land should be raised from £25 to £100 and the rate of conversion increased, that Maori land acquired by conversion should not be set aside for settlement exclusively by Maori, and that small areas of Maori land, with fewer than five owners, should be Europeanised. These recommendations were much in the tradition of the period 1905 to 1913, being concerned mainly with efficient use of the land in economic terms and with an element of compulsion about some of the solutions proposed.

91. NZPD, 1952, vol 297, p 775
92. ma 28/23/29 (cited in Bennion, p 70)
93. E Schwimmer, *The Maori People in the Nineteen-Sixties*, p 24 (cited in Bennion, p 71)

The committee nevertheless believed, on the basis of its meetings in the districts, that there was Maori support for this.[94]

15.16 Maori Affairs Amendment Act 1967

The Maori Affairs Amendment Bill was introduced into Parliament in May 1967. Part i of the Bill provided that Maori land with fewer than five owners, and meeting other criteria, would be Europeanised.

Part ii had as its main purpose 'to promote the effective and profitable use and the efficient administration of Maori land in the interest of the owners'. This part of the Act provided for the appointment of Improvement Officers, who would investigate Maori land on the instructions of the Secretary of Maori Affairs, and report on its situation, the state of the survey, the current use and occupation, the most suitable use, the number of owners, the position with respect to rates and any other relevant matter. After such consultations as 'is conveniently practical', the Improvement Officer was to 'determine' what action should be taken with respect to the land.[95] This action could include partition or amalgamation, laying out of roadways, incorporation, survey, or alienation. Proceedings thereafter were by application through the Registrar of the Maori Land Court, and while the Court had to take into account the interests of the owners, and satisfy itself that adequate consultation had taken place, it could proceed to make the necessary orders 'not withstanding any objection thereto by any owner or owners'.[96] One section of the Bill provided for land under incorporated owners to cease to be Maori land, thus losing, as Wetere said in 1974, 'their tribal identity'.[97] Other sections provided for the sale of vested or reserved lands to lessees. In introducing the Bill, the Minister, J R Hanan, said that it was based on the Prichard–Waetford report, although 'the committee's recommendations have not been followed exactly in all cases'. The Bill was intended to put Maori on the same footing as Europeans with respect to land, and in particular to deal with the problems that had arise 'from the system whereby much Maori land is owned in common by a number of owners in varying and often very small shares. Another problem is the awkward and impractical size and shape into which Maori land over the years had become divided'.[98]

When the Bill was reported back from the Maori Affairs Committee, with a recommendation that it be allowed to proceed with the amendments that had been made, Rata, the other Maori members, and Opposition speakers tried to have the Bill referred back to the committee for further consideration. They said the Bill went far 'beyond the Prichard–Waetford report'. It was not what the Maori people wanted: 'not a single part of the Bill has failed to draw strong opposition from

94. 'Report . . . of Committee on Inquiry into the Laws Affecting Maori Land and the Jurisdiction and Powers of the Maori Land Court', Wellington, 1965, (Prichard–Waetford Report), pp 5, 35, 42, 79, 85, 143
95. Section 17 of the Maori Affairs Amendment Act 1967
96. Section 19 of the Maori Affairs Amendment Act 1967
97. NZPD, 1974, vol 395, p 5099
98. NZPD, 1967, vol 350, p 46

Maori groups.' The suggestion that the Bill promotes the equality of Maori was 'nothing more than a sugar coating on an otherwise bitter pill of accelerated alienation of Maori land'.[99] The Maori Council's verdict was quoted to the Government:

> Our main disagreement with the Bill is that the provisions that make it easier to sell our land are clear and definite but those which enable us to use our land for ourselves are much less clear and certainly far from definite.[100]

The notion and purpose of Improvement Officers was objectionable and discriminatory. The submission of the Citizens Association for Racial Equality was cited in support of this point:

> If . . . the public interest requires the enactment of measures that would compel the owners of unproductive or unused land to develop it or else sell it to others who will, then let the legislation apply to pakeha as well as Maori land.[101]

The motion to have the Bill referred back to the Maori Affairs Committee was defeated, the minister arguing that the legislation was necessary to 'free our Maori people from much of the feudal serfdom which has kept them in an economic strait jacket for far too long'.[102] In due course, the Bill came up for further consideration. In the course of his speech, Hanan stated that one of the key issues raised by the legislation was 'to what extent should the rights of the individual owner to realise his interest to the best advantage to him be subordinated to the interests of the group wishing to hold property to the exclusion of outsiders'. He also advised the Maori members to think carefully before attacking the section to do with the Improvement Officer, issuing what may have been a veiled threat: 'the Government could withdraw [Part ii] and leave much Maori land to go on accumulating rates until such times as some county decides it wants the rates'.[103]

Despite this warning, the Maori members comprehensively attacked the Bill. Part i was objectionable to Maori because the legal status of the land was to be altered 'without their [the owners']say-so'.[104] Part ii (providing for the Improvement Officers) was an intolerable intrusion. No European would accept that a civil servant should be appointed to tell him what to do with his land. Rata said there was a general Maori objection to the element of compulsion that was present in a number of places in the Bill. He quoted a Maori submission: 'We would like to see a little less 'must and a little more 'may [in the Bill]'.[105] The provisions for consultation with Maori owners about their lands were inadequate. Several sections provided for the sale of land to lessees; lessees were nearly always Europeans. Most

99. NZPD, 1967, vol 353, p 3656–3662
100. Ibid, p 3657
101. Ibid, p 3667
102. Ibid, p 3658
103. NZPD, 1967, vol 354, p 4007
104. Ibid, p 4010
105. Ibid, pp 4011–4013

of the Taranaki leases, moreover, were due for renewal in 1969. Tirikatene-Sullivan quoted from submissions that had been made by the Law Society that parts of the Bill amounted to 'compulsory deprivation of property rights of Maori landowners , that the underlying tendency was to ease 'restrictions on alienation of Maori land', and that the legislation would have the effect of 'converting Maori land into European land at an accelerated rate'.[106]

Part ii of the Maori Affairs Amendment Act 1967 was repealed by section 6 of the Maori Purposes Act 1970. During the debate on this legislation it was admitted that the provisions had been 'in fact little used'.[107]

15.17 1973 White Paper

The Labour Party manifestos for the 1969 and 1972 general elections recognised the 'right of kin-groups to remain proprietors of their land and committed the party to 'retention of Maori land in Maori ownership and management in every practicable instance'.[108] Labour became the government in November 1972, with Rata as Minister of Maori Affairs. He immediately began a round of consultations with Maori. In November 1973, he tabled a white paper setting out the general direction the Government would follow with respect to a number of areas of Maori policy, including land.[109]

15.18 Maori Affairs Amendment Act 1974

In July 1974, Rata introduced the Maori Affairs Amendment Bill. Those sections of the Bill relating to land were intended, 'to restore the principle of hereditary ownership of land and to recognise the rights of the Maori people to succeed to and perpetuate ownership in common in accordance with Maori custom'. It was the Government's belief 'that the right of inheritance does not or should not affect the effective administration or utilisation of Maori land'. Part vii of the Bill set out new procedures to do with the alienation of Maori land, giving 'the owners a greater say in any proposals to sell, lease, or to consider any other proposals affecting their lands'.[110] Clause 33 removed the option to purchase from leases. Clause 52 repealed the parts of the 1967 Act that provided for the compulsory acquisition of uneconomic interests by the Maori Trustee. Clause 68 allowed those Maori land owners who had had their land declared to be no longer Maori land by Part i of the 1967 Act to apply for a declaration restoring its Maori freehold status. Clause 77 provided

106. NZPD, 1967, vol 354, pp 4022, 4373
107. NZPD, 1970, vol 370, p 4913
108. Government White Paper on Proposed Amendments to the Maori Affairs Act 1953, the Maori Affairs Amendment Act 1967, and Other Related Acts, Wellington Government Printer, 1973, p 6
109. Government White Paper on Proposed Amendments to the Maori Affairs Act 1953, the Maori Affairs Amendment Act 1967, and Other Related Acts, Wellington Government Printer, 1973
110. NZPD, 1974, vol 391, p 2688

that incorporated land that had become European land by virtue of section 68 of the 1967 Act could be declared, on application to the Maori Land Court, Maori land again. According to Rata, 252,000 acres of land had been effected by these compulsory sections of the 1967 legislation.[111] Clause 57 allowed European land owned by Maori to be declared, under certain circumstances, Maori land.

During the second reading, Rata said that the Bill was based on the opinions drawn forth by the 1973 white paper, and the amendments made by the Maori Affairs Committee. It now represented 'the wishes expressed by the majority of the Maori people'. It was intended to 'painstakingly [repair] the invasion of the rights of the Maori people brought about by the legislation of 1967'.[112] The basic philosophy underlying the parts dealing with alienation was 'that the continued alienation of Maori land to non-Maori ought not to be facilitated'.[113] The Act was to come into force on 1 January 1975, except for Part vii, dealing with the alienation of land. That came into force on the day the Act was passed.[114]

15.19 Alienation of Maori Land, 1967–75

Maori members had opposed the 1967 legislation on a number of grounds, but one prominent line of attack was that the legislation would promote the alienation of Maori land. The 1973 white paper contained figures on the number of land transactions confirmed by the Maori Land Court from 1963 to 1973, whether leases or alienations, the amount of land involved, and whether the parties involved were Maori or European.[115]

Sales of Maori land to Maori appear to have remained more or less stable during the decade 1963 to 1973, save for a notable increase in 1969, when 26,753 acres were transferred. In 1968, by comparison, only 5584 acres changed hands. The figure for 1970 is 7498.

The figures for alienation of Maori land to Europeans show a similar 'one-off increase in 1969, amounting to 35,301 acres. Thereafter the amount of land changing hands tended to decline year by year, except for 1972, when it was 34,151 acres. In 1973, it was 18,219 acres, the lowest total recorded in 1963 to 1973.

On the face of it, the figures in the 1973 white paper show that the 1967 Act did not markedly accelerate the rate at which Maori land was being alienated to Europeans. Nor did it produce, on the other hand, any sharp decline in the rate of alienation. The 1974 Act, however, was intended to curtail the loss of Maori land, and it had a dramatic effect. In the 11 years preceding 1974, alienations to Europeans amounted to 307,929 acres, an average of 28,000 acres per annum. From 1974

111. NZPD, 1974, vol 391, p 2694
112. NZPD, 1974, vol 394, p 4775
113. Ibid, p 4777
114. Section 1(3) of the Maori Affairs Amendment Act 1974
115. Government White Paper on Proposed Amendments to the Maori Affairs Act 1953, the Maori Affairs Amendment Act 1967, and Other Related Acts, Wellington Government Printer, 1973, p 69

to 1975, only 5559 acres (2250 hectares) changed hands. In 1975 to 1976, the first full year of the Act's operation, 6533 acres (2644 hectares) were sold.[116]

The 1967 Act had continued the trustee's authority to sell reserved lands. Between 1967 and 1973 nearly 18,000 acres of this kind of land had been alienated.[117] Section 9 of the Maori Purposes Act 1975 abolished the sale of reserved and vested land to lessees.

The 1974 Act marked a major reversal of the philopophy and law which had governed Maori land since 1862. The return to a view of land as a taonga of the community has strengthened in the Ture Whenua Maori Act 1993.

116. AJHR, 1975, e-13, pp 37, 39
117. AJHR, 1975, h-3, p 51

CHAPTER 16

NATIVE TOWNSHIPS

16.1 Introduction

In 1895 the Liberal government passed the Native Townships Act which was designed to secure control of Maori land quickly, for the building of townships in key locations. Pressure for the townships 'tended to come from Europeans interested in potential economic opportunities associated with activities such as tourism, saw milling or providing services to surrounding farmland'.[1] Woodley has argued that in assessing the intention, practice, and benefits of the 1895 Act, there are three possible interpretations: firstly, that the townships were an attempt at 'genuine' assimilation benefitting both Maori and Europeans; secondly, that the townships were part of the Liberal government's attempt at a 'show of justice' or rather, assimilation intended to mask exploitation; and thirdly, 'that Maori were able to use the townships and adapt them to promote their own interests despite assimilationist or exploitative intentions by Government'.[2] In fact Maori had been resisting the Liberal Government's efforts to take over their lands for townships; for example Te Heuheu Tukino wrote to Native Minister Cadman in 1892, declining to make over land at Tokaanu for a township.[3]

16.2 The Native Townships Act 1895

The preamble to the Native Townships Act 1895 illustrates the Act's purpose:

> Whereas, for the purposes of promoting the settlement and opening-up of the interior of the North Island, it is essential that townships should be established at various centres: And whereas in many cases the Native title cannot at present be extinguished in the ordinary way of purchase by the Crown, and other difficulties exist by reason whereof the progress of settlement is impeded.

The Act gave the Governor power to proclaim any area of up to 500 acres as a Native township, whether or not this land had passed through the Native Land

1. Cathy Marr, *The Alienation of Maori Land in the Rohe Potae (Aotea Block), 1840–1920*, Wellington, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), December 1996, p 206
2. Suzanne Woodley, *The Native Townships Act 1895*, Wellington, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), September 1996, pp 1–2
3. ma/mlp 1892. I acknowledge, with appreciation, Mr Mikaere Nepia of Ngati Porou for this reference.

Court. The area was to be surveyed and laid out into streets, allotments and reserves. Allotments were to be reserved and laid out for Maori owners, but they were not to exceed 20 percent of the total area of the township. Included in these reserves were to be every urupa and building occupied by Maori at the time of the proclamation. Maori wishes as to the selection of these allotments were to be complied with as long as they did not interfere with the 'survey, or the direction, situation, and size of the streets, allotments or reserves of the township'. Maori then had two months to lodge any objections with the Native Land Court.

All streets and reserves in the Native Township were to be vested in the Crown, while all native allotments were to be vested in the Crown 'in trust for the Native owners' to be leased, by public auction or tender, for terms of up to 21 years with the right of renewal for a further 21 years. Leases were to be offered either by public auction or public tender. Rental was to be fixed by valuation or arbitration, and the leases were to provide for the payment by the incoming tenant for improvements made by the outgoing tenant. All lease moneys were to be paid into an account from which costs of surveying and 'constituting the township' were to be taken. Only then was the surplus to be divided among the owners in proportion to their relative shares and interests. The owners could sell their allotments to the Crown only. Maori were to have free use of thermal springs or baths in the townships, subject to regulation.

16.3 The Intention of the Act

Woodley has concluded that three different points of view emerged in the Parliamentary debates about the Act:

> Those of the European members who were concerned with Government and settler interest; those, such as Carroll, who were concerned with settler as well as Maori interests; and those Maori members concerned primarily with the effect of the Act on Maori.[4]

In explaining in 1910 the origin of the Act, Carroll (one of the Act's two architects) stated that he had seen the need for such a piece of legislation whilst travelling around the many Maori districts in the North Island in 1895. The Act was required, he argued, because Europeans who had settled in Maori areas were unable to secure legal tenure to residential blocks in growing settlements, for instance Waipiro Bay on the East Coast.[5] Much debate has centred on Carroll and whether he leaned towards preserving land in Maori ownership or toward assisting settlement, in the benefits of which Maori would hopefully participate. The Native Townships Act reflects this ambivalence.

J McKenzie, who with Carroll was the other architect of the Act, represented the first view mentioned above. He argued that the inability of settlers to gain legal

4. Woodley, p 9
5. NZPD, 1910, vol 151, p 272 (cited in Woodley, p 9)

tenure retarded the country's settlement and resulted in Europeans building on Maori land.[6] This, he was sure, would lead to trouble in the long term. Other European Members of Parliament focused on the argument that the Act would be good for tourism. Concern was expressed that because Maori would not alienate land, there were no hotels for tourists in places such as Pipiriki, Tokaanu, and Otorohanga. Vesting the land in the Crown enabled Government to bypass the Native Land Court and overcome the problems associated with land in multiple ownership.

There were potential benefits to Maori in the Act, such as a flow of rental income, and increasing value of the land. Hone Heke however, the Member for Northern Maori, had serious concerns. He believed that Maori were amenable to having their land utilised for townships but objected to not receiving market value for their property. He reminded Parliament of a similar system used at Rotorua and how Maori derived little benefit from it. He also mentioned the West Coast Settlement Reserves and the fact that these reserves were passing into Crown ownership. He concluded that:

> Honourable members would find that whenever the prosperity of a township was assured the Crown stepped in and sent their agents amongst the Native owners and asked them whether they desired to dispose of their interests to the Crown.[7]

16.4 The East Coast Townships

It appears that the major thrust for townships came from the Crown and settlers. In 1897 land at Te Puia (which encompassed the thermal springs) was set aside as a township at the Crown's instigation. According to Woodley, the evidence suggests that:

> the Crown used the Act because protracted negotiations (since 1885) for the acquisition of the springs and the surrounding area became largely unfruitful. The Native Townships Act was a convenient alternative to trying to acquire 730 shares from the 230 reluctant owners in the block [and] . . . was also less complicated or fraught than the other option mooted by the Crown, compulsory acquisition under the Public Works Act.[8]

The taking of the land at Te Puia was largely compulsory. The owners' efforts to have land on the eastern side of the main road, including an eeling lagoon, excluded from the township were declined. Subsequently the owners were consulted as to the location of their allotments.[9]

Other East Coast townships at Tuatini, Waipiro Bay and Kawakawa (Te Araroa) were discussed by the Surveyor-General Percy Smith, James Carroll and the local

6. NZPD, 1895, vol 87, pp 180–181 (cited in Woodley, p 10)
7. NZPD, 1895, vol 87, p 593 (cited in Woodley, p 11)
8. Woodley, p 14
9. 'Exploratory Report', Wai 272 rod, doc a1, p 7

owners in 1899. Some effort was made to respect existing cultivations and residences, and the townships were declared. The layout of Te Araroa however, took less account of the owners' wished, and encompassed many cultivations.[10]

16.5 Townships Elsewhere

In most of the townships examined by Woodley, settler agitation prompted the Crown to form the townships. This was the case at Waipiro, Parata, and the King Country townships of Te Kuiti, Otorohanga, and Taumarunui. Parata township (near Waikanae) was formed in response to settler statements that there was a shortage of land for settlement in the area. The township was laid out on Wi Parata's land with his consent, but the wishes of his brother Hemi Matenga, who also had interests in the land and did not agree with the land being used as a township, were not considered. The official response was that it was:

> a matter of indifference to the government as to who was the legal owner of the land, for the consent of the owner is not necessary to proclaiming a township under this Act. The ownership merely involves the question as to whom the rents should be paid to.[11]

The three King Country townships played a role in opening up the area, which until the early 1890s had largely avoided land alienations. All three townships were also located on the Main Trunk Railway line.

It would appear that Maori, on occasions, took the initiative to form a township and requested that one be laid out on their land. From this, it would seem that some Maori perceived that benefits would result. In 1904 owners in the Ngapuketurua block in the Wairarapa wrote to the Lands and Survey Department stating their intention to lay out a township on the block. This township, it appears, was never created. Maori also wished to form a township at Ohotu, on the east bank of the Mangawhero River, at the junction of the road from Wanganui to Raetihi. Woodley suggests that the incentive for Maori may have been the attraction of gaining better access to European goods and services, given the remoteness of this site. This township was proclaimed in 1901 and consisted of 227 acres, of which 12 acres were native allotments. In 1902 the proclamation was revoked and the Ohotu block came under the control of the Maori Land Council of the area.

16.6 The Success of the Townships

In some of the townships the number of sections taken up was initially encouraging. In the first decade of its existence, all sections in the Pipiriki township were leased,

10. Wai 272 rod, doc a1, pp 8–14
11. Percy Smith, Surveyor General, to Minister of Lands, 12 January 1900, Parata Township file, ls 1, box 356, no 39588, NA Wellington (cited in Woodley, p 16)

as were many of those in Taumarunui, Te Kuiti, and Otorohanga. Maori owners in Taumarunui were recorded as receiving good rental income from sections in the business area for nearly 20 years after the township's formation.[12] Unfortunately this did not seem to be the case for all townships, mainly due to the large number of owners amongst whom rent had to be distributed. At Pipiriki, for example, the owners received less than sixpence every six months. There were also problems with the distribution of rents due to owners living in remote locations and infrequently journeying to Pipiriki.

In other townships significant numbers of sections were not leased. The Native Department reported that by 1910 some 1681 acres of township lands had been leased, representing about 40 percent of the total township lands. Until 1928 the amount of land leased remained around this figure.[13] In 1902 when 59 sections of the Rotoiti township were offered for lease, only 14 were taken up. Three years later a further seven sections were leased, but by 1908 only three of the 21 lessees had paid the rental owed. Rental was distributed to the Maori owners only once. Very few sections were taken up in Te Puia and owners received virtually no rental during the first 10 years of the twentieth century. One owner remarked in 1906 that the township was useless to its owners 'and to this fact the owners only are aware'. His suggestion was that the land be sold to the Crown and the Maori owners be given first option to buy it back so they could obtain a 'better title'.[14] The Department of Lands and Survey and the Department of Tourist and Health Resorts (after 1908) both neglected Te Puia, which degenerated badly. Maori became interested in selling in the hope that the Government would invest more in the springs.

Speculation was a problem in some of the townships. Speculators would acquire leases but the sections would often lie idle. This impacted on the township's popularity as potential lessees were not anxious to settle in a township with little development. This scenario was apparent in Parata.

16.7 Pressure for the Freehold and the Native Townships Act 1910

Lessees under the Act did not have the option to freehold their leased allotments. Pressure from lessees to gain this option was constant. In 1907, 85 Te Kuiti settlers petitioned the Crown to be given the option to freehold. A long debate in the House resulted and Carroll and Ngata convinced the Members that freeholding was not in the best interests of Maori. However, in 1910, Carroll and Ngata had to give way to the political pressures and a new Native Townships Act was passed (repealing the earlier 1895 Act) which permitted settlers to acquire the freehold. The Act also made the Maori Land Boards leasing authorities and vested Maori township land in the Boards to be held in trust for the beneficial owners and to be administered by

12. Pei te Hurunui Jones, *Taumarunui Looks Forward*, Taumarunui, Taumarunui Borough jubilee booklet, 1960 (cited in Woodley, p 21)
13. Woodley, p 21
14. Te Puia township file, ma-mlp, no 80, file 1910/3, NA Wellington (cited in Woodley, p 23.)

the Boards. (It must be remembered that only one of the three members of these Boards was required to be Maori). Leases could be made perpetual and Native allotments could be leased with the consent of the owners. Allotments on which there was a church or a meeting house could not be leased.

The 1910 Act also provided that (as in the Native Land Act 1909) a majority in value of a 'meeting of assembled owners' could approve an alienation (rather than the previous requirement of a deed of sale signed by the owners).

The sale of Te Puia, then under negotiation, was in fact completed under the 'assembled owners' provisions of the 1909 Act. At the meeting representatives of 294 shares (40 percent of total shareholding) voted for sale, and 192 shares (26 percent) were opposed. The sale was thus legalised by the votes of a minority of the total shareholders.[15]

Woodley has concluded '[t]he result of the 1910 Act was land loss for Maori'.[16] In 1910 the Native Department reported that 108 acres of township land had been alienated. By 1920 the amount of land sold under the 1910 Act had increased to 550 acres. This figure consisted largely of the alienation of Te Puia township (350 acres) and Te Puru township (24 acres) in 1912. The Native Townships Amendment Act 1919 provided that any land acquired by the Crown in a Native Township could be sold or leased by the Governor 'as he thinks fit' according to section22 of the Native Townships Act 1910; effectively assisting the Crown to buy out Maori interests for sale to the settler tenants, thereby improving their tenure. During the early 1920s there were a significant number of purchases in the townships vested in the Waikato-Maniapoto Maori Land Board. By 1922, 100 acres had been alienated from the townships of Taumarunui, Te Kuiti, and Otorohanga. By 1927 this figure had increased to just under 480 acres, which was over 50 percent of the total land in the townships. By 1928, a total of 982 acres or 22 percent of all township lands had been alienated.[17] Correspondingly, as the sales of land increased, the number of leases decreased.

The increase in alienations in the three King Country townships was due to pressure being placed on the Government to acquire the freehold for settlers. If sufficient applications were received from settlers for sections (settlers were required to give a deposit to the Crown as an indication of their intentions), the Government would proceed with acquiring the freehold. Interestingly, the land purchase officer in this area did not acquire interests from those owners willing to sell land that the lessees did not want.

Another issue arising from the 1910 Act was that of perpetual leases, which generally resulted in notoriously low rentals for Maori and the inability to gain access to their land. In Otorohanga in 1975, 16 acres remained under perpetual lease. Each shareholder in the land received an annual rental income of $8.76. The 1975 Commission of Inquiry into Maori Reserved Land reported that just over

15. Wai 272 rod, doc a1, p 17
16. Woodley, p 29
17. Ibid

500 acres of township lands remained under perpetual leases (about 11 percent of the total amount of land laid out for townships).[18]

Maori were not absolutely obliged, however, to consent to sale or perpetual lease and, if the local Maori Land Board supported them (which the Tairawhiti Board did) the Crown (and the tenants) were stymied. This proved to be the case at Waipiro Bay and Tuatini. The Crown, however, gave the lessees extended time to renew leases which had lapsed, putting pressure on Maori to renew the leases on terms favourable to lessees. Eventually some of these leases came under the Maori Trustee, under the Maori Reserved Land Act 1955. Fractionation of title meant that returns to individual owners were very low. Some lands were sold and some revested in the owners.[19]

16.8 Conclusion

The Native Township Act 1895 was a component of the Liberal government's land policy which was strongly focused on providing land for settlement. Its intention was to promote security of tenure for settlers starting to cluster on Maori land at significant communication points or likely centres of tourism, and to secure for settlers a major stake in tourism and hotel revenue at such places as Pipiriki, Te Puia springs and key locations on the main trunk railway.

The taking of compulsory power to vest the land in the Crown for these purposes, other than reliance on negotiation and agreement with the Maori landowners, meant that the latter were eventually cast into a secondary role. There was nevertheless a measure of consultation and agreement in a number of cases; Maori too saw the value of the Crown's involvement in the development of the townships and their amenities, and hoped for a flow of revenue from leased sections.

Many of the townships languished, however. The Crown was reluctant to put in significant capital and private investors wanted either perpetual leases or the freehold. In the Native Townships Act 1910, the government succumbed to their pressure and granted their demands. It also began to buy up the lands itself for resale or long lease to the settlers. Maori, disillusioned by the poor returns, were in many cases inclined to sell, so that townships such as Te Kuiti, Taumaranui, and Otorohanga were largely alienated. On the East Coast, Maori were less inclined to sell (although Te Puia was sold under the 'assembled owners' provision of the Native Land Act 1909, by less than an absolute majority of the owners). Roads and reserves were taken without compensation.

The question of an appropriate form of tenure to attract private investment (especially to remote locations) is a vexed one, and the failure of some of the townships cannot wholly be attributed to the Crown's mismanagement. Nevertheless, the impatience of governments, their willingness to resort to a degree of compulsion, and their support for settlers having the main development opportuni-

18. Woodley, p 30
19. Wai 272 rod, doc a1, pp 18–21

ties deprived Maori both of full legal ownership and a genuine involvement as partners in the control and development of the towns. (In the event the Crown or settlers made use of their development opportunities in some cases.) The native townships represent another example of genuine joint-venture opportunities being missed in the development of New Zealand, and of the familiar tendency to reduce the Maori landowners to a secondary role or to exclude them altogether, rather than to involve them fully in the administrative responsibilities and commercial risks involved in development.

CHAPTER 17

DEVELOPMENT SCHEMES

17.1 Origins of the Schemes

The question of access to credit for Maori to develop their own land had become very much to the fore by the 1920s. Maori had not been included in the Advances to Settlers scheme launched in 1894 to support small farming ventures. In the context of the policy of setting apart land for Maori development from the 'surplus' for lease or sale, Carol and Ngata, in the 1905 and 1907 legislation, secured limited access for Maori farmers to revenue generated by Maori land vested in the Public Trustee and the Maori land boards. This had not amounted to very much at all and generally Maori still had to go to the private market, where interest rates ranged from eight percent to 15 percent or even 20 percent.[1] This was because of the complexities of title and because lenders considered Maori farmers to be bad risks. The issue of credit for Maori farming was said to be coming up at 'nearly every Cabinet meeting' in the 1920s.[2] The need amongst Maori was the more pressing because Maori returned soldiers from World War 1 were not eligible for rehabilitation funding as were Pakeha soldiers.

17.2 Consolidation Schemes

The 1909 Act provided for consolidation of scattered Maori interests in land. Consolidation was simply the pulling together of fragmented land holdings, whether by purchases, exchanges and sometimes sales. It was a legal process enabling disparate interests in land to be combined, but since this was a fundamental aspect to farming and other operations which followed after, consolidation schemes often became synonymous with development schemes in some areas.[3] Ngata used the provisions of the 1909 Act to promote consolidation schemes on the East Coast and in the Urewera in the 1920s (see vol iii, ch 4).

In 1921 the consolidation provisions in the 1909 legislation were extended to allow Maori to exchange Crown land as well as Maori land to obtain usefully sized holdings. The intention was for a mutual benefit. The Crown was able to pull

1. NZPD, 1920, vol 187, p 967 [Patuki]
2. Tom Bennion, 'Maori land and the Maori Land Court, 1909–1953' draft report for the Waitangi Tribunal Rangahaua Whanui Series, September 1996, p 33
3. Ibid, p 38

together its various purchases and create economic holdings to on-sell to Pakeha settlers, and thus relieve the pressure to buy further Maori land. Maori, on the other hand, were no longer limited to Maori land for consolidation purposes.[4]

Bennion notes the piecemeal extension of legislation in the 1920s to assist development. The Native Trustee Act 1920 enabled the Trustee to establish a common fund from monies held by Maori Land Boards from rents and sales and retained while successors were being determined before distribution of the money. About £578,000 was held from sales and £262,000 from undistributed rents at the time.[5]

The Trustee made loans to Maori farmers who had partitioned out their interests and held individual title. It was a deliberate incentive towards individualisation and, as Bennion remarks, the Government did not put in any of its own money. The Boards themselves had certain development powers under the 1909 Act, usually related to preparing vested lands for sale or lease.

In 1922 Maori Land Boards were enabled, with the consent of the Minister, to loan their undistributed revenue on mortgage. Bennion notes that the mortgage required the signed consent of the numerous owners of blocks concerned, but that the Waikato – Maniapoto Board had registered 42 advances to Maori under this provision and the Waiariki Board had registered 47 advances by 1934.[6]

From 1926 the Boards could, with the Minister's approval, simply make advances charged against the land, rather than registered mortgages. Bennion notes that the Te Kao scheme in Taitokerau began with advances from the Board (Judge Acheson) *without* ministerial approval, retrospectively secured under the 1926 Act. This was part of a tendency in the whole process to load charges onto land without the owners' prior approval.

17.3 Ngata's Involvement

In 1928 Ngata became Native Minister. His own account of what followed shows how closely financed for land development was linked to the question of upaid rates and other issues. Writing to Buck, Ngata stated:

> the demand was that the Government allowed charging orders on lands for unpaid rates to be enforced by sale of the charged lands – the combination of many years of thrust and counter-thrust. It was the psychological moment. Our little force went gaily to the attack – a forlorn hope and we attacked the Government! . . . well, we won out. We conceded not an inch to the local bodies and obtained at length from the Government the following:
>
> (a) an undertaking that consolidation schemes be carried out in all districts commencing with Bay of Islands and the King Country.
>
> (b) Legislation

4. Bennion, p 39
5. Ibid, p 34
6. Ibid, p 39

> (i) writing off the old Native Land Rate Duty which is collected by way of stamp duty on alienations
>
> (ii) abolition of the right to take up to 5% of the area of any native block for public purposes without paying compensation . . .
>
> (iii) providing for heavy remissions of old survey liens and
>
> (iv) a promise that this session the state will provide up to 250,000 pounds to assist Maori farmers.[7]

New legislative steps were taken to support Ngata's initiative: in the 1928 Act more comprehensive provisions allowed boards to manage land, as farms, on behalf of the Maori owners. Either the consent of the majority of owners was required, or an order of the Maori Land Court, which had the same effect as the consent of the owners. The second option allowed farming initiatives to proceed, without explicit consent of the owners, and in this case no consent from the Native Minister was required.

The Native Land Amendment and Native Land Claims Adjustment Act 1929 further developed Ngata's policy. Under this Act the Native Minister was given power to overcome any difficulties arising from the state of titles of the land to be developed and was authorised to bring these lands under the scope of a development scheme. Once notification was given of this, owners were prevented from interfering with development work and private alienation of any of the land was prohibited. In other words, the difficulties of title were put aside in favour of the development of the land. Alienation was prevented but control moved substantially from the owners to the Minister and the Boards. The 1929 Act gave the Native Minister powers relating to improving, equipping and financing the land for settlement by Maori. The State provided the funds for development, all of which were interest bearing and secured by way of mortgage over the land concerned. They were restricted to three-fifths of the value of the land, or interests in land included in the mortgage.

The legislation had given the Minister the powers he had sought for some years, overcoming what he saw as a blockage due to the judicial authority of the Native Land Court judges. Ngata worked quickly and within a year of the first scheme beginning (by March 1931) 41 schemes were in operation over 591,524 acres of which 228,000 acres were thought to have been cultivable. By 1934 there were 76 schemes. Some £174,697 had been spent, including £6509 by the Trustee and £30,122 by the Maori Land Boards. Development proceeded in two ways depending upon the nature of the country and the size of the holdings:

(a) the 'unit' system was applied in areas where Maori land tended to be widely scattered in small holdings. Title and occupancy were investigated and the area's suitability for development and the amount of material input required was assessed. The unit, or nominated occupier (normally nominated by the owners, with priority to one of their own number, with the approval of the agency running the scheme) was then provided with the necessary develop-

7. Ngata to Buck, 9 February 1928, *Na To Hoa Aroha*, vol 1, p 69 (cited in Bennion, p 41)

ment funds and the work was supervised by a field inspector. This system applied to numerous scattered families. For example Ngata found that in the Bay of Islands, partitions had created 1274 different sections that had to be dealt with 'and the same people occur in dozens of little pieces all over the Country, like volcanic ejecta spewed out of an irresponsible and devilish legal volcano'.[8]

(b) the second method was used for large areas of (partially) unoccupied land, not necessarily under a single title. Here, development was undertaken usually by local owners employed by the Native Affairs Department. During the depression up to a quarter of the total Maori population benefited to some degree from this type of funding.[9]

Effort on consolidation of titles was greatly diminished in favour of both of these methods of development and settlement, complexities of title being over-ridden administratively in the short term, with the agreement of owners participating in the schemes. Some of the submerged complexities tended to re-emerge later, as whanau remembered where their interests were, and did not consider that they relinquished them to farmers from outside their lineage.

17.4 Review and Tighter State Control

The financial crisis of the great Depression meant that the Native Affairs Department, Maori Land Boards and Development Schemes could not escape review by the National Expenditure Commission after 1932. There was concern at the loose control on expenditure and relatively poor returns from the schemes. Concern at the extent of Ngata's direct authority resulted in legislation of 1932–1933 requiring that the Native Land Settlement Board, not just the Minister, approve mortgages by Boards and sales of land in Trust. The Settlement Board, comprising relevant ministers and department heads in Wellington, took over a number of the development schemes previously run by Maori Land Boards. The Native Trustee had been given power in 1930 to manage land under the Native Minister; now the Settlement Board took more oversight of the Trustee's work, including the appointment of managers and farm supervisors.[10] Following a report of the Commission on Native Affairs in 1934, and Ngata's subsequent resignation, the Native Land Court and Native Trustee came increasingly under the control of the Native Department, and the Native Land Settlement Board.[11]

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8. *Na To Hoa Aroha*, vol 1, p 69 (cited in Bennion p 43)
9. Ashley Gould with Graham Owen and Dion Tuuta, 'Maori Land Development 1929–1954: an Introductory Overview with Representative Case Studies', report to the Crown Forestry Rental Trust (in association with the Waitangi Tribunal Rangahaua Whanui programme), (draft report) 1996, p 27
10. Bennion, p 50
11. Ibid, p 51. For the 'Report of the Commission of Native Affairs', see AJHR, 1934, g-11. The composition of the Native Land Settlement Board was the Native Minister and the Under-Secretary of the Native Department, the Under-Secretary of Land, the Valuer-General, the Financial Advisor to the Government, the Director-General of Agriculture, and two others appointed by the Governor-General.

17.5 Labour's Paternalistic Control

A Maori labour conference in 1936 called for increased control by the beneficial owners of matters affecting their land and increased Maori participation in the central and district administrative bodies. But Labour's paternalistic tendencies resulted rather in increased pakeha control, through the Board of Native Affairs (which replaced the Native Land Settlement Board in 1936, but with similar membership). The recommendation of the 1934 commission was adopted whereby Maori 'nominated occupiers' (or 'units') not necessarily chosen from the beneficial owners, could be put on the land. Owners were debarred even from entering the land without prior consent. The units were supposed to get leases, but because of the perennial difficulties with title and succession usually received what Bennion regards as revocable licenses instead.[12] Compensation for improvements was at least theoretically provided for, to be paid out of the profits of the scheme itself. Given the marginal nature of many of the farms, however, there were often no profits to the beneficial owners and no sinking fund to pay for improvements.

The 1936 Act circumvented the problem with multiple ownership even more dramatically than before. An official describing the effect of the legislation said that it 'suspends the operation of the ordinary law and gives the board of Maori Affairs an open mandate to develop and improve the land and place it under capable management . . . extraordinary measures of a more or less emergency nature.'[13] Bennion goes on, 'in practice, the Board became simply a creature of the Department – Langston, the Minister, only occasionally attended and the Under Secretary, normally chaired it'.[14] It was estimated in 1937 that some 1500 units were receiving Departmental assistance, charged against the land.[15]

Ngata was not happy with the trend of events:

> People have the fear and feeling, not without justification, that all control of their land will pass from them and they will become the support of Pakeha supervisors and Boards . . . wherever Maori leadership should find scope it is denied it, and we as a race see all the practical measures taken for our good committed to Pakeha. The fact is that the Pakeha scheme of administration as it is interpreted in Wellington, does not permit of the Heads there sleeping soundly, unless the administrative positions right down to the humblest are held by Pakehas . . . Thus, altruistic schemes for the betterment of Maori are readily turned into magnified services by Pakeha supervisors, shepherds, inspectors, teachers and all who see opportunities for their own employment and fulfillment.[16]

Nevertheless considerable money continued to be advanced for the schemes, for development work which absorbed about 5000 Maori who would otherwise have

12. Bennion, p 54
13. Williams to Bland, 24 March 1952, ma 60/1 (cited in C Orange, 'A Kind of Equality: Labour and the Maori People 1935–1949', MA thesis, University of Auckland, 1977, p 70)
14. Orange, p 71, and see AJHR, 1937, g-9 for a full discussion of the board
15. Orange, p 74 (cited in Bennion, p 55)
16. Ngata to District Governor, Rotary International Auckland, 24 March 1939, Ngata Papers (cited in Orange, p 76)

been on social security. The annual wages bill of the Native Department was over £500,000.[17] Government, however, generally declined Maori requests to buy Pakeha land to include in the schemes.

17.6 The Schemes Start to Falter

By 1940 the dilemma underlining the schemes all along was becoming acute: were the schemes primarily intended to benefit the individual 'units'or the owners of the land? Ngata quoted the situation of the Waiapu Valley, 'where some 1300 people lived on a strip of land which, if fully subdivided would support fewer than 80 individual farms'.

The root of the problem was of course that a century of aggressive Crown and private buying of Maori land had left very little to support the Maori people, when at last significant state assistance was brought to bear to help them with development. Ngata's hope that the schemes would support a core of farmers amidst a larger number of people who mixed gardening with seasonal labour, was a forlorn one. By 1940 the modern Maori movement took towns in search of work begun and the war hastened the change.

Before the 1949 election, Opposition speakers pointed to the declining, not increasing, numbers of Maori small farmers on development schemes. At Horahora, outside of Rotorua:

> there was at one time a number of Maori small farmers on a block of 3000 acres. That land had been subdivided and developed by the Native Department under Sir Apirana Ngata. But today, there is not one Maori farmer on it, the whole area being farmed by the Native Department in one large block.

People with houses on the block had apparently been moved off it.[18]

Rating was again an issue according to Bennion and the opposition picked on the trend for Maori to move to urban centres, suggesting it was a sign of the failure of land development.[19]

The Labour Government's review of Maori Land holding in 1948 showed that of an estimated four million acres of Maori land, there were:

(1) ***Land gazetted for development schemes***

Under development 319,000 acres; suitable for further development 520,000 acres; unsuitable for further development 118,000 acres; total area gazetted 957,000 acres.

17. Orange, p 73 (cited in Bennion, p 55) see also AJHR, 1939, g-9, p 4
18. NZPD, 16 July 1947, vol 276, p 583 (cited in Bennion, p 64)
19. NZPD, 1949 vol 285, pp 512–513 (cited in Bennion, p 64)

(2) *East Coast Commission lands*

Of the 225,000 acres of East Coast Commission lands vested, 204,000 acres were under development (see vol iii, ch 5).

(3) *Maori land boards*

Land vested in boards for leasing mainly to Europeans 650,000 acres; farmed by Maori with assistance of boards 12,000 acres; Maori land board stations 40,000 acres.

(4) *Maori Trustee*

Maori reserves 94,000 acres; stations farmed by the Trustee 52,000 acres. The balance, 1,970,000 acres, comprised land occupied by Maoris, leased by Maori directly to Europeans, forest lands, unoccupied land and lands unfit for development.[20]

The area farmed by Maori themselves was small, most of it being farmed by authorities on behalf of the Maori owners. Labour proposed to bring another 200,000 acres under development, mostly on the western side of Lake Taupo now that the cobalt deficiency in the soil had been identified. Priority was to go to Maori owners, or their kin, or other Maori approved by the owners. The National government which took office in 1949 continued this development, but with rather more emphasis on farming by returned soldiers, Pakeha or Maori. In 1953 the National government also abolished the Maori Land Boards.

17.7 Appraisal of the Development Schemes

A principal concern relating to the schemes is the degree of consent that owners of the land were able to exercise. Much land was put in by the owners themselves, inspired by leaders such as Ngata and Te Puea. A considerable amount of land, however, was committed to the schemes by decision of the administering authorities – the Minister, the Maori Trustee or the Maori Land Boards – with doubtful levels of consent or consultation with the owners.

Funds were also committed to the schemes and charged against the land by the administering authorities without full consent. In Gould's view some of the schemes were 'required to bear a burden of development costs beyond that which might have been considered prudent'.[21] Much of this was Maori money – undistributed funds held by the Trustee or the Land Boards. The state however did put in considerable funds, commencing with the £250,000 voted in 1928, and eventually it wrote off a lot of its debts. Further research would be required to determine how much of the funds were from consolidated revenue and how much from Maori funds in trust.

20. Orange, pp 201–202 (cited in Bennion, pp 65–66, from original ma 38/1)
21. Gould, p 85

After repayment of loans there was often little cash return from the schemes either for the 'unit' – the farmer and his wife and children had to get up before dawn to milk cows – or for the beneficial owners of the land.

With or without formal consolidation of title, the schemes confused the underlying pattern of hapu interests. Some of this was based on consent of the parties at the time, some was not. The question of priority between the farmer and the beneficial owners was never adequately resolved; most units never got a secure lease to pass to their heirs or to encourage them sufficiently to invest their own capital and labour on making improvements. Commonly, 'strangers' were put on the land rather than one of the owners themselves. In a recent study of Taitokerau schemes, Aroha Harris argues that:

> there were, inevitably, 'certain ambiguities and contradictions' in the supervision process. While the Department 'wanted farmers to become *independent* of a very protected environment into which the Department itself had placed those farmers in the first place' it also wanted 'to dictate the nature of the independence that it wanted farmers to achieve, that is, an independence brought on secure tenure, orderly land titles, and high productivity'.

Despite advocating self-reliance, initiative and confidence in Maori farmers, the Department would only allow farmers to show limited initiative:

> This ambiguity had the Department performing a delicate balancing act, giving Maori farmers a measure of control over their farming activity but within an environment that imposed restrictions over stock, cream cheques and household spending. In many cases, Maori farmers experienced that balancing act as an overbearing Government patronising and lack of faith in Maori farmers, up to the point that they were treated as little more than employees of the Department'.

Furthermore, Harris argues that many in the Department:

> harboured a negative attitude towards Maori farmers, basically believing that Maori people were simply incapable of being good farmers . . . the promise of equity, financial reward and farming way of life was a long term incentive 'generally unsuited to the Maori temperament'.[22]

A certain insensitivity towards cultural values and the problems of Maori communities was also manifested amongst some farmer supervisors, for whom considerations of economic efficiency were no doubt always paramount.

The dilemmas of owners' rights and the Department's interests were illustrated by the Ranana scheme on the Wanganui River. In 1951, the scheme had a debt of £19,514 and the owners were calling for the return of their lands. During the 20 years of development they had received nothing in the way of rents or dividends for the land they had given up. A representative of the owners, H Marumaru, believed that the owners should receive something for the use of their lands from

22. Aroha Harris 'Maori Land Development Schemes, 1945–1974; with two case studies from the Hokianga', M Phil thesis, Massey University, 1996, pp 152–153

either the Department or the occupier. If they received nothing they felt that they should get their land back. Others were questioning why fully developed areas within the scheme were still under the auspices of the Department and had not been released. A compromise could not be reached; the Department was perceived as wanting owners to lay aside all concern for their family interest despite the fact that many wanted their children to farm their lands rather than amalgamate their titles with other blocks.[23]

Even when the department retained control, they were not always able to return land in a good financial order despite the boom years of the 1950s and 60s. When the Te Haranui scheme in Taitokerau was returned to the owners in 1982, not only was the property in a bad state (the housing, the fencing, the forestry project, the pasture) but they inherited a debt of $304,134 that was not of their own making.[24] In the Ngati Tuhekerangi scheme in Taranaki the land went into the scheme with unpaid rates as the only debt; when land was returned the debt was greater than the government valuation.

Other complaints about the schemes are that people lost use rights and were virtually obliged to relocate; that the employment of professional managers to make schemes profitable meant that owners did not acquire necessary skills; that the Crown (the Trustee, the Department or the Boards) bought out shareholders and became a major owner itself in some schemes; and that uneconomic shares were compulsorily consented.

Bennion provisionally concludes from his research that because in 1948 much more Maori land continued to be farmed or let by statutory authorities than was farmed by Maori themselves 'development [schemes] had been largely a waste of time'.[25]

Yet this conclusion is too sweeping. Many factors operated to make it impossible for Ngata's high hopes to be realised, although those factors were not necessarily able to be appreciated in 1928. The most important was that there simply was not enough suitable land left to support a class of Maori small holders in reasonable prosperity even before the schemes started. Successive Governments over a century (including the Governments of 1910–28) had pushed ahead with purchase of Maori land before finance and technical support had been brought to bear on any serious scale to assist Maori farmers. Most of the Maori land which remained was high country, suitable only for extensive farming. It would have been foolish to bring that land out of existing tenures and attempt to sub-divide it. Rich lowlands of the West Coast Settlement Reserves, moreover, were locked up in perpetual leases under the Maori Trustee.

Related to this was demographic and social change. In 1928 it might have just been possible for Ngata and his supporters to believe that land development could support most of the Maori people in rural lifestyles, but few could doubt by then

23. Dion Tuuta, '"Something definite must be done": the Ranana development scheme 1930–1962', in Gould et al, pp 16–18
24. Harris, p 121
25. Bennion, p 65

that Maori numbers were increasing rapidly; in 1939 it was obvious that the remaining land could no longer support all of them. Ngata himself was of course a visionary; he hoped that rural Maori communities could be revitalised around their kainga and marae. In fact he succeeded in this to a remarkable degree. But he envisaged rural community lifestyles being supported by a mixture of farming, cultivating for food and seasonal labour; this was a lifestyle not all Maori desired by any means. Maori like most New Zealanders, wanted to live in reasonable comfort rather than struggle on marginal farms; they wanted well paid jobs, good housing and other opportunities in the towns. The booming post-war economy made this possible and the often very hard, precarious, rural lifestyles, with uncertain future for the children, began to be abandoned.

The efforts of the departments to take more control over the schemes, amalgamate the small farms and create efficient units more suitable to modern farming methods and more responsive to changing market conditions, were therefore not wholly inappropriate, even from the point of view of Maori owners themselves. Even so to see the land sold outside of the ambit of the beneficial owners, and even to Pakeha, was taking efficiency too far. As Ngata had commented it seemed increasingly as if the schemes were being run for the benefit of the national economy, rather than the beneficial owners.

Maori communities, now, therefore, in many cases, tend to look back on the schemes with a sense of bleakness and frustration. In many cases, especially in the early years, they had committed land voluntarily and with high hopes. Later they found that other land was being committed to many schemes without much consultation. By the 1980s there often seemed to be a little to show for the effort. Under those circumstances the exclusion of the owners from control of the land and the eventual alienation of some of it, is seen as a grievance and features in a number of Waitangi Tribunal claims.

There was no doubt bad planning behind many of the schemes. The New Zealand goal of a numerous and prosperous small farming society had always been a utopian one, as Dr Miles Fairburn has eloquently pointed out.[26] A great many soldier settlers as well as Maori, suffered from being put on uneconomic holdings over the years and being directed by bureaucracies. That trend persisted even after World War 2. Many of the farms which have survived have done so only on the basis of being amalgamated with neighbouring farms. Ngata was not wrong in assuming from the outset that farms could only be one part of an income stream for a rural Maori community. On the other hand, the swiftness of the demographic, social and economic changes after World War 2 was probably greater than governments could anticipate. The boom years after the second world war, helped small farms throughout the nation; the necessity to readjust afterwards ought perhaps to have been foreseen, but the complications of British entry into the European Community and the oil crisis, could not necessarily have been predicted.

26. Miles Fairburn, *The Utopian Society and its Enemies*, Wellington, Victoria University Press, 1989

There is also the point that in many schemes the outcome was by no means wholly unsatisfactory. There were about 136 schemes operating by 1939, with assistance going to over 2000 individual farmers and many thousands of contract workers receiving employment at the height of the development programme. Some of the owner/farmers, and occupiers/lessees, are still working on development scheme farms, having survived many vicissitudes and adjustments.

It is therefore, premature to conclude negatively about the development schemes overall and generally. They were a belated effort to help Maori become farmers, in many cases on their own land. There was certainly ineptitude in planning, and excessive paternalism in management. Some schemes were evident failures and led to land loss. How far this should be laid as a responsibility of the Crown and how far to general circumstances working against the schemes, is a judgment that is not possible to make without detailed investigation of each particular case.

Unlike other Crown policies (such as the concerted efforts to overcome evident and expressed Maori resistance to land selling) it is not possible, in the author's view, to conclude negatively on development schemes as a whole; each would need to be looked at for its particular features, for the balance of profit and loss to the communities concerned, to the amount of capital and land which Maori had put in and sometimes lost and the amount of capital which government had put in, sometimes to the advantage of the community.

CHAPTER 18

THE MAORI TRUSTEE

Note: Material for this chapter has been drawn largely from Kieran Schmidt and Fiona Small, 'The Maori Trustee 1913–1953', May 1996, a report completed under the aegis of the Crown Forestry Rental Trust, in cooperation with the Waitangi Tribunal Rangahaua Whanui Series.

18.1 The Public Trustee

The West Coast Settlement Reserves Act 1881 vested over 200,000 acres of very fertile Taranaki land in the Public Trustee. Some was reserved for Maori occupation but the bulk of the estate was leased to settler tenants. This was the first step towards a very different emphasis in the administration of Maori reserved lands from that of Heaphy and Mackay, the previous administrators of Maori reserves.

Following the death of Mackay in 1881, the Native Reserves Act 1882 provided for the vesting of the other Crown-administered Maori reserves in the Public Trustee. Like his predecessors the trustee had the power to lease these reserves and to collect and distribute the resulting rents to the beneficial Maori owners, after deducting expenses. The Board of the Public Trust Office was to be extended by the appointment of two Maori representatives. The Board was to provide guidelines for the leasing of the trust estate, but the trustee was also required by the act to consult with the beneficial owners. The independent Commissionership of Native Reserves, that had existed since 1862, ended with the appointment of Alexander Mackay to a judgeship of the Maori Land Court in 1884, and the reserves were solely under the control of the Public Trustee. He appeared to reverse the previous Commissioners' policy of 'aggregating the accounts according to tribal communities and using the surplus from one block to assist the development of another' by instead accounting for each individual block separately. This, it has been suggested, led to his role being that of a 'passive administrator' with an interest in the economies of the blocks rather than a concern about the long-term interests of the beneficiaries'.[1] The Board failed to meet regularly (not even twice a year) and consequently did not provide opportunity for its Maori members to represent Maori interests. (They were unsalaried and their involvement with the board seems soon to have lapsed.)

During this period of Public Trustee control of Maori reserves, a number of pieces of legislation were passed which encroached on the ability of Maori owners

1. G V Butterworth and S M Butterworth, *The Maori Trustee*, Wellington, 1991, pp 19–20

to both retain their land and influence the terms of the leases of their land. Extensions of the terms of leases and reductions in rents were granted, by legislation and Order-in-Council in 1883 and 1887 respectively. By 1908, the interests of Maori beneficial owners in these estates had been reduced to an annuity computed at a 30 year intervals on the unimproved value of the land.[2] In 1887 the Westland and Nelson Native Reserves Act gave Greymouth lessees a perpetual right of renewal. This was extended to Taranaki lessees by the West Coast Settlement Reserves Act 1892 against the wishes of the Maori owners. This conversion to perpetually renewable leases involved some 120,000 acres. Maori petitioned Parliament every year from 1900 to 1912 protesting about the administration of the settlement reserves. The Waitangi Tribunal has noted that the Public Trustee was required, under the West Coast Settlement Reserves Act 1881, 'to promote two goals inherently in conflict': to act for the benefit of the Maori owners and to promote settlement.[3] As commented above (sec 8.11.1) this is not strictly the case; an equitable leasehold system could, all along, have served the interests of both parties. But there is always a tension between the two sets of interests, a balance to be struck, and it is clear that the settlement reserves were administered overwhelmingly in the interests of the settlers, especially under the 1892 Act.

The Native Land Amendment Act 1888 removed most restrictions on the purchase of reserves, the result being inroads into the New Zealand Company tenths and the Otago Heads reserve, for example. In the same year (1888) the Maori Real Estate Management Act laid down rules for the administration of the estates of minors and Maori adults under disability, which were vested in the Public Trustee by the Native Land Court. This category of trusteeship was a significant part of the Public Trustee's responsibility.

By the early twentieth century the majority of accounts vested in the Public Trustee came under four principal Acts: the Native Reserves Act 1882, the Westland and Nelson Native Reserves Act 1887, the West Coast Settlement Reserves Act 1892, and section 185 of the Native Land Act 1909. Under legislation such as the Public Works Act and section 428 of the Native Land Act 1909, the Public Trustee controlled 'cash' accounts for compensation to be paid out for Maori land taken under the Public Works Act, or for rentals received by the trustee when the recipient of the rent was in dispute.

The period from 1913 to 1921 saw an increase in accounts and estates. Much of the Public Trustee's administration of Maori affairs was coming from Native Land Court decisions upon succession and orders appointing trustees of the interests of minors in respect of the intestate estates of deceased Maori. The same period also saw an increase in the trustee's responsibilities in collecting and distributing rentals. The Public Trust Office was becoming increasingly unwieldy and over-burdened. In 1913 a Commission of Inquiry investigated a range of problems relating to the office, some of them indicated by Maori petitions. In 1912 a commission had also investigated the situation of tenants under the west coast settlement reserves.

2. AJHR, 1891, h-3, p v
3. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wellington, GP Publications, 1996, p 258

Perhaps 'symptomatic of the negative attitude expressed by the Office towards Maori Reserve administration', it was revealed that it had not kept rent succession records or made payments to each beneficiary.[4] The Public Trust officers in fact urged the 1913 Commission that Maori matters be removed from their brief. Not only did the administration of Maori reserves and estates often run at a loss, but it often cost them business from lessees.

The Public Trustee had a legal responsibility to ascertain Maori wishes regarding the administration of their reserves but he was under no obligation to take these wishes into account. The 1912 commission recorded the Public Trustee's failure to consult Maori about legislation affecting the reserves:

> In the whole of this legislation [the west coast settlement reserves legislation] two facts stand prominently out. The first is, that every legislative measure has been in favour of the lessees; and the second, that on no occasion has the Native owner been consulted in reference to any fresh legislation.[5]

The blame apportioned by the 1912 West Coast Settlement Reserves Commission to the Public Trustee for failing to consult with Maori about legislation may in part be mis-directed. While the trustee had a legal responsibility to those whose land was vested in his control, the government's obligations under the Treaty of Waitangi also have to be considered. While Treaty principles about the Crown's obligation to consult Maori are not closely defined it appears that Maori interests must be considered and that would normally imply consultation except in unusual circumstances. The duty of active protection, also identified in the Court of Appeal judgment, would seem to require that the trustee should consult adequately with owners as to major changes in the future disposition of their lands, and that the Crown should have ensured that he did.

Under the West Coast Settlement Reserves Amendment Act 1913, major changes occured. Lessees who had not taken up perpetual leases under the 1892 Act were granted an extra ten years' lease; two-thirds of the rentals were to be set aside for compensation for improvements upon expiry of the leases. Maori owners, who had retained about 26,000 acres as papakainga, and 25,000 acres under Occupation Licences, could have these lands partitioned and vested in them via the Land Court. The Public Trustee lost control of this land– a rare case of reserved land being returned to its owners.[6] Most seriously, however, section 2 of the Native Land Act Amendment Act 1913 gave the Crown power to purchase west coast settlement reserves land. It did so vigorously between 1913 and 1923; much of the newly returned land was sold, along with lands that still remained under the Public Trustee. Willan gives the figure of 20,000 acres of settlement reserves having been alienated by the Native Trustee to the Native Land Purchase Board from 1915 to 1916.[7] The total amount of Maori reserves under the Public Trustee were reduced

4. Kieran Schmidt and Fiona Small, 'The Maori Trustee 1913–1953', CFRT Report in association with the Waitangi Tribunal Rangahaua Whanui Series, May 1996, p 160
5. AJHR, 1912, g-2, p 6
6. Schmidt and Small, p 10

from around 209,000 acres before the West Coast Settlement Reserves Act 1913 to around 119,200 acres by 1919, falling to around 94,000 acres by 1921 and 72,000 acres by 1934. Of the remaining 115,000 acres (at 1921) 73,000 acres included land occupied or retained as papakainga, leaving around 42,000 acres unaccounted for.[8] Some may have been taken under the Public Works Act (although the low value of the Public Works Compensation Account suggests the amount taken was very low), but it is likely, according to Schmidt and Small, that the rest was sold by the trustee. In Schmidt and Small's judgement:

> The large proportion of vested land permanently alienated under the Public Trustee indicated his failure to act in the best interests of his Maori beneficiaries and to protect the latter's land. It meant that the Maori beneficial owners of the Reserves became worse off as the Public Trustee's administration wore on.[9]

Certainly there are situations where a responsible trustee could sell part of his estate if that improved the position of the estate as a whole, or a significant portion of it. The extent of selling in the west coast settlement reserves, mostly of excellent quality land, makes it difficult to believe that such was the case in this instance.

In 1919, 90 percent of leases under the Public Trustee were for 10 to 21 years and 3.3 percent for 21–42 years. When these leases fell due, there were often sharp increases in rentals when they were renewed, indicating the extent to which land prices had increased during the lease, and implying 'that the overall rental return for Beneficial Owners was less for long term leases'. It appears that rent renewals only took place at the expiry of a lease, not during the lease's term. Schmidt and Small believe that '[a]s most leases were for 21 years then Beneficiaries were significantly disadvantaged'[10], although it must be noted that 21 years was a normal term for agricultural leases in New Zealand, sometimes with rent revisions at seven-year intervals, but often not. There is also evidence that re-valuations of reserve land at the expiry of a lease were not always carried out, and that rents were often reassessed at less than 5 percent of the unimproved value as required by the West Coast Settlement Reserves Amendment Act 1893.[11]

It appears that Maori owners had a less than satisfactory opinion of the administration of their reserves by the Public Trustee. Small highlights their 'grave dissatisfaction' with the Public Trustee's handling of the Nelson and Motueka reserves and the west coast settlement reserves. At the heart of this dissatisfaction appears to lie the issue of lack of consultation, which was recognised by the West Coast Settlement Reserves Commission in 1912. The 1913 Commission into the Public Trust Office pointed out that the trustee's position had diminished his mana among Maori.[12]

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7. Rachael Willan, 'Maori Land Sales, 1900–1930', report for the Crown Forestry Rental Trust, Twentieth Century Maori Land Administration Project, March 1996, p 27.
8. Schmidt and Small, p 162
9. Ibid, p 163
10. Ibid, p 164
11. Ibid, p 164
12. Ibid, p 18

18.2 The Native Trustee

The 1912 Commission into the Public Trust Office recommended that the Maori reserves and their administration be vested in an independent body. The outbreak of World War I delayed the implementation of this recommendation until 1920. The Native Trustee Act 1920 established the office of the Native Trustee. All Maori reserves vested in the Public Trustee were transferred to the Native Trustee along with the requisite powers, duties, functions, and funds. As well as having normal powers of investment, the Native Trustee was given the power to loan trust moneys by mortgage on freehold or leasehold interests in Maori hands. This was an attempt to alleviate the problem Maori had in obtaining mortgage finance. He was also empowered to use funds accumulated by Maori Land Boards for the same purpose, prior to their distribution to beneficial owners.

The Native Trustee started out with just over 90,000 acres of reserves and £262,000 of accumulated rents and assets. In his role as banker for the seven Maori Land Boards, an extra £544,441 came under his care. However, the Native Trustee did not initially live up to Maori hopes that he would be a major source of funds: out of all his funds which totalled approximately £800,000, only £25,000 was in cash, the rest in mortgages (mainly to Pakeha) or securities.[13]

The Maori Land Boards carried out a very similar role to the Native Trust Office. They held Maori land in trust and collected and distributed rental moneys to the Maori owners. From 1922 they also acted as mortgagee to Maori and so competed with the Native Trustee for mortgage investment. In 1952 the Maori Land Boards were abolished and their functions were transferred to the Maori Trustee[14], who consequently received greater revenues but was also under obligation to accept the administration of uneconomic properties.

18.3 The Native Trustee and Land Development

In the late 1920s the Native Trustee's role expanded to fit in with Ngata's land development proposals and he began to invest in farming on a large scale. Under the Native Trustee Amendment Act 1929 and the Native Trustee Act 1930, the Minister could vest the control and management of any native land in the Native Trustee. This assisted land development, the advances being made out of the trust funds and guaranteed by the state. These powers of investment were, as pointed out by the 1934 Royal Commission into Native Affairs, much wider than those that existed previously.[15] The trustee was given the power to use any proportion of his trust funds as he thought fit for farming purposes, totally without the control of any Board. Concerns were rightly expressed about the wisdom of subjecting the trus-

13. AJHR, 1935, g-11, p 134
14. The term 'Native' was changed to 'Maori' under the Maori Purposes Act 1947
15. AJHR, 1935, g-11, p 27

tee's funds to the fluctuations of primary product prices and whether the trustee had unneccessarily put under threat the funds under his control.

The Native Trustee's role as a farmer was to prove to be a heavy burden on funds. Not only did it seriously threaten the trustee's liquidity (with 78 percent of funds being held in mortgages by 1930)[16] but it seriously affected the trustee's ability to meet his commitments to Maori reserve owners. Falling primary produce prices meant that mortgagors were unable to meet their liabilities and this had a flow-on effect to the Native Trustee. Those who held leases under the Native Trustee were unable to pay their rents, and the trustee was unable to collect rents to pass on to Maori owners. Questions were raised whether the stations were being farmed for the benefit of their Maori owners or for the protection of the Native Trustee's securities. Submissions to the 1934 Royal Commission into Native Affairs not only highlighted the financial inconvenience to Maori owners, but also to the Maori Land Boards (who had large funds deposited with the trustee) and their beneficiaries. The Commission concluded that these complaints were well-founded and 'that there is at present a dislike of the Native Trustee among many Natives'.[17]

The 1934 Royal Commission into Native Affairs was highly critical of the trustee's farming ventures: firstly for the conflict of interest between his role as supervisor of the Native Trustee Office and as mortgagee; secondly for the inexperience in farm management of the trustee, Native Affairs Department, and the supervisors; and thirdly, for the over-expenditure at the expense of the trustee's commitment to the Maori owners.[18] In 1932 the trustee was unable to meet his rent obligations to west coast settlement reserves owners. Distribution of rents were late and only two-thirds were paid out in June and only one-third in December. The arrears were paid in full by the end of 1933 after the trustee mortgaged the stock from Aohanga Station with Dalgety and Company Limited. Nevertheless, the beneficiaries who were dependent on these rents suffered great inconvenience.[19] The Government injected a number of grants of capital in order to help the trustee meet his commitments, the first of which was an emergency loan from Treasury of £38,000 in 1928. In 1949 the trustee was embroiled in a court case regarding its management of Motuweka Station. All of this only served to further damage the trustee's integrity in Maori eyes.

The 1934 commission concluded that:

> there is need for a trustee who will act as a safe investment trustee for the Natives. We think that the Native Trustee should be limited to the functions of such a trustee and should not be permitted to act as a farmer, except in so far as he is a mortgagee in possession, or is otherwise protecting a security upon which he has advanced moneys subject to the safeguards proper to a trustee board of investment. We think that schemes for the development of Native lands and for granting farming assistance to Natives should be carried on by the State and by the Maori Land Boards (whose funds

16. Butterworth and Butterworth, p 34
17. AJHR, 1935, g-11, p 134
18. Schmidt and Small, p 89
19. AJHR, 1935, g-11, p 144

> are not guaranteed by the State) and should not be undertaken by the Native Trustee; and we make recommendation accordingly.[20]

Native Trustee investment in farms continued however, and in the period from 1934 to 1953 investment increased. In the 1940s the trustee actually took over the management of a number of new stations. But expenditure was now heavily monitored and restricted by the Board of Native Affairs, created under legislation in 1934 to take over from the Native Land Settlement Board. Until 1948, no Maori served on this Board.[21]

18.4 The Native Trustee Amalgamates with the Department of Native Affairs

The 1932 Native Land Amendment Act saw the amalgamation of the Native Trustee Office and the Department of Native Affairs. This move grew out of the recommendations of the 1932 National Expenditure Commission and was endorsed by the 1934 Native Affairs Commission, both of which propounded the advantages of decentralising the functions of the Native Trustee Office. Under the 1932 Act the position of Native Trustee was combined with the position of Under-Secretary of the Department. Chief Judge Jones became the first holder of both positions. The most significant change was that the field staff of the Native Trustee Office were now to come under the control of the various Maori Land Board Registrars, who were to oversee the collection and distribution of rents, manage the estates vested in the trustee, and the various other duties under the trustee's jurisdiction.

Butterworth and Butterworth have argued that these actions were the catalyst for the Native Trustee's role being reduced to 'a second grade function of the Native Department', a process marked by loss of administrative autonomy, loss of corporate identity, the absorption of Native Trust Office staff into the Department of Native Affairs, the elimination of all administrative signposts of independence, the 'gradual dissipation of the pool of expertise in the Native Trust Office through the natural processes of retirement and promotion', and decentralisation. A further contributing factor was the vesting of control of the Native Trustee's investment decisions and expenditure on farming in the Native Land Settlement Board (which was later replaced by the Board of Native Affairs). All of these actions, the Butterworths believe:

> left little room for initiative or imagination and its ultimate effect was to turn the Native Trustee into a bureaucratic arm of the Department rather than a prudential financial institution and an agent of his beneficiaries.[22]

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20. Ibid, p 147
21. Butterworth and Butterworth, p 40
22. Ibid, pp 39–41

There are numerous examples showing that the decentralisation of the Native Trust Office was less than well received by Maori. In 1938 the accounts of the west coast settlement reserves were transferred from head office to the Aotea District Maori Land Board in Whanganui, and it was proposed that the half-yearly rental distributions be stopped and payment made through the Post Office. This decision was reached following reports of alleged careless spending and drunken behaviour by Maori following rent distributions. Taranaki Maori were strongly opposed to the change and raised other issues regarding the administration of their reserve lands and the lack of consultation:

> In the new regime that arose in the reconstituted Native Affairs Department, we see the sudden decline of our interests back to the state existent prior to the World War. No longer will we and our lands be regarded as a large enough section to warrant the full time care of a trustee and a competent staff ... because of extraneous circumstances, we are again thrust into the midst of a Department bound up with multifarious duties which have very little relationship to the obligations required of a trustee. We claim that dealings with us ... [are] being delegated more and more into ordinary office routine.[23]

The perception of beneficial owners seems to have been that the Department did not seem to be concerned with their interests.

A number of other issues surrounding the decentralisation process surfaced. Taranaki Maori complained that the Whanganui office no longer provided distribution sheets to the 'principal' owner showing the names of all owners and what rent they had received. This had been supplied by the Public or Native Trustee since 1881. In 1938 the deputy trustee accused Registrars of the Maori Land Boards of granting illegal rent advances to owners in order to buy popularity. There were complaints that the Boards were being too slow in collecting and distributing rents and not enforcing lease covenants. In 1942 owners were told that they would have to wait for their rents to be paid as the district office was too busy to prepare accounts. The Whanganui district officer advised head office in 1953 that the west coast settlement reserves rents were in arrears and that there was no indication when they would be paid as there were still many rents to collect. [24]

From 1920 onward, the trustee's role in development and management of Maori estates had produced an ongoing interaction of the trustee with the Department of Native Affairs. (This applied also to the relationship of the Department with the Maori Land Boards and with the Native Land Court, the Judge of the district being, since 1913, also President of the Land Board of that district and the Land Court Registrar being the other Board member). This close network of administration belies any suggestion that the Crown was not involved in the work of the Native Trustee. The trustee was very much an agent of the Government's management policies towards Maori land, both in respect of development and Maori land

23. ma 54/2/30, pt 1, 12 August 1937, submission of deputation of Taranaki Maori to Savage, cited in Butterworth and Butterworth, pp 46–47
24. Schmidt and Small, p 193

settlement. The amalgamation of the office of Native Trustee and Native Department Under-Secretary simply recognised the fact.

18.5 The Native Trustee and the West Coast Settlement Reserves

The west coast settlement reserves made up a significant portion of the reserves vested in the Native Trustee and consequently figured largely in the business carried out by the trustee. These reserves provide a case study of the problems inherent in the trustee's administration. In 1924 the ten year leases issued under the West Coast Settlement Reserves Amendment Act 1913 began to expire and it immediately became obvious that the fund for compensation for improvements was short of the estimated necessary amount. The trustee, Rawson, was in favour of extending the leases for another five years, partly to save his office from the burden of paying compensation and partly because he seemed reluctant to allow the land to revert to the owners. He argued that other Maori in the district who had their land returned to them were already behind on rate payments and that it would be difficult and expensive to partition the land between the various family groups. He also believed that as most owners only had small shares they would have to sell them to derive any benefit. The wishes of the Maori owners prevailed and the West Coast Settlement Reserves Amendment Act 1923 provided for advances to owners to pay compensation to lessees and mortgage the land as security. Some owners re-leased their land in order to repay the compensation charge from the rents while others sold their land to the Crown.[25]

Related to this was the issue of whether compensation for improvements was necessary in all cases. The lessee had the responsiblity to ensure the land was maintained in good condition and the trustee had the corresponding responsibility to inspect the leasehold properties. Some owners found, as leases expired, that there had been breaches in lease covenants, and rightly complained that the breaches should have been identified earlier by the trustee. This implied that the trustee's administration in terms of inspecting leasehold lands was lacking and he thus failed to protect the owners' interests. The appropriate level of compensation for improvements became an issue. Although the trustee advised that he would not pay compensation to the lessees until disputes were settled, the owners claimed that the trustee paid out before the matter was settled.[26]

Schmidt maintains that the most distinctive feature of the trustee's administration of the west coast settlement reserves was his failure to monitor and control the valuation process. He believes that evidence shows the:

> . . . Maori Trustee pursued a flawed policy in the important area of valuations as it was in the interests of his beneficiaries that the valuation process be consistent and fair in view of the fact that their whole rental income depended on valuations.[27]

25. Ibid, pp 100–101
26. Ibid, p 101

Under section 19 of the Native Purposes Act 1935 lessees were permitted to be credited with all improvements when calculating renewal rentals, over-ruling an earlier Supreme Court decision that the lessee was only entitled to improvements carried out in the previous 21 years. Maori owners were understandably angry about this provision and wanted to know why they had not been consulted on the matter. An examination of 48 arbitration awards held by lessees that were assessed between 1934 and 1938 show that 85 percent of reviewed rentals were reduced. Of the total number of leases renewed under section 19 of the 1935 Act, 10 percent resulted in rent reductions. It has been estimated that losses to owners amounted to £20,000 a year.[28]

Rent collection and distribution attracted a great deal of criticism from Maori owners. The trustee's over-expenditure on stations combined with the economic depression of the 1930s meant that there were often delays in collecting and distributing rents. In 1932 the trustee changed the timing of distribution in Taranaki from April and October to June and December in an attempt to gain more time. It would appear that not only were the rent payments late, but they were not for the full amount. As stated earlier, only two-thirds were paid out in June and one-third in December. This distribution of rents was partially paid for out of a mortgage on the livestock of Aohanga Station. By 1934 rent arrears among west coast settlement reserves lands totalled £7,000.[29] The resulting dissatisfaction and hardship to Maori was predictable. At the same time, however, the trustee seemed to improve the collection and payout procedures by attempting to keep rent cards and distribution lists up to date.

The depression also brought a reduction in the level of rental income. Like the Public Trustee, the Native Trustee did not ensure that all rents were assessed at the minimum percentage of 5 percent of government capital valuation.

18.6 Unclaimed Moneys

Over the years the Public and Maori Trustee was to accumulate a large amount of unclaimed moneys, principally rents accrued due to owners' absences, death, and subsequent waiting for succession to be decided by the Maori Land Court. By 1957 the amount stood at £64,192.[30] In the Rotorua district it would appear that the majority of unclaimed moneys were interests of £5 or less.[31]

The Maori Trustee Act 1950 stated that after these funds had been held by the trustee for 10 years or more without any claim being made by those who were entitled to the funds, a list of unclaimed moneys was to be published. If after another year they had still not been claimed, 10 percent was to go to the Maori

27. Schmidt and Small, p 103
28. Ibid, p 107
29. Ibid, p 108
30. Ibid, p 204
31. Ibid, p 93

Purposes Fund and 90 percent to a disposal scheme approved by the Minister. Some of these funds were eventually channelled into the Maori Education Foundation. Unclaimed moneys was an issue that was to plague the trustee continuously and hinted at problems of inadequate staffing, lack of consultation and communication with owners, and probably most importantly, the ever increasing problem of administering multiple interests divided between numerous heirs at each generation.

18.7 The Conversion Programme

The Conversion Programme was one of the most controversial issues surrounding the Maori Trustee. The Conversion Programme was an attempt to stop the further fragmentation of small 'uneconomic' interests worth under £25. Under the Maori Affairs Act 1953 the Maori Trustee was required to purchase these interests and resell them to individual owners or to an incorporation of Maori owners. By September 1959 the Maori Trustee had purchased 10,874 interests at an average of £10 for a cost of £109,936. He had resold 5,930 interests for £74,764 at an average price of £12 10s. Most of these interests were acquired on an owner's death but some were the result of 'live buying'. Under the Maori Reserved Land Act 1955 the programme was extended to include uneconomic interests in reserved land. This compulsory acquisition of uneconomic interests stopped in 1974.

As the Butterworths have pointed out, this programme was extremely unpopular with Maori because 'it deprived them of the interest in land, however small, that proved their kinship connections and gave them their turangawaewae'. They believe that the programme's major weakness was that:

> it continued the legal tradition ... of treating Maori tribal property in land as an aggregation of the individual interests of members of the tribe instead of as ownership in common by the whole group.[32]

Expressions like 'ownership in common' by the whole group are somewhat problematic (see Chapter 1 above) but it is certainly true that access to rights, however small, in the rohe of a hapu, deepened upon whakapapa linkage to a descent group.

18.8 The Maori Affairs Amendment Act 1967

In 1965 the Prichard–Waetford Inquiry reported on the laws affecting Maori land and the powers of the Maori Land Court. In keeping with the concerns already expressed, the Inquiry concluded that fragmentation and unsatisfactory partitions were 'evils which hinder or prevent absolutely the proper use of Maori lands'.[33] In

32. Butterworth and Butterworth, p 85
33. 'Report of Committee of Inquiry into Laws Affecting Maori Land and Powers of the Maori Land Court, 15 December 1965, p 6

order to overcome the problems of fragmentation of interests it was recommended that the limit for conversion be increased from £25 to £100. If, once the Crown had taken control of these fragmented interests, no other owners or other Maori wished to purchase them, they would become Crown land and be available for disposal. Furthermore, it was recommended that the conversion programme be undertaken by the Crown rather than the Maori Trustee.[34] The trustee, the Inquiry proposed, was to gain other powers. If after one year from the request for all Maori with land interests to file their address with the District Officer no address was filed and if the same person had not withdrawn any funds in the preceding six years, the Maori Trustee could:

> elect to act as agent for such person in respect of any interest in Maori freehold land, such agency to include the power both to vote at meetings and to execute documents of alienation.[35]

The Maori Affairs Amendment Act 1967 included many of the Prichard–Waetford Inquiry's recommendations. Controversially, sections 155–156 gave the Maori Trustee certain powers over the alienation of reserved land. These provisions saw the west coast settlement reserves lessees acquire the freehold of large areas of the Parininihi ki Waitotara Reserve, which had been formed from the settlement reserves.[36] Butterworth and Butterworth describe this Act as containing many 'distasteful provisions' to Maori and that inevitably the trustee 'as the agent of so many of these unpopular policies' bore much of the resulting dissatisfaction.[37]

18.9 Conclusion

The office of the Maori Trustee was created in 1920 taking over from the Public Trustee the management of important estates such as the west coast settlement reserves, the Mawhera (Greymouth) leases and the remainder of the 1840s reserves in Wellington and Nelson. It was also involved in land development and provision of mortgage finance to Maori farmers. Neither the Public Trustee nor the Maori Trustee and his administration exercised their responsibilities in the best long-term interests of those Maori whose land and revenue was vested in the trustee. Alienation of land under their control, large capital expenditure with little return, charging of lands with high levels of debt, problems surrounding the collection and distribution of rents, land valuations and the maintenance of lease covenants, and inadequate consultation with beneficial owners in respect of all these matters, indicate a dubious record of protection of reserves and other lands vested in the trustee. The difficulties the trustee faced in all aspects of his administration have to be acknowl-

34. Ibid, pp 8–9
35. Ibid, p 13
36. Janine Ford, 'The Administration of the West Coast Settlement Reserves in Taranaki by the Public/Native/Maori Trustees, 1876–1976', Wai 143 rod, doc m18, 1995, pp 90–92
37. Butterworth and Butterworth, pp 95–96

edged but it seems that considerations of general efficiency and the interests of tenants came before the interests of the beneficial owners in many areas of the trustee's operations.

Responsibility for the inadequacy of the trustee's administration rests also with the Government. The trustee was obliged to carry out both the legislative directives concerning Maori land under his administration, notably the provision of perpetual leases to the Mawhera tenants from 1887 and the west coast settlement reserves tenants from 1892. The trustee had also to serve the interests of the Native Department. This became increasingly obvious with the amalgamation of the Native Trust Office into the Department of Native Affairs. It is doubtful whether the trustee could have gone against Ministers' directives to protect his clients' interests; the conflict of roles was simply too strong between the Maori Trustee as an agent of the Crown and as trustee for Maori owners.

The Maori Trustee also became an agency for the Department of Public Works and for local bodies, taking over portions of Maori land for public purposes. With most Maori land under multiple title it was difficult to consult with Maori owners before the taking of land or to pay them compensation afterwards. But it was all too convenient for the taking authority to simply take the land, advise the Maori Trustee and let his office deal with the owners as best he could. The trustee's office was also used for the recovery of rates, even exercising the power of sale. While there are genuine dilemmas here in respect of the rights and obligations of the owners, the Maori Trustee, like the Public Trustee before, had increasingly been used to serve the interests of others ahead of the beneficial owners of the land in his charge.

CHAPTER 19

MAORI AND RATING LAW

19.1 The Origins of Rating

By 1840, rating in England was a basic financial tool for local government to fund community goods and services. A 'rate' had become a tax, based on property ownership, which was levied by a local authority and applied to services at a local level. This kind of rating system, which was also to develop in New Zealand, has its philosophical origin partly in the legal theory that all land is ultimately held by the Crown. However, in New Zealand the question has persistently arisen in the development of rating law as to whether land not held by the Crown, but rather held by Maori in customary tenure, should be subject to rates. Maori land which was not purchased or investigated by the courts has generally remained exempt from rates.[1]

The different approaches of Maori and Pakeha to land use and development has also been a recurring theme in the development of rating law in New Zealand. Allegations have been made over time that valuation policy has failed to consider Maori land for anything other than European defined 'productive purposes'. Maori land was valued for rating purposes in the same manner as European land. However, the valuation of Maori land has periodically caused problems in allegedly being valued too low or too high. For example in 1883, at a time when the government reimbursed local authorities directly for rates owing on Maori land, the Property Tax Department was found to be valuing Maori land well above the market rate. On the other hand, in 1915 it was revealed that land in the King Country was being valued low to facilitate European settlement, despite the Valuer-General's insistence that lands should be valued in a standard manner.[2]

19.2 The First Rating Schemes

It was an imperative within the new colony to promote local government and, as a result, to also reduce the expenditure required from England. Local government in New Zealand, however, had a troubled existence after 1840, including various abortive attempts to establish municipal authorities in Wellington and Auckland. The earliest local body rating laws, the Municipal Corporations Ordinances of 1842

1. The discussion in this chapter of Maori and rating law is drawn from Tom Bennion, 'Maori And Rating Law', Wellington, Waitangi Tribunal Rangahaua Whanui Series (draft), January 1995
2. v 12/416 Valuation of Native Lands 501, NA

and 1844, exempted the 'properties . . . of the aboriginal inhabitants of the Colony' (s 67). The Property Rates Ordinance 1844, however, which empowered the general government to rate the land, appeared to make no distiction. The Native Exemption Ordinance 1844 made it clear that Maori were generally intended to be subject to the new laws unless otherwise specified.[3] Roading provided the impetus for the Public Roads and Works Ordinance 1845, under which elected boards would levy special rates (based on the number of acres owned) to create roads as required in areas such as Auckland. This too, did not appear to exempt Maori land. The 1849 Ordinance of the same name was similarly concerned with rates for roading, although the rate was to be based on the net annual value of houses, lands and tenements in the town. The Country Roads Ordinance 1849 created a system of rates based on the value of the land – a precursor to the most common form of valuation for rates. Crown land and 'land belonging to . . . any of the aboriginal inhabitants of the colony' was exempted from these Ordinances (under s 27 of the Public Roads and Works Ordinance and section 28 of the Country Roads Ordinance 1849).

With the creation of six provinces in 1853, each province adopted its own rating laws which generally excluded customary Maori land from their operation in keeping with section 19(10) of the Constitution Act 1852 which provided that provincial councils could not make laws '[a]ffecting lands of the Crown or Lands to which the Title of the aboriginal native Owners has never been extinguished.'

19.3 Road Boards and the Highway Boards Empowering Act 1871

Under the Municipal Corporations Act 1867 electors, who had to be ratepayers, could petition to create a borough to run local affairs. Maori land was included in the scheme, raising the legal possibility for Maori to participate in local elections. Road or highway boards, created in tremendous numbers in the 1850s and '60s, brought the provincial government under critical levels of debt which in turn prompted schemes for the main trunk line in the 1870s as a solution to these debts incurred from roading.

In 1871, the Highway Boards Empowering Bill was introduced to settle once and for all the question of rates for property held under Crown or Native title. This prompted debate in the House about the rating of Maori land. European resentment that Maori would be exempted from rates was raised in the House when it was argued that Maori should be rated because many now had Crown grants and used the roads.[4] Others, however, viewed the matter as rather more complex, pointing out, for example, that Maori in the Mangonui electorate already paid a substantial customs duty which might be used on roading, particularly in view of the fact that money collected for roads was invariably spent on European settlements in or

3. However, s 12 provided that Maori be exempt from the 'more severe penalties' of the civil law while they remained 'ignorant of the operation of the law in civil cases'.
4. NZPD, 1871, vol 10, p 358

around urban areas.[5] Maori participation in the construction of roads was also noted by those who opposed further rating of Maori land. Maori members suggested, amongst other things, that the Treaty of Waitangi had reserved all matters regarding land to Maori, and that Maori too poor to pay rates should be able to give land, or work on the roads, instead of paying rates.[6] Maori members expressed the fear that land might be taken compulsorily if rates could not be paid. The Act provided that owners of native lands would be liable to rates only if a native land court certificate of title had been issued, or if the native title remained unextinguished when the occupier was someone other than a Maori. This compromise was to appear in subsequent rating measures also. Fixed term pastoral lessees on Crown lands were to pay only half rates and the provision was made that the recovery of rates in arrears could only allow the forced sale of personal property (s 15).

19.4 The Native District Road Boards Act 1871

At the time of the Highway Boards legislation, Wiremu Katene, member for Northern Maori, proposed the introduction of a Bill whereby Maori could govern the application of highway boards' legislation in their own areas. Later in the year, Donald McLean introduced the Native Districts Road Boards Bill which he stated had its genesis in Katene's idea. Some parliamentarians were alarmed by the power it awarded to Maori who, according to the Bill, would make up three quarters of the boards' composition. According to the Bill, provincial government ordinances would cease to apply in those areas which elected to enact the provisions. While the Bill was passed, the Act did not operate extensively in practice, perhaps, Bennion suggests, because it was entirely voluntary and did not satisfy the broader calls by Maori for local self-government, particularly in the north. Katene later advised a gathering of chiefs that the Act was not what he had wished to establish, and that he had opposed the Bill in the House (in order to argue for a more powerful Native and European runanga). However, when he had heard a member say '[t]hat if the Natives would not pay rates they ought not to be allowed to use the roads but have to walk in ditches' he agreed to the Bill in order that Maori might enjoy some measure of control.[7] As the 1871 measure had not, for the most part, been taken up by Maori, McLean urged local European land boards to include Maori leaders. However, he appeared to regard the contribution of Maori land and labour for road works as 'sufficient for the time being'.[8] The Act was repealed in 1891.

5. Ibid, p 364
6. Ibid, p 362
7. AJHR, 1872, f-4, p 4
8. McLean to Superintendent, Otago, 16 March 1872, ma 4/95; McLean to Superintendent, Taranaki, 14 October 1874, ma 4/20

19.5 The Rating Act 1876

Throughout the 1870s, Maori remained cautious about allowing roading which would attract rates to their land and often resisted attempts to establish roads in their own districts. For example, the construction of the road between Hamilton and Thames was disrupted by Maori who sought assurances that they would not be liable for rates if the road proceeded. Mackay, in a bid to avoid delays to the roading programme, urged that all native land outside townships, whether held under Crown grant or not, should be exempt. Under-Secretary Clark supported this exemption for similar reasons.

Following the abolition of provincial government, a number of measures were taken to improve the system of local government including the Rating Act 1876 which replaced the various ordinances in force with a uniform land valuation and assessment scheme. Rates were levied by local bodies at a percentage of the rateable values of all rateable property in the district. Substantial exceptions to 'rateable property' were made, including section 37(4) which exempted 'Lands over which the Native title has not been extinguished, and lands in respect of which a certificate of title or memorial of ownership has been issued, if in the occupation of aboriginal natives only'. The 1876 Act replaced the provisions of the 1871 statute by making Maori owners liable where their European lessees defaulted, with the provision that a local body had the right to sell property on 12 months notice if rates remained unpaid for a period of at least 14 days – an extremely short period of grace. While no Maori member of Parliament spoke when the Bill was debated, the European members appeared to resent the exemptions, complaining that efforts should be made to place Maori in the same position before the law as themselves.[9]

In practice Maori demonstrated enthusiasm and support for local roads except when rates were being levied to build them. At the meeting of the Maori parliament at Orakei in 1879, resistance to rating was evident. Tiopera Kinaki, for example, asserted that justice came from the Treaty of Waitangi and that the Government was at fault in 'the establishment of these Road Boards...[that] want me to pay for using that road [from Wairoa to Hokianga].' He said 'I am grieved about that'.[10] Te Hemara Tauhia was also concerned that, although the Government was aware that little land remained to Maori at Kaipara, road board rates were being levied and sales for rates in arrears were threatened.[11] Wiremu Paitaki of Ngatipaoa at Thames complained that '[w]e Maori do not understand the meaning of these Road Boards. Our ignorance of these Road Boards causes us to be put in gaol for taxes we do not pay'.[12] A resolution was finally carried by the Orakei hui that 'Road Boards and County Councils should not deal with Maori lands, except in the case of lands leased to Europeans[13] (which was already the position of the 1876 Act).

9. NZPD, 1876, vol 22, p 29
10. AJHR, 1879, sess 2, g-8, p 2
11. Ibid, p 27
12. Ibid, p 32
13. Ibid, p 35

In addition to these concerns, Maori faced the added problem of not being eligible to vote at the local level because they did not pay rates as required, for example, under the Counties Act 1876. However, where Maori were eligible to vote, the provision was that in the case of mulitple ownership, only one person would appear on the rating roll. This meant that even legislation which purported to give Maori ratepayers voting rights did not guarantee that all owners would have the right to vote.

19.6 The Native Lands Rating Act 1882

From the late 1870s increasing pressure came to bear on local authorities to find alternatives to government funding for public works. In 1882, two new rating laws came into force simultaneously: the Rating Act and the Crown and Native Lands Rating Act. The former Act changed the basis of valuation (from annual to capital value – the latter being the value of the land plus improvements) and exempted Maori lands where the original title had not been extinguished and the land was occupied, as well as all lands owned by Maori 'of which there is not an owner or occupier other than a Native' (s 2). The latter Act, intended to provide local government with its own funding base, widened the rateable Maori land to include all Maori land within the borough boundaries (s 3). Exceptions were made for: Crown and Native land occupied by Europeans (s 6(14)); Maori land within the counties of East and West Taupo, Kawhia, Sounds, and Stewart Island (s 6(13)); and Maori land more than five miles from any public road open for horse traffic (s 6(15)). Other provisions were that Maori enrolled on the ratepayers roll were eligible to vote in local body elections and that government expenditure was recovered with the stamp duty which had to be paid whenever the land was leased to non-Maori or when it was sold or exchanged for the first time (sections 17 and 12 respectively). It is interesting to note that something of a circular system operated here. Local authorities levied rates and the government paid them. When Maori subsequently sold or leased their land, they paid a percentage of the purchase or lease price to the government as a means for the government to recover the rate. Maori consequently received ten percent less than the market price for their land. The final notable provisions were that rates not paid by Maori within three months would be paid by the colonial treasurer (ss 9 and 15) and the Governor in Council could proclaim districts where Maori owned lands could be rated under the ordinary law.

A typical response to the Act came from the member for Dunedin South, who said:

> I can't see why [Native] lands should be exempt from rates . . . Surely they should pay something to the State for the benefit they receive from State expenditure . . . My opinion is that the sooner we make the Maoris understand that they are not to be pampered the better it will be for us and them.[14]

Some Pakeha members, however, suggested that Maori were being taxed for roads they had never asked to have built and the measure was 'but another attempt to fleece the Natives'.[15] There was also strong criticism that rates were imposed on Maori with only a very limited provision for Maori representation on local bodies.[16] For example, the member for Rangatikei expressed considerable concern that 'we compel [Maori] to pay taxation for inflicting that hardship upon them without them having any voice in the matter'.[17] Maori themselves were concerned that rated lands were not increasing in value as predicted, and that accumulating unpaid rates might force the sale of Maori lands for payment, or that some Maori might be unaware of the new law and fail to pay rates, thereby having the lands taken from them also. Finally, the member for Western Maori reminded the legislature that Maori had already paid 10 percent tax on the initial sale of their land (presumably in reference to stamp duty, as discussed above).[18]

In 1885, Hauraki Maori expressed concern to Native Minister Ballance that they be exempt from rates because they had gifted their land for a road and could not afford to pay rates for it too. Despite his caution about rating land not yet passed through the court, Ballance advised that 'when they get their land in their own name, [Maori] should stand in the same position as non-Maori and pay rates.'[19] Maori from Tauranga also complained to Ballance that they were being singled out for rating charges when theirs was the only name appearing on the Crown grant, although they were meant to be representatives of a whole hapu.[20] Ballance showed greater sympathy for the Maori position in addressing the concerns of Gisborne Maori. He said:

> With regard to [the Native Lands Rating] Act, I am not personally in favour of it. I do not know whether the Rating Act will be repealed by Parliament, as there is strong feeling in favour of the Natives paying rates; but my opinion is that Native lands should not pay rates until they can be used, and therefore I am not in favour of the present Rating Act . . . But I think that, when title has been ascertained, and the interests of the Native owners subdivided, the time has come when they should take the same position as Europeans.[21]

The Native Lands Bill 1888 proposed taxation on all Maori lands. This provision was subsequently removed from the Bill following petitions from over 1500 people. The Crown and Native Lands Rating Act Repeal Act 1888 instead provided for the continuance of rating under the 1882 Act, but it ended the scheme of Treasury reimbursements to councils. This change deeply concerned Members of Parliament who had large amounts of Maori land in their electorates because of the loss of

14. NZPD, 1882, vol 43, p 709
15. Ibid, p 709
16. Ibid, p 704
17. Ibid, p 710
18. Ibid, p 712
19. AJHR, 1885, g-1, p 48
20. Ibid, pp 60, 63
21. Ibid, p 71

revenue this would create for their local bodies.[22] Under the Act, Maori were provided the one safeguard that all rates paid in the district were to be spent in that same district. Under the Repeal Act, Maori were also liable for rates for the maintenance of hospitals.

In total £67,369 was paid out to local bodies by the Crown for rates levied under the 1882 Act. Of that amount, £38,235 had been recovered by 1924 while £29,134 had not been recovered (although realistically Crown purchases of lands on which rates were unrecovered probably lowered that amount to around £15,000).[23]

19.7 The Rating Acts Amendment Act 1893

The long title to the Rating Acts Amendment Act 1893 noted that it was an Act to 'declare all Native Land to be Rateable Property.' While local authorities and many members of Parliament were pleased with the new amendment, saying, for example, that it was 'time [Maori] should contribute to the taxes of the colony',[24] Maori members opposed this extension of liability. While Maori petitioned to have the Bill delayed, the Government agreed to rate at a half rate land that had been through the land court, thereby retaining significant exceptions for Maori land. While stating that all native land, held customarily or otherwise (s 15) was to be rateable, the Act made provision for a number of exemptions, including Maori land occupied by Maori and outside the boundaries of towns or boroughs which would be levied at half rates and exempt from any special rates. No rates at all were to be levied from other lands including (amongst other things) land more than five miles from a public road or highway (s 18(1)). This Act was later consolidated with other rating legislation under the Rating Act 1894.

In touring Maori areas in 1895, Seddon and Carroll heard similar complaints from Maori to those earlier heard by Ballance. For example, it was alleged that Maori would never be able to pay their rates and that it was inevitable that their land would be taken from them as a result.[25] In the same year, the Native Affairs Committee received three petitions claiming that Maori were not receiving proper notices relating to the rating of their land and that rating values were being wrongly assessed.[26] The committee recommended that the petitions be referred to Government for an inquiry into these matters. Furthermore, when rates were extended to Taranaki reserves, the Public Trustee attempted to protect the interests of Maori beneficiaries and warned that rating land which generated a low income would load the land and inhibit future development as well as raise the danger of 'indirect confiscation'.[27] Despite his efforts, the Rating Act Amendment Act 1895 provided

22. NZPD, 1888, vol 62, p 380
23. Bennion, p 32
24. NZPD, 1893, vol 82, pp 407–408
25. AJHR, 1895, g-1, p 33
26. Petitions from Paratene Matenga and 181 other, Taituha Hape and 68 others, H tare Tikao and 22 others, AJHR 1895, i-3, p 6
27. AJHR, 1895, i-5a, p 20

that all native lands vested in the Public Trustee under the West Coast Settlement Reserves Act 1892 or otherwise should be deemed rateable (s 2(1)). A concession to the trustee was the provision that reserve land occupied by Maori only, or unoccupied, should be rated at half normal rates and that no special rates should apply (s 2(3)).

19.8 The Native Land Rating Act 1904

In 1904 a Bill dealing specifically with Maori rates was introduced by James Carroll. Carroll said 'I have always held and pronounced myself in a public way that Native Lands should be rated more than they are at present . . . that the Maoris should come into line with the Europeans and bear their fair share of the public burdens.' At the same time he acknowledged that Maori were under certain disabilities.[28] The introduction of the Bill triggered debate about the Maori Land Councils established in 1900 (see ch 15 above) and aroused Maori members' objections to compulsory vesting in councils. (Clause 8 of the Bill gave the Minister the option to put under the control of the land councils land carrying rates in arrears.) Maori members insisted that, before the Bill was passed, they be freed from the constraints of stamp duty on land sales and that provision be made for advances for settlement by Maori so that they might compete equally with Pakeha as farmers and therefore also pay the necessary rates.[29] Maori asserted that 'Maoris should be given the permanent administration of their own lands and their own affairs' and that it was 'inflicting a great injury on them to treat them in this way'.[30] Moves to have the clause removed were unsuccessful.

Some members of Parliament appeared to show some support (or at least sympathy) with Maori. For example, the member for Napier (an Opposition member) argued that:

> To place the further incubus of rating . . . on the Native race, with their hands and feet tied as they are in dealing with their lands, is ungenerous, and taking advantage of members of the British race that, I feel sure, was never anticipated when we joined hands in treaty with them in 1840.[31]

This member also wished to see Maori able to lease their lands as they saw fit and be protected from sale which would denude them entirely of land.[32] In addition, another member questioned the basic fairness of involuntary vesting for non-payment of arrears, saying:

28. NZPD, 1904, vol 128, pp 196–197
29. Ibid, p 610
30. NZPD, 1904, vol 131, p 350
31. Ibid, p 352
32. Ibid, p 352

> It would be precisely the same thing as though with our own lands we were arbitrary enough to pass an enactment to take the lands of any of us and hand them over to the County Councils or Road Boards to administer.[33]

Another member strongly asserted that the Bill be delayed, saying:

> the whole of this country did originally belong to the Natives, although it is now occupied by Europeans. This land belonged to them, and now we are going to make them pay rates. I do not believe they will do this.[34]

When it was pointed out that the Government had a duty to ensure that Maori did not become landless,[35] the Government introduced the provision that 'Native reserves in the Middle [South] Island occupied by Maoris' should not be liable for more than half rates (s 17).

Despite objections and petitions from prominent Maori leaders (Keepa Te Rangihiwinui and Te Wherowhero Tawhiao) and their numerous supporters, the Bill was passed making half rates payable only on Native land where a title had been ascertained (with exceptions) and exempting only customary or papatupu land from rates under section 2(2). The Act also allowed the Minister to place the land under the administration of the district land council (s 9) or to pay the rates and place a caveat against dealing with the land and take a portion for the Crown on the next partitions of the land (ss 10–12). Even more significant was the provision that if the Minister thought that Maori owners were keeping customary land out of the court to avoid paying rates, he could apply to the court to ascertain the title (s 2(2)). Bennion states that:

> this [provision] removed a voluntary element from the land court procedure and forced Maori to deal with their land in a way which they had not agreed to. Looked at it logically, the provision did not make sense. Since the land was exempt from rates, how could it be said owners were trying to avoid paying them? It also appears to be in direct contradiction to article ii of the Treaty of Waitangi.[36]

The Act does, however, appear to be the first to direct that Maori owners be noted on valuation rolls, which would ensure they were eligible to vote in local body elections.

The Rating Amendment Act 1910 further simplified rating law as it applied to Maori land, thereby making it as close to Pakeha rating law as was feasible. While customary land remained exempt from all forms of rating, a major provision was introduced that, unless otherwise provided, all Maori freehold land was to be subject to rates in the same manner as European land (s (2)). The coercive power of the Minister to bring customary land into the court was dropped and limitations were made on lands held by Maori Land Boards or the Public Trustee which were

33. Ibid, p 806 (Ormond)
34. Ibid, p 808
35. Ibid, pp 805, 814–815
36. Bennion, p 42

to be liable only to the extent that the land produced revenue (s 4). As Bennion notes, the statutory distinctions between liable and exempt lands and full or half rating were thereby abolished and the South Island Reserves lost their half-rated status (with no explanation given). Under these new provisions, the bulk of Maori land had finally been brought within the general rating regime and become liable for rates.[37] The Governor in Council retained the power to exempt lands from rates (a provision which had existed since the Rating Amendment Act 1893) and did so in respect of the Urewera lands of which over six hundred thousand acres was still unroaded. However, all such exemptions were to be provided for in this discretionary manner. Ngata surmised that the 'expected result of this Bill will be to force a large area of land in the North Island into settlement' as Maori would have to lease their lands to pay rates. There would be no legal 'shelter' as there had been under the 1904 legislation.[38]

A further amendment to the Rating Act in 1913 made the collection of rates on Maori land even easier. It provided that any number of areas of Native freehold land, within the district of one local authority which had the same group of beneficial owners, could be collectively liable for all rates levied by the local authority (s 9).

19.9 Wartime and Post-War Rating

The financial demands of the First World War put further pressure on local authorities, who in turn raised the issue of the rating of Maori land in the search for a solution to the problem. In particular, the National Efficiency Board, which had been created for the war effort, urged the Prime Minister on behalf of local authorities to rate Maori lands according to the standards used for European lands or let the state subsidise local authorities where rates were not paid.[39] However Herries, Native Minister, supported only a limited power to register charges or liens against Maori land under the Native Land Court titles, noting that there would be 'strenuous opposition' from the Maori members and their supporters.[40] In particular, Herries noted that:

> It would be contrary to the universal policy of all New Zealand Governments to allow Native land to be sold for non-payment of rates or to be so charged with liens as to destroy the equity of redemption, and thus render a Native landless without giving him a chance of occupying the land and getting enough out of it to pay rates.[41]

37. Bennion, p 44
38. NZPD, 1910, vol 153, p 436
39. National Efficiency Board to Acting Prime Minister, 18 May 1918, DB, p 490
40. Herries to Minister of Internal Affairs, 24 May 1918, DB, p 484, and see the same sentiments in Minister of Maori Affairs to Acting Prime Minister, 15 July 1918, DB, p 484
41. Herries to Minister of Internal Affairs, 24 May 1918, DB, p 484

In disagreeing with the Minister, the Board radically suggested that settlement by individual Maori farmers was not constructive and their 'useless and unoccupied' Maori lands should be sold for European settlement. As for the 'landlessness' which might result for Maori, the Board felt it would be better for Maori to sell their unoccupied lands even if this left them no other lands for their support.[42]

While this matter was deferred by the Government, the financial position for local authorities appears not to have improved after the war and the pressure to collect rates continued. The Native Land Amendment and Native Land Claims Adjustment Act 1919 gave sole discretion to the land court, on partition, to award additional land to any owner who had paid survey charges, rates or otherwise expended money for the benefit of all owners in a block.

In 1920, Maori petitioners advised the Minister of Lands that:

> We would like to bring under your notice the fact that we are now being rated for the first time. We are agreeable to pay general rates, but we wish to be exempted from the harbour rate and the hospital rate . . . We are quite prepared to be rated on the lands we have improved, but not on our unimproved lands, and we ask you to take special note of this. With respect to the hospital and harbour rates we would like the Government to use the power that it possesses under Section 5 of the Rating Act 1910 to exempt certain lands from rates by Order in Council.[43]

The more general Maori response included complaints of an apparent lack of consultation at a local level before rates were imposed and willingness to pay for facilities coupled with a desire for some separate development and for unimproved lands to be exempt.

The major demand by local authorities around 1920, however, was to have rates charges registered against blocks of land rather than registered titles (thereby allowing previously exempt Maori land which had not passed through the court to be rated). Advice was sought from the land court registrars, some of whom thought this would not be a difficult adjustment, while one registrar pointed out that councils in his area were careless in their rates demands, referring to whole areas of the country and not specific blocks or titles; a lax practice which might be continued under the proposed system.[44] Herries responded to continued demands for powers to charge the land for unpaid rates with the comment that it was unfair to allow communally owned land to be sold for rates since many did not directly derive benefit or use from it, and that individualization was the answer.

Also in 1920, Arthur Ormsby noted in the *New Zealand Truth* that, in 1885, Ballance had argued that Maori had made their contributions in the form of land taken for roads and railways and given for national parks and educational purposes, and also in lands taken for confiscation. He said:

42. National Efficiency Board to Acting Prime Minister, 4 July 1918, DB, pp 476–478
43. Office of Minister of Lands, 25 March 1920, DB p 458
44. Registrar Tairawhiti Court to Under-Secretary of the Native Department, 28 April 1920

> the amount of land now in [the] possession of the Maori in the North Island, unoccupied, is estimated at 19 acres per head. This would mean that if the local bodies are to levy the same it is only a matter of a short period when they (the natives) will become landless and paupers.[45]

During the early 1920s, pressure continued to be applied to Government by local authorities to make Maori lands more susceptible to rating charges and to make customary lands liable for rates. In 1923 the Native Land Amendment and Native Land Claims Adjustment Act provided for consolidation schemes, first envisaged by Ngata, which allowed the court to vest land in the Crown to satisfy outstanding rates (s 6(5)).

19.10 The Native Land Rating Act 1924

While many laws, especially in the nineteenth century allowed for the rating of Maori land, the actual return on rates was poor until the 1920s when progress in collecting rates was made. The Native Land Rating Bill was introduced to the House in 1924, (having first been suggested by the land court judges two years earlier). Its effect was to:

> simply transfer the whole question over to the Native Land Court, and give the Court the power to deal with each individual case that comes before it. It may use rents for the purpose of paying rates; it may enter into an arrangement in regards to arrears; and it has the power to arrange with the local authority and the Natives as to how much shall be paid.[46]

Under this new provision, liens would be simple charging orders, easily imposed by the court (a system which local bodies had been agitating for since 1910). Ngata stated his opinion that while the legislation might force Maori communities to decide how better to utilise their lands, 'a large area of so-called Native land in this country is land which should not be liable for any rates at all.'[47] Customary land continued to be exempt under section 4(a) of the new legislation. Section 9 of the Act provided for the recovery of rates by way of applications for charging orders upon the land which would be noted in the court records and registered against the title if one existed. A receiver would then be appointed who had the power to lease the land to recover the rates if necessary. If the rate remained unpaid after one year, s 10 of the Act allowed the land to be vested in the Native Trustee for sale, subject to the consent of the Native Minister.

At a conference convened by Te Kuiti local authorities in 1927, one legal representative for some Maori groups argued that Maori 'objected to paying rates on unoccupied holdings, especially as the Government held large areas of land on

45. *New Zealand Truth*, 25 September 1920
46. NZPD, 1924, vol 205, pp 1051–1053
47. Ibid, p 1057

which no rates were paid'.[48] The conference generally called for an end to the veto power of the Minister and the unrestricted power to sell land for unpaid rates. Other Maori also brought a petition to Government in September 1927, recalling the words of Stout in 1885 when the Main Trunk railway line began, that Maori lands would not be rated until sold or leased.

19.11 The Consolidation Commission

The Native Land Amendment and Native Land Claims Adjustment Act 1927 had also outlined a programme to establish a Native Lands Consolidation Commission, which Ngata turned his attention to soon after his appointment as Native Minister in 1928. With a view to extending consolidation schemes to North Auckland and the King Country, Ngata was intent on ridding native lands of outstanding rates in order to promote land development. Ngata encountered resistance from Maori to the scheme especially in the Rohe Potae, where Maori rejected both rates and a consolidation scheme and emphasised the agreement struck with Ballance in 1885 (that lands would not be rated until leased or sold). Maniapoto leaders eventually offered £13,000 to settle outstanding rates with eight local authorities. This offer was accepted by the councils.

The Native Land Amendment and Native Land Claims Adjustment Act 1930 authorised the Native Minister to make payments to local authorities in settlement of rates, and to take a charge to satisfy the payment, on land that was either outside or inside the consolidation scheme (s 13). Ngata, and other Maori, again pleaded for finance to enable Maori to compete fairly with Europeans and meet rates demands. The Native Land Act 1931 confirmed the provisions of the 1930 Act and reinforced the provisions for boards to administer lands, make payments towards rates from revenue received (s 343); to administer other lands when rates were in default (s 538); to make compromises with local authorities (s 536) and for the Native Minister to compound rates and acquire land in satisfaction thereof (s 537).

Local bodies had short-lived enthusiasm for the consolidation schemes, but the economic depression from 1929 raised new concern that Ngata's compromises had removed the ability to enforce payment of rates. In April 1933 the Government appointed a committee to look into the rating issue in general. Evidence given to the committee highlighted the familiar problem of Maori inability to gain finance and overcome the burden of rates. While Maori speakers tended not to question the principle of paying rates, they pleaded for exemptions for various reasons. Timu Te Kerehi and others of Wairoa submitted (rather too simplisticly) that 'we should not pay any rates to the borough or to the county council or to the harbour board for the reason that under the Treaty of Waitangi we are not supposed to pay rates.'[49]

The committee also provided the forum for local bodies to air their concerns, one of which was the fact that Maori non-payment of rates had become worse since the

48. *New Zealand Herald*, 26 August 1927
49. 17 May 1933, ma 1 20/1/14

1924 – 25 legislation because Maori had refused to pay once they knew their land could not be taken off them without charging orders. (Maori were generally confident that either the land court, or finally the minister, would be lenient.) The demand from local bodies was again that Maori be rated as Europeans by individualising land titles and making the land revenue-producing. Underlying all complaints was a disapproval of the Maori lifestyle and approach to land use.[50] However, local bodies apparently did not want Maori to lose their land but rather to be able to lease good land to rate-paying Europeans if the land was not being used productively. In its final report the committee noted that:

> No local authority, however urgently in need of revenue, desires to see Natives dispossessed of their lands and it is certain that no Government could stand by and watch Native land generally being compulsorily disposed of for rates liabilities.

It broadly recommended better use of the existing system and some policy changes in the application of the existing law, including the introduction of a statutory charge against revenue from the land rather than any charge affecting the land itself.

No legislation followed the committee's report and the existing law continued to be enforced. Bennion comments that as the recording systems improved and more land became individualised or incorporated, the land boards appear to have been quite helpful to rates collection[51]. For two reasons, however, very little land seems to have been taken for rates arrears alone. First, the Ministerial veto remained a block to this solution (Benion notes that it was the policy of successive ministers to refuse consent)[52] and second, the land court appeared ambivalent and in some cases hostile towards using the Rating Powers Act, largely because the court procedures were time-consuming.

By 1938 there was argument from the Cook County Council that 'the Treaty of Waitangi' (presumably specifically the refusal of ministers and courts to allow the taking of Maori land for rates) was preventing an effective solution to the rating problem.[53]

Rates compromises in Whakatane, whereby the county council agreed to remit 50 percent of rates where occupiers could make satisfactory arrangements to pay, resulted in a record collection in 1947 of 87 percent of the county council rates and 99 percent of the drainage rates. However, in Hokianga County (of which one third was Maori land) the consolidation schemes and rates compromises were not producing rates as expected. The council did not seem to have gone to the lengths of the Whakatane county to collect rates from individual owners or occupiers. The Taitokerau District land court judge, Judge Acheson, argued that little of the rates collected to date had been spent on roading in Maori areas and that Maori had not

50. See 20 July 1933, ma 1 20/1/14, for example by the solicitors acting for the borough council at Ohakune
51. Bennion, p 70
52. Ibid, p 71
53. *Poverty Bay Herald*, 20 July 1938, DB, p 542

yet been compensated for the thousands of acres of 'surplus lands' secured under old land claims investigations.[54]

In 1940, the Department of Native Affairs reported that charging orders were on the decrease, that the Maori Land Boards were being appointed as receivers, where required, and that there was 'general satisfaction' with the systems for collecting payments.[55] For example, a record collection of rates was made at Waiapu (77 percent) in 1941 and further progess was reported in subsequent years. This was not true however for Ikaroa and South Island court districts where 'numerous' applications were received for charging orders each year and no compromises were noted.[56] In 1940, Michael Joseph Savage, as chairman of the Board of Maori Affairs, summarised Government attitudes to rates demands in saying:

> Believing that it is neither equitable not just to the Maori race that its birthright should be whittled away though non-payment of rates on areas which have in the past lain idle, the Government is reluctant to agree to the enforcement of rating charges by sale until such a time as the particular Native has had a reasonable chance of obtaining from his land the necessary revenue to meet living-expenses, farm maintenance, and interest and rates.[57]

Bennion notes that Savage's attitude was shared by the land court judges as they struggled to balance the demands of councils and Maori ratepayers.[58]

19.12 The National Government and Land Development

The Maori Purposes Act 1950 embodied a National Government policy to utilise 'unproductive Maori land' which gave local authorities a further impetus to collect rates arrears. Section 34 of the Act allowed the Land Court to appoint the Maori Trustee to effect alienations of land which was: unoccupied; uncleared of noxious weeds; where rates had not been paid and the amount of rates had been charged against the land. By 1961, the Maori Trustee was receiver for 341 blocks for unpaid rates.[59]

In 1965, the Government established the Pritchard – Waetford committee to investigate Maori land questions (see ch 15 above). The committee set aside Maori concerns to retain their links with remaining lands through fractional interests, however uneconomic, and recommended that sweeping powers be given to the courts to bring fragmented blocks into productive development. The Maori Affairs Amendment Act 1967 subsequently sought to put many of the report's recommendations into effect and was fiercely opposed by important Maori groups. One of the

54. Acheson to Under-Secretary of the Native Department, 21 October 1935, DB, p 513
55. AJHR, 1940, g-9, p 9
56. Ibid; AJHR, 1941, g-9, p 6
57. AJHR, 1940, g-10, p 6
58. Bennion, p 78
59. G and S Butterworth, *The Maori Trustee*, Wellington, 1991, p 83

concerns was that the compulsory conversion of Maori freehold land with four or fewer owners into the category of general land, made the land fully liable for rating.

At the same time, a rating Bill was introduced to the House and debated within the wider context of land development issues. The Bill provided that the court could vest land in the Maori Trustee to lease, sell or otherwise alienate if it felt that the alienation of the land would facilitate the payment of future rates. No ministerial check was provided and the authority levying the rate was required to advise the court on the 'best utilisation' of the land. The Minister for Local Government hoped that '[the Bill] would enable a good deal more Maori land to be brought into production'.[60] Rata complained that Maori lands were being judged by their 'production' while no such requirement was placed on Crown or general lands.[61] The section (155) of the Act was violently opposed by Maori, and eventually repealed by section 6 of the Maori Purposes Act 1970. However, this was done on the grounds that it was a 'dead letter provision' as the Maori Land Court had preferred to use others powers allowed to it to vest lands in trustees for better management.

19.13 Contemporary Issues

In 1987, the Government introduced a new rating Bill designed to consolidate and rationalise the rating powers of different types of local authorities under the one Act. It did not significantly alter the existing scheme for the levying and recovery of rates on Maori land. Bennion describes the provision exempting customary land as 'more symbolic than practical' presumably in reference to the small amount of land retained under this title. The power to have Maori land sold for rates was removed as a result of arguments that it was contrary to the principles of the Treaty.[62]

Claims before the Tribunal indicate that historic and contemporary rating issues remain a concern for Maori groups. Bennion notes that 'at the heart of many contemporary submissions is the old concern that the different cultural approach of Maori to their lands ought to be taken into account, as well as the Treaty promise of undisturbed possession'.[63] Councils with large areas of communally owned Maori land accept that the land may never be developed and the rates will periodically need to be written off. For example, in the *Daily Post*, it was reported that 'nearly one third of a million dollars in rates owing on Maori-owned land had been written off – an annual event which the Rotorua District Council had labelled farcical and embarrassing.' The mayor said that attempts to change the Rating Act had failed, and commented that 'It is absolute nonsense to put a commercial value on multiple owned Maori land which can never be sold'.[64] On the other hand, the provisions of

60. NZPD, 1967, vol 353, p 3335
61. Ibid, p 3079
62. NZPD, 1987, vol 48, p 4165
63. Bennion, p 83
64. 'Maori land rates written off', in *Rotorua*, 1 May 1996

Part XIII of the Rating Powers Act 1988 mean that Maori land which is accessible and developed is liable for rates. However, the difficulty in collecting rates for Maori land under mulitple ownership allows Maori land-owners of well developed land to avoid paying rates even though they receive services from councils. Some councils consider that uncollectable rates should become a cost to central government, not regional councils.

19.14 Conclusion

The rating of property to pay for social services is a reasonable exercise of kawanatanga, legitimated by article 1 of the Treaty. However, Maori lacked capital other than their land, and they made a valid point that rates charges, especially in respect of customary land, amounted to a compulsion on them to sell land. The usual arguments that rating is a reasonable device to oblige people to develop land and make it yield revenue do not apply with the same force when land was is in multiple title without a single legal personality and not readily able to attract credit from either the private market or the state. Maori cultural values require land to be set aside for wahi tapu, or mahinga kai (and therefore not yeilding a revenue) need also to be considered. The legislative provisions that rated Maori land only when it was leased, or developed and yeilding a revenue, are therefore more appropriate, in Treaty terms, than rates on Maori customary land, or undeveloped land. There is also the problem that Maori, in remote areas especially, saw little in the way of services for their rates. The exempting of certain categories of Maori land from the payment of rates, and the levying of other lands at half the usual rate were, therefore, reasonable attempts by the legislature to recognise the particular situation of Maori, but arguably did not go far enough. Given all the problems of title and credit, and the very small amount of Maori freehold land left by the 1920s, given also the compulsory takings of a percentage of Maori land under public works legislation, it can certainly be stated that no Maori land should have been sold up by the Maori Trustee or any other agency, for the non-payment of rates, and that rating should only have applied to land from which significant revenue was being made.

Detailed research in local body records, Maori Trustee files and Maori Land Board Files, held in district offices around the country, would be necessary to determine, with any precision, the takings of Maori land for non-payment of rages. In many more, indeterminable instances, arrears of rates contributed to other pressures to sell land. In terms of Treaty settlements it is questionable whether such time-consuming research is cost-effective. Arguably grievances arising from rating should be dealt with as a general factor in Treaty negotiations before a particular date (1940? 1945?) with individual attention being given to claims arising from later land takings for rates.

CHAPTER 20

TINO RANGATIRATANGA: MAORI IN THE POLITICAL AND ADMINISTRATIVE SYSTEM

Treaty claims, and the debates about Treaty claims, commonly involve the recognition by the British in 1840 of the tino rangatiratanga of chiefs, tribes and individuals over their lands and valued possessions, under Article 2 of the Treaty. Pressures of time and space preclude a full recapitulation of that debate here, but some comments are offered on two of the main ways in which tino rangatiratanga might be expressed, namely Maori representation in the central Parliament and the authority of 'Maori committees'. Both of these have been matters of most serious concern to Maori since 1840 and both are the subject of reports in the Rangahaua Whanui research series.[1]

20.1 Maori Parliamentary Representation and the Maori Parliament Movement

The British Government realised by late 1837 that New Zealand was being colonised informally, mostly by British subjects, and believed that the flow of European settlement could regulated but not stopped.[2] It was also accepted, in the light of recent experience in Upper and Lower Canada, that the settlers would demand self-government and that this was indeed their right. But the British Government also accepted that the Maori needed protection least they suffer the fate of all other indigenous peoples exposed to European colonisation. While New Zealand remained a Crown Colony therefore, British policy attempted to steer between these poles of self-government and protection.[3]

The long-term approach adopted by the British for resolving the dilemma lay in 'amalgamation' of the Maori people into the same framework of law and govern-

1. See Bill Dacker, Michael Reilly and Leo Watson, 'Te Mamae me te Taumaha, A Report on Maori Representation and the Authority of Maori Bodies', Waitangi Tribunal Rangahaua Whanui series, draft report, 1996; and Vincent O'Malley, *Maori Committees*, Waitangi Tribunal Rangahaua Whanui series, draft report, 1996..
2. Alan Ward, *A Show of Justice*, Auckland University Press, Auckland, 1995 (4th ed), ch 3
3. William Renwick, 'Self-Government and Protection: a Study of Stephen's Two Cardinal Points of Policy in Their Bearing Upon Constitutional Development in New Zealand in the Years 1837–67' MA thesis, Victoria University of Wellington, 1962, ch 1

mental institutions as the settlers. Trying to protect the indigenous peoples of North America and Australia by making 'reserves' for them had not worked; they were merely marginalised in a broken version of their own culture until the reserves too were swept away by settlement. Instructions from the Colonial Office to Governor Hobson in 1840 therefore looked to 'the permanent welfare of the tribes' by bringing them progressively under British law 'than to the supposed maintenance of their own laws and customs'.[4]

E G Wakefield and the New Zealand Company planners also envisaged a mingling of the English gentry with the Maori chiefly class and their mutually lording it over the workers of both races; the British colonisation of New Zealand thus began, in theory at least, on a class, not a racial, basis. Avoidance of conflict and protection of Maori lay in incorporating them ultimately, but unhurriedly, into mainstream institutions, with all the rights and privileges of British subjects. Meanwhile their possession of land actually occupied would be recognised. These principles were in essence embodied in the Treaty of Waitangi by which the Governor Hobson in 1840 negotiated with some 500 chiefs the cession of sovereignty to the British Crown.

But the British Government had embroiled itself in serious difficulties from the outset. For the Maori were by no means as weak on the ground as had been supposed and they claimed all their lands, not just their settlements and cultivations. Moreover, the term used in the Maori version of the Treaty to equate with 'full possession' was 'tino rangatiratanga' – the 'entire chieftainship', of their lands and treasured things. The British officials had expected to find Maori grateful for the advent of their authority and happy to comply with British law; but while Maori were in fact grateful for Crown protection against the powerful settler companies and the French they were far from being totally compliant and submissive. Instead the stage was set for mounting confrontation over the land and over Maori intentions of preserving a considerable degree of autonomy; all discussion of political and jural institutions occurred in the context of that struggle.

When local courts were introduced, Maori accepted their jurisdiction in many cases involving disputes with settlers. They were much less willing to do so in disputes amongst themselves. Their compliance in either case depended on the willingness of the chiefs to maintain relations with the British authorities and to trade and seek employment in the new settlements. An attempt in 1843 by the New Zealand Company representatives and local magistrates to take an armed posse and serve a warrant on the powerful Ngati Toa chief Te Rauparaha, on disputed land at Wairau, resulted in the annihilation of the posse. Settlers pressed Governor FitzRoy to use his military force on their behalf but FitzRoy refrained until Hone Heke challenged British authority by cutting down the flagstaff at the Bay of Islands and sacking the town of Russell.

Heke's action was linked to questions of mana. In the years immediately after the signing of the Treaty the term 'tino rangatiratanga' did not feature commonly in

4. Russell to Hobson, 9 December 1840, co 209/8, pp 480–487 (cited in Ward, p 38)

public discussion but Maori did commonly express their concern for mana and how to safeguard it. In the north chiefs like Heke, who had been first to sign the Treaty, were resentful of the Crown's pre-emptive right of land purchase (a condition of the Treaty not well understood at the time),the Crown monopoly of customs and excise and the regulation of timber cutting. Some years later, at the great meeting of chiefs at Orakei (Auckland) in 1879, northern said that the British flag had been seen as symbolising a British claim to mana over the land, 'a means of taking the whole of our land', well beyond the terms of the Treaty.[5]

But FitzRoy and the next Governor, George Grey, were supported by many northern chiefs, standing by their compact with the Crown, in suppressing Heke's rising. When peace was restored Maori helped re-erect the flagstaff and called it 'Unity', symbolising a new effort to work in partnership with the British. In the Wellington district the Te Atiawa chiefs, partly out of rivalry with the Ngati Toa and partly also because they had entered into relations with the Crown over the negotiations for land, supported Grey in driving the Ngati Toa out of the disputed Hutt Valley.

By this time the settlers had grown in numbers and, as anticipated, were pressing for self-government. In 1845 discussions centred on the possibility of creating municipalities, the boundaries of which would be drawn so as to include few Maori. Lord Stanley, Secretary of State for Colonies, considered it impossible to admit them to the franchise but some of his advisers and some settler leaders thought that those Maori who possessed the property qualification, an individual freehold or urban tenement under the introduced property law, should be enfranchised so as to give them a stake in the new society. Almost all Maori held land on customary tribal tenure so there was no likelihood that they could dominate the settler electorate.[6] The settlers, however, pressed for powers beyond the municipalities and over the country at large; their interest was to control national Maori policy and thus the land.

In 1846 an attempt was made to meet the situation by the grant of a constitution creating two provinces: New Ulster, comprising most of the North Island with its majority Maori population, and New Munster, comprising Wellington and the South Island where settlement was dominant and fast-growing. Earl Grey, a very pro-settler Secretary of State, proposed that there should be immediate representative assemblies for both provinces but that the Maori vote be contained by making the franchise dependent upon ability to read and write English.

In New Zealand, Governor Grey, aware of continued Maori restlessness and of the provacative effect of the proposed constitution, sought postponement of most of its provisions. He also managed to set aside proposals to register the uncultivated lands as Crown lands, securing the land instead by buying up huge areas of the South Island and parts of the North under the Crown's monopoly of land transactions and prosecuting settlers who leased directly from Maori (see above ch 5).

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5. Speeches of Paikea and Tare, AJHR, sess II, 1879, G-8, p 24 (cited in Dacker et al, p 80)
6. Renwick, pp 71–72

Grey meanwhile sought to draw the Maori chiefs into relations with the Crown by control of expenditure on Maori purposes. In his intructions to Governor Hobson in December 1840, and in supplementary instructions of January 1841, Lord John Russell had sought to provide for future Maori needs. This was partly to be through the reservation of sufficient land for their own occupation. Russell's January 1841 instructions also authorised the governor to make available between 15 and 20 percent of the profits from the sale of Crown land for Maori purposes (see above ch 1) But this was to include the salaries and administrative costs of the Protectorate of Aborigines and in the first years of the colony, with little land being traded, the costs of running the Protectorate would have exceeded 15 to 20 percent of the land fund, for some years at least. In 1847 Governor Grey abolished the Proctectorate Department, claiming that it had done little for Maori. The Protectorate had in fact done a great deal to secure some equity for Maori in land transactions and its abolition was a precursor of Grey's own sweeping purchases in the South Island and elswhere. But because he spent conspicuously on schools and hospitals which catered for Maori as well as settlers, made gifts to chiefs of flour mills, agricultural equipment, boats and suchlike, and introduced the system of paid Maori assessors in the Resident Magistrates' courts and Maori police, he created the somewhat specious impression of providing for Maori involvement in the new society. In fact the policy won a good deal of cooperation from Maori in the local regulation of day to day areas of settler-Maori contact, such as petty crime, trespass of stock and damage to crops.

In the aftermath of the 1846 constitution the control of expenditure on Maori purposes became a serious issue between Grey and the settler leaders. Representative government was in fact postponed for five years, Grey introducing only nominated councils for New Ulster and New Munster. However, Lt Governor Eyre of New Munster reported in 1849 that not only might the expenditure on 'native presents and entertainment natives' be struck out of the estimates by the Council but also that for education of Maori as well.[7] Grey therefore proposed to London that for Maori purposes a Civil List vote of £7000, plus 15 percent of the land fund, be reserved for the governor's control in future constitutional arrangements. He added that he assumed that Russell's original instructions still authorised the governor to spend 15 percent of the land fund for Maori purposes.[8] However, control of the land fund was about to be handed over to the provinces in the new constitutional arrangements and Earl Grey preferred that any sum reserved to the governor for Maori purposes come from the general revenue, principally the customs and excise duties to which Maori themselves were substantial contributors.[9]

Settler agitation for representative and responsible government nevertheless grew steadily and settler leaders sought a property qualification to keep all but a few Maori unfranchised. They also opposed the creation of any Civil List vote for Maori purposes under the governor's control. Maori leaders in Wellington, aware of the

7. Eyre to Grey, 29 May 1849, and Grey to Earl Grey, 22 June 1849, BPP, 1850, vol 6, pp 171–172
8. Grey to Earl Grey, 30 August 1851, BPP, 1852, vol 8, pp 32–33; see also Renwick pp 95–96, 151
9. Earl Grey to Grey, 23 February 1852, BPP, 1852, vol 8, encl 1, p 8, para 30

settler meetings, petitioned London to leave the governor in control.[10] In the event, the 1852 Constitution Act finally granted representative government, with a property qualification for the franchise. It was argued that there was no distinction by race, and Maori possessing individual property could join the governing institutions according to the policy of amalgamation. But some safeguards were added. Native Affairs was reserved to the Governor and the Imperial Government, and Grey did get his Civil List of £7000 for Maori purposes, variable by the General Assembly subject to confirmation in London. A further safeguard was clause 71 which provided for the creation of Native Districts, outside the settler Provinces, where Maori could live under customary law.

In the 1853 elections, held under the new constitution, the Wairarapa chief, Te Maniheru, who held individual property under Crown grant, registered as a voter and the electoral meeting for the district was actually held at his house.[11] This is a nice image of rural settler/Maori amalgamation, but it was close to tokenism. For only about eight Maori qualified for the vote. In Wellington and Otago the possibility of Maori being enfranchised and their votes being marshalled by rival candidates, made them a political football, as also in subsequent elections. For the most part they were bystanders – very suspicious bystanders. It is surely no accident that discussion of a separate Maori parliament or possibly a Maori king began to be promoted by mission educated chiefs of Otaki, near Wellington, and that their initiative began in 1853.

Before leaving New Zealand, Grey secured from the new legislature the allocation of most of the £7000 civil list for the missionary societies' schools, attended mainly by Maori but also by Pacific Islanders (from Bishop Selwyn's Melanesian Mission) and some destitute settler children. Subsequent requests by the general government to the Commissioners of Crown Lands for the provinces about the 15 percent for Maori purposes were ignored; that concept had now died – further expenditure on Maori purposes depended on votes of the settler assemblies.

Grey did not implement clause 71 of the 1852 Constitution Act. Progress towards racial 'amalgamation' was well under way he reported, superficially, and there was no need to create Native Districts which would perpetuate 'barbarous customs'.[12]

By 1855, when the next governor, Gore Browne, arrived, settlers were pressing for responsible as well as representative government, including the control of Native Affairs by a settler minister. Responsible government was in fact granted in 1856 but, on Browne's recommendation, London directed that Native Affairs, including land purchasing, remain an Imperial responsibility. The great majority of the advisers whom Browne had consulted in New Zealand had argued that he should not transfer Native Affairs to the settler ministry, at least not without enabling Maori to become electors and requiring the assembly to accept the cost of any military action taken against Maori.[13] In 1858, however, a settler minister was

10. Renwick, pp 147–148
11. Paul Goldsmith, *The Wairarapa*, Wellington, Waitangi Tribunal Rangahaua Whanui series (working paper: first release), July 1996, p 32
12. Ward, p 86

appointed to offer advice to the governor. At the urging of the Anglican bishop, Selwyn, some thought was given to declaring the Waikato a Native District, but Grey had boasted of the progress of the 'amalgamation' policy and settlers were very hostile to 'shutting up' a large and fertile region of the country to freehold settlement in this way.

Browne and his officials therefore pressed on with the amalgamation programme, using the £7000 civil list vote for Maori purposes, most of it going to the mission schools. In 1858 the General Assembly took over the payment of £7000 for Maori education under ordinary appropriations, freeing the civil list vote for other purposes, but controlling the detailed allocation of the fund through the Native Minister. The civil list was divided that year between £2000 for hospital and medical care, £1000 in salaries for Assessors, £500 on presents and entertainment and £1800 on other matters – a total of £12,300.[14] The assembly was bitterly jealous of any payment for Maori purposes not controlled by themselves. In effect London's attempt, through the Civil List, to protect Maori from the Parliament in which they were not represented had begun to break down. Meanwhile, Maori were estimated by Browne to be contributing £51,000 in customs duties in 1856 compared with the settlers' £36,000.[15]

Maori were very well aware of the tenor of the settler assembly, remained deeply distrustful of it and continued to urge the governor to retain control of all matters affecting Maori. Meanwhile, their own initiatives had rapidly matured, taking two main forms. The kingitanga, or King movement, centred on the Waikato district and resulted in the choice of Potatau te Wherowhero as king in 1858, beginning a dynasty which lasts to this day. Among the many tribes who were too independent to place themselves under the mana of Potatau there developed a movement for large runanga, tribal assemblies, which, like the kingitanga, asserted tribal control over land, checked the tendency of individual chiefs to sell their community's patrimony and sought to admit settlers only on leasehold terms and under local Maori governance. The settler assembly in 1858 passed legislation to give the local runanga some power to make regulations which would be enforcable in the Resident Magistrates' courts, with the salaried Maori Assessors assisting. But these initiatives were designed as much to limit and control Maori as to empower them. Maori leaders recognised this and though many took the salaries and did cooperate in regulating such matters as stock trespass they continued to resist encrochments on their control of land.

Crown land purchasing in the North Island was increasingly frustrated and, determined to prevent what they regarded as illegitimate interference by 'land leagues', Governor Browne and the settler leaders in 1860 used the army to force through the survey of a disputed purchase at Waitara, Taranaki,in contradiction of solemn undertakings made in 1856–58. Fullscale war began, with Waikato Maori

13. Dacker et al, p 50
14. AJHR, 1858, B-2 and B-3. Renwick estimates that the total expenditure on Maori affairs in 1855–56 was £15,762. See Renwick, p 313
15. Browne to Labouchere, 31 May 1856, BPP, 1857, vol 10, p 502

supporting the Taranaki resisters.[16] In 1861 with the British army virtually stalemated, the Government in London replaced Browne with George Grey (for a second term) and reconsidered policy.

In 1860, as the war developed, Browne convened a conference of chiefs at Kohimarama, Auckland, in an effort to win their support for the Government's position. The minutes are important evidence of Maori attitudes.[17] In general speakers affirmed the benefits of the British connection. Many statements referred to difficulties in earlier times and affirmed the Christian faith and with it the law, te ture. The Queen was seen as the upholder of law and protector of both races as equals, or perhaps as older and younger brother. The younger, the Maori, asked for the law to be made known so that they would be included, as equals with the Pakeha. The Treaty was affirmed by northern speakers especially.

But the chiefs also complained that they were not in practice being treated equally with the settlers, or sharing with them in the councils of state. Several speakers linked their sales of land to the Crown with expectations of a consequent close relationship with the Crown, and expressed disappointment that this had not ensued. 'I sold my lands but you keep the laws, and do not allow me to share in them'.[18] Mohi and others complained that they had wanted to lease or sell land directly to settlers but had found this prohibited. Several speakers asked that Maori should be enabled to participate in the General Assembly, regardless of the language difference, others that they be consulted regularly by the governor. The Kohimarama conference itself was warmly welcomed, as was Browne's suggestion that it might become a regular meeting.

When Grey took up the governorship for his second term he quickly rejected two options available to him. London had given him authority to recognise the Waikato as a Native District and try to win the cooperation of the kingitanga. The settlers, however, remained hostile to this course and Grey resorted instead to a vain attempt to outbid the kingitanga by a refurbished version of the 1858 'official' runanga.[19] He also declined to convene an annual assembly of chiefs of all tribes such as Browne had assembled at Kohimarama. Grey considered it unwise to encourage the chiefs to develop a separate assembly.[20] Devoid of fresh ideas, Grey blundered into a resumption of the war in Taranaki and attacked the kingitanga in mid-1863.

Meanwhile in 1862, the Canterbury politician, J E FitzGerald, had moved in the General Assembly a series of resolutions affirming the amalgamation policy, asserting that no law should be passed which did not give Maori and settler equal civil and political privileges and proposing that Maori be brought into the Government, Parliament and the provincial councils without delay. The assembly passed only the statements of principle and defeated the third resolution, for Maori representation

16. See Keith Sinclair, *Origins of the Maori Wars*, Wellington, New Zealand University Press, 1957, ch 14
17. The original minutes are filed as MA 23/10, NA, Wellington; a serialised version was published in the official journal, *Te Karere Maori*, from April to November 1860; see also discussion in Dacker et al, pp 25–40 and Ward, pp 115–118
18. Mohi Te Ahi-a-te-Ngu of Waikato (cited in Dacker et al, p 30)
19. Ward, ch 9
20. B J Dalton, *War and Politics in New Zealand*, Sydney, Sydney University Press, 1967, p 145

in Parliament, by 20 votes to 17. But the issue had been considerably advanced and remained a live one.

It had been assumed, since the 1846 and 1852 constitutional discussions, that as Maori acquired property in individual title they would join the ranks of electors. It was also assumed that this process would speed up as Maori customary land went through the Native Land Court set up in 1865 and recipients of new, individual, titles qualified for the franchise under the 1852 Constitution Act. In 1865, however, prompted by a petition from the Otaki chiefs presented by J E FitzGerald, there was further discussion among settler leaders of granting a measure of Maori parliamentary representation anyway, as a means of helping to end the war. Nothing ensued until 1867 when the Stafford Government asked FitzGerald to draft a bill. This was presented in Parliament by Donald McLean and provided for Maori representatives (who might be Europeans) to be elected by adult Maori male suffrage. This was to be a temporary provision, for five years, by which time it was expected that many Maori would have qualified for the general roll. The actual form of representation reflected settler rather than Maori concerns: the agreement on four seats, three in the North Island and one in the South, was determined largely by the fact that it preserved the distribution between the islands which would otherwise have been disturbed by the grant of increased representation to the goldfields of the South Island's west coast. On the other hand it was largely because the South Islanders were concerned at the prospect of three additional settler members from the North (garnering the votes of the Maori electors) that the Government accepted an amendment making it mandatory that the Maori representatives should themselves be Maori.[21]

Although the first elections were poorly publicised and thinly contested, Maori were quick to apprehend the importance of parliamentary representation and the four seats were contested seriously as the century wore on. Nor were the Maori members as manipulable and incompetent as many settlers expected. The record of their speeches in fact reveals a sharp awareness of matters affecting their people, especially the impact of the Native Land Acts and Native Land Court, about which they continually, but vainly, protested. The number of Maori with property qualifications for the general electoral roll increased only slowly and, although some Maori voted for both the general electorate of their district *and* for the Maori representative, their preference to retain the Maori seats was strong, and a measure which was intended to be transitional and temporary was renewed and has remained to the present day. From 1872, two or three Maori were also nominated to the Legislative Council. The Council was abolished in 1951.

The dual voting of Maori was ended in 1893. From that date persons of more than 50 percent Maori descent were to go on the Maori roll; those of less than 50 percent on the general roll; those of exactly 50 percent each way had a choice! This fatuous system of measuring the degree of Maori 'blood' of course never

21. NZPD, 1868, vol 2, p 494; W K Jackson and G A Wood, 'The New Zealand Parliament and Maori Representation', *Historical Studies*, vol 11, no 43, October 1964, p 387

worked in practice, most people of any Maori descent who identified as Maori voting on the Maori roll.

The question of whether the four Maori seats in the national Parliament provided sufficient representation for Maori has long been a contentious one. If it is assumed that Parliament representation should be on a communal basis and that the number of Maori (or settler) members of Parliament should be in proportion to the size of the community in the nation generally, then Maori were greatly under-represented by the four seats for most of the century. The authors of the report *Te Mamae* appear to take this view and regard the four seats as little more than tokenism, convenient to the settlers in providing a specious form of Maori participation in the making of laws that affected them. This, however, is to overlook the view that, until 1893 at least, the *main* means of providing for Maori representation in the national Parliament was intended, in 1867, to be through Maori participation in the general electorates, both as voters and as candidates. The charge of token representation becomes more serious after 1893 when persons of more that 50 percent Maori descent were excluded from the general roll. This situation was not corrected until 1974, when Maori (of any degree of Maori parentage) were accorded the right to opt for the Maori or for the general roll. Depending upon the number of Maori opting for the Maori roll so the number of Maori seats would be determined, on the basis of approximately the same number of electors for each Maori seat as for each general seat. The number of Maori seats rose to five for the first time in 1996.

But Maori have never felt that their representation in the political and administrative system was adequate either in numbers at the centre or in terms of control of local tribal matters, especially land. Governments did not reconvene a consultative Maori assembly, on the lines of the Kohimarama conference, and the Maori representatives in Parliament quickly sensed their weakness in the General Assembly alongside 72 Pakeha members. Various proposals for increased Maori representation were put forward, ranging from 50 percent Maori representation (signifying two peoples equal in power and status) to two or three additional Maori members. In 1875 and 1876 a bill introduced by H K Taiaroa, member for Southern Maori, to increase the Maori membership was defeated in the House of Representatives.[22] Some very able Maori, such as Major Te Wheoro of Waikato and Henare Tomoana of Hawkes Bay, strong allies of the Crown during the wars, left the Parliament after one or two terms in the 1870s and became active leaders of autonomous Maori movements. In many districts of New Zealand, in fact, chiefs who had been 'kupapa' (neutral or loyalist) in the wars, developed movements aiming to regain control of the land and to secure some genuine equality and partnership with the settlers in the governmental and administrative structures. For them the promises at Waitangi, and at the time of their allegiance in the wars, had not been fulfilled.[23]

In 1879, Paora Tuhaere, principal chief of the Ngati Whatua (Auckland), convened a 'parliament' of chiefs, from almost all districts, at the Orakei marae.[24] He

22. Dacker et al, pp 97, 99, 107
23. Ward, ch 13
24. A record of its proceedings are printed in AJHR, 1879, sess 2, G-8

saw this a part of a continuum from the original Treaty discussions of 1840 through the Kohimarama conference, which, he regretted, had not been reconvened as promised. Maori still sought that relationship with Government, respectful of their mana, which the Treaty and the governor's speech at Kohimarama had implied. Tuhaere and other chiefs were critical of the system of four Maori seats in the national Parliament, not so much because of lack of capability in the members (though some were seen as being easily seduced by Pakeha goals of wealth and power) but because they were too few in number to be effective, either in the Parliament or in to have any hope of truly representing their huge electorates and the many tribes within each of them. Some speakers at Orakei favoured an increase of Maori seats in the national Parliament but the stronger interest was in holding a series of meetings and developing a separate Maori parliament to deal with Maori concerns. This was by no means a wholly separatist concept, for most speakers, and the resolutions at the end of the conference, continued to affirm allegiance to the gospel, the Queen and the law, and to recognise them as sources of Maori advancement. But they sought the equality of standing with the settlers that they believed they had been promised, and the best means of securing that equality. There was a good deal of detailed criticism of the land laws, laws which deprived Maori of control of their coastal and inland fisheries, and laws controlling the shooting of game on Maori land. Te Keene, as assessor of the Native Land Court, flourished a copy of the Native Lands Act 1862 and declared that it was from that the mana of the land had been lost.

Many Maori felt that a separate Maori parliament would enable Maori better to work together, both among themselves and with the Pakeha. This was the impetus for the Kotatitanga or Maori parliament movement which, after a series of further meetings, was formally launched at Waipatu, Hawkes Bay, in 1892. It was the basis also of a petition of the Maori members of General Assembly in 1883 (Tomoana, Taiaroa, Te Wheoro and Tawhai) to the Aborigines Protection Society in England for an elected Maori assembly, with legislative and administrative functions, responsible to the governor but not the national Parliament.

Against this trend, was the emergence in the national Parliament, of men like the mixed-race leader James Carroll, who first represented Eastern Maori in 1887 then switched to the general seat of Gisborne in 1893, became Native Minister in 1899 and served briefly as Deputy Prime Minister. New Zealand was a small society and many Maori had engaged in farming and in the commercial economy as best they could. Many had attended the village schools and learned English. By the 1890s an elite group, exemplified by Apirana Ngata, had gone through the private denominational secondary schools and were beginning to graduate from the universities. They exemplified success in what was a widespread Maori aspiration to engage with the modern world, master its skills and acquire wealth and status alongside the settlers. For them a separate Maori parliament and legal/administrative system seemed hazardous and retrogressive.

20.2 Maori Councils and Committees

Alongside, and contributing to, the proposals for stronger Maori national representation, were various forms of local or regional runanga, councils or komiti. These developed naturally out of traditional tribal assemblies, but took up some of the organisational features of church mission or state committees (such as office-bearers, written minutes, and formal resolutions) to meet new needs. Tribal runanga, runanganui crossing tribal lines, developed strongly in the 1850s to try to retain mana against encroaching Government authority. In Hawke's Bay and Poverty Bay they asserted control over the runholders, seeking to develop, in effect, a leasehold system, in defiance of the Native Land Purchase Ordinance 1846.

Two attempts were made to give the runanga a form of official recognition. In 1858 the General Assembly passed the Native District Councils Act and the Native District Circuit Courts Act. The first empowered local runanaga, with the local Resident Magistrate to pass by-laws to regulate civil injuries and lesser criminal offences; the second gave the Maori Assessors authority to enforce the by-laws, on their own for small matters (the £5 jurisdiction), and with the Resident Magistrate on circuit for more serious matters. The system was not well funded or supported administratively but several runanga were encouraged in their efforts at local self-regualation and some chiefs (Assessors) enthusistically exceeded their jurisdiction.

In 1861 Grey embarked upon a much more substantial system of official local and district Runanga, building upon existing structures with much greater funding and administrative support. Several Maori districts, notably in the north, engaged seriously and with much promise, in this endeavour. On both occasions, however, the settlers and officials had ulterior motives for setting up official Runanga: it was hoped that they would determine customary rights to land and oversee the sale or lease of land to the Crown or to settlers. The use of the local Runanga was by no means an inappropriate way of approaching either the issue of settling land title or of regulating land alienation; it did, after all, offer a way of involve the tribal leadership in open, representative, and public dealings. Had something like this been attempted in the 1840s, as a way of handling land purchase, it might have won Maori support. By 1858, however, and more especially by 1861, the Government's record on land purchase and its aggression in Taranaki, had made Maori almost everywhere highly suspicious of any official proposals to do with land. Grey's purpose of undermining or outbidding the kingitanga was also fairly obvious. Consequently, what might have otherwise been an appropriate approach to the land question met little favour at the time with Maori, who continued to support the kingitanga and attempt to manage land through their unofficial tribal assemblies. In turn the Government lost interest in supporting the runanga system, which became neglected after the resort to war in 1863.[25]

By 1865, the Government had found a new way of securing access to Maori land. The Native Lands Act of that year (and its predecessor of 1862), set up the Native Land Court and launched the process of converting customary tenure to a form of

25. Official and unofficial runanga in the 1850s and 1860s have been discussed in detail in Ward, chs 6–9

pseudo-individualised title. Every owner named on the new titles could sell his or her interest directly to settlers (see above ch 7). The system battened upon the intersecting nature of Maori customary rights; traditional rivalries and want of capital both to pay debts and to develop their own farms, propelled Maori into the land courts.

The settler politicians were delighted at the way the system took hold. Henceforth they had no need for Maori runanga or committees. Conversely the Maori, realising that the sale of individual interests undermined their previous tribal control of land, began to press for the formal recognition of tribal committees. The remainder of the nineteenth century thus witnessed various proposals coming from the Maori side, all rejected, watered down or circumscribed by successive Governments, who knew full well the importance of keeping the system of individual dealing alive. Thus when Donald McLean introduced a Bill in 1872 which might have given local Maori committees power in respect of title determination, he had to withdraw it in the face of settler hostility. John Bryce did secure the enactment of a Native Committees Act in 1883 but for very large districts, not appropriate to the numerous tribal divisions which Maori wanted to empower, and advisory only to the all-powerful Native Land Court. Of the committees created under the 1883 Act the 'Kawhia committee', chaired by John Ormsby and representing the Ngati Maniapoto and Ngati Hikairo tribes, proved most effective in settling questions of title and leasing land.[26]

Meanwhile an alternative form of Maori committees was being developed principally on the East Coast under (among others) the very able Maori Assessor, Paratene Ngata and the entrepeneurial chief, Wi Pere. These committees were essentially 'block committees' representing the hapu or hapu clusters that owned the big blocks of land in that district. They secured the support of the 1890–1 Commission into the Native Land Laws (the Rees-Carroll commission), which reported in favour of dealing with land by hapu, not by individual owners. As discussed above (ch 15) the commission's recommendations led to the passage of the Maori Land Councils Act of 1900 which, with the Maori Councils Act of the same year, aimed to give a considerable amount of local authority to the tribes, in repect of a range of matters such as health, sanitation and consumption of alcohol as well as over land.

It is generally well known that the members of the kotahitanga and kingitanga were divided in the years leading to the passage of the 1900 Act. Many favoured legislating independently for Maori, as a Home Rule parliament, to by-pass the Native Land Court and place land under the authority of tribal committees both for determination of title and for subsequent leasing or development. Others favoured securing ratification of their bill by the national Parliament, and the Maori members of Parliament introduced it there for successive years from 1895. The influence of

26. These movements are discussed in Ward, ch 18, and in greater detail in a report by Vincent O'Malley, 'Maori Committees in the Nineteeth Century', Crown Forestry Rental Trust, 1996. For the Kawhia Committee see Cathy Marr, *The Alienation of Maori Land in the Rohe Potae (Aotea Block), 1840–1920*, Wellington, Waitangi Tribunal Rangahaua Whanui Series, (working paper: first release), December 1996

powerful and confident members of the national Parliament such as Carroll, and of new leaders such as the young law graduate Apirana Ngata, together with the persistent Maori desire to work with the Crown rather than against it, led to the acceptance of the Government's bill and thence to the disbandment of the kotahitanga parliament.[27]

The Councils began promisingly, with even the kingitanga accepting a Land Council in the Waikato, in return for King Mahuta himself being given a seat in the Legislative Council of the national Parliament. But, as Dr Loveridge has shown, settler impatience at the slowness with which they made land available for settlement led to the Maori Land Councils, renamed Maori Land Boards in 1905, being stripped of powers which would have made them vehicles for any real self-determination. Soon they lost their Maori membership as well and became part of the official apparatus of land alienation, for the most part. The powerful Maori autonomist movements of the late nineteenth century had effectively been sidetracked and defeated.

In the early twentieth century then, the main avenues by which Maori engaged with the processes of Government and administration were via the four seats in the national Parliament (and two or three members in the Legislative Council) and the local councils dealing with health and sanitation. In respect of land the system of incorporation of owners and elected block committees, launched in 1893 in repect of the Mangatu blocks and given general legislative recognition from 1894, provided some scope for local hapu leaders. But the incorportions' powers were carefully defined by the Native Land Act 1909 and its successors and hapu autonomy was undermined by the dubious device of the 'meeting of assembled owners' also introduced in 1909.

Over three million more acres of remaining land passed from Maori hands between 1900 and 1930. When, in the 1920s, Wiremu Ratana movement began to command increasing support from the Maori people, burgeoning in numbers but increasingly marginalised in the economy, he looked for means of secular as well as spiritual advancement for the common people. The Ratana leaders thought it necessary to capture the four Maori seats in Parliament, and in 1932 Eruera Tirikatene took Southern Maori. The leaders of the New Zealand Labour party then discerned the electoral strength of the Ratana movement and made the famous alliance which led to Ratana nominees becoming the official Labour candidates. With the secret ballot being introduced for the first time in the Maori seats in 1937, voters' reluctance to oppose their chiefs at a public show of hands no longer applied and the four seats fell to the Ratana/Labour alliance, Apirana Ngata being defeated by the Labour candidate in 1943.

In the twentieth century, as in the ninetheenth century, Maori have continued to express demands for tino rangatiratanga, as guaranteed under article two of the

27. See John A Williams, *Politics of the New Zealand Maori: Protest and Cooperation 1891–1903*, ch 7. Dr Don Loveridge has discussed these developments in some detail in his report, *Maori Land Councils and Land Boards: A Historical Overview, 1900 to 1952*, Wellington, Waitangi Tribunal Rangahaua Whanui Series, Decmber 1996 and his views are summarised above, pt 1, pp 10–48.

Treaty. Governments' responses to these demands have been tempered by a desire to retain power and control over land and other resources, at the central level and within the bureaucratic institutions. Maori were feeling the impact of land-taking. In an effort to keep up with the shift of Maori into urban areas after the second world war and the great depression, the Department of Maori Affairs focused on welfarist activity designed to remove obstacles thought to hinder the economic progress and social absorption of Maori people.[28] 'The objective was to achieve equal rights and opportunities for the Maori without depriving them of the right to cultural pursuits of their choice'.[29]

During the Second World War, however, Maori assumed unprecedented responsibility in the administration of their own affairs, with considerable success.[30] In 1939 a Maori military unit was formed and in 1940, the 28th Maori Battalion left for the war. As further pressure mounted for recruits, the Government continued to favour voluntary Maori conscription but sought new ways to encourage Maori involvement in the war effort. In 1941, Parere Paikea, Maori Member of Parliament, was given responsibility for this, and his authority grew as additional responsibilities were shifted onto the emerging Maori War Effort Organisation. In 1942, the Prime Minister approved a scheme submitted by Paikea which provided for a network of tribal committees to work closely with Maori communities to encourage recruitment.[31] Maori values were to be applied to the organisation's deliberations and decisions and all tribes were to be involved. In its first six moneths the organisation formed 315 'tribal' committees in 21 zones around the country, co-ordinated by 41 tribal executive committees. The scheme received no Government funding, but operated on voluntary assistance from the community. Maori seized the opportunity to demonstrate their planning and leadership talents.

Not only did the organisation successfully reduce the threat of conscription by providing the necessary Maori enlistment, but it also expanded to deal with housing and certain social security issues pertaining to Maori. Education, vocational training and land use also eventually fell within the auspices of the organisation. It appeared that Maori were finally moving towards participation in the mainstream in New Zealand, on their own terms, to a considerable, and growing, extent. While Paikea was successful in extending the organisation's lifespan from the originally conceived six months, by mid 1943 it appeared to the Native Minister that the organisation was undermining the authority of the Native Department. Despite Maori attempts to make permanent the organisation's autonomy, by June 1944, scaling down of the organisation had begun. Maori responded, in an attempt to

28. A Fleras, 'From Social Welfare to Community Development: Maori Policy and the Department of Maori Affairs', *New Zealand Community Development Journal*, vol 19, no 1, 1984, p 33
29. A Fleras, 'Towards "Tu Tangata"', Political Science, 1985, vol 37, p 23
30. All discussion of the Maori War Effort Organisation comes from Claudia Orange, 'An Exercise in Maori Autonomy: The Rise and Fall of the Maori War Effort and Organisation', *New Zealand Journal of History*, April, 1987, pp 156–172
31. Claudia Orange, 'A Kind of Equality: Labour and the Maori People, 1935–1949', MA thesis, University of Auckland, 1977, pp 129–130

become a permanent part of the national scene, by demanding an investigation into the administration of Maori affairs.

The Maori Social and Economic Advancement Act 1945, which resulted, was only a partial victory for Maori. Eruera Tirikatene (Southern Maori) was one of the progenitors of the Act. According to Claudia Orange:

> Firstly, he had hoped to secure a permanent place throughout the whole of the administration for members of the Maori race; and secondly, he had wanted to reorganise the administration so that all the resources of Government, such as education, helah, and housing, for example, could be co-ordinated and made more easily available to meet the needs of the Maori people. His objectives were thwarted by the pasage of the 1945 Act, for Maori participation of the kind that he envisaged, at top levels of Government, was excluded, and the Board of maori Affairs structure remained unchanged'.[32]

Prime Minister Peter Fraser too had hoped for much more from the Act, saying:

> It was early recognised by myself that if the Organisation was absorbed into the ordinary activities and routine of the Department it would to a very great extent, be stultified and could not possibly exercise that positive beneficial influence, and carry out the work specified by Parliament for it to do as efficiently as if it was practically an autonomous organisation. It has been my aim to make the Organisation as self-controlling and autonomous as possible.[33]

But the committees and executives had, however, lost the autonomy and leadership enjoyed previously. They were neither completely independent nor wholly a part of the Government.[34] However, the Act did draw the Department into a wider range of work and committed it to a larger degree of cooperation with Maori than had previously existed. Meanwhile, the Department grew stronger, with increasing Maori personnel. Commencing with the appointment of T T Ropiha as Secretary of Maori Affairs in 1948, senior positions were increasingly filled by Maori. Maori also began to be appointed to the Maori Land Court judgeships, beginning with Judge E T Durie in the 1970s.

The Maori Women's Welfare League flowed from the 1945 Act also. Female Welfare officers were appointed under the Act and organised committees of Maori women to advance the welfare of women and children. These Maori women's welfare committees formed the basis of the Maori Women's Welfare League, established in 1951 as an incorporated soceity, receiving operating funds from the Government. The League focuses primarily on family centred interests such as education, health, housing and welfare, which encouraged a unifying Maori voice on matters of universal concern for Maori, as well as having strong roots at the tribal level.

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32. Orange, 'A Kind of Equality', p 155
33. Fraser to Under-Secretary, 21 September 1948, ma 35/1 (cited in Orange, 'A Kind of Equality', p 192)
34. Orange, 'An Exercise of Maori Autonomy', p 170

The 1945 Act was replaced in 1962 by the Maori Welfare Act, under which the New Zealand Maori Council was established. At this time, Maori urbanisation was well advanced, and looking to a new Maori social order, it tended to draw away the authority of the tribal structures rather than complementing and adding to them.

Despite these significant developments, the Maori people at large had been economically marginalised by urbanisation; rising unemployment affected Maori particularly seriously. Increasing frustration and protest by Maori in the 1970s over their status in New Zealand society led to, amongst other things, a broad-based Government re-appraisal of the role and function of the Department of Maori Affairs.[35] In the 1970s the 'Tu Tangata' policy (literally meaning 'people standing tall'), was developed by Kara Puketapu who became the Secretary for Maori Affairs in 1977. It introduced community based planning and implementation of policy and programmes for Maori at the local level.[36] In hindsight, it was the beginnings of a policy of 'devolution'. The most successful of the 'kokiri' ('to advance') units, which were the building blocks of the policy, were the kohanga reo (Maori language nests) staffed voluntarily by parents and grandparents.[37] These exemplified the Department's general shift away from 'top-down' management to a community based 'bottom-up' philosophy.[38] While some sectors of the Maori community appeared to support the principle of Tu Tangata as an expression of Maori autonomy, others remained sceptical of the Department's intentions and were suspicious that Maori would not be adequately resourced in their new role.[39]

In the 1980s, the Tu Tangata philosophy became the Government's best hope for achieving three policy objectives concurrently: the minimisation of Government spending on Maori; the reduction of Maori dependency on welfare services; and the pacification of Maori demands for increased self-determination.[40] In 1988, the Labour Government announced its intention to replace the Department of Maori Affairs with a Ministry of Maori Affairs. It also proposed setting up an interim Iwi Transition Agency (ITA) which would strengthen the iwi (tribal) operational base; develop delivery mechanisms for iwi; and transfer existing programmes to iwi within five years, at which time the ITA would also disband. The Ministry of Maori Affairs, which would replace the defunct Department, would deal with policy issues only, monitor other departments' responses to Maori needs, advise Government on Maori issues and act as a legislative 'watch dog' for Maori interests.

The Runanga Iwi Act 1990 was integral to this policy in providing for the establishment of 'runanga' (councils) as legal corporations which would function as the authoritative voice of iwi in their dealings with the Crown. The Act set out the essential characteristics of 'iwi' and the rules for the registration and operation of iwi authorities, or 'runanga iwi'. In 1991, however, and following the election of

35. Fleras, 'From Social Welfare to Community Development', pp 33–34
36. Ibid
37. Fleras, 'Towards "Tu Tangata"', p 29. As of 2 October 1984, there were 302 such language nests in operation in New Zealand.
38. Fleras, 'From Social Welfare to Community Development', p 35
39. Fleras, 'Towards "Tu Tangata"', p 31
40. Ibid, p 36

a National Government, the Act was repealed. The Act has been criticised as an attempt to 'create' a Treaty partner in the form of runanga in the image of Pakeha legal institutions.[41] Objections were also made over the failure of the legislation to recognise the significance of the hapu (sub-tribe) and whanau (extended family) under the Treaty. The Government was accused of causing unprecendented in-fighting in districts as different runanga struggled for access to funding.[42]

Following the repeal of the Runanga Iwi Act and the abolition of the Department of Maori Affairs, the new Ministry of Maori Affairs (Te Puni Kokiri) was established, comprising specialist divisions for health, education, training and economic resource development. The Ministry emphasises the regional delivery of services, with the co-operation of iwi who can choose to form legal entities and contract with Government to deliver services to Maori people in their region.[43]

During these reforms, particularly in the late twentieth century, Maori have consistently maintained the fundamental importance of the principle of partnership under the Treaty, while at the same time recognising the the complexities surrounding the concept of 'iwi' in contemporary society. It has been stated that partnership between Maori and the Crown at the most senior level is essential, in addition to well managed devolution of Maori services to the Maori community.[44] True partnership, some Maori assert, must be between Maori and the Government itself, not Government departments, as they have no guarantee of their, or the departments' accountability for the needs of Maori.[45] Many Maori, and others, recognise the complex nature of applying treaty terms to the contemporary context. In particular, the identity of 'iwi' in contemporary Maori society, raises certain challenges. In asserting the right of iwi to govern themselves as governmental or jurisdictional authorities in their own right, concern is expressed that iwi have power over their resources.[46] 'It is considered imperative that Maori participate in the formulation, implemention and evaluation of those national development plans and programmes which directly affect them.'[47] There are also, however, significant concerns about the place and nature of iwi today. While the Runanga Iwi Bill was seen by some to impose rigid, inflexible Pakeha concepts upon the iwi,[48] some groups warned Government that the iwi was not the root of power, which is dispersed between hapu and whanau.[49] There is also the contemporary (particularly post-Second World War) challenge of urban Maori, some twenty percent of whom are said to be 'de-tribalised' and 'de-culturalised' as well. Urban Maori, some suggested, must be able to establish incorporated runanga to cater for their particular needs (a move that has provoked criticism from the more traditionally organised groups[50]).

41. Ngati Irakehu, Submission to the Maori Affairs Committee, 1990, no 151
42. Kia Mohio Mia Marama, Submission to the Maori Affairs Committee, 1990, no 164
43. McLeay, 'Two Steps Forward, Two Steps Back', Political Science, vol 43, no 1, 1991, p 41, footnote 51
44. New Zealand Maori Council, 'A Response to: He Tirohanga Rangapu–Partnership Perspectives', Wellington, 17 June, 1988, pp 17–18
45. Te Runanga o Te Rarawa, RI Bill Submission, no 53
46. Nga Kaiwhakamarama i Nga Ture, RI Bill Submission, no 59
47. Erihapeti Rehu Murchie, Human Rights Commissioner, RI Bill Submission no 89
48. Nga Kaiwhakahaere o Ngaruahine Conservation and Water Rights Committee, RI Bill Submission, no 112
49. Te Runanga o Ngati Porou ki Tamaki, RI Bill Submission, no 50

Maori have also shown a willingness to advance possible structures for accountablility of Maori, given the opportunity to enjoy greater autonomy. For example Ngai Tahu, a South Island iwi, stated that its runanga should be the principal shareholder for Ngai Tahu and accountable to Ngai Tahu only in the management of its assets. At the same time, the iwi asserts that the runanga should be accountable to the Crown for the management of resources voted by Parliament. According to the iwi, auditors should be appointed by the iwi as an expression of the autonomous management of its affairs, although the Crown should have the right to specify the form of audit and the responsible auditor in respect of Crown monies and functions used by the iwi authority. It was also advised that iwi should be in a position to accept or decline the Crown services and resources in a contractual relationship.[51]

Given Maori demands and expectations of Government and the bureacracy, as briefly introduced here, and given the present level of commitment by Government in managing Maori affiars, it is widely recognised by Maori and Pakeha alike, that the policy of devolution, despite its difficulties, remains the most appropriate vehicle for the expression of Maori autonomy within bureaucracies. Devolution has accordingly been described as 'an acceptable way, for many Maori, of securing tino rangatiratanga.[52] It has been likewise been dubbed 'a genie now freed from the bottle in which history has entrapped it' which, once freed, cannot be stuffed back in the bottle again.[53] The present direction, if indications are correct, is for the Government to pursue its devolution and associated schemes, but on terms more widely acceptable to Maori. Challenges remain, however, for Maori to determine the shape and nature of contemporary Maori society under the Treaty, and for Government to better accommodate those structures, once they are established.

Outside bureaucratic management of Maori affairs, however, recent developments in New Zealand at the level of political representation may have a significant impact on the shape of Maori affairs in the future. In October 1996, New Zealand held its first general election under the mixed member proportional system of voting, with considerable success for Maori. Fourteen Maori members of Parliament were elected, a significant increase on the seven representatives in the previous Parliament. The predominantly Maori, New Zealand First Party, has entered into coalition with the National Party to form the first government under the new system of proportional representation.

50. RI Bill Submission, no 37 (no identity provided)
51. Ngai Tahu Maori Trust Board, RI Bill Submission, no 85
52. McLeay, p 46
53. The Mahuta Committee on Devolution, 1986, quoted in Ministry of Maori Affairs, *Ka Awatea*, Report of the Ministerial Planning Group, Wellington, March, 1991, p 71

APPENDIX

THE PRINCIPLES OF THE TREATY OF WAITANGI

Note: This appendix was compiled by Dr Janine Hayward.

This appendix draws together some statements by the courts, the Waitangi Tribunal, and the Government in New Zealand regarding the interpretation and application of the principles of the Treaty of Waitangi. The discussion is divided into three sections. The first part investigates the principles of the Treaty according to some seminal judgments of the courts in New Zealand since 1840, with an emphasis on the 1987 Court of Appeal decision in the case of *New Zealand Maori Council v Attorney-General*. The second part discusses the principles identified in some of the Waitangi Tribunal reports released since 1983. The final part presents the principles established by the Labour Government in 1989.

Two important points underlie this discussion. First, the Treaty is a living document to be interpreted in a contemporary setting. Therefore, new principles are constantly emerging from the Treaty and existing ones are modified. Professor Gordon Orr of the Waitangi Tribunal has observed that it may never be possible to formulate a comprehensive or complete set of principles because the Tribunal has dealt with only a limited range of cases and has not speculated about principles relevant to cases yet to be heard.[1] Secondly, and perhaps most importantly, the provisions of the Treaty itself should not be supplanted by the principles emerging from it. In the words of Justice Richardson in the 1987 case:

> much of the contemporary focus is on the spirit rather than the letter of the Treaty, on adherence to the principles rather than the terms of the Treaty. Regrettably, but reflecting the limited dialogue there has been on the Treaty, it cannot yet be said that there is broad general agreement as to what those principles are.[2]

APP.1 TREATY PRINCIPLES EMERGING FROM THE COURTS, 1840–1995

The attitude of New Zealand courts towards the Treaty of Waitangi has undergone significant development since 1840. This discussion is not exhaustive; rather it identifies significant cases that demonstrate an initial enthusiasm by the courts for upholding native title to land immediately after the signing of the Treaty in 1840, followed by a period from the mid-1860s well into the twentieth century during which the courts' interpretation gave the Treaty considerably less weight. A further turning point came in 1987 with *New Zealand Maori Council v Attorney-General*.

1. G S Orr, 'Principles Emerging from Waitangi Tribunal Decisions', unpublished paper presented to Tribunal members, 1989, p 1
2. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 672–673

APP.1.1 *R v Symonds* (1847)

The case of *R v Symonds* in 1847 questioned the competence of the settlers to buy land direct from Maori owners (as a departure from the Crown's right of pre-emption stated in the Treaty). In his ruling, Justice Chapman upheld the notion of native title and observed:

> Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of their country, whatever may be their present clearer and still growing conception of their dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers.[3]

Justice Martin, Chapman's fellow judge, similarly ruled that the Crown's title to land within the colony was subject to the aboriginal rights of Maori which could only be removed through voluntary act by the native owners.[4]

On the matter of the Treaty itself, Chapman declared that it was simply a declaration of the law the court had applied in making its judgment on this matter. He said:

> It follows . . . that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the charter of the Colony, does not assert either in doctrine or in practice anything new and unsettled.[5]

APP.1.2 *In re The Lundon and Whitaker Claims Act 1871* (1872)

The courts expressed a similar attitude toward native title *In re The Lundon and Whitaker Claims Act 1871*. On this occasion, the court ruled that:

> The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of native proprietary rights. Whatever the extent of that right by established native custom appears to be, the Crown is bound to respect it. But the fullest measure of respect is consistent with the assertion of the technical doctrine, that all title to land must be derived from the Crown; this of necessity importing that the fee-simple of the whole territory of New Zealand vested and resides in the Crown, until it be parted with by grant from the Crown.[6]

Despite judgments such as the two discussed above, the courts' attitude towards native title was not upheld over subsequent years. In particular, it was to change when Chief Justice James Prendergast was appointed in 1875. For the 20 years he was in office, Prendergast consistently denied that aboriginal title had any legal character or that the Treaty reaffirmed or created rights enforceable in the courts. In particular, in the case of *Wi Parata v The Bishop of Wellington* (1877), Justice Prendergast transformed the position of aboriginal title from one subsisting at law, to one held on sufferance of the Crown. He also ruled that the Treaty of Waitangi, 'could not transform the natives' right of occupation into one of legal character since, so far as it purported to cede the sovereignty of New Zealand, it was a simple nullity for no body politic existed capable of making cession of sovereignty'.[7] This set the precedent for Prendergast's subsequent decisions, and those of other judges. In

3. *R v Symonds* (1847) NZPCC 388
4. Ibid, p 395
5. Ibid, p 390
6. *In re The Lundon and Whitaker Claims Act 1871* (1872) 2 NZCA 41, 49
7. *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72

particular, the decisions of Sir Robert Stout, as chief justice of the local courts, upheld and reinforced the *Wi Parata* decision. This and other decisions that denied customary Maori title to land at law and reduced or rejected the role of the Treaty will not be discussed here, but examples of unsuccessful appeals to the courts by Maori include *Nireaha Tamaki v Baker* (1901) NZPCC 371; (1902) AC 561; *Hohepa Wi Neera v Bishop of Wellington* (1902) 21 NZLR 655 (CA); *Baldick v Jackson* (1911) 13 GLR 398; *Tamihana Korokai v Solicitor General* (1912) 32 NZLR 321; *Waipapkura v Hempton* (1914) 33 NZLR 1065; and *Hoani Te Heuheu Tukino v Aotea District Maori Land Court* (1941) AC 308.

Well into the twentieth century, debate about native land rights and the Treaty within the courts reappeared, but still with little success for Maori (in particular, see *Re the Bed of the Wanganui River* (1963) and *In re the Ninety Mile Beach* (1955)[8]). A significant development came with *Te Weehi v Regional Fisheries Officer* (1986), which tested the notion of customary Maori fishing rights when a Maori was charged with being in possession of paua smaller than the minimum size permissible under the under the Fisheries Regulations 1983. The judge found that 'the appellant was exercising a customary Maori fishing right within the meaning of section 88(2) of the Fisheries Act, [and in view of this conclusion] it follows that the other provisions of the Fisheries Act . . . did not affect his right to take the paua'.[9]

APP.1.3 *New Zealand Maori Council v Attorney-General* (1987)

In 1987, a case was brought to the High Court by the New Zealand Maori Council and its Chairman, Sir Graham Latimer, who applied (the application then being transferred to the Court of Appeal) that, despite section 27 of the State-owned Enterprises Act 1986 (which dealt with land subject to claim under the Treaty of Waitangi Act), the Crown was able to transfer to State enterprises lands that were subject to claims to the Waitangi Tribunal lodged after 18 December 1986 (as well as claims that were not yet lodged) and that this was contrary to the principles of the Treaty of Waitangi according to section 9 of the State-owned Enterprises Act. The duty fell upon the Court of Appeal to determine the principles of the Treaty with which the Crown's actions had been inconsistent. The court asserted the following principles.

(1) *The acquisition of sovereignty in exchange for the protection of rangatiratanga*

Justice Cooke observed that the 'spirit' rather than the strict text of the Treaty should be considered. The basic terms of the Treaty bargain, according to Justice Cooke, were 'that the Queen was to govern and the Maoris were to be her subjects; in return their chieftainship and possessions were to be protected, but that sales of land to the Crown could be negotiated'. Justice Cooke further observed that 'these aims are partly conflicting.'[10] In addition, Justice Richardson stated:

> There is . . . one overarching principle . . . that . . . the Treaty must be viewed as a solemn compact between two identified parties, the Crown and the Maori, through which the colonisation of New Zealand was to become possible. For its part the Crown sought legitimacy from the indigenous people for its acquisition of sovereignty and in return it gave certain guarantees.[11]

8. See *Re the Bed of the Wanganui River* [1963] NZLR 673; *In re Ninety Mile Beach* [1955] NZLR 419
9. *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, 693
10. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 663
11. Ibid, p 673

(2) ***The Treaty established a partnership, and imposes on the partners the duty to act reasonably and in good faith***

The principle that the Treaty established a partnership and imposed on the partners the duty to act reasonably and in good faith was independently agreed to by all five members of the Court of Appeal, though it was expressed differently by each. Justice Cooke characterised this duty as 'infinitely more than a formality'. He stated that, 'If a breach of the duty is demonstrated at any time, the duty of the Court will be to insist that it be honoured.'[12] Furthermore, he said:

> the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation.[13]

Justice Richardson similarly observed the reciprocal obligations of the Treaty partners in stating that, 'In the domestic constitutional field . . . there is every reason for attributing to both partners that obligation to deal with each other and with their Treaty obligations in good faith.'[14]

(3) ***The freedom of the Crown to govern***

On the freedom of the Crown to govern, Justice Cooke ruled that:

> The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected government to follow its chosen policy. Indeed, to try and shackle the Government unreasonably would itself be inconsistent with those principles.[15]

Also, Justice Bisson observed that:

> it is in accordance with the principles of the Treaty that the Crown should provide laws and make related decisions for the community as a whole having regard to the economic and other needs of the day.[16]

(4) ***The Crown's duty of active protection***

Justice Cooke stated that 'the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable'.[17] This principle in particular had been identified by the Waitangi Tribunal prior to 1987 and was further discussed and developed in Tribunal reports following the court's ruling in 1987 (see the later discussion).

(5) ***Crown duty to remedy past breaches***

On the matter of remedy, Justice Cooke stated that:

> [a] duty to remedy past breeches was spoken of. I would accept that suggestion, in the sense that if the Waitangi Tribunal finds merit in a claim and recommends redress, the Crown should

12. *New Zealand Maori Council v Attorney-General*, p 667
13. Ibid, p 664
14. Ibid, p 682
15. Ibid, pp 665–666
16. Ibid, p 716
17. Ibid, p 664

grant at least some form of redress, unless there are grounds justifying a reasonable Treaty partner in withholding it – which would be only in very special circumstances, if ever.[18]

(6) ***Maori to retain rangatiratanga over their resources and taonga and to have all the rights and privileges of citizenship***

In relation to the rights of Maori under the Treaty, Justice Bisson noted:

> The Maori Chiefs looked to the Crown for protection from other foreign powers, for peace and for law and order. They reposed their trust for these things in the Crown believing that they retained their own rangatiratanga and taonga. The Crown assured them of the utmost good faith in the matter in which their existing rights would be guaranteed and in particular guaranteed down to each individual Maori the full and exclusive and undisturbed possession of their lands which is the basic and most important principle of the Treaty in the context of the case before this Court.[19]

(7) ***Duty to consult***

On the question of whether the Crown has an obligation to consult Maori, Justice Cooke advised:

> in any detailed or unqualified sense the duty to consult is elusive and unworkable. Exactly who should be consulted before any particular legislative or administrative step which might affect some Maoris, it would be difficult or impossible to lay down.[20]

Moreover, he said, 'wide ranging consultations could hold up the processes of Government in a way contrary to the principles of the Treaty.'[21] Similarly, Justice Richardson stated that:

> the notion of an absolute open-ended and formless duty to consult is incapable of practical fulfilment and cannot be regarded as implicit in the Treaty . . . [however] . . . the responsibility of one treaty partner to act in good faith fairly and reasonably towards the other puts the onus on . . . the Crown, when acting within its sphere to make an informed decision.[22]

Following the 1987 Court of Appeal judgment, the Treaty principles were developed and reconsidered in a variety of cases. Some of these cases are discussed below.

app.1.4 *Tainui Maori Trust Board v Attorney General* (1989)

The issue at question in this case was whether the granting of coal mining rights by the Crown to Coalcorp represented a transfer of Tainui's 'interests in the land' subject to the protection of the Treaty of Waitangi (State Enterprises) Act 1988. Furthermore, whether the proposed transfers of land direct to third parties would be inconsistent with the principles of the Treaty of Waitangi and the Crown's obligation to evolve a system for safeguarding Maori claims before the Tribunal.[23] In finding in favour of Tainui on both matters, the judge ruled that:

18. Ibid, pp 664–665
19. Ibid, p 715
20. Ibid, p 665
21. Ibid, p 665
22. Ibid, p 683
23. *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513

> the Crown should take no further action…in selling, disposing of or otherwise alienating the said lands until such time as the Crown has established a scheme of protection in respect of the rights of the plaintiffs [Tainui].[24]

The judge also expressed the sentiment that:

> the principles of the Treaty of Waitangi . . . are taking effect only slowly but nevertheless surely. It is as well to stress also that they are of limited scope . . . As regards those Crown assets to which the principles do apply, this Court has already said in the forests case that partnership certainly does not mean that every asset or resource in which Maori have some justifiable claim to share must be divided equally.[25]

Justice Cooke also acknowledged that coal did not seem to have been of particular importance to Tainui at the time of the land confiscations (in the 1860s) and that what mattered to them was the general use of their land. However, the judge qualified this observation with the warning that any attempt to shut out in advance a claim by Tainui to be awarded some interests in the coal would not be consistent with the Treaty. For that reason, the judge explained, the interim order made by the High Court for Crown action to cease until the matter was resolved by the Waitangi Tribunal was upheld.[26]

app.1.5 *New Zealand Maori Council v Attorney-General* (1989)

Following the Court of Appeal's decision regarding the transfer of state assets to State-owned enterprises in 1987, the Crown proposed to sell forestry rights but not the ownership of land on which exotic forests are planted. The New Zealand Maori Council subsequently applied to the Court of Appeal that the Government's proposal to dispose of forestry assets was inconsistent with the judgment delivered by the Court of Appeal in 1987. In ruling on the matter and in considering the significance of the Treaty principles, the Court of Appeal in 1989 held that for the Government to present Maori with a forestry proposal that was a 'fait accompli' 'would not represent the spirit of partnership which is at the heart of the principles of the Treaty of Waitangi'.[27]

app.1.6 *Ngai Tahu Maori Trust Board v Director-General of Conservation* (1995)

In December 1992, four appellants, collectively known as Ngai Tahu, who, at the time of the case, held permits for commercial whale watching, challenged the Director-General of Conservation's intention to issue a further permit for commercial whale-watching (and other activities) by boats off the Kaikoura coast.[28] The judge hearing the case admitted that the Director-General ought to have consulted Ngai Tahu interests, but dismissed the applicants' claim for entitlement by virtue of the Treaty or applications of the principles of the Treaty, to a period of operation protected from competition. Ngai Tahu appealed and Justice Cooke, having heard the case at the Court of Appeal, made the following observations in his ruling.

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24. *Tainui Maori Trust Board v Attorney-General*, p 527
25. Ibid, p 527
26. Ibid, p 530
27. *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142, 513 (CA)
28. *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 534, 535

First, it was noted that the Conservation Act 1987 required that the director-general administer the Marine Mammals Protection Act so as the give effect to the principles of the Treaty.[29] In acknowledging that both active protection and consultation were appropriate principles for the court to consider in this case, the question remaining was whether the right to conduct commercial boat tours was within the scope of the Treaty or aboriginal title.[30] On this matter, the court ruled that the development right was not unlimited:

> however liberally Maori customary title and Treaty rights may be construed, tourism and whale watching are remote from anything in fact contemplated by the original parties to the Treaty. Ngai Tahu's claim to a veto must be rejected.[31]

Nevertheless, the judge found in favour of Ngai Tahu that, although a commercial whale-watching business is not a taonga:

> certainly it is so linked to taonga and fisheries that a reasonable Treaty partner would recognise that Treaty principles were relevant. Such issues are not to be approached narrowly . . . [and] the Crown is not right in trying to limits those principles to consultation . . . since . . . it has been established that principles require active protection of Maori interests. To restrict this to consultation would be hollow.[32]

APP.1.7 *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* (1994)

In 1994, a case was brought in the Court of Appeal by certain Maori against the transfer of property rights in the Rangataiki River and the Wheao River to the Bay of Plenty Electric Power Board and the Rotorua Electricity Authority, pending the resolution of a claim to the rivers lodged by Maori with the Waitangi Tribunal. While the appeal was unsuccessful, it did address the question of the limits to aboriginal title. In an earlier High Court decision on the same case, the judge had stated that:

> The Treaty of Waitangi 1840 guaranteed to Maori, subject to British kawanatanga or government, their tino rangatiratanga and their taonga. In doing so the Treaty must have intended effectively to preserve for Maori their customary title. However liberally Maori customary title and treaty rights might be construed, they were never conceived as including the right to generate electricity by harnessing water power.[33]

The High Court had also observed that:

> It is as well to underline that in recent years the Courts in various jurisdictions have increasingly recognised the justiciability of the claims of indigenous people either by developing the principle of fiduciary duty linked with aboriginal title . . . or in New Zealand decisions in which it has been seen, not only that the Treaty of Waitangi has been acquiring some permeating influence in New Zealand law, but also that treaty rights and Maori customary rights tend to be partly the same in content.[34]

In hearing the appeal, Justice Cooke endorsed the High Court's ruling on the matter and also dismissed the appeal, stating that:

29. Ibid, p 540
30. Ibid, p 541
31. Ibid, p 543
32. Ibid, p 544
33. *Te Runanga o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, 21
34. Ibid, p 21

> The essence of what has been said above is that neither under the common law doctrine of aboriginal title, nor under the Treaty of Waitangi, nor under any New Zealand statute have Maori . . . had preserved or assured to them any right to generate electricity by the use of water power.[35]

However, in setting these limits to customary title, the court admitted that Maori enjoy some water rights under the Treaty. In particular the court advised that if control over the rivers for the dams had been assumed by the Crown without Maori consent, that may well be the basis for a breach of the Treaty. The judgment records that 'The Crown emphasises that it acknowledges that the appellants may well have a well-founded grievance in terms of the Treaty of Waitangi Act 1975'[36] and that Maori remedy under such circumstances would appropriately lie in a claim to the Waitangi Tribunal or court-based action regarding Maori customary title or the Crown's fiduciary duty.[37]

APP.1.8 *Taiaroa v the Minister of Justice* (1994)

This case to the High Court concerned the 'Maori option' which required Maori, over a limited period in 1994, to choose between enrolment on the Maori electoral and general roll. This choice and the results of the option would carry repercussions for the number of Maori constituency seats in the first mixed member proportional Parliament in 1996. Maori who brought the case to the High Court (and the subsequent appeal to the Court of Appeal) claimed that the policy was conducted unlawfully in that it was held without adequate notice, and without adequate Crown resources devoted to informing voters.[38] In ruling on the case, Justice McGechan identified a number of principles which would guide him. He stated that he would not attempt to state the full content of tino rangatiratanga preserved in article 2, but would 'readily accept it encompassed a claim to an ongoing distinctive existence as a people, albeit adapting as time passed and the combined society developed'.[39] In particular, Justice McGechan advised that with regard to the Maori seats in parliament and the so-called 'Maori option':

> there is no doubt Treaty principles impose a positive obligation on the Crown, within constraints of the reasonable, to protect the position of Maori under the Treaty and the expression from time to time of that position . . . It is a broad obligation of good faith. Maori representation – Maori seats – have become such an expression. Adding this together, for my own part I consider the Crown was and is under a Treaty obligation to protect and facilitate Maori representation.[40]

In drawing on the principle of redress, Justice McGechan found that, 'The Crown, as a Treaty partner acting in good faith, should recognise past error when it comes to light, and consider the possibility of remedy under present conditions.'[41] Despite this, the High Court rejected the complaints brought by Maori, who subsequently appealed. In hearing the appeal, Justice Cooke said:

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35. *Te Runanga o Te Ika Whenua Inc Society v Attorney-General*, p 25
36. Ibid, p 26
37. Ibid, p 25
38. *Taiaroa v Minister of Justice* unreported, 29 August 1994, McGechan J, HC Wellington CP 99/94, pp 2–3
39. Ibid, p 69
40. Ibid, p 69
41. Ibid, p 70

> Special obligations to the Maori people, whether arising from the Treaty of Waitangi, partnership principles, fiduciary principles or all three sources in combination, are not needed to give rise to an implication that reasonable notice of such an option is inherent in it.[42]

Justice Cooke nevertheless also rejected the Maori argument that reasonable notice had not been given.

APP.1.9 *New Zealand Maori Council v Attorney-General* (1995)

New Zealand Maori Council v Attorney-General was an appeal to the Privy Council against the decision by the Court of Appeal and the High Court in New Zealand that the Crown could transfer broadcasting assets to Radio New Zealand and Television New Zealand under the State-owned Enterprises Act. In making the appeal, the New Zealand Maori Council argued that the proposed transfer was illegal with regard to section 9 of the State-owned Enterprise Act, which requires that the Government not act in a manner inconsistent with the principles of the Treaty of Waitangi. The Council submitted that the transfer was inconsistent with the Treaty's principles because it indicated that the Crown was not taking necessary steps to protect the Maori language with respect to television and radio in New Zealand. While the appeal was unsuccessful, it prompted further development by the courts of the principle of active protection.

In considering the case, Lord Woolf of the Privy Council acknowledged that:

> Foremost amongst [the] principles are the obligations which the Crown undertook of protecting and preserving Maori property, including the Maori language as part of taonga, in return for being recognised as the legitimate government of the whole nation by Maori.[43]

He said also that:

> This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. 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.[44]

In making his ruling and dismissing the appeal, Lord Woolf concluded that 'The purpose of section 9 is not, however, to provide a lever which can be used to compel the Crown to take positive action to fulfil its obligations under the Treaty.'[45]

APP.2 PRINCIPLES EXPRESSED IN TRIBUNAL REPORTS, 1983–87

The Treaty of Waitangi Act 1975 requires that claims brought to the Tribunal by any Maori or group of Maori relate to actions and policies by the Crown that were or are inconsistent with the principles of the Treaty of Waitangi. This discussion distinguishes between principles emerging from Tribunal reports released before and after the 1987 Court of Appeal decision (discussed in the previous section), thereby demonstrating the impact this

42. *Taiaroa v Minister of Justice* [1995] 1 NZLR 513, 517
43. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517
44. Ibid, p 517
45. Ibid, p 520

ruling had on the development of the Tribunal's Treaty principles.[46] Not all Tribunal reports are included in this discussion, which is intended to be introductory only, and not comprehensive or exhaustive.

APP.2.1 The Treaty implies a partnership, exercised with the utmost good faith

The principle that the Treaty implies a partnership, exercised with the utmost good faith, was first established in the *Manukau Report*, where it is stated that the interests recognised by the Treaty give rise to a partnership, 'the precise terms of which have yet to be worked out'.[47] Further, more extensive, references were made to this principle in other Tribunal findings following the ruling by the Court of Appeal in 1987 (see the later discussion).

APP.2.2 The exchange of the right to make laws for the obligation to protect Maori interests

The *Motonui–Waitara Report* discussed the principle of exchange between gifts, as 'The gift of the right to make laws, and the promise to do so as to accord the Maori interest an appropriate priority'.[48] Later, in the *Manukau Report*, the Tribunal suggested that, under article 1 of the English text of the Treaty, Maori ceded all rights and powers of sovereignty to the Crown. It also stated that, under the Maori version of article 1, Maori ceded 'kawanatanga', or the authority to make laws for the good and security of the country, subject to an undertaking to protect particular Maori interests.[49]

APP.2.3 The Maori interest should be actively protected by the Crown

With regard to the matter of active protection, the Tribunal has frequently stated that article 2 of the Treaty 'confirms and guarantees' to the Maori their property and other rights and that the preamble to the Treaty expresses the Queen's anxiety to protect the just rights and property of Maori. For example, the *Manukau Report* said that 'The Treaty of Waitangi obliges the Crown not only to recognise the Maori interests specified in the Treaty but actively to protect them.'[50] Similarly, the *Te Reo Maori Report* stated that in the enjoyment of their culture and language:

> the word (guarantee) means more than merely leaving the Maori people unhindered . . . It requires active steps to be taken to ensure that Maori people have and retain the full exclusive and undisturbed possession of their language and culture.[51]

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46. See Parliamentary Commissioner for the Environment, 'Environmental Management and the Principles of the Treaty of Waitangi', 'Report on Crown Response to the Recommendations of the Waitangi Tribunal, 1983–1988', Wellington, 1988, and also see, Orr, 'Principles Emerging from Waitangi Tribunal Decisions and Court Decisions'.
47. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed, Wellington, Department of Justice: Waitangi Tribunal, 1989 (the *Manakau Report*), p 70
48. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motonui–Waitara Claim*, 2nd ed, Wellington, Government Printing Office, 1989 (the *Motonui–Waitara Report*), p 52
49. *Manukau Report*, p 69
50. Ibid, p 70
51. Waitangi Tribunal, *Report of the Waitangi Tribunal on Te Reo Maori Claim*, 4th ed, Wellington, GP Publications, 1996 (the *Te Reo Maori Report*), p 20

APP.2.4 The needs of both Maori and the wider community must be met, which will require compromise on both sides

The principle of compromise was first enunciated in the *Motonui–Waitara Report*, which advised that 'It is not inconsistent with the Treaty of Waitangi that the Crown and Maori people should agree upon a measure of compromise and change.'[52] The *Te Reo Maori Report* identified compromise of a different sort when it urged that the language of both of the partners must be recognised if the Treaty is to find expression.[53]

APP.2.5 The courtesy of early consultation

The principle of consultation was first raised in the *Manukau Report*, in which the Tribunal noted that:

> consultation can cure a number of problems. A failure to consult may be seen as an affront to the standing of the indigenous tribes and lead to a confrontational stance.[54]

This principle was further developed by the Tribunal following the Court of Appeal's ruling in 1987 (see the later discussion).

APP.2.6 The Crown cannot evade its obligations under the Treaty by conferring authority on some other body

The principle that the Crown cannot evade its obligations under the Treaty by conferring authority on some other body was first established in 1983 with the *Motonui–Waitara Report* and was confirmed in subsequent reports. For example, within the *Manukau Report*, the observation was made that 'the Crown cannot divest itself of its Treaty obligations or confer an inconsistent jurisdiction on others'. The Tribunal explained that there is a duty on the Crown not to confer authority on an independent body without ensuring that the body's jurisdiction is consistent with the Crown's Treaty promises.[55]

APP.2.7 The Treaty is an agreement that can be adapted to meet new circumstances

In 1983, the *Motonui–Waitara Report* advised that the Treaty 'was not intended to fossilise the status quo, but to provide a direction for future growth and development . . . as the foundation for a developing social contract'. It further stated that the Tribunal considered the Treaty 'capable of a measure of adaptation to meet new and changing circumstances provided there is a measure of consent and an adherence to its broad principles'.[56] Following the Court of Appeal decision in 1987, a modified version of the principle emerged as the principle of development, which was further developed in subsequent Tribunal reports (discussed later).

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52. *Motonui–Waitara Report*, p 52
53. *Te Reo Maori Report*, p 20
54. *Manukau Report*, p 87
55. Ibid, p 73
56. *Motonui–Waitara Report*, p 52

APP.2.8 Tino rangatiratanga includes management of resources and other taonga according to Maori cultural preferences

The meaning of tino rangatiratanga in the Treaty was discussed extensively in the Tribunal's early reports. The *Motonui–Waitara Report* stated:

> We consider that the Maori text of the Treaty would have conveyed to Maori people that amongst other things they were to be protected not only in the possession of their fishing grounds, but in the mana to control them and then in accordance with their own customs and having regard to their own cultural preferences.[57]

A similar interpretation of the rangatiratanga guarantee was noted in the *Kaituna River Report* in 1984.[58] In the *Manukau Report*, 'te tino rangatiratanga' was further defined as 'full authority status and prestige with regard to [Maori] possessions and interests'.[59]

APP.2.9 Taonga includes all valued resources and intangible cultural assets

In the *Motonui–Waitara Report*, the *Kaituna River Report*, and the *Manukau Report*, the Tribunal noted that taonga means 'all things highly prized' by Maori, which includes tangibles such as fishing grounds, harbours, and foreshores (as well as the estuary and the sea, together with the use and enjoyment of the flora and fauna adjacent to it) and intangibles such as the Maori language and the mauri (life force) of a river.[60]

APP.3 PRINCIPLES EXPRESSED IN SOME TRIBUNAL REPORTS, 1987–95

Subsequent to the Court of Appeal ruling in 1987, the Tribunal discussed new principles, including the right of development, the right of trial self-regulation, the Crown's obligation legally to recognise trial rangatiratanga, and the principle of options. The Treaty implies a partnership, exercised with the utmost good faith.

First established in the *Manukau Report* and reinforced in the 1987 Court of Appeal decision, the principle of partnership was reiterated in the *Orakei Report*. The Tribunal supported the court's ruling that a leading principle was partnership between the races, inherent in which is an obligation to act towards each other (as Justice Cooke said) 'with the utmost good faith'.[61]

The *Te Roroa Report* in 1992 reiterated that the Treaty is a sacred covenant entered into by the Crown and Maori 'based on the promises of two people to take the best possible care they can of each other' and that both parties have a common moral duty to abide by the Christian and traditional Maori values it embodies.[62] The *Ngai Tahu Sea Fisheries Report 1992* advised that the Treaty signified a partnership between Pakeha and Maori requiring

57. *Motonui–Waitara Report*, p 51
58. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Kaituna River Claim*, 2nd ed, Wellington, Government Printing Office, 1989 (the *Kaituna River Report*), p 13
59. *Manukau Report*, p 67
60. *Motonui–Waitara Report*, p 50; *Kaituna River Report*, p 13; *Manukau Report*, p 67
61. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 3rd ed, Wellington, GP Publications, 1996, (the *Orakei Report*), p 147; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 3rd ed, Wellington, GP Publications, 1996, (the *Muriwhenua Fishing Report*), pp 190–192
62. Waitangi Tribunal, *The Te Roroa Report 1992*, Wellington, Brooker and Friend Ltd, 1992, p 30

each other to act towards the other reasonably and with the utmost good faith.[63] In the *Ngawha Geothermal Resources Report 1993*, the Tribunal's statement on partnership was reiterated with the statement that:

> with the Treaty principle of partnership, the needs of both cultures must be provided for and compromise may be needed in some cases to achieve this objective. At the same time the Treaty guarantee of rangatiratanga requires a high priority for Maori interests when proposed works may impact on Maori taonga.[64]

In 1995, the *Turangi Township Report* reiterated the statement first made in the *Muriwhenua Fishing Report* that:

> It was a basic object of the Treaty that two people would live in one country. That in our view is also a principle, fundamental to our perception of the Treaty's terms. The Treaty extinguished Maori sovereignty and established that of the Crown. In doing so it substituted a charter, or a covenant in Maori eyes for a continuing relationship between the Crown and Maori people, based upon their pledges to one another. It is this that lays the foundation for the concept of a partnership.[65]

Furthermore, the *Turangi Township Report 1995* argued that the responsibilities of the parties to the Treaty were 'analogous to fiduciary duties' or 'of a fiduciary nature' and had their source in the Treaty, not outside it or within the common law.[66] The *Te Maunga Railways Report* had also earlier found that there was a fiduciary obligation on the Crown as a part of its obligation to protect the interests of Maori (in this instance to facilitate the return of former Maori land taken by the Crown when no longer required for the purposes for which it was taken).[67]

APP.3.1 The exchange of the right to make laws for the obligation to protect Maori interests

This principle had been previously discussed by the Tribunal and was further developed in the *Orakei Report*, which confirmed that:

> The Treaty was an acknowledgment of Maori existence, of their prior occupation of the land and of an intent that the Maori presence would remain and be respected. It made us one country, but acknowledged that we were two people.[68]

The Tribunal also stated that article 2 of the Maori text conveyed an intention that Maori would retain full authority over their lands, homes, and things important to them – their mana Maori – while the English text was limited to a guarantee of 'the full, exclusive and undisturbed possession of lands, estates and forests, fisheries and other property'.[69] The *Muriwhenua Fishing Report* similarly stated that 'The principle that emerges is the

63. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992, p 273
64. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, Wellington, Brooker and Friend Ltd, 1993, p 137
65. Waitangi Tribunal, *The Turangi Township Report 1995*, Wellington, Brooker's Ltd, 1995, p 289
66. Ibid, p 289
67. Waitangi Tribunal, *Te Maunga Railways Land Report,* 2nd ed, Wellington, GP Publication, 1996, p 80
68. *Orakei Report*, p 130
69. Ibid, p 134

protection of Maori interests to the extent consistent with the cession of sovereignty'.[70] It went on to say:

> Maori were protected in their lands and fisheries (English text) and in the retention of their tribal base (Maori text). In the context of the overall scheme for settlement, the fiduciary undertaking of the Crown is much broader and amounts to an assurance that despite settlement Maori would survive and because of it they would also progress.[71]

In the *Ngai Tahu Report 1991*, it was observed that 'the cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga.'[72] Moreover, in the *Ngai Tahu Sea Fisheries Report 1992*, this principle of exchange was extended to embody four principles which had previously been identified separately.[73] These were the principles of active protection, the tribal right to self-regulation, the right of redress for past breaches, and the duty to consult. Subsequently, the *Ngawha Geothermal Resource Report* and the *Turangi Township Report 1995* also presented an overarching principle of exchange, which incorporated the principles of active protection, tribal self-regulation, redress, and the duty to consult.[74]

APP.3.2 The Crown obligation actively to protect Maori Treaty rights

While the principle of active protection was raised by the Tribunal prior to 1987, it was more widely developed following the Court of Appeal judgment. For example, the *Orakei Report* stated the position previously advanced in the *Te Reo Maori Report* that:

> the word 'guarantee' meant more than merely leaving the Maori people unhindered in their enjoyment of language and culture. It required active steps to be taken to ensure that the Maori people have and retain the full exclusive and undisturbed possession of their language and culture.[75]

In the *Mohaka River Report*, the very important principle of active protection meant that 'the Crown is obliged to protect Maori property interests to the fullest extent reasonably practicable'.[76] As mentioned earlier, the *Ngai Tahu Sea Fisheries Report 1992* spoke of the Crown's obligation of active protection within the larger principle of an exchange between the Crown's right to make laws and its obligation to protect Maori interests. The report stated that 'The Crown obligation to protect Maori rangatiratanga required it actively to protect Maori Treaty rights, including Maori fisheries rights'.[77] Similarly, both the *Ngawha Geothermal Resources Report* and the *Turangi Township Report 1995* identified the duty of active protection within the overarching principle of exchange between Maori and Crown.[78] Finally, the *Te Whanganui-a-Orotu Report* in 1995 stated that matters arising in the claim

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70. *Muriwhenua Fishing Report*, p 191
71. Ibid, p 194
72. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991, vol 1, p 236
73. *Ngai Tahu Sea Fisheries Report 1992*, p 269
74. *Ngawha Geothermal Resources Report*, pp 99–102, *Turangi Township Report 1995*, pp 284–288
75. *Orakei Report*, p 135
76. Waitangi Tribunal, *The Mohaka River Report 1992*, 2nd ed, Wellington, GP Publications, 1996, p 77
77. *Ngai Tahu Sea Fisheries Report 1992*, p 270
78. See *Ngawha Geothermal Resources Report*, pp 100–101; *Turangi Township Report 1995,* pp 286–287

were found to be in breach of the general overarching principle that the Crown must actively protect Maori rangatiratanga over taonga.[79]

In the case of the *Ngawha Geothermal Resources Report*, the Crown's obligation actively to protect Maori Treaty rights was seen to apply to all the interests guaranteed to Maori under article 2 of the Treaty which are not 'confined to natural and cultural resources'.[80] Furthermore, the *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* found, as the *Ngawha Geothermal Resources Report* also had done, that the Crown was under a duty to protect Maori taonga, in this case the hot springs and baths.[81]

While the notion of tino rangatiratanga had been summed up previously in the *Motonui–Waitara Report* and developed in the *Manukau Report*, it fell within the principle of active protection in the *Orakei Report*, with the finding that:

> The second article envisaged the retention of Maori lands by Maori people for as long as they wished to retain them and then in accordance with their customary lore and tenure. If anything other than that were intended it would need to have been expressly said.[82]

APP.3.3 The need for compromise by Maori and the wider community

After 1987, the Tribunal continued to develop the notion raised in the Motonui–Waitara and Manukau reports that reconciling kawanatanga and tino rangatiratanga required compromise by both Maori and the Crown. In the *Orakei Report*, for example, it was reiterated that 'there is room for movement and scope for agreement between the Crown and Maori people which involves a measure of compromise and change'.[83] The report explained that, while the effective settlement of many claims will often depend upon the willingness of parties to seek a reasonable compromise, it follows that the mana to propose such a compromise vests not in the Tribunal but in the affected claimant tribes.[84] The *Muriwhenua Fishing Report* stated that:

> neither partner in our view can demand their own benefits if there is not also an adherence to reasonable state objectives of common benefit. It ought not to be forgotten that there were pledges on both sides.[85]

The *Waiheke Island Report* included the proviso that 'it is out of keeping with the spirit of the Treaty that it should be seen to resolve an unfair situation for one party while creating another for another'.[86] The principle was interpreted as the principle of mutual benefit, whereby both parties expected to gain from the Treaty: Maori from new technologies and markets, non-Maori from the acquisition of settlement rights, and both from the succession of sovereignty to a supervisory State power. Neither partner, the Tribunal advised, can demand their own benefits if there is not also an adherence to reasonable State objectives of common benefit.[87]

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79. Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, Wellington, Brooker's Ltd, 1995, pp 201–203
80. *Ngawha Geothermal Resources Report*, p 100
81. Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, Wellington, Brooker and Friend Ltd, 1993, p 18
82. *Orakei Report*, p 135
83. Ibid, p 137
84. Ibid, p 186
85. *Muriwhenua Fishing Report,* p 195
86. *Waiheke Island Report*, ch 8
87. *Muriwhenua Fishing Report*, p 195

The principle of compromise was also explored in the *Mangonui Sewerage Report*, which stated that:

> The Treaty . . . requires a balancing of interests in some cases, and a priority for Maori interests in others. This is one occasion where a balancing is needed and some compromises must be made.[88]

The *Ngai Tahu Sea Fisheries Report 1992* reiterated the statement made in the *Muriwhenua Fishing Report* that 'neither partner in our view can demand their own benefits if there is not also an adherence to reasonable state objectives of common benefit'.[89] In the *Mohaka River Report*, this was expressed as the balancing of competing interests.[90]

APP.3.4 A duty to consult?

The Tribunal continued to develop its interpretation of the principle of consultation following the Court of Appeal decision in 1987. In short, the principle developed from the courtesy of Crown consultation (as discussed earlier) to the Crown's duty to consult with Maori. For example, in the *Mangonui Sewerage Report*, the Tribunal asserted the need for early consultation, saying 'In accordance with the Treaty, there should be consultations with the district tribes in our view, when certain local projects are proposed.'[91] However, at the same time, the Tribunal recognised the difficulty that often arises when the statutory body is unsure whom to consult.[92]

The *Muriwhenua Fishing Report* advised that regard must be had to Maori interests and that may in practice require consultation in some cases.[93] The *Ngai Tahu Sea Fisheries Report 1992* stated (within the overall principle of 'exchange') that 'the duty to consult with Maori does not exist in all circumstances'. However, the report affirmed that 'environmental matters and . . . measures of resource control as they affect Maori access to traditional food resources – mahinga kai – require consultation with the Maori people concerned'.[94] Much the same argument was present in the *Turangi Township Report* in 1995.[95] The *Ngawha Geothermal Resources Report* more strongly asserted (still within the broader principle) that:

> Before any decisions are made by the Crown . . . on matters which may impinge upon the rangatiratanga of a tribe or hapu over their taonga, it is essential that full discussion take place with Maori [if the obligation of active protection by the Crown is to be fulfilled].[96]

The duty to consult has also arisen in the respect of public works takings. For example, in the *Ngati Rangiteaorere Claim Report*, the Tribunal found that the Crown's obligation to protect Maori and their lands also involved an obligation properly to consult with them before disposing of their lands to the Crown or, by way of Crown grant, to any other party. They were not to be deprived of their lands without due legal process or by unilateral

88. *Mangonui Sewerage Report,* p 7
89. *Muriwhenua Fishing Report 1992*, pp 194–195 (as cited in the *Ngai Tahu Sea Fisheries Report*, p 273)
90. *Mohaka River Report*, p 75
91. *Mangonui Sewerage Report*, p 47
92. Ibid, p 48
93. *Muriwhenua Fishing Report*, p 193
94. *Ngai Tahu Sea Fisheries Report 1992*, p 272
95. *Turangi Township Report 1995*, pp 287–288
96. *Ngawha Geothermal Resources Report*, pp 101–102

action. In that particular case, the Tribunal found that the Treaty had been breached by the Crown's failure to consult and protect Maori.[97] It stated that:

> the Crown failed to consult with Ngati Rangiteaorere . . . in the first instance about the need for a public road, and it failed to negotiate genuinely with them to purchase the land. The Crown therefore had no right to proceed with compulsory acquisition. It was clearly in breach of article 2 of the Treaty.[98]

APP.3.5 The Crown cannot divest itself of its obligations

The *Mangonui Sewerage Report* found that the principle that the Crown could not confer an inconsistent jurisdiction on others extended to the laying down of rules for local authorities and the Planning Tribunal.[99] The principle that the Crown cannot divest itself of its Treaty obligations by conferring authority on other bodies reappeared in the *Te Roroa Report* in 1992. The report stated that the duty of the Crown extends to agents of the Crown in their official capacities, as well as individuals (which included the Native Land Court).[100]

APP.3.6 The right of development

As early as 1983, the Waitangi Tribunal was discussing the possibility that the Treaty was able to adapt to meet new circumstances. Following the 1987 Court of Appeal judgment, this principle was significantly modified and reappeared in the *Muriwhenua Fishing Report* with the statement that a fishery, 'As a property right, was not limited to the business as it was, or the places that existed, but had every facility to expand'.[101] The *Ngai Tahu Sea Fisheries Report* also stated that:

> It is common ground between the claimants, the Crown and the fishing industry that inherent in the Treaty of Waitangi is a right to development. This was recognised by the Muriwhenua tribunal in the context of a discussion of new technology and the right of development.[102]

The principle of development has since been developed and tested further in court decisions (see, in particular, *Te Runanga o te Ika Whenua Society v Attorney-General* and *New Zealand Maori Council v Attorney-General*, both discussed earlier).

APP.3.7 The tribal right of self-regulation

The principle of the tribal right of self-regulation was first developed by the Tribunal in the *Muriwhenua Fishing Report* as an elaboration of the concept of tino rangatiratanga. The report explained that:

> on reading the Maori text in the light of contemporary statements we are satisfied that sovereignty was ceded [under article 1]. Tino rangatiratanga therefore refers not to a separate

97. *Ngati Rangiteaorere Claim Report*, p 31
98. Ibid, p 47
99. *Mangonui Report,* p 4
100. *Te Roroa Report*, p 31
101. *Muriwhenua Fishing Report*, p 220
102. *Ngai Tahu Sea Fisheries Report 1992*, pp 253–254

> sovereignty but to tribal self management on lines similar to what we understand by local government.[103]

The duty on the Crown to recognise tribal rangatiratanga was further emphasised in the *Mangonui Sewerage Report*, which stated that:

> the nub of the problem is in the omission of the Crown to recognise the tribal position and to provide the legal foundation and resources for tribes to contribute more fully to local affairs and to take all necessary steps for the protection of tribal interests.[104]

Finally, in the *Ngawha Geothermal Resources Report*, the tribal right of self-regulation (self-management) was also considered an inherent element of tino rangatiratanga.[105] Following this report in particular, the tribal right of self-management fell within the broader principle of the exchange of sovereignty for protection (see the earlier discussion).

APP.3.8 The Crown's obligation legally to recognise tribal rangatiratanga

In response to the difficulties facing the Crown in achieving effective consultation with Maori and in connection with the developing notion of tribal self-regulation, the *Mangonui Sewerage Report* explored, for the first time, the possibility that the Crown had an obligation legally to recognise tribal authorities under article 2 of the Treaty. It observed that, as a result of the signing of the Treaty, 'traditional mechanisms for tribal controls would continue to be respected and maintained' but that this had not happened. The problem was identified as 'the omission of the Crown to recognise the tribal position and to provide the legal foundation and resources for tribes to contribute more fully to local affairs'.[106]

APP.3.9 The Crown's right of pre-emption and its reciprocal duties

From the *Orakei Report* emerged the new and important principle that, while under article 2 of the Treaty the Crown obtained the right of pre-emption over Maori land, the Crown should have left sufficient endowment for the present and future needs of Maori. In other words, according to the *Orakei Report*, the right of pre-emption was to be a limited one and did not extend to land needed by Maori.[107] The report stated that:

> we find that Article 2, read as a whole, imposed in the Crown certain duties and responsibilities, the first to ensure that the Maori people in fact wished to sell; the second to ensure that they were left with sufficient land for their maintenance and support or livelihood or, . . . that each tribe maintained a sufficient endowment for its foreseen needs.[108]

Later, in the *Muriwhenua Fishing Report*, it was explained that:

> The essential point was that the Treaty both assured Maori survival and envisaged their advance but to achieve that in Treaty terms, the Crown had not merely to protect those natural

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103. *Muriwhenua Fishing Report*, p 187
104. *Mangonui Sewerage Report,* p 47
105. *Ngawha Geothermal Resource Report*, p 101
106. *Mangonui Sewerage Report*, p 47. The report goes on to list the detail developing the scope and nature of that right (pp 47–48).
107. *Orakei Report*, pp 143–144
108. Ibid, p 147

> resources Maori might wish to retain, but to assure the retention of a sufficient share from which they would survive and profit, and a facility to fully exploit them.[109]

In the *Te Roroa Report*, a similar view was expressed that the Treaty is essentially a contract or reciprocal arrangement between the Crown and Maori, a ratification of the terms and conditions on which Europeans were allowed to settle in the country whereby the Queen was to establish government and the chiefs, the hapu, and all people were guaranteed their tino rangatiratanga. It involves continuing obligations to give, receive, and return.[110] Also, the *Ngai Tahu Ancillary Claims Report 1995* advised that the restoration of tribal estate demands acknowledgement of the fact that Ngai Tahu were, at the time of the report, all but landless (in breach of the principles of the Treaty of Waitangi).[111] The Tribunal recalled the words of Chief Judge Durie that fundamental to the Treaty was the expectation that:

> in the colonisation process the tribes would not be left landless, and by extrapolating from that, a continuing duty to consider redress where a current state of landlessness is in itself evidence that the Crown has not maintained that intent.[112]

APP.3.10 The principle of options

In the *Muriwhenua Fishing Report*, the principle of options between Maori, Pakeha, and biculturalism was first raised. The report noted that the Treaty envisaged the protection of tribal authority, culture, and customs, and also conferred on individual Maori the same rights and privileges as British subjects. Therefore, the Treaty provided an option for Maori to develop along customary lines and from a traditional base, or to assimilate into a new way. Inferentially it offered a third alternative: to walk in two worlds. Most importantly, as options, it was not intended that the partner's choices on these matters could be forced.[113]

APP.4 GOVERNMENT STATEMENTS OF PRINCIPLES OF THE TREATY

In 1989, the Labour Government announced the principles by which it would act when dealing with issues arising from the Treaty of Waitangi. These principles were:

(a) *The principle of government or the kawanatanga principle:* Article 1 gives expression to the right of the Crown to make laws and its obligation to govern in accordance with constitutional process. This sovereignty is qualified by the promise to accord the Maori interests specified in article 2 an appropriate priority. This principle describes the balance between articles 1 and 2: the exchange of sovereignty by the Maori people for the protection of the Crown.

It was emphasised in the context of this principle that 'the Government has the right to govern and make laws'.

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109. *Muriwhenua Fishing Report*, p 194
110. *Te Roroa Report*, p 30
111. Waitangi Tribunal, *Ngai Tahu Ancillary Claims Report 1995*, Wellington, Brooker's Ltd, 1995, p 370
112. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Waiheke Island Claim*, 2nd ed, Wellington, Government Printing Office, 1989, (the *Waiheke Claim Report*), pp 36–37
113. *Muriwhenua Fishing Report*, p 195

(b) *The principle of self-management (the rangatiratanga principle):* Article 2 guarantees to iwi Maori the control and enjoyment of those resources and taonga that it is their wish to retain. The preservation of a resource base, restoration of iwi self-management, and the active protection of taonga, both material and cultural, are necessary elements of the Crown's policy of recognising rangatiratanga.

The Government also recognised the Court of Appeal's description of active protection, but identified the key concept of this principle as a right for iwi to organise as iwi and, under the law, to control the resources they own.

(c) *The principle of equality:* Article 3 constitutes a guarantee of legal equality between Maori and other citizens of New Zealand. This means that all New Zealand citizens are equal before the law. Furthermore, the common law system is selected by the Treaty as the basis for that equality, although human rights accepted under international law are also incorporated. Article 3 has an important social significance in the implicit assurance that social rights would be enjoyed equally by Maori with all New Zealand citizens of whatever origin. Special measures to attain that equal enjoyment of social benefits are allowed by international law.

(d) *The principle of reasonable cooperation:* The Treaty is regarded by the Crown as establishing a fair basis for two peoples in one country. Duality and unity are both significant. Duality implies distinctive cultural development while unity implies common purpose and community. The relationship between community and distinctive development is governed by the requirement of cooperation, which is an obligation placed on both parties by the Treaty. Reasonable cooperation can only take place if there consultation on major issues of common concern and if good faith, balance, and common sense are shown on all sides. The outcome of reasonable cooperation will be partnership.

(e) *The principle of redress:* The Crown accepts a responsibility to provide a process for the resolution of grievances arising from the Treaty. This process may involve courts, the Waitangi Tribunal, or direct negotiation. The provision of redress, where entitlement is established, must take account of its practical impact and of the need to avoid the creation of fresh injustice. If the Crown demonstrates commitment to this process of redress, it will expect reconciliation to result.