Tino Rangatiratanga
me te Kāwanatanga

Tino Rangatiratanga me te Kāwanatanga

The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry

Part 1

Volume 2

Wai 1040

Waitangi Tribunal Report 2023

The cover photograph shows a land deed for James Kemp's Kororipo claim (OLC 597). Photograph courtesy Archives New Zealand Te Rua Mahara o te Kāwanatanga (R18461728).

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NGĀ KERĒME WHENUA I MUA I TE TIRITI, NGĀ HOKONGA WHENUA KI TE KARAUNA ANAKE, ME NGĀ WHENUA TUWHENE

OLD LAND CLAIMS, PRE-EMPTION WAIVERS, AND SURPLUS LANDS

> Should any of the lands belonging to [the missionary] children be taken we shall view ours as lost. It is true these lands have been made sacred to the children but we can still walk over them without treading on needles, and sit down quietly on them without sitting on needles, and of getting our fire-wood without molestation. Whereas if the lands go to other people, if we walk or sleep on them we shall be pierced and if we attempt to get firewood our hands will be tied. Now all is common we go on the children's land and they on ours and a good feeling exists, let things remain as they are.
>
> —Hōne Heke to Richard Davis, 1847[1]

6.1 Hei Tīmatanga Kōrero / Introduction

Land was a matter of critical, early concern for Māori, the British government, and settlers alike. The status of lands that missionaries and other early settlers claimed to have been sold to them was debated at the treaty negotiations at Waitangi and elsewhere in our inquiry district. Were they indeed sold as missionaries and settlers claimed, or did Māori retain rights in these lands as they would under customary law, and would that change if they agreed to the presence of a Kāwana? What would the new Kāwana do about the apparent loss of their lands?

Ngāpuhi rangatira thought the agreement reached as a result of the treaty negotiations was that they and the Governor would be equals and, looking to the future, that their relative authority and responsibilities would be worked out where their interests overlapped with those of settlers.[2] Governor William Hobson had also given a general assurance that Māori would be protected in autonomous possession of their lands, and he had made a specific promise to investigate pre-treaty land transactions and return to them any lands that were unjustly held.

How the Crown set about fulfilling the promises made by Hobson and meeting Māori expectations of equal authority was one of the first important tests of their future

relationship under the treaty, and this would be played out in the processes established to ratify the early land transactions.

For its part, the Crown considered control of land purchasing as fundamental to its ability to govern, control settlement, ensure the protection of Māori rangatiratanga, and make certain that both settlers and Māori benefited from the future development of the colony. Even before the signing of the treaty or its assertion of sovereignty, the British government had made it clear that land purchases would be valid only if derived from or were confirmed by a grant from the Crown. At the same time, settlers were reassured that they would not be deprived of their properties if they had been obtained on 'equitable terms'. How terms of equity were defined, the legitimacy and fairness of acquisitions assessed, and the interests of Māori and settlers reconciled (or not) were matters that directly affected the treaty relationship well into the twentieth century.

In addition to asserting a pre-emptive right to purchase land, the Crown appointed Pākehā commissioners to investigate the settler claims to land that were based on their pre-1840 transactions. Questions arise whether the Crown, in its establishment of the rules and procedures to be followed by the first Land Claims Commission, respected Māori law and custom as it had promised to do; and whether, before recommending a grant of title to the settler concerned, the investigations undertaken by the commission established that Māori had consented to the full and final alienation of the affected land.

Even when awards were recommended, many of the old land claims of settlers remained unresolved. Māori continued to occupy lands that the commission had validated as legitimately purchased; boundaries of grants to settlers and any reserves promised to Māori were still unsurveyed. In 1844, further complications in the treaty relationship were created when the Crown temporarily waived its pre-emptive right in favour of individual settlers. The protections for Māori that had been intended under this waiver scheme often failed to be put into effect, while disallowance of many of the 'purchases' under waiver certificates for failure to comply with regulations caused considerable dissatisfaction among settlers. There was a question, too, about what should happen to any lands – the so-called 'surplus' – that the commission deemed to have been purchased under equitable terms but was in excess of what could be granted under statute to an individual settler. Did this belong to the Crown, since native title had been extinguished by a validated deed of purchase; or should it be returned to the original owners, since their agreement had been with the settler, not with the Crown, whose claim Māori were unlikely to understand or accept? That land also remained unsurveyed.

In the late 1850s, the newly established colonial Legislature set up a second Land Claims Commission to bring finality to the process and certainty to both settler title and the Crown's ownership of any surplus lands. Settlers were required to survey the boundaries of the lands they had claimed and were incentivised to do so; but again, the equity of the procedures established by the Crown would be at issue, and many decades followed in which Te Raki Māori protested at the loss of their lands as a result of the Crown's title ratification process.

6.1.1 The purpose of this chapter

The issues regarding old land claims raised in this chapter are of considerable importance to the claimants. Not only did the lands granted to settlers or claimed by the Crown as 'surplus' represent a significant portion (an estimated 14 per cent) of the district as a whole (and in the case of the Bay of Islands taiwhenua, some 29 per cent) but the issues are also central to the treaty relationship; they concern not only land, but also questions about the relative authority of the treaty partners, and the relationship between tikanga Māori and English law. This chapter focuses on the Crown's handling of old land claims in that context and addresses fundamental questions about both the nature of pre-treaty land transactions and the relationship between the Crown and Te Raki Māori in a post-treaty world. We include discussion of transactions under the pre-emption waiver scheme in this chapter because, in our view, the question of what Māori intended when entering into such arrangements was not yet settled in 1844, and because the Crown process for investigating and validating 'purchases'

conducted under waiver certificates became intertwined with that for old land claims in general.

We have already concluded in our stage 1 report that Māori who signed te Tiriti were not ceding their sovereignty, nor were they consenting to the Crown imposing its own legal system or worldview over theirs. Rather, they were consenting to a partnership in which the Crown would control settlement and protect Māori interests, and the Crown and rangatira would work together for the mutual benefit of their respective peoples. The Crown's handling of the old land claims and transactions undertaken under its temporary waiving of its pre-emptive right in favour of individual settlers was an early and crucial test of the treaty partnership, and of the Crown's willingness and ability to protect Māori interests as it had said it would. This chapter considers whether the Crown kept that promise of partnership and respect for Māori rangatiratanga and fulfilled its obligations under the treaty.

6.1.2 How this chapter is structured

To provide context for our discussion, we begin by outlining the development and scale of entry into land arrangements in the Te Raki region before 1840 and briefly introduce some of the key settlers and rangatira involved.

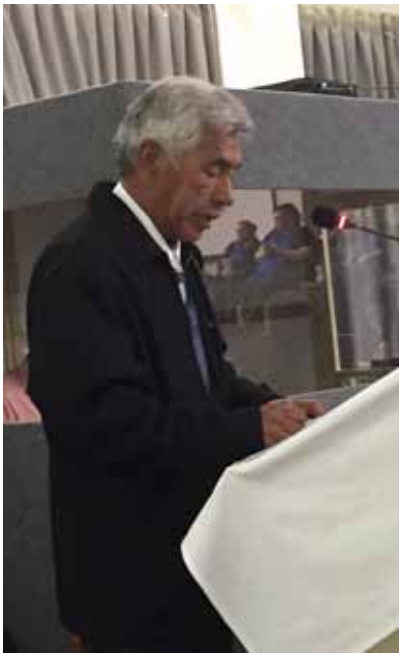
We then consider the conclusions and findings of other Tribunals which have looked at pre-treaty transactions and the Crown's handling of them; summarise the Crown's concessions and the key arguments of claimants and Crown; and at section 6.2.6, identify the issues to be determined.

We turn first (at section 6.3) to the core issue between the Crown and claimants: what was the nature of the pre-treaty land transactions? Did they signify arrangements involving ongoing reciprocal obligations, as the claimants said? Or, as the Crown submitted, were they in some instances transactions that equated to the Crown (Pākehā) understanding of sale? In addressing this issue, we will consider the applicability of Tribunal findings in other inquiry districts to our own.

We move next (at section 6.4) to a consideration of how the Crown responded to the expectation expressed by Māori at the treaty negotiations that their views regarding arrangements they had made with missionaries and settlers would be respected, and their concerns that their lands might be gone. A series of ordinances were passed by the Crown to assert its radical title and to set up inquiries, the latter intended to establish whether pre-treaty transactions were valid, and on favourable recommendation, to provide for the issue of a Crown grant to the Pākehā claimant. We begin with the first Land Claims Commission (1841 to 1844), explore its procedures, and consider whether Māori expectations of their retention of rights in the lands subject to pre-treaty agreements were fulfilled.

In the following section (section 6.5), we turn to the policies introduced by Governors of New Zealand, Robert FitzRoy and George Grey, in respect of pre-1840 land transactions. Particularly crucial was FitzRoy's decision to increase the size of grants to missionaries and other 'deserving' settlers beyond the limits set by legislation, and the recommendations of the first commission that placed Māori retention of their cultivations, pā, kāinga, and wāhi tapu in jeopardy. Also of significance was FitzRoy's effort to diffuse growing Māori tensions by promising the return of 'surplus' lands and, looking forward, even by waiving the Crown's right of pre-emption to allow direct purchase of land from Māori by settlers in certain circumstances (considered separately in section 6.6). Governor Grey's criticisms and attempts to overturn key aspects of his predecessor's policies provide a powerful critique of the Crown's early handling of land issues and Māori rights under te Tiriti, most notably the generous awards to the missionaries and the failure to protect cultivations, wāhi tapu, and other key sites, the retention of which was acknowledged by the Crown as essential to Māori well-being. We then assess Grey's own response to the problems he had identified and the effectiveness of the measures he introduced to rectify them.

In chapter 4, we considered whether the Crown's assertion of a right of pre-emption and, conversely, FitzRoy's decision to waive that right to enable direct purchase of Māori land by settlers under certain restrictions was in breach of treaty principles. In section 6.6 of this chapter, we examine FitzRoy's pre-emption waiver policy in



Some of the claimants (and the claimant group they are representing) who presented on old land claims during Waitangi Tribunal hearings. *Clockwise from top left:* Ani Taniwha (Ngāti Kawau me Kawhiti, Ngāti Kahu o roto Whangaroa), Awhirangi Lawrence (Ngā Hapū Whānau o Whangaroa), Hugh Rihari (Ngāti Torehina ki Matakā), Marsha Davis (Ngāti Rāhiri, Ngāti Manu, Te Uri Karaka, Te Uri o Raewera, and Ngāpuhi ki Taumarere), Dr Merata Kawharu (Ngāti Rāhiri, Ngāti Kawau), Nora Rameka (Ngā Hapū o Te Takutai Moana, Ngāti Rēhia), Owen Kingi (Ngāti Uru, Ngāti Tahawai, Ngāti Pakahi, Ngāti Teketanumi, Kaitangata), Shirley Hakaraia (Te Patukeha, Ngāti Kuta, Ngāti Manu), and Tahua Murray (Ngāti Ruamahue).

Key Terms

Old land claims: As part of the Crown's plan to establish sovereignty and foster British settlement in New Zealand, it determined that it would not recognise any land purchases unless the Crown itself had awarded the title. The policy meant that all settler titles must derive from the Crown, including those resulting from land deeds signed prior to 1840. Accordingly, in 1840 the Crown established the first Land Claims Commission, which was tasked with investigating pre-treaty transactions, determining their validity (according to English law), and making recommendations about the area to be awarded to settlers. The claims made by settlers for validation of their pre-treaty transactions have come to be known as 'old land claims'. Individual claims were numbered in a series, prefaced by 'OLC'.

Pre-emption waiver claims: Enshrined in the Treaty, the Crown's right of pre-emption was its exclusive right to purchase any land put up for sale by Māori owners. Between 1844 and 1846, Governor FitzRoy waived this right on two occasions and allowed settlers to buy land from Māori directly, with the Government collecting a fee per transaction. Such transactions between Pākehā and Māori were referred to as 'pre-emption waiver claims'.

Radical title: Under English law, on the Crown's acquisition of sovereignty, it acquired ultimate or 'radical' title to all New Zealand lands, but that title was considered to be 'burdened by', or subject to, customary title until the latter was extinguished. This was the legal basis for the Crown's claim to 'surplus' lands.

Scrip: On occasion, the Crown acquired an old land claimant's confirmed land interests in exchange for a credit note known as 'scrip', which allowed the claimant to buy Crown land elsewhere in the colony at a fixed price per acre. The lands the Crown acquired through this arrangement became known as 'scrip lands'.

Surplus lands: When it established the Land Claims Commission, the Crown determined that it would limit the amount of land any individual settler could be granted. A scale of acres to be granted for money and goods expended was set with an upper limit of 2,560 acres, though this was later relaxed in some cases. If the commission determined that a settler had made a 'legitimate' purchase of land in excess of what he was entitled to by law, the Crown claimed the 'surplus' for itself on the basis that customary Māori title had been extinguished by the original settler transaction. It therefore belonged to the Crown because of its underlying radical title.

practice and the effectiveness of the protections for Māori that were put in place under his two proclamations in 1844. We then turn to the response of the Colonial Office and Governor Grey and assess the Crown's efforts to balance the requirements of settlers against the rights of Māori under the system FitzRoy had instituted.

In section 6.7, we move to the policies introduced by the newly established colonial Legislature in the 1850s intended to finally 'settle' old land and pre-emption waiver claims, many of which remained unsurveyed with no grant issued. We begin by discussing what commitments the Crown had made to Māori regarding the return of 'surplus' lands and assess whether they were kept as responsibility for 'native policy' shifted. We compare the treatment of Māori and Pākehā in the legislation and in the procedures followed by the second Land Claims Commission (the Bell commission), itself established by that legislation. This section considers the contrasting treatment of the interests of Māori who objected that lands subject to old land claims were considered 'sold' and who, in many cases, continued to occupy portions of them. A separate discussion concerns the efforts of the commission to define 'scrip' lands claimed by the Crown (see key terms above) and the tactics deployed in doing so.

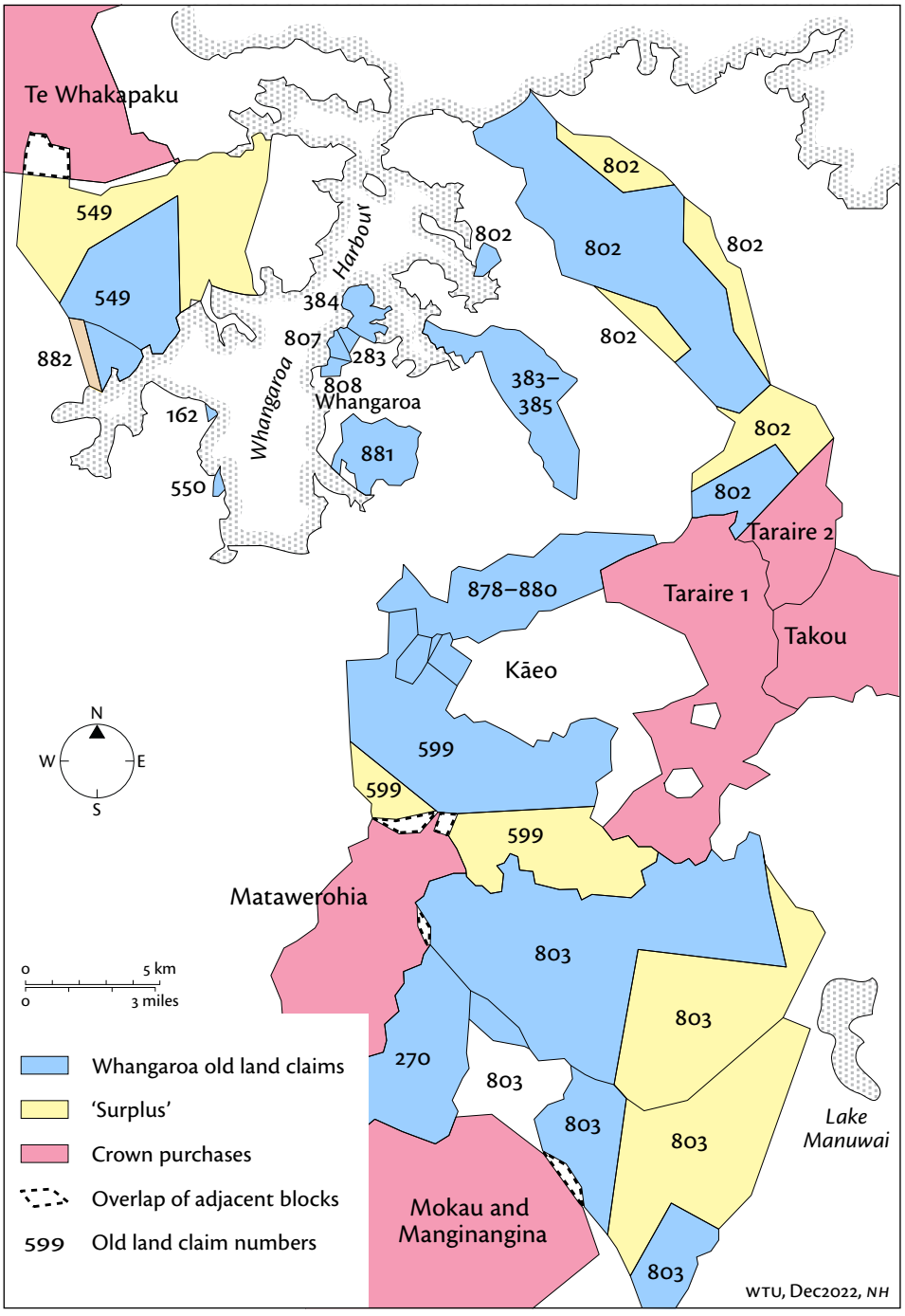

Historians Bruce Stirling (*left*) and Richard Towers presenting extensive evidence on old land claims during hearing week 4 at the Turner Centre, Kerikeri, September 2013.

At section 6.8, we then consider the many decades of Te Raki Māori protest about the Crown's handling of old land claims and the Crown's responses to those protests, both in negotiations and in a series of commissions of inquiry in the twentieth century. Finally, we draw overall conclusions at section 6.9; and at section 6.10 we summarise our findings of breaches of treaty principles and the resulting prejudice to Māori.

6.1.3 The scale of pre-treaty land transacting in our inquiry district

Definitive details of the number of pre-treaty land transactions in Te Raki have proved elusive, as have the total acreages involved. Precision is not possible for several reasons: most claims as described in land deeds were unsurveyed for many years; the Crown had purchased portions of the same land before boundaries were confirmed; or boundaries were revised by later Crown processes. In addition, there are gaps in the record and difficulties in aligning historical boundaries with those of our inquiry. Researchers cite different figures based on different criteria and defined by different boundaries.

The district was one in which pre-treaty transactions and subsequent land claim commission investigations played a particularly prominent role. According to the historians Bruce Stirling and Richard Towers, who



Map 6.1: Whangaroa old land claims and 'surplus' lands.

Land category	Bay of Islands	Hokianga	Mahurangi and Gulf Islands	Whangaroa	Whāngārei/ Mangakāhia	Total
Land granted to settlers from OLCs	84,833.29	9,775.43	38,509	17,991.61	8,351.8	159,461.13
Land granted to settlers from pre-emption waivers	0.5	0	14,119	0	281	14,400.5
Scrip land from OLCs claimed by Crown	2,419	13,829	0	5,272	1,818	23,338
Scrip land from pre-emption waivers claimed by Crown	320	0	3,925	0	0	4, 245
Surplus land from OLCs	35,541	773.25	80	11,696	3,890	51,980.25
Surplus land from pre-emption waivers	0	0	20,877	0	291	21,168
Total	123,113.79	24,377.68	77,510	34,959.61	14,631.8	274, 592.88

Table 6.1: Land considered purchased from Te Raki Māori as a result of old land claims and pre-emption waivers (in acres).

undertook detailed research on this issue, there were 519 Northland pre-treaty transactions filed with the first Land Claims Commission, excluding pre-emption waiver claims and those made later on behalf of Māori children. Of the 519 claims, 392 were allowed, and grants were made to settlers or the Crown or both. In 91 cases, the settler claimant failed to appear, 18 cases were withdrawn, and another 18 were disallowed. Subsequent interventions by the Crown, through its Governors or later commissions, resulted in further adjustments.[3]

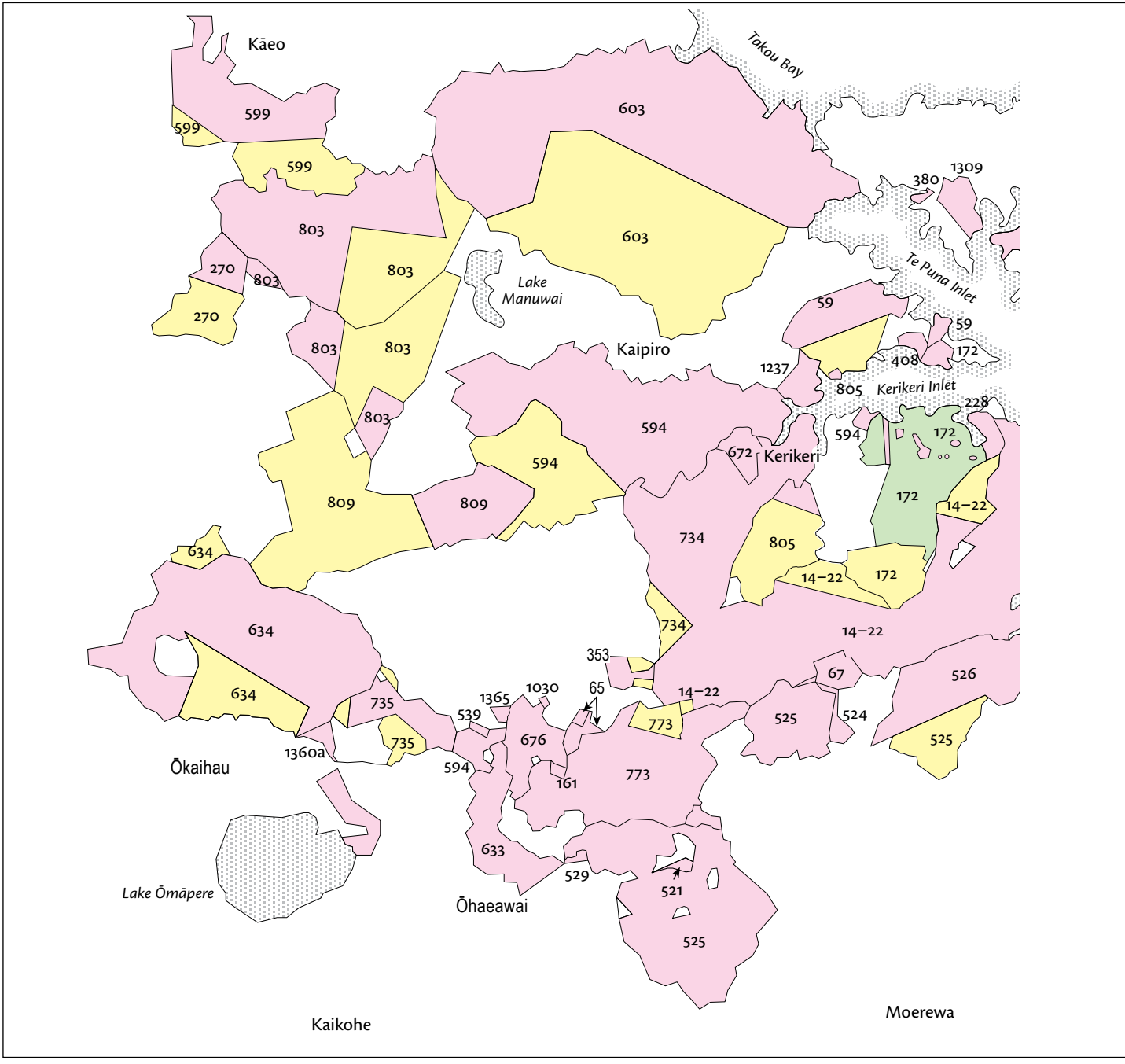
The vast majority of these claimed transactions, 356 identified claims in all, occurred in the Bay of Islands (broadly, the areas in this inquiry district covered by the Takutai Moana and Te Waimate Taiāmai ki Kaikohe taiwhenua), reflecting closer contact between Māori and Pākehā there. As such contact spread, similar arrangements over land and resources were reached in other parts of the district as well. According to Stirling and Towers, 121 land claims were lodged in Hokianga; 40 in Whangaroa; 21 in Whāngārei and Mangakāhia; and 13 in Mahurangi and the gulf islands.[4]

The best approximate figures we could obtain of the acreage involved was presented in data provided by historian Dr Barry Rigby in a series of reports validating Crown data.[5] After undertaking our own analysis of the data he provided, we estimate that:

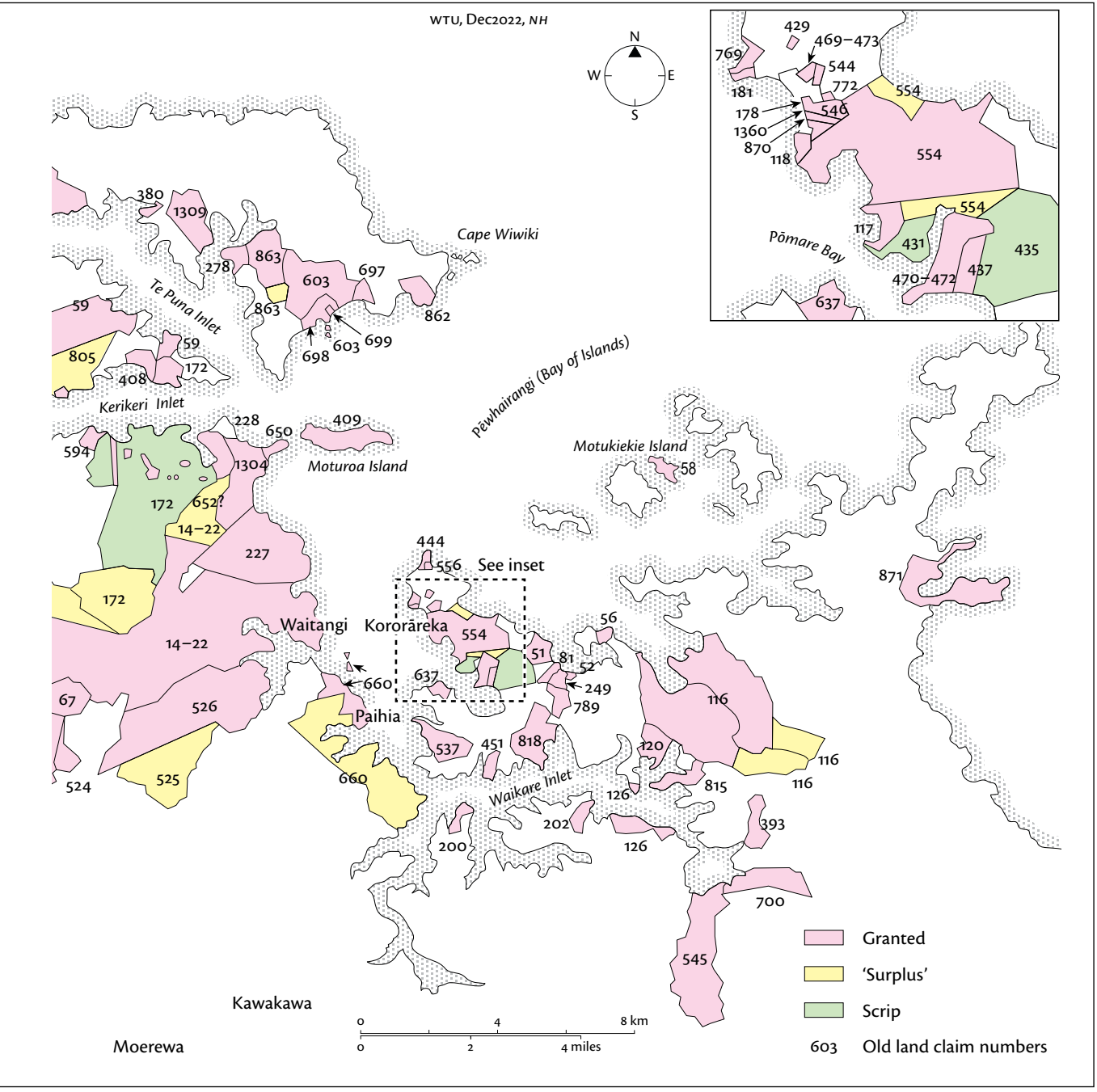
- Approximately 234,779 acres of land in the Te Raki inquiry district transferred from Māori to Pākehā ownership as a result of the Crown's old land claims processes.
- From this total, 159,461 acres were granted to settlers; the Crown took 51,980 acres as 'surplus' lands and it obtained a further 23,338 acres as the result of 'scrip' exchange.
- Another 39,531 acres passed out of Māori hands as a result of pre-emption waivers, of which 14,400 acres were granted to settlers and another 25,121 acres were acquired by the Crown as 'scrip' or 'surplus' lands.

We break these figures down by taiwhenua in table 6.1.

Overall, it has been estimated that less than five per cent of New Zealand's total land area was alienated through old land claims processes.[6] This compares to an estimated 11 per cent of the Te Raki district (and 12.9 per cent if pre-emption waiver 'purchases' are included). For the claimants in our inquiry, then, and particularly for those with claims in the Bay of Islands where some 29 per cent of



Map 6.2: Bay of Islands old land claims, scrip, and 'surplus' lands.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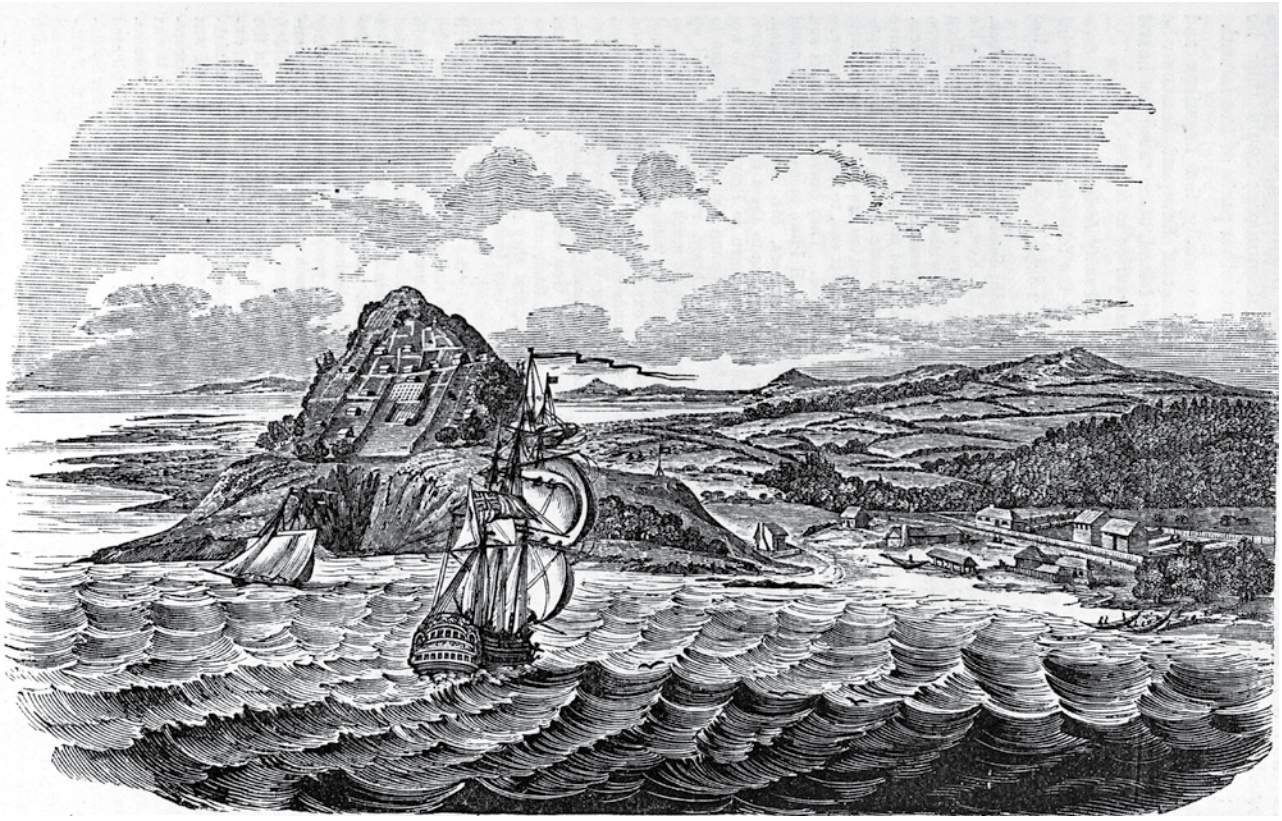
Cape Wiwiki
Te Puna Inlet
Kerikeri Inlet
Pēwhairangi (Bay of Islands)
Moturoa Island
Motukiekie Island
Waitangi
Kororāreka
Paihia
Waikare Inlet
Kawakawa
Moerewa
See inset
Pōmare Bay
380
1309
278
863
603
697
862
59
805
408
172
698
699
228
650
409
594
1304
652?
14–22
227
444
556
871
58
56
554
51
81
52
249
789
660
637
67
526
524
525
537
451
818
120
116
815
126
202
200
393
700
545
429
469–473
769
544
772
181
178
546
1360
870
118
117
431
435
437
470–472
Granted
'Surplus'
Scrip
603 Old land claim numbers
0 4 8 km
0 2 4 miles



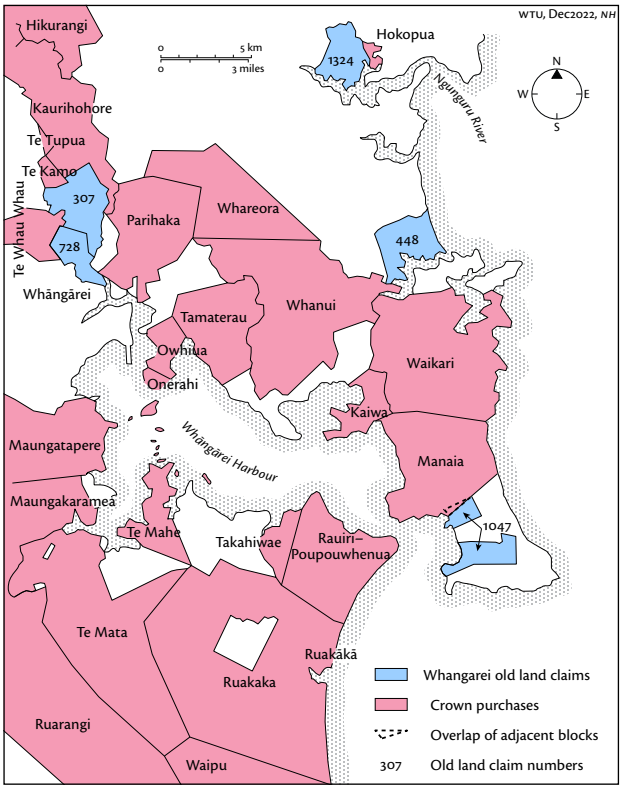
Rangihoua, the first mission station in New Zealand, which was the subject of an agreement between missionary Samuel Marsden and Te Hikutū.

the area transferred out of hapū ownership,[7] the Crown's handling of old land claims was an especially important and significant issue.

6.1.4 Settlers involved in pre-treaty land transactions

These figures encompass a variety of arrangements made between Māori and Pākehā over more than 20 years of European residence before 1840. The size of individual transactions varied from those supposedly involving huge tracts of thousands of acres, or entire islands, to tiny plots of land, in the case of Kororāreka. So, too, did the intentions of Pākehā who sought to acquire lands vary – from setting up missions, domestic residences, farms, or trading companies, to extractive ventures with little idea of establishing permanent settlement but which attempted to secure exclusive access to timber or mineral resources for some years ahead.

As the stage 1 report noted, the Church Missionary Society (CMS) had led the way in entering land transactions with Māori, drawing up deeds for rangatira to put their mark on or sign. In 1815, the first mission station in New Zealand was established on 200 acres at Rangihoua under the patronage of Te Hikutū, 'the proceedings being formalised in European eyes in a deed written in English by [the Reverend] Samuel Marsden.'[8] As Marsden explained, he wished to secure more land than the piece on which the missionaries had begun to build and 'obtain and secure, as far as possible, a Legal Settlement for the



Map 6.3: Whāngārei old land claims.

Europeans whom [he] should leave upon the island'.[9] Four years later, a similar deed was drawn up for the land at Kerikeri on which the CMS mission house was established under Hongi Hika's authority and protection. In these early years of contact, however, land transactions remained relatively rare; the first Land Claims Commission recorded fewer than 20 deeds forwarded to support applications dating from the 1820s. More than half involved the missions; the rest were drawn up by traders, shipbuilders, and timber millers in Hokianga, and there were a few small transactions in Kororāreka.[10]

During the 1830s, the frequency of transactions grew as increasing number of settlers arrived in the region (discussed in chapter 3), while the purposes for which Pākehā sought land also widened. Entrepreneurs such as James Reddy Clendon, Gilbert Mair, and Captain John Wright set up sizeable trading enterprises in the Bay of Islands to meet the needs of the growing number of visiting whalers, while there were numerous transactions for small sites of a few acres for grog shops, blacksmiths, and other commercial ventures at Kororāreka, then expanding rapidly. Other larger transactions were undertaken by merchants such as Thomas Bateman (OLC 56–63) from 1837; George Thomas Clayton (OLC 100–103, 108–113) between 1829 and 1838; Thomas Spicer (OLC 429–430, 431, 432–434, 435, 436–438, 440, 441, 442–443) between 1833 and 1840; and John Evans (OLC 178–183) between 1833 and 1839.[11] The pace of deed-signing increased in the second half of the 1830s as settlers arrived in greater numbers, New South Wales speculators became interested, and 'longer-term European residents sought to formalise existing arrangements or enter new ones' in anticipation of British annexation.[12]

The British Resident James Busby, for example, at first sought to buy land at Waitangi for official and domestic purposes, but his own ambitions grew – and with them, the number and scale of his land transactions. Ultimately, he claimed 9,605 acres through nine deeds signed with Hōne Heke, Te Kēmara, Marupō, Toua, and other rangatira between June 1834 and November 1839;[13] and another 25,000 acres at Ruakākā (Bream Bay), 15,000 acres at Waipū, and 40,000 acres at Ngunguru through deeds signed in December 1839 and January 1840, by which he attempted, primarily, to secure timber resources.[14] As the timber trade developed, other settlers drew up deeds for lands at Whāngārei, Hokianga, and Whangaroa.[15] There were also some extensive claims in Mahurangi. For example, William Abercrombie, Captain Jeremiah Nagle, and William Webster claimed some 20,000 acres on Aotea (Great Barrier Island) through an 1838 deed, and were ultimately awarded more than 8,000 acres each.[16] At Mangakāhia, there was a single recorded transaction – a deed signed by the missionary Charles Baker with Wai, Huarahi, and others in 1836 for approximately 5,000 acres.[17] But as table 6.2 demonstrates, the majority of claims were for small areas in the Bay of Islands.

CMS activity also expanded through the late 1830s. Missionaries began to enter into deeds for purposes other

District	Acres								
	None recorded	≤10	11–50	51–100	101–200	201–1,000	1,001–4,999	5,000+	Total
Bay of Islands	43	126	46	30	22	55	30	4	356
Whangaroa	3	3	10	6	2	5	11	2	42
Hokianga	7	5	8	10	15	48	19	6	118
Whāngārei / Mangakāhia	2	2	0	0	0	3	3	5	15
Mahurangi	1	0	0	0	0	2	2	8	13

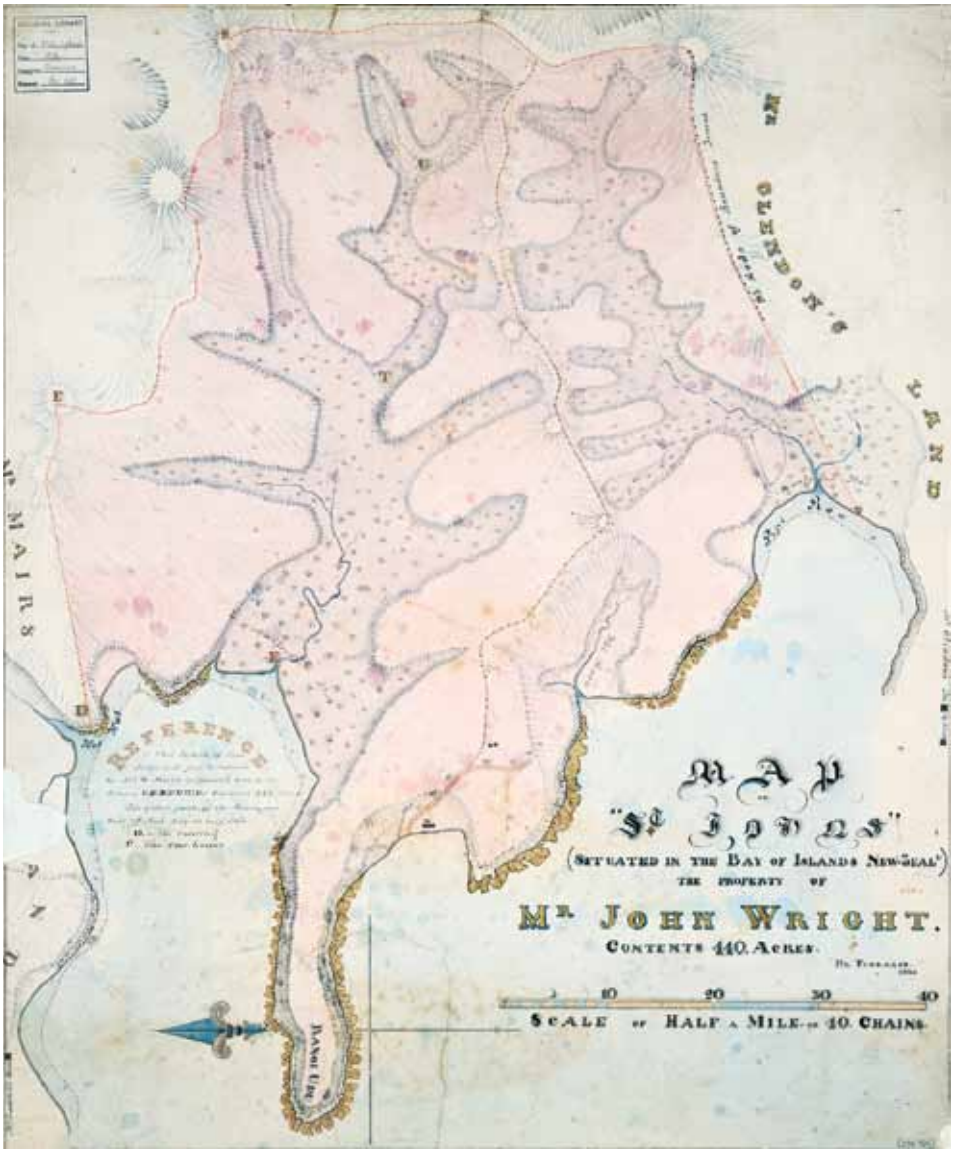
Table 6.2: Claims before the first Land Claims Commission in this district, by land area and sub-district.

than to secure the land on which their mission houses were built. A farm was established at Waimate in 1830, and missionaries began to acquire properties to provide for their own children and, in some cases, for both their children and those of the Māori signatories. Arrangements in which sizeable tracts of land were placed into the hands of missionaries for the intended purpose of preventing their future alienation were also recorded in trust deeds.[18] Missionary dealings on their own behalf could involve some extensive areas. For example, the missionary James Kemp claimed some 3,100 acres at Kerikeri on the basis of two deeds signed with Rewa, Wharerahi, Wakarua, and others in 1831 and 1834. That claim resulted in the first Land Claims Commission recommending a grant of 2,960 acres, which was later increased. The Williams family also claimed to have purchased some 11,000 acres at Pākaraka, an acquisition for which Williams, like the other CMS missionaries who claimed extensive property interests in this period, would later be heavily criticised.[19]

A brief lull in the land trade occurred when fighting broke out between the northern and southern alliance in the Bay of Islands in 1837, but it recovered quickly.[20] Then news of the New Zealand Association's plans for systematic colonisation in late 1838 prompted a rush of attempted land purchases both by those based in New South Wales and, to an even greater extent, by Pākehā already residing in the inquiry district.[21] In fact, residents already known to Māori – men such as Busby, Bateman, Clendon, Spicer, and Mair – were involved in some three-quarters of the 76 transactions identified as undertaken in the Bay of Islands in the late 1830s. The largest speculator, the Kororareka Land Company, entered into a variety of deeds but used local shareholders, such as Alexander McGregor and Thomas Spicer, who were known to Māori of the district to negotiate on its behalf. Spicer reached agreement on eight of the claims that would be successful for the company.[22] As historian Dr Grant Phillipson observed in evidence before us, 'An impression that strangers were buying large quantities of land [in the district] would be quite misleading.'[23]

6.1.5 Rangatira and communities involved in signing pre-treaty land deeds

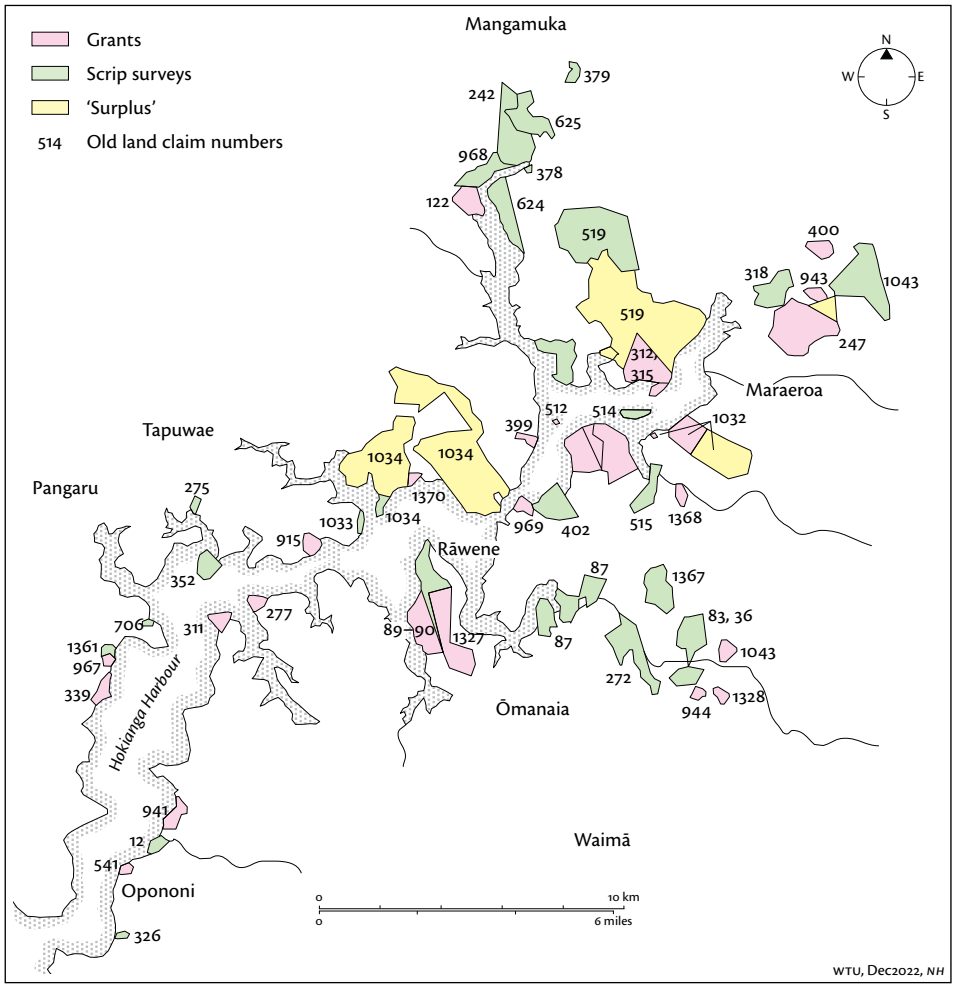
Rangatira who were prominent in the affairs of the Te Raki region, and interacted closely with the missionaries and early traders, dominated the early land agreements.[24] This is hardly surprising, especially if rangatira understood these deeds as confirmation of arrangements based on customary law that cemented relationships they valued. Historian Tony Walzl pointed out that, in many cases,



Land boundaries in the Bay of Islands claimed by Captain John Wright, James Reddy Clendon, and Gilbert Mair, 1836.

the rangatira signing a deed were drawn from several different hapū, 'reflecting the complex and dense nature of rightholding and/or the interests held in land'.[25]

The Te Waimate, Taiāmai, and Kaikohe claimants have identified 64 deeds concerning lands in their taiwhenua.[26] Foremost amongst those making arrangements with missionaries and traders in the Bay of Islands was Rewa (Te Patukeha, Ngāi Tāwake), who signed or approved numerous deeds – with James Kemp, George Clarke senior, the CMS, James Reddy Clendon, John Israel Montefiore,



Map 6.4: Hokianga old land claims.

and Captain John Roberton (at Pāroa Bay); Joel Samuel Polack, John Grant Johnson, and Henry Henderson (for 'Wangamamu'); and (in or near Kororāreka) with Robert Cunningham, John Evans, Thomas May Battersby, Ambroise Basil Victor de Sentis, Newton Lewyn (in a transaction that was later transferred to Francis Hodgkinson), and Donald McKay. In a number of these transactions, Rewa was joined by other rangatira, including Wharerahi, Moko, Kiwikiwi, Hongi, Heke, Korokoro, and Pau.[27] The name of Te Kēmara (or Tāreha),[28] marked by a tohu or a simple 'x', appeared on six of the nine deeds Busby drew up for lands at Waitangi (OLC 15, 17, 18, 19, 21, and 22).[29]

Mr Walzl identified Tāreha, Te Pakera, Tītore, and most frequently Te Hakiro (Tāreha's son) as leading Ngāti Rēhia participation in some 70 deeds. These mostly concerned arrangements for small allotments at Kororāreka, but also included transactions at Kerikeri, Whangaroa, and Waimate as well as a handful at Pāroa Bay and Tākou.[30] Ngāti Manu claimants cited 27 deeds involving their

Rangatira Te Hakiro, Tāmati Waka Nene, and Rewa, who were prominent in pre-treaty land arrangements.

rangatira, mostly concerning lands at Kororāreka and Waikare but also Ōtuihu, Ōkiato, and Wahapū (as well as many other deeds for lands at Kororāreka, Paihia, Ōpua, and elsewhere in which Ngāti Manu claimed rights but were not included).[31] Prominent among Ngāti Manu signatories were Kiwikiwi and Pōmare II, who had developed 'very good relationships with the European traders Clendon, Mair, and Charles Waetford'.[32]

The deeds signed for Whangaroa land and its resources also involved many rangatira, among whom Te Ururoa was pre-eminent. He entered into numerous arrangements: with William Alexander, who onsold to Patrick Donovan (OLC 162); William Lillico (OLC 283); Hugh McLiver (OLC 302–304); Henry Southee, who onsold to William Powditch (OLC 383); directly with Powditch (OLC 384); Edward Stillard (OLC 446); Henry Snowden (OLC 549–550), which were transferred to William Baker; James Kemp (OLC 599–602); Thomas Cooper (OLC 713); Thomas Florance (OLC 738); James Shepherd (OLC 808); Robert Lawson (OLC 845); William Spickman (OLC 878–880); and John Lander (OLC 974–975).[33]

At Whāngārei, the senior Te Parawhau rangatira Te Tirarau also encouraged Europeans to settle in the territory of his hapū, allowing mission stations to be established at Tangiterōria (by the Wesleyans) and Te Hatoi (by the Roman Catholics). However, it was another Whāngārei rangatira, Wiremu Pohe, along with Wai and Huarahi, who led the way in dealing with settlers and allocating lands in the district.[34] Also significant were Te Tirarau's strenuous objections when he was not

included in transactions in areas in which he considered he held rights – notably Charles Baker's arrangement with Huarahi, Wai, and others at Mangakāhia (OLC 547); the arrangement of Thomas Scott and others with Pohe, 'E Ware', and others for an estimated 3,000 acres at Whāngārei (OLC 842); and the arrangement requiring Gilbert Mair to make payments to 'Taurikura' with respect to earlier arrangements between the trader and Pohe.[35]

Many rangatira participated in allocations of land and timber in Hokianga, including Te Tirarau, who joined with others in signing a deed for an estimated 50 acres of land to John Martin in 1838 (OLC 327).[36] Taonui was involved in numerous Hokianga arrangements throughout the pre-1840 period. In 1826, he joined Muriwai and Matangi in a relatively large-scale allocation of rights (over 2,000 acres) to the shipbuilders Deloitte and Stewart (OLC 27), and in a second transaction with Stewart alone (OLC 761). In 1831, together with Whatia and others, Taonui entered into an arrangement with Thomas McDonnell, who would subsequently claim over 80 square miles at Motukaraka (OLC 1034). In 1834, Taonui also joined with Kawieka in a deed with Edward Fishwick for 80 acres (OLC 191), a portion of which they had also allocated to Charles de Thierry; with Wakahouki, 'Howdidi', Raumati, Rianui, and others in a deed with Thompson for lands on the Ōrira River (OLC 461), estimated at 1,800 acres; and with Kaitoke and Tano in an arrangement (acreage unknown) with George Hagger, which was transferred to other settlers many times before being disallowed by the first Land Claims Commission for non-appearance of the claimant (OLC 464).

Taonui signed numerous other deeds over the next three years, allocating lands to Francis and William White, John Marmon, Thomas McDonnell, John Anderson, and others. In 1839, he disputed the right of Ngakahi and Epuo to allocate rights at Motu Kiore to Thomas Birch, although the matter was later settled when the rangatira met and 'arranged it all satisfactory'.[37]

Other Hokianga rangatira who entered into multiple land arrangements in these years included Waka Nene, Patuone, and Rewarewa. Waka Nene, for example, joined in transactions both at Hokianga and Waimate with Cassidy (OLC 83), George Russell (OLC 247, which was transferred to Jellicoe, and 248), Nesbitt (OLC 353), Harris (OLC 400); and alongside Taonui, with William White (OLC 515), William Young (OLC 540), George Clarke (OLC 634), the Wesleyan Missionary Society (OLC 939), Grant and Humphries (OLC 973A), and De Thierry and Kendall (OLC 1043).[38]

6.1.6 Were women rangatira involved in land arrangements?

Evidence from the early contact period suggests that women exercised powerful leadership roles in Māori society.[39] Claimants argued that wāhine were the 'backbone of the hapū' but had been marginalised from early on by the 'way in which the Crown came in and only dealt with the men'.[40] As European observers, missionaries, settlers, and officials imposed 'the values of their own culture onto Māori society', the meaning of 'rangatira' was transformed and came to exclude women.[41] That we should be even using 'women' as a qualifying term for rangatira reflects, in itself, one of the impacts of colonisation.

Claimants called our attention to the important roles a number of whaea tūpuna played in the fortunes of their hapū in these years. Haki was described to us by Meretini Waina Ryder as '[o]ne of the most influential women leaders of Ngāti Manu in the 1800s'. The 'only daughter of Puhi of Ngāti Manu and Tuwhangai of Te Kawerau a Maki and Ngāti Rango', sister to Pōmare I and mother of Pōmare II, she had been alive at the time of the Girls' War and the British attack on Ōtuihu pā.[42] There was Roera, an important rangatira at Whangaroa, who had three husbands. She held customary lands in her own right, including at Ota, with its deep-water anchorage at Waitapu. During the early settlement period, Tauranga Bay belonged to Roera but was sold to the Anglican missionary James Shepherd, a purchase that she and other Ngāti Kawau rangatira did not accept.[43] We were told that she was also 'moe to the Danish ship master, called Kiritepa'.[44] Patu Hohepa spoke of Ani Kaaro, sister to Patuone and Nene, who was a 'distinguished tohunga'. He also told us about Whakatahanga pā on the Moehau River, which Ngauru, the wife of Te Kiripute, and the women of Te Māhurehure built when

they became dissatisfied with Te Kiripute's leadership. When Marsden observed 'a woman who was ordering things around' at the site, he wrongly assumed her to be a widow, not realising that 'the husband was in the next pa' (Otahiti).[45] We should mention, too, Turikatuku of Te Hikitū and Ngāti Rēhia, who was related to Te Pahi. The senior wife of Hongi Hika, she was his closest friend and confidante and reputed to be his chief adviser. All Hongi Hika's wives held extensive land rights, and Turikatuku's children formed their own important alliances; notably, Rongo (later given the Christian name of Hariata), who married Hōne Heke and then Arama Karaka Pī.[46]

As hapū members, all women held usufructuary rights in commonality with others, but high-ranking women such as these exercised authority over land and resources as rangatira in their own right. They were present at negotiations, contributed their views, and received their share of the koha or payment for land transactions undertaken with early settlers, yet their names rarely appeared on the early land deeds or in the validation procedures that would follow.

The drawing up and signing of deeds was initiated and largely controlled by Pākehā men as they sought proof of their rights over those of other settlers, in case of annexation. Because of their cultural prejudices, title sourced in the rights of male rangatira would likely have been preferred and recognised by officials. Of Roera, for instance, Ani Taniwha of Ngāti Kawau me Kawhiti and Ngāti Kahū o Roto Whangaroa told us that '[her] position of esteem would have ended after the English ways took over and women's mana was reduced'.[47] CMS missionaries, heavily involved in land deeds procedures, had an impact too. They brought with them views on the place of women in both the public and domestic spheres and introduced formalities surrounding document signing in which they were largely excluded.[48]

One notable exception was the important rangatira Hamu, baptised as Ana in 1834, and the first woman to sign te Tiriti.[49] She was closely related to Patuone and was married to Te Koki (Te Uri o Ngongo), who consulted with her on all matters of strategy. Hamu and Te Koki allocated land to the CMS at Paihia and according to Lawrence Rogers, the editor of Williams' correspondence, the Waimate site was gifted by Hamu herself.[50] Hamu (with Tuperiri) allocated Kotikotinga (south-east of Paihia) to Williams in July 1831. The same year, she was also a principal participant in the allocation of land to Gilbert Mair at Te Wahapū, where she was one of five signatories to a deed for the area called Waipara and the island of Toretore; this recorded her receipt of:

> One Musket, one Spade, one Hoe, one iron pot, one Hatchet, ten pounds tobacco, twelve pipes, one hundred flints, two Scizzors, one Blanket, tens pounds Powder, and two hundred Musket Balls.[51]

Undisclosed in the early land record but underpinning many of the early transactions with Pākehā 'purchasers' were marriages with high-ranking wāhine who were closely related to the 'vendors' signing the deeds. Such arrangements were, in our view, clearly based in customary practice. The obligations of high-ranking Ngāpuhi women – notably those with rights in harbour areas, traditionally sites of trading activity – included marrying men from other hapū for the purposes of political alliance and trading advantage. This practice, we were told, ensured 'optimal economic opportunities for their communities through the traditional mechanisms of marriage alliance with foreign traders'.[52] In custom, allocation of land rights would also entail marriage. As Ruiha Collier explained, 'The tuku involved having to marry as well to bring the bloodline in.'[53] For example, Pairama Tahere told us that 'Berghan was allowed to marry a high-ranking Māori woman, Turikataka, this was Ururoa's daughter.' This wove the settler into the community. Their son was then married to Pororua's daughter; and later Pororua and his hapū gifted land (Muritoki) to Turikataka and Berghan's children.[54] There were also 'gifts' of land made directly to settlers in these circumstances – with no reciprocal payments of goods and cash recorded – but in the absence of a written deed, Crown validation of these transactions was rarely pursued.[55]

These women were the aho, the weft to the warp of the land, and intimately involved in bringing the Pākehā

newcomers onto it. But their existence was only briefly mentioned – if at all – as settlers sought to have their claims to lands ratified by the Crown.

6.2 Ngā Kaupapa / Issues

This section sets out the conclusions reached by the Tribunal in previous inquiries, the Crown's concessions of treaty breaches, and the arguments made by the claimants and the Crown in order to establish the issues for determination.

6.2.1 What previous Tribunal reports have said about pre-treaty transactions

Whether Māori understood and accepted that their transactions entailed permanent and exclusive alienations, as maintained by settlers, was considered in our stage 1 report. The answer to this question is crucial to an assessment of the adequacy of the Crown's subsequent handling of the matter, and our preliminary thinking on the issue is summarised later in the chapter at section 6.3. Here we examine what other Tribunal inquiries have concluded.

The first report to consider this question was the *Muriwhenua Land Report* (1997), which drew several important conclusions. In the Tribunal's view, it was 'highly unlikely' that Māori of the district thought of pre-treaty transactions as 'land sales in the European sense'. Rather, Māori saw them through the lens of their own system of law and values, in which rangatira could not 'sell' lands, because land rights could not exist independently of the wider community.[56]

The Tribunal acknowledged that Māori had begun adapting in some ways to a European presence in their actions involving land; for example, by signing deeds and accepting cash payments, and in acknowledging the views of settlers by making allowances in what might constitute their usage rights. But it was 'a large step to assume that [Māori] were thinking outside their own cultural framework'; such adaptation did not necessarily indicate a change in the fundamental way in which they understood their relationship to the land and to the people making use of it.[57] The Tribunal concluded that Māori did not consider payments to represent permanent sale of all rights and obligations in land, but as an allocation of use rights that enhanced the settlers' mana and strengthened their relationship with the hapū. It stated:

> The view persisted that the underlying right to the land, and the authority over it, remained with the ancestral community. People did not buy land so much as buy into the community . . . the land was still the land of the people.

As part of this relationship, a settler's usage rights could be passed to his children and descendants but not handed on to other settlers without hapū approval. The Tribunal concluded that pre-treaty transactions 'did not effect, and could not have effected, binding sales'.[58]

The Muriwhenua Tribunal based that conclusion on its assessment of the balance of power in that region. It found no compelling evidence that Māori had bowed to British power and had accepted an alternative way of thinking at the time the transactions were undertaken. They retained control by 'sheer weight of numbers' and, therefore, '[t]he presumption must be . . . that Maori saw things faithfully in terms of their own law, which was the only law they needed to know and the only one to which they owed commitment'.[59] Māori law did not permit permanent alienation of land; and even if English law had applied, the transactions could not have been sales because there had been no mutuality of comprehension; 'the parties were not of sufficiently common mind for valid contracts to have formed'.[60]

Since the issue of the *Muriwhenua Land Report* Crown counsel have argued in various inquiries, including our own, that those findings cannot be applied as some sort of precedent to other districts without investigating the local evidence.[61] This has been accepted by the Tribunal in other districts – and so do we here, notwithstanding the multiple Bay of Islands examples that influenced the conclusions reached by the Muriwhenua Tribunal. We note also that there were far fewer old land claims in other parts of the country than in Te Raki and thus, a more restricted evidential base on which to draw.

In *Te Raupatu o Tauranga Moana: Report on the*

Marriages between Women Rangatira and Early Settlers in Te Raki

Early settlers who were 'sold' lands were often also married to important local women in order to bring their bloodline into the hapū. These marriages tied the newcomers to the hapū both socially and economically, and ensured any future children would remain within it. Despite the aspirations of Māori, it was usually the settler who profited – by gaining an absolute title to the land 'sold' to him by relatives. The rights of the children of these unions would be one of the last matters to be dealt with in the Crown's validation process.

We note here several early marriages between Māori women and old land claimants in the district, but the list is not exhaustive:

John Anderson, sawyer of Ōrira, was married to the daughter of Makoare Taonui. When Anderson sought title to 1,000 acres at Wharewharekauri, Hokianga River, his father-in-law argued for the rights of the grandchildren resulting from this union.

Christopher Harris was married to the daughter of Hua. Land at Motukaraka was later claimed for their son.

The settler Marmon was married to the daughter of Raumati. Marmon would later claim 200 acres of land gifted by the rangatira for his granddaughter.

Takatowi Te Whata married Dennis Cochrane. When officials investigated Cochrane's claim for scrip at Hokianga (OLC 122), they learnt of his part-Māori child, Jane, who was entitled to 200 acres of the land.

Captain Wing was married to the daughter of Tutu. He would claim land that had been gifted in the Bay of Islands for their daughter Fanny – though she was deceased.

Mairoa, daughter of Te Toko, married the settler Hardiman. He would seek title to land at Te Mata for their children in the 1850s, overriding objections from Mairoa's hapū that they had intended it to be shared with them.

William Cook was married to Tiraha, the daughter of Te Kapotai. Her hapū continued to occupy land 'sold' to him at the Waikare inlet. Tāmati Waka Nene later attempted to gift land at Kororāreka to George Cook because of a 'near relationship', as Cook's mother was 'Tira', Nene's sister.[1]

Maraea Te Kuri-o-te-Wao, daughter of Moka, had her own working pā, Whaengenge. She married Thomas Cassidy – at her own request, after he had caught her attention at Port Jackson – and they went on to have seven children. The oral tradition goes that she killed and buried him when he was unfaithful. A gift of land to their daughter Ngahuia (Bridget) Cassidy was later dealt with as a 'half-caste claim'.

In Mahurangi, William Anderson, a miner at Kawau, was married to Rangipeka. He would later seek title for their children.

Similar marriages, resulting in children and claims to lands set aside for them, occurred between Māori women and the settlers Berghan, Bryers, Gundry, James Nairn Inches, and others.[2]

Tauranga Confiscation Claims (2004), the Tribunal concluded from the evidence in that district that the same tikanga operated there much as it had in Muriwhenua. In particular, the papers of Archdeacon Alfred Brown, who had 'purchased' Te Papa for the CMS between 1838 and 1839, demonstrated that the transaction from a Māori point of view was conditional in nature, not an absolute English-style alienation. The same held true at Te Ngae (at Rotorua) and Matamata where Māori saw transactions as establishing an ongoing personal relationship between themselves and the missionary who was a source of trade, and their own right to use the land continued.

As Te Waharoa expressed it in the instance of Matamata, the goods would soon be 'broken, worn out, and gone, but the ground will endure forever to supply our children and theirs.'[62] In both its majority and minority reports, the Tribunal agreed that the Crown should not have turned these conditional, customary arrangements into a freehold title.[63]

In *The Hauraki Report* (2006), the Tribunal reached what it called a 'modified view' on the question of whether Māori had understood their pre-1840 transactions as customary tuku whenua or as permanent sales in the English style. The circumstances of the region were different from those in Muriwhenua. Significantly, iwi and hapū who had fled the district because of inter-tribal fighting in the 1820s were re-establishing their presence on the land at the same time as Pākehā were seeking to settle there. The Hauraki Tribunal agreed that permanent alienation of land was inconceivable to Māori until the late 1830s. However, the growing importance of Pākehā in the region meant that it was 'not a *wholly* traditional world' (emphasis in original). By the last few years of the decade, Hauraki Māori 'might have gained an understanding of European notions of property transfer', and the nature of their transactions was 'more debatable'.[64]

In reaching that conclusion, the Tribunal drew on the evidence of Drs Michael Belgrave and Grant Young, historians who had appeared on behalf of the Marutūāhu claimants. In their view (as summarised by counsel), the Crown had provided

> a very substantial amount of evidence to show that Maori understandings of the transfer[s] or sales were very much closer to European understandings than the claimants had argued in Muriwhenua.

For example, Māori had allowed transfer of land to third parties without interference and

> Maori attitudes to the land that had been sold to Europeans illustrate a degree of loss and finality that would not have been appropriate where tuku whenua transactions had taken place.[65]

In the opinion of Belgrave and Young, 'it was possible for Maori to transfer substantial rights to Europeans . . . beyond those understood in the narrower tuku whenua position.'[66]

The Tribunal's thinking was also influenced by the Crown's argument that a 'middle ground' had developed – a concept that historians also discussed at some length in our inquiry (see section 6.3). In the Hauraki inquiry, it was argued that Māori and Pākehā had the capacity to operate competently in more than one cultural setting, and in the interests of furthering trade, forged a relationship that was 'mutually understood and mutually acceptable'. Transactions were not conducted in a British legal and political framework. Nonetheless, settlers had gained a degree of 'autonomy from the Maori socio-political context in which they lived', while there were 'constraints on Māori action' when dealing with Europeans 'that were not likely to have existed had they been members of the iwi, hapu or whanau.'[67]

The Hauraki Tribunal acknowledged that it was dealing with a limited number of transactions, but concluded that 'there could be considerable variations in the pattern' in the district and that a 'sharp dichotomy between a classic "tuku whenua" model and "sale" in the European sense' was an inadequate framework for analysing pre-treaty transactions there.[68] Some transactions contained commercial elements; for example, because they were undertaken with speculators who did not intend to occupy the land, or because rangatira did not necessarily intend to bind the settlers to their communities permanently. On the other hand, transactions were not purely commercial in nature either. Competing Hauraki groups were returning to previously abandoned lands and entering transactions to assert their mana. Although rangatira 'could well have intended to convey substantial and perhaps permanent rights to Pakeha' in that situation, there was nonetheless still a customary element at play. This was

apparent when rival groups contested the validity of these transactions and when 'vendor' rangatira felt obliged to defend their settlers.[69]

Even with these differences in experience and circumstance, the Hauraki Tribunal still found that essentially there remained a strong Māori understanding that they retained rights in lands 'sold'. It concluded that 'we are by no means persuaded that the rangatira and hapu concerned intended to relinquish *all* their interests in or connections with the land' (emphasis in original) and 'concur[red] in general with the findings of the Muriwhenua Tribunal' about the inadequacy of Crown inquiries into old land claims.[70]

In *The Wairarapa ki Tararua Report* (2010), the Tribunal looked at Māori understandings of land transactions of very different circumstances, characterised by the prevalence of grass leases rather than outright 'sales' in the years immediately following the signing of the treaty. The leasing arrangements involved problems for settlers in that region similar to those experienced elsewhere. Māori expected that they would continue to receive goods and favours in addition to rents and that they could continue to use the land and resources; they retained the power to enforce their understandings, and settlers had no choice but to accept this situation. There was, in the Tribunal's view, 'strong evidence that things continued to be dealt with using customary practices and understandings, although inevitably with changes over time'.[71]

We note that the Wairarapa ki Tararua Tribunal also found strong evidence that Māori considered themselves to retain rights even over land that had been 'sold' in the 1850s. The report cited, in particular, correspondence from rangatira who spoke of 'our two offspring' being 'wed' once consensus had been reached as to the 'giving over of the land', described as 'this land of yours and mine'. The Tribunal concluded: 'What they have in mind has two characteristics that are alien to the English notion of sale.' They envisaged themselves and the Crown 'owning the land together on an on-going basis, and on-going payments being made in that regard.' These arrangements were 'tied to the spirituality of the land, grounded in the past and projecting into the future.'[72]

He Whiritaunoka: The Whanganui Land Report (2015)[73] also considered understandings of tuku whenua in some detail, noting that, while the term is itself a modern one, it reflects the ancient concept of take tuku (granting rights in land), also known as 'te tukunga o te whenua'.[74] In that report, tuku was defined as 'permissions granted to use certain lands or resources', which 'always carried with them the expectation that the recipient continued to have reciprocal obligations to the giver'. This might include economic benefits or mutual protection. Tuku was always undertaken 'with a specific purpose, reason or intended use in mind'. The only circumstances in which land could be permanently transferred were instances of conquest, or peacemaking in which a group agreed to leave their territories permanently. Even if a group were defeated, any survivors could retain ancestral rights if they remained on the land and were tolerated by the conquerors.[75]

In that Tribunal's view, there was no concept of permanent alienation in Whanganui tikanga up to 1840 and for some time afterwards, except in the circumstances already outlined – a rejection of the Crown's submission to the contrary.[76] The report agreed with the conclusions reached in the Hauraki inquiry that there was 'likely . . . considerable variation in what the Maori transactors understood by and intended by their dealings'. However, there was evidence (as in other parts of the country) that Whanganui Māori involved in the New Zealand Company's attempted purchase in 1840 'continued to deal with the land as if it was still theirs, placing settlers on it and organising lease arrangements over parts of the block'.[77]

The Tribunal again concluded in its report *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (2023)[78] that the 'evidence points to the ongoing application of Māori custom . . . during and after the time when pre-Treaty transactions were entered into', and that Māori brought those cultural expectations to their early land deals with Pākehā. There nevertheless remained many gaps in what could be known about Māori understandings

of signing deeds, whether they understood their content, and the extent to which the first Land Claims Commission inquired into such matters.[79]

Despite acknowledgements of likely variations in numbers and pattern as well as gaps in the record, these earlier inquiries have all agreed that there were serious flaws in the procedures introduced by the Crown for the investigation and ratification of pre-1840 transactions under the New Zealand Land Claims Ordinance 1841, including the failure to direct the commissioners charged with investigating the validity of such transactions to take Māori customary law into account, ascertain whether a sale would be in breach of an intended trust, or verify whether hapū retained sufficient other lands. They have also agreed that the later inquiry conducted under the Land Claims Settlement Act 1856 was similarly flawed: transactions were assumed to be valid and could not be overturned, even if it was found that not all owners had consented to the alienation. Again, the commission failed to consider whether the transactions had been conducted under customary law and that a permanent sale had not been intended. These Tribunals have found that the inquiries undertaken by the first and second Land Claims Commissions failed to protect Māori interests, and the resulting Crown grants breached treaty principles.[80]

The Muriwhenua and Hauraki inquiries also addressed the issue of 'surplus' lands from the old land claims. In the *Muriwhenua Land Report* the Tribunal found the Crown was not entitled to take the 'surplus' (lands subject to a deed deemed valid by the first Land Claims Commission but not included in the grant awarded to Pākehā claimants): first, because the Crown was not entitled to assume that the land had been sold; and secondly, because it was not entitled to apply the legal doctrine of radical or underlying title, on which the policy of Crown ownership of 'surplus' land was based. At the time of the transactions, the underlying title belonged to hapū, and in the Tribunal's view, the Crown's claim 'was contrary to Maori law and to the Maori contractual terms'.[81] In the *Hauraki Report*, the Tribunal agreed with the essential conclusions in the *Muriwhenua Land Report* while noting also that the Crown had made express or implied promises that the 'surplus' would be returned to Māori.[82]

The *Muriwhenua*, *Hauraki*, and other Tribunal reports have found the Crown to be in breach of the treaty for:

- applying its own legal standards to pre-treaty transactions, when Māori law was the only applicable law;
- failing to adequately determine the true nature of the transactions in accordance with Māori custom, and instead assuming that all transactions found to be legitimate could be treated as permanent sales as settlers understood it when few, if any, Māori intended that;
- taking written deeds of sale at face value without giving adequate consideration to the meaning in te reo Māori or to the cultural context;
- failing to ensure that pre-treaty transactions had the consent of all customary owners;
- failing to ensure that the affected land was properly defined;
- failing to determine the adequacy of the consideration;
- failing to determine whether any fraud or unfair inducement was involved in the transaction;
- failing to determine whether the transaction would leave Māori with sufficient lands, including their pā, kāinga, and cultivations;
- dealing with pre-treaty transactions in a manner that was protracted and inconsistent, through a series of inquiries over many years, in which awards were increased in favour of settlers; and
- breaching promises to return lands that had not been granted to settlers, retaining it as 'surplus'.[83]

6.2.2 What Tribunal reports have said about the Crown's pre-emption waiver policy

As we discussed in chapter 4, a number of Tribunal inquiries have investigated the obligations resulting from the Crown's right of pre-emption and delineated the protective duties arising from it. Less attention has been paid to the decision by Governor FitzRoy to make a limited waiver of pre-emption in 1844. In the Mohaka ki Ahuriri

inquiry, the Tribunal considered that the waiver was a 'direct violation of the Treaty' and its principles. While the treaty could be altered, 'any amendment needed to have the consent of both parties (ie, the Crown and an assembly of Maori as fully representative as the original signatories had been).' In its view, that condition had not been met. Although it was said, at the time, that Māori wanted the freedom to sell their land directly to the highest bidder, Māori were not fully consulted.[84]

The Hauraki Tribunal has also considered whether the 1844 waiver was a breach of the treaty. In its view, the Governor's policy was certainly a departure from the terms of the treaty but it is less clear whether it was also a breach of treaty principles. There was no reason to assume that the principle of protection should not apply to any purchases conducted under its waiver system. It was the view of officials in the Colonial Office that the Crown's obligation remained and FitzRoy showed concern for Māori rights in introducing his new policy. The Governor's references to Māori rights under article 3 and its 'implied contradiction with article 2' suggested 'rightly' that 'strict compliance with the actual terms of the Treaty might not always be possible'. The Tribunal's view was:

> In principle . . . FitzRoy's general statements can be regarded as showing a reasonable sense of the Crown's treaty obligations, both to include Maori in economic opportunities, as they perceived them, and to protect them from excessive and inequitable land alienation.[85]

In other words, the waiver of pre-emption by FitzRoy was not in itself a breach of treaty principles but the policy might be if safeguards were inadequate or poorly administered.[86] This approach was also taken by the Tribunal in *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims*.[87]

6.2.3 Crown concessions

The Crown acknowledged that 'it had a duty to actively protect Māori in relation to their pre-Treaty land transactions when it investigated those transactions in the 1840s and 1850s'.[88]

It made a number of important concessions and specific acknowledgements.

(1) *Investigation of pre-treaty transactions*

The Crown conceded that its 'investigation of pre-Treaty transactions was flawed and caused particular prejudice to Māori'.[89] These flaws included:

> failing to investigate transactions for which 'scrip' was given, establishing a surplus lands policy that failed to ensure any assessment of whether Te Paparahi o Te Raki Māori retained adequate lands for their needs, and in some cases taking decades to settle title or assert its own claim to these lands.[90]

The Crown also acknowledged:

- that its land claims commissioners 'were focussed on determining whether a permanent alienation had occurred rather than conducting a customary rights investigation';[91]
- that investigations 'did not always address whether the vendors had a customary right to the land';[92]
- that its investigations 'were not conducted in a timely manner';[93]
- that a 'large proportion of claims were not surveyed before Crown grants were issued to settlers, leaving uncertainty as to the exact area of the original purchase, the boundaries of the settler's grant, and the Crown's surplus land';[94]
- that '[n]umerous attempts to resolve the problems left many Māori and settlers feeling aggrieved';
- that large areas of land allocated to settlers or the Crown remained unoccupied and were resumed by Māori, causing considerable protest and confusion when the land transfers were later enforced;[95] and
- that Te Raki Māori lost title to approximately 170,000 to 174,200 acres of lands that were granted to settlers (including as a result of pre-emption waivers); approximately 59,800 to 60,000 acres of lands that were retained by the Crown as surplus lands; and approximately 24,200 acres of lands that were retained by the Crown as 'scrip' lands.[96]

Regarding the second Land Claims Commission (1857 to 1862), the Crown acknowledged:

> [Commissioner] Bell proceeded on the assumption that the commissioners who had investigated the claims in the 1840s had found Māori title to be legitimately extinguished and generally did not reinvestigate this. . . . Bell generally recommended that the Crown's surplus and the settlers' grant be enlarged proportionately.[97]

(2) *Crown retention of 'surplus' lands*

The Crown also acknowledged that it took Māori 'surplus lands' in:

> the Bay of Islands, Hokianga, Whāngārei, Mahurangi, and Gulf Islands districts, . . . rather than returning these lands to Māori, and this has long been a source of grievance in the region.

Crown counsel conceded:

> its policy of taking surplus land from pre-Treaty purchases breached the Treaty of Waitangi and its principles *when it failed to require proper surveys and to require an assessment of the adequacy of lands that Māori held*. [Emphasis added.]

This was in breach of the Crown's duty to actively protect Māori property interests, and its duty to deal with Māori in a manner that was reasonable and fair.[98] It acknowledged that these breaches 'resulted in some hapu losing vital kainga and cultivation areas', a matter compounded by its failure to investigate 'scrip' transactions, and by delays in determining title or asserting its claim to these lands.[99]

(3) *Pre-emption waiver claims*

The Crown also included pre-emption waiver claims within its concession on surplus land, stating:

> its policy of taking surplus land from pre-emption waiver purchases breached Te Tiriti o Waitangi/the Treaty of Waitangi and its principles when it failed to ensure any assessment of whether affected Māori retained adequate lands for their needs. The Crown also concedes that this failure was compounded by flaws in the way the Crown implemented the policy, including failing to investigate transactions for which 'scrip' was given, and in some cases taking decades to settle title or assert its own claim to these lands, in further breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.[100]

6.2.4 The claimants' submissions

The claimants argued that the Crown's concessions were 'by no means sufficient in terms of the impact of Old Land Claims and the Land Claims Commission's adjudication'.[101] Their submissions focused on numerous actions and omissions of the Crown and the inquiries it instituted, which they alleged were in breach of the treaty. These included:

- the Crown's 'retrospective imposition of British law on[to] the pre-Tiriti transactions', when the law applying at the time of the transactions being made was tikanga Māori;[102]
- the Crown's determination to impose its own system of land tenure on Māori, and to extinguish customary rights, and its consequent failure to properly investigate the nature of pre-treaty transactions or acknowledge them as tuku whenua;[103]
- the failure of the New Zealand Land Claims Ordinance 1841 to provide for a proper inquiry into the customary understandings of the transactions under investigation, its purpose being to extinguish customary title, not to protect Māori;[104]
- flaws in the first Land Claims Commission's processes, including its failures to give adequate notification; conduct meaningful inquiry into who had rights; deal with all customary owners and ascertain that their rights had been validly extinguished and that signatures on deeds were genuine; consider the adequacy of compensation; and properly define the boundaries; and the failure of the Protector of Aborigines to carry out his duty of protection or to build an 'ethical wall' around his own land claims;[105]

- the Crown's failure to provide reserves when validating transactions and subsequently to honour promises that those lands would be set aside and protected, in breach of its fiduciary duty to protect Māori lands;[106]
- Governor FitzRoy's interventions in the Land Claims Commission process, which included issuing grants when the commission had recommended none, making grants of unsurveyed land, and making grants that exceeded the maximum area allowed under the law;[107]
- the failure to fully and consistently apply regulations intended to protect Māori when waiving pre-emption – including reservation of pā, urupā, and cultivations, the setting aside of tenths, and limitations on the area that could be purchased; and the subsequent failure to remedy known defects in the administration of pre-emptive waivers;[108]
- the failure of the Land Claims Settlement Act 1856 to require the second Land Claims Commission to investigate Māori customary rights or adequately protect Māori, and the subsequent failure of the Bell commission to do so;[109]
- the Crown's taking of surplus lands in contravention of treaty guarantees and in spite of promises to the contrary;[110]
- the flawed investigation of and procedures for issuing scrip, which resulted in limited reserves and further takings by the Crown to '"make good" the amount of land that had been "paid for"';[111] and
- the Crown's failure to respond adequately to Māori protests and grievances.[112]

Claimant counsel told us that there was no justification for the Crown imposing its system of land tenure on pre-treaty transactions, both because Māori law applied at the time of those transactions, and because Māori had not consented to British sovereignty, or the imposition of British law over Māori lands, or the British legal doctrine of radical title.[113]

Permanent land alienation did not exist as a customary concept, and this was still the case when Māori engaged with incoming settlers. Under custom, land was not a commodity to be bought and sold by individuals, but was 'inherited and collectively owned'.[114] When Māori entered into land arrangements with Pākehā and signed deeds of 'sale', they were 'not relinquishing their own rights to their tupuna whenua' but bringing Pākehā into the community 'as part of the hapu'.[115] Counsel argued that such transactions were best understood 'in terms of the customary practice of land allocation', or tuku whenua.[116]

Claimant counsel submitted that settlers were 'well aware that they were living under Māori law' and that they were not making 'permanent land purchases'. Yet the purpose of the process created by the Crown under the New Zealand Land Claims Ordinance 1841 was not to ascertain what Māori had intended by entering into land transactions, but 'to extinguish Māori customary title, thus clearing the way to unencumbered Crown title and a subsequent grant under the doctrine of radical title'.[117] The test established to determine whether purchases were valid 'had nothing to do with tikanga Māori pertaining to land' and 'wrongly assumed that Māori intended to permanently alienate land'.[118] These issues, combined with the flaws in the procedures of the Land Claims Commission, meant the Crown had failed to extinguish customary title, counsel said.[119]

The claimants also condemned the actions of Governor FitzRoy. The new commissioner he appointed overrode the earlier findings of his predecessors who had restricted their recommended awards, in almost all cases, to the maximum set by the ordinance. FitzRoy issued a number of grants contrary to earlier recommendations that they should be disallowed. He also issued Crown grants of unsurveyed land, in many cases in excess of the statutory maximum of 2,560 acres. In counsel's submission, this was done 'without the authority of the ordinance and outside the Instructions and Charter'.[120] In the generic submissions, counsel argued that the decision of the Supreme Court in the *Proprietors of Wakatu v Attorney General* (*Wakatu*) case applied: FitzRoy did not have the discretion to exceed the recommendations of the Land Claims Commission and 'there was "no scope for an expansive view of a power to make grants under the [Governor's] prerogative."'[121]

The claimants also argued that the pre-emption waiver system FitzRoy introduced was not motivated by its protective obligations; rather, it was the Crown's solution to stagnation in the land market, a financial crisis, settler discontent, and Māori demands for direct sales to settlers.[122] Claimant counsel characterised the decision to waive pre-emption as 'unilateral' and cited the conclusions of the Tribunal in *The Mohaka ki Ahuriri Report* (2004) that this was 'in direct violation of the Treaty'.[123] Claimants acknowledged that FitzRoy's scheme could have brought significant benefits to Māori by enabling them to trade their land on an open market;[124] however, flaws in the policy and its implementation precluded this result. The 10 shillings per acre fee required under the March 1844 proclamation meant that there was limited interest among Pākeha, leaving Māori desire for greater settlement and participation in the economy unfulfilled. On the other hand, the subsequent reduction in fees to one penny per acre in October 1844 represented a capitulation to settler demands rather than the 'parental care' that supposedly informed FitzRoy's policy.[125] Some of the regulations intended to protect Māori in terms of preventing excessive loss of land were too imprecise to be effective;[126] others were undermined by failures in implementation.

The second commission established by the Land Claims Settlement Act 1856 failed to address the shortcomings of the first commission and FitzRoy's intervention, compounding the earlier failure to recognise customary rights and adequately protect Māori. Counsel submitted that the second commission under Francis Dillon Bell 'did not observe reserves and did not conduct further investigations into rights claimed by others' who had not been involved in the original deed signings. 'Rather he pushed ahead to "resolve" disputed claims and issued grants that did not comport with previous recommendations or provide for any reserves.'[127] Māori who objected were 'brushed aside', at best paid compensation while surplus lands were amassed for the Crown.[128]

Surplus lands were taken by the Crown under a legal doctrine of which Māori had no knowledge at the time and that had no application when sovereignty had not been legitimately acquired. Māori assumed that they retained the underlying right to land on which Pākehā were living, whereas the 'British assumed, but did not say', that radical title would be held by the Crown 'in accordance with English beliefs'.[129] In counsel's submission, that assertion of radical title was 'one of the first dominoes to fall in an unbroken chain towards landlessness for Māori'.[130] Furthermore, Māori had been promised by both Hobson and FitzRoy that 'surplus lands' would 'revert' to them.[131]

According to claimant counsel, the Government often simply held the land for itself. Sometimes Māori only discovered that land was in the Crown's possession when they made application for award of title in the Native Land Court. In some instances, land claimed by the Government had 'never been through any of the systems that could result in it being Crown land'.[132]

The Crown also became heavily invested in lands acquired by scrip (by which Pākehā grantees were offered £1 per acre to acquire lands elsewhere, while the Crown retained the lands they had been awarded in the inquiry district). Claimant counsel submitted that, as a result of this policy and the failure to investigate the original transactions adequately, the Crown was 'under considerable pressure to enlarge its holdings': 'This could take the form of further takings under various devices, all to "make good" the amount that had been "paid for" with the issuance of scrip.'[133]

In the submission of counsel, Crown officials knew that injustice had been done and that it might have been rectified. Instead, the Crown chose not to return surplus lands or rectify losses to Te Raki Māori, retaining the 'lion's share' in the early years of the colony, ignoring subsequent protests, and 'then proceeding to alienate more lands in the subsequent decades' in further breaches of te Tiriti.[134] Claimants submitted that the Crown's breaches of te Tiriti and its fiduciary duties 'cannot be viewed on the basis of individual claims' but rather as part of a cumulative process in which the Crown dispossessed Te Raki Māori of their lands and authority. Through its handling of pre-treaty claims, the Crown dispossessed Māori in this

district of at least 218,000 acres and had started a process that left some hapū landless.[135] As we heard in specific closing submissions on pre-treaty claims, this is a key grievance for hapū in Te Raki.

6.2.5 The Crown's submissions

Although the Crown conceded that elements of its investigations into pre-treaty transactions were flawed and in breach of the treaty, it did not accept that all transactions were customary in nature; therefore, the Crown could have legitimately treated them as 'valid'. Crown counsel argued that Māori had a 'general understanding of the nature of permanent alienations' by 1840,[136] and accordingly it was necessary to determine what the parties intended in any particular transaction. This might have been a 'permanent transfer of exclusive rights or a different arrangement'.[137] The Crown submitted that the Tribunal 'cannot assume or reach any finding that in all cases Māori did not intend a full and final alienation of their land before 1840'.[138] Counsel argued that the language used in a substantial proportion of the extant te reo deeds suggested that Māori did intend sales, as did their failure to repudiate their transactions before the Land Claims Commission.[139]

Nor did the Crown accept that the Land Claims Commission presumed that all legitimate transactions were sales. The Crown said that processes it instituted had two objectives: first, to fulfil Governor Hobson's 1840 pledge at Waitangi that conveyances would be overturned if 'unjust'; and secondly, to provide Europeans with a title cognisable in British law if their purchase was shown to be valid. These processes 'allowed an inquiry into whether a sale or some other form of transaction had taken place'; there was no legal presumption that a sale had occurred.[140]

The Crown also rejected several allegations of flaws made by claimants: that there was insufficient notice of hearings,[141] that the Protector of Aborigines had failed in his duties under the Land Claims Ordinance or was in conflict of interest;[142] and it questioned allegations that it had failed to reserve kāinga, cultivations, and wāhi tapu, including them in grants to settlers instead.[143] Crown counsel did not make any submission on whether the waiver of pre-emption was a breach of the principle of protection.[144]

The Crown did acknowledge that its application of a surplus lands policy was flawed and in breach of the treaty but did not concede the same of the legal basis underpinning it (the Crown's radical title). Counsel submitted the Crown acquired title to 'all land in New Zealand as a function of obtaining sovereignty in 1840'. Counsel explained that the Crown's radical title was considered to be 'burdened by, or subject to, customary title until [it] was extinguished', at which point the Crown considered that Māori had no further legal claim to the land:

> Accordingly, where Maori had actually sold land to settlers prior to 1840, the Crown considered that it held a full title to that land and had the discretion to grant or withhold that land to settlers who made claims through the Old Land Claims process.[145]

The Crown noted that it 'does not consider the doctrine of radical title to be inconsistent with the principles of the treaty' or prejudicial to Māori.[146] Counsel was also 'unaware of evidence that rangatira in 1840 would have thought that lands that were justly acquired, but not granted to settlers, would be returned to them';[147] and questioned whether they had been promised the return of 'surplus' lands by Governor FitzRoy.[148]

The Crown indicated that a measure of redress had been offered in the past; after several parliamentary commissions and a 1946 Royal Commission of Inquiry (the Myers commission), which it described as 'adequate, detailed . . . and principled', the Crown had provided some fiscal compensation via the Taitokerau Maori Trust Board in the early 1950s.[149]

6.2.6 Issues for determination

Having reviewed the stage 2 statement of issues, the Crown's concessions, arguments of the parties, and the evidence presented to us, we identify the issues for determination in this chapter as follows:

- What was the nature of the pre-treaty land transactions in this district? Were pre-treaty transactions outright sales or social agreements based in tikanga?
- Did the first Land Claims Commission adequately inquire into and protect Māori interests?
- Did Governors FitzRoy and Grey adequately protect Māori rights and interests in their handling of pre-treaty transactions?
- Was the Crown's pre-emption waiver policy in breach of the treaty?
- Were the Bell commission and the Crown's policies on scrip and surplus lands in breach of the treaty?
- Did the Crown's response to Māori petitions and protest meet its treaty obligations?

6.3 What Was the Nature of the Pre-Treaty Land Transactions in this District and Were Pre-Treaty Transactions Outright Sales or Social Agreements Based in Tikanga?

6.3.1 Introduction

In our stage 1 report, we discussed whether Māori were concerned about their land transactions in the 1830s and whether they were losing control. An examination of specific transactions, how the parties understood those transactions, and how the Crown subsequently dealt with them was left to stage two of our inquiry.[150] We noted that many questions remained as to whether the Tribunal's characterisation of land transactions in the Muriwhenua district as tuku whenua, with the creation of ties of mutual obligation, applied also in Te Raki; whether the understandings changed over time; and asked what was the possible impact of those understandings on events as they unfolded after 1840.[151]

The nature of the pre-treaty land arrangements or transactions and whether the analysis of the Muriwhenua Tribunal applies in our inquiry district is the key area of disagreement between the claimants and the Crown. Were these arrangements transactions conducted under the customary principles of tuku whenua – under which rangatira allocated usage rights and thereby incorporated settlers into their hapū, binding them to relationships of mutual obligation? Were they commercial transactions – sales, in the European sense, involving permanent extinguishment of all ancestral rights and interests in the land? Or did they fall somewhere in between? While the claimants drew heavily on the *Muriwhenua Land Report* the Crown questioned whether the 'stark conclusions' of the Tribunal in that inquiry applied in Te Raki.[152]

The claimants' view was that '[t]he law of New Zealand at the time the transactions were made was tikanga Māori',[153] and that tikanga Māori should therefore have been used to review the transactions.[154] In generic submissions, they argued:

> nothing in te Tiriti, or in any of the proceedings or the written record leading up to it . . . would have announced, justified or supported retrospective imposition of British law on the pre-Tiriti transactions.[155]

As counsel for Ngāti Manu submitted:

> Entering into a land transaction with a Pakeha newcomer did not involve Māori bowing to an alternative power structure. Rather, they viewed such arrangements in terms of their own law.[156]

The claimants told us that, under Māori custom, land was not a commodity to be bought and sold but was 'inherited and collectively owned'. 'There was simply no such thing as permanent land alienation' and even if there had been, rangatira did not have the power to unilaterally enter such transactions.[157] Claimants argued that these principles remained essentially unchanged in 1840 and beyond. The early land transactions were 'consistent with tuku whenua, or in Pākehā terms, a use right'. These arrangements allowed settlers to live among Māori; they were 'more or less adopted by a hapū'; and their 'presence on the land was part of the bargain for the land'. Māori entered into these transactions because they brought benefits, such as access to knowledge and trade, and in so doing enhanced the mana of the host hapū. Critically,

such arrangements did not require Māori to relinquish their ancestral rights.[158] Counsel for Ngāti Manu argued that Māori viewed pre-treaty land arrangements as 'creating personal bonds and as allocating conditional rights of resource use' in a defined area to particular Pākehā, who 'did not buy land so much as buy into the community'. Access to land and resources came with 'social obligations and responsibilities' and was 'conditional upon ongoing contribution to the community'.[159] Nor could those rights be assigned to another without the consent of that community.[160]

Claimants acknowledged that the tikanga relating to land could change over time, as occurred, for example, with the adoption of cash payments, written deeds, and language that implied that transactions were permanent. But, they argued, this did not mean that Māori were relinquishing their own rights or relationships with land. On the contrary, those ancestral rights endured:

> [Māori] were not 'sellers' – they did not leave their land but continued to live in areas they had occupied before the transaction. In many cases Māori remained on transacted land for generations, until being forced off it by the Crown.[161]

Counsel for Ngāti Manu reminded us of the Tribunal's view in the *Muriwhenua Land Report*: notwithstanding any changes in the 'outer form' of the transaction, 'it is a large step to assume that [Māori] were thinking outside their own cultural framework, or were operating within that peculiarly Western concept of absolute alienation.'[162]

The Crown accepted that 'there is a real question of whether the pre-1840 deeds were intended to be a sale – that is, a full and permanent alienation of land – or something else'. The Crown also accepted that some transactions were not intended to be permanent alienations, but submitted: 'There is also clear evidence that some were.' Crown counsel acknowledged that Māori and settlers had different cultural views of the transactions, although he suggested that the claimants had failed to produce evidence of the absence of permanent land alienation under custom.[163] Counsel argued 'that the real question is not whether tikanga Māori provided for permanent alienation of land', but 'whether Māori and non-Māori, coming from different cultural contexts, intended to engage one another in such arrangements'.[164] In the Crown's submission,

> It is not the case that all pre-1840 transactions were absolute sales. It is not the case that none of the pre-1840 transactions were absolute sales. The issue is whether Māori and non-Māori . . . intended any particular transaction to be a permanent transfer of exclusive rights or a different arrangement.[165]

The Crown also submitted that the Tribunal could not assume that the intention of Māori in land transactions prior to 1840 was uniform; that indeed some could have been seeking a 'full and final' sale.[166] In the Crown's view, by the late 1830s Te Raki Māori understood the British concept of land alienation and were consenting to sales.[167]

It is implicit in the Crown's arguments that a *majority* of the transactions were sales, or at least that rangatira later came to accept them as such. The Crown told us that the first Land Claims Commission disallowed claims if Māori gave evidence that they were not true sales.[168] Yet, of the 410 cases ultimately heard by the commission, it disallowed only 18.[169] The clear inference is that rangatira who appeared as witnesses in almost every case, as would be required by the Crown under the Land Claims Ordinance 1841 (discussed at section 6.4), accepted the remaining 392 as legitimate sales.

In sum, both parties in this inquiry accepted that Māori and settlers brought different legal and cultural assumptions to the pre-treaty land transactions; that there was variation in the exact details of the arrangements; that there was adaptation over time as Māori and settlers acquired greater understanding of each other's mindsets; and that there was an element of permanence in some transactions. Yet, despite these points of commonality, claimants saw most or all pre-treaty land arrangements governed by the tikanga of tuku whenua, whereas the Crown saw most as legitimate sales, worthy of validation under English law. As we will see, the parties arrived at these views by applying markedly different interpretations

to key evidence, ranging from statements made by rangatira at Waitangi to statements made in this inquiry by expert witnesses. In our view, the essential question is this: did Māori who entered pre-treaty land arrangements intend to retain customary rights and interests in the land? Even allowing for variation and adaptation in the form these transactions took, if Māori did intend to retain rights and interests, and if the Crown was aware of that, it was obliged by treaty principles to protect those rights and interests to the fullest extent practicable. Any failure to do so would be in clear and significant breach of the treaty's article 2 guarantees.

Over several inquiries and despite minor exceptions in some circumstances, the Tribunal has consistently found that, overwhelmingly, Māori did not see pre-treaty land arrangements as sales in the sense of the legal permanent loss of all rights and interests in land that the settlers making the deeds sought to rely on. We need to consider the circumstances of our inquiry district, where significant contacts and developments between settlers and Māori were occurring, to judge whether this was also the case here.

The Tribunal has developed various tests that may assist us with this consideration. These include questions such as, did Māori continue to occupy and use the land over which a deed had been signed? Did settlers marry into the hapū participating in the deed? Did Māori protect those settlers who joined in deeds? Was there an understanding that settlers making the deeds would contribute to the well-being of the hapū involved, through such measures as cash payments, provision of goods and technology, and access to the new settler economy? Did Māori then reclaim the land subject to the deed if it was not used for the intended purpose or if the individual or family involved moved away? What happened if settlers onsold land to other settlers? Did hapū enter new transactions with other settlers over the same land and if so, under what circumstances? If settlers believed they had extinguished all Māori rights and interests in the land subject to the deed, could they practically enforce that belief and convince Māori of it?

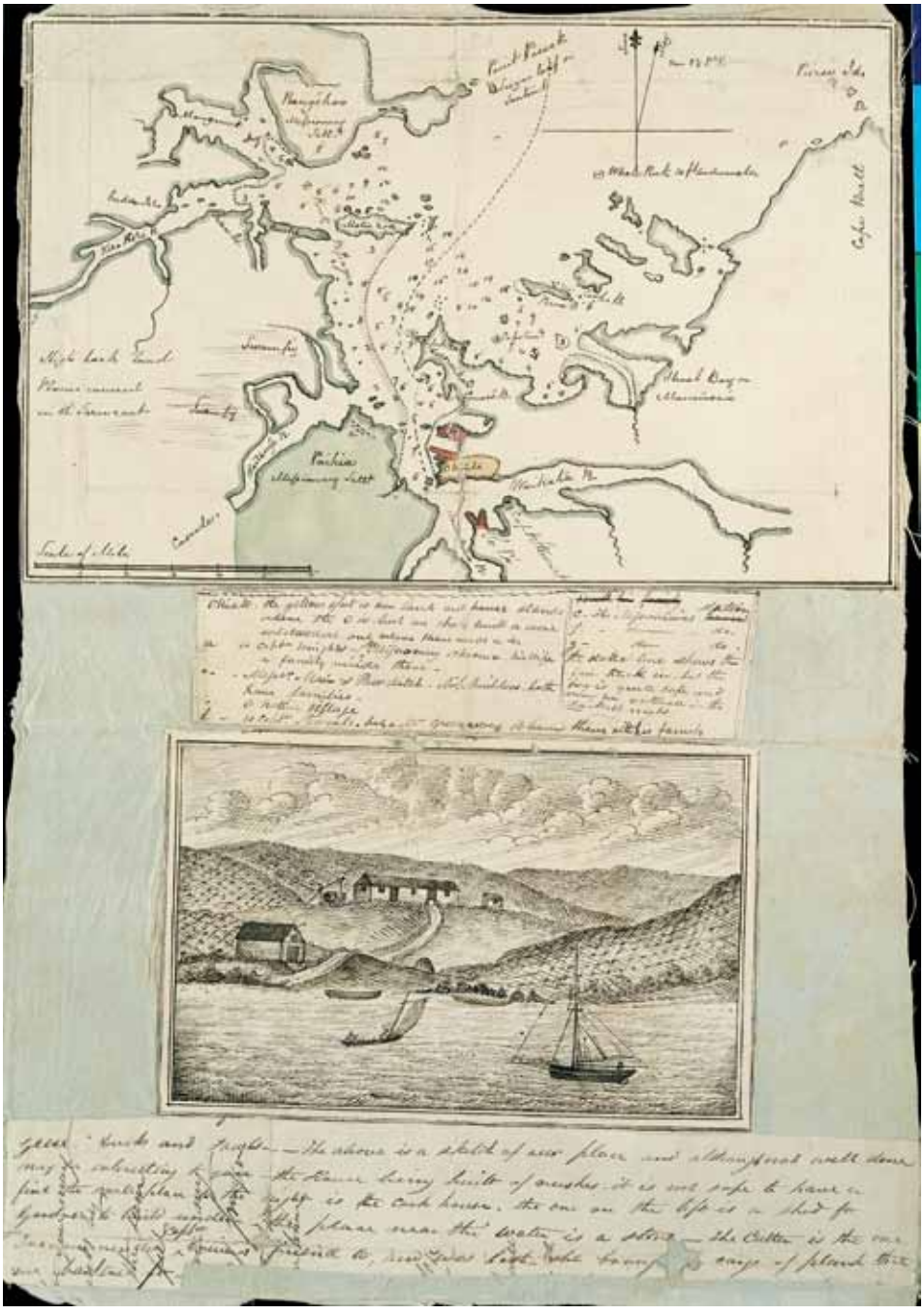
In the following section, we will consider the evidence before us, including what the claimants told us about their understandings of the concept of tuku whenua, scholarly debates about the nature of land tenure arrangements, the written deeds, the 1840 Tiriti debates, testimony given during the Land Claims Commission hearings, and accounts from early settlers and visitors to this district.

6.3.2 The Tribunal's analysis

(1) *What do claimant traditions tell us about the nature of the pre-treaty land arrangements?*

Claimant evidence greatly assisted our understanding of the traditions and the importance of these arrangements in each of our taiwhenua. Claimants told us that traditional systems of exchange were based on gift-giving. Between Māori groups, land could be transferred by tuku for a variety of reasons: 'as part of peace-making, marriage, reward to allies, or to people who wished to settle with their hosts'.[170] A number of traditional tuku between Māori were brought to our attention. Te Ihi Tito told us that there had been several 'notable tuku whenua between Te Parawhau and other hapu'. At Kapehu, the rangatira Te Tirarau and Paikea gifted land to Ngāti Kahu. Mangarata was a tuku whenua to Ngāti Rangi. Another tuku was made to Te Māhurehure for coming to Te Parawhau's assistance during a time of conflict.[171] These tuku were conditional on maintaining a mutual relationship and, under tikanga, the hapū who made the gift retained the ultimate authority. 'In all these instances,' Mr Tito explained, 'Te Parawhau retained the mana over the land.' This 'continued to be Te Tirarau's experience with the Pakeha who settled amongst his rohe. Te Tirarau protected the Pakeha, in accordance with the values of mana and manaakitanga.'[172]

Other witnesses described how their tūpuna continued to act in keeping with tuku whenua principles when making over land to Pākehā – who assumed that British norms should apply, and that the land had been sold to them for their permanent and exclusive use. Marsha Davis of Ngāti Manu explained that 'tuku' was a system of gifting and usage rights with terms and conditions, and its continuance was dependent on future actions; despite



The claims of James Reddy Clendon at Ōkiato and other points of interest in the area, 1833. Clendon entered into two separate deeds with Pōmare, Kiwikiwi, and other local rangatira at Ōkiato (one for 220 acres in 1830 and another for 80 acres in 1837) for money and goods later estimated at less than £200. He arranged to sell the claims to the Crown for £15,000 for the capital and the Governor's residence. Pōmare approved that arrangement and later supported Clendon's claims before the Commission despite the vast difference in payments, deeming the presence of the Governor on his land to be desirable. The subsequent move of the capital to Auckland was to be a severe blow. In 1842, Clendon received a grant of 10,000 acres for land at Papakura in exchange for his awards at Ōkiato.

innovations such as written deeds, custom still regulated the arrangements. For example, when Pōmare, Kiwikiwi, and others allowed Clendon to occupy land at Ōkiato (OLC 114), the rangatira continued to make additional demands for goods. If settlers were absent for some time:

> the land would be transacted to someone else . . . Maori continued to live on lands that had been the land they 'sold' for many years after confirming they continued to exercise mana whenua and mana rangatira.[173]

She argued:

> whakapapa, whakawhanaungatanga and manaakitanga are all cultural norms which reinforce collective as opposed to individual interests and this norm is what would have informed our tupunas' perspective of land transactions.[174]

Claimant witnesses were universally of the same opinion. We cite only a handful of those who assured us that the concept of sale was utterly alien to how their tūpuna thought about land and people. Tahua Murray, a Whangaroa claimant, told us, for example:

> There is no doubt in my mind and heart tuku whenua means tuku whenua not riro whenua atu mo ake tonu atu. And any goods and money given was an acknowledgement of the goodwill and reciprocity bond between the giver and the receiver, not a trade of goods and money for the sacred land of Mahinepua as land could not be treated as a commodity to be disposed of to whoever for whatever and whenever. This was the Crown's framework to disempower the hapu of Ngati Ruamahue of its rights and privileges and to wrest the sacred land of Mahinepua under the umbrella of its false power and authority.[175]

Pairama Tāhere of Te Uri o te Aho agreed:

> [T]hese transactions were not sales. This was not a part of the rubric of customary law. The hapu oral history is these transactions represent assimilating useful Pakeha into their hapu with hapu consent. These Pakeha were expected to enhance the hapu's ability to trade. They were allocated land to reside on but were expected to pay tribute. These Pakeha were selected. Those they admitted were guaranteed the tribe's protection and allowed to marry into Ngapuhi.[176]

The marrying of Berghan to Turikataka and the subsequent marriage of their children back into the hapū was one instance of Māori customary practice at work. According to the oral traditions of Te Uri o te Aho, the connection was but one of several such relationships entered into in these years.[177]

Erimana Taniora, giving evidence on behalf of Ngāti Uru and Te Whānaupani, argued:

> even after te Tiriti was signed, Ngātiuru were still operating under tikanga, especially that tikanga associated with the land. Sales were understood to be more of a tuku arrangement. This means they retained rights to usage and occupation . . . and it wasn't meant to be permanent. The right that they thought they had ceded was merely the right to occupy the land under the mana, kawa and tikanga of the hapū.[178]

As an example of how Ngāti Uru viewed their own ongoing rights, the witness described how the hapū was still cutting down trees in 1852 on land they had allocated to the missionary James Kemp almost 20 years earlier.[179] Kaumātua Nuki Aldridge of Ngāti Pākahi told us that he remembered his elders calling old land claims 'whenua tahae'; as he sees it, a theft orchestrated by the Crown. He explained:

> Maori were familiar with the notion of permanently alienating rights to objects from one person to another. Hoko is a concept in tikanga . . . However, hoko only refers to the exchange of movable objects like kumara, korowai and other objects . . . The concept of hoko was never attached to land . . . According to tikanga, land is not a saleable commodity.[180]

In his view, settlers and the Crown manipulated the concept of 'hoko' by applying it to arrangements about land, distorting its meaning and subsuming it to their own notion of sale.[181]

Claimants told us that hapū had been severely impacted by the Crown processes that converted tuku whenua transactions into sales.[182] Ms Davis asked how it was possible for Ngāti Manu to have lost one-quarter of their land by 1853, when the concept of permanent alienation had only recently been introduced and was not yet accepted. The impact on Ngāti Torehina ki Matakā was also marked, as claimant witness Hugh Te Kiri Rihari, described:

> After the 'sale' at Hohi and before we understood the implications under English law, further 'sales' occurred both at Te Puna and on the whenua nearby, until the British had 'bought' virtually the whole [Purerua] peninsula, as follows: 1818 the Te Puna block; 1832 the Waikapu block; 1834 the Te Koutu block; 1835 the Matapuratahi block; 1836 the Tapuaiti block; 1838 the Poukoura and Hawai Blocks; and 1839 the Putanui block. From this 'Treaty' we lost our whenua. We lost the resources we had freely used since ancient times. We lost the red stone, the flint, the flax, the ōi, the poaka, the hapuka, the kaimoana, the oneone. We lost our forests, our mahinga kai. We lost the economic and social basis of our hapu. All that remains is the small area at Wharengaere and many of our people had to move away. The so called sales that originally alienated Rangihoua Pa, some of these occurred very recently after our contact with Europeans. We do not consider these sales. We have no such word as 'sales' in our vocabulary. If we stand on the beach at the high tide mark now and look at what is left we have got nothing left. We had the whole peninsula and over time it has gone.[183]

In summary, claimant witnesses and their counsel argued that tuku whenua continued to regulate arrangements regarding land and provided 'the mechanism for governing land use rights'. In their view, the essential character of that mechanism remained fundamentally the same when dealing with new settlers. The characteristics of tuku whenua may be summarised as:

- no absolute transfer of title was possible;
- the tuku was personal and could only pass to descendants;
- when Māori 'sold' to Europeans, they retained the right to occupy the land alongside them;
- tikanga and the decisions of rangatira governed the settler in all matters including land use; and
- if 'purchasers' failed to occupy the land or maintain mutual obligations with the host community, the land would revert to the original owners.[184]

We note also that the responsibilities of Māori to 'their' Pākehā did not end with the allocation of land and resource use right. Annette Sykes (counsel for Ngāti Manu, Te Uri Karaka, and others) drew our attention to the assistance they gave to early settlers by sharing their resources, giving shelter, assisting them onto the land, 'guiding new arrivals on foot from the Hokianga, providing them with food and supplies on the way, arranging for waka to take them to Kororareka.'[185] They gave settlers gifts, married them to their women, and offered protection.[186]

Thus, the overwhelming weight of claimant evidence was that early transactions between Māori and Europeans were not absolute sales as the British understood them, but agreements in which Māori retained their customary title, granted shared-use rights to the land, and created an ongoing relationship with missionaries and other settlers, so bringing them into the hapū community.[187]

(2) *What was the scholarly view put before us of pre-treaty land arrangements?*

In making its findings about the nature of pre-treaty transactions in the *Muriwhenua Land Report* the Tribunal acknowledged a particular debt to the ground-breaking research of the historian Philippa Wyatt. Prior to her research during the 1990s, most scholars had assumed that pre-treaty transactions were sales in the European sense, but Wyatt argued that the transactions should be viewed in a customary context. Her initial research focused on the Bay of Islands, and she concluded that the arrival of settlers had not fundamentally disturbed either Māori customary law or the authority of rangatira.[188] Drawing on a range of evidence, including early missionary accounts, written deeds, and evidence from the 1838 House of Lords select committee inquiry into New Zealand (all considered by us later), she concluded that settlers who negotiated deeds had failed to explain the concept of purchase adequately, and that Māori had understood the

arrangements as taking place within the scheme of tuku whenua:

> where Pakeha were allocated specific land and resources, that allocation was conditional in nature and took place within the customary framework of an ongoing and mutually beneficial relationship between Pakeha guest and the Maori host community. The allocation of land to Pakeha required the sharing of the land and its resources with the Maori hosts, who retained ultimate control of the land and its resources. Pakeha were obliged to fulfil their side of the bargain – providing access to trade goods, employing Maori, and making regular gifts – in return for which Maori would allow them to use the land and its resources, protect them from other Maori and other Pakeha, and reciprocate the gifts made to them.[189]

In the Muriwhenua inquiry, Crown witness historian, Dr Fergus Sinclair, disputed Ms Wyatt's interpretation and argued that Māori had adopted the practice of commercial dealing in land from an early stage. To support this interpretation, he referred to steps taken by Māori to protect remaining lands (through trusts and reserves), and warnings by missionaries to Māori about the consequences of 'selling'. In Dr Sinclair's view, when Māori remained on the land, or demanded additional payments, or offered the land to other settlers, these were mere bargaining tactics.[190] As discussed earlier, having considered these opposing views, as well as Māori traditions and evidence from other academic disciplines such as anthropology, the Muriwhenua tribunal found in favour of the claimants' interpretation.[191]

Subsequently, before the Hauraki inquiry panel, Drs Michael Belgrave and Grant Young questioned the Muriwhenua findings. In their view, the Crown had provided:

> a very substantial amount of evidence to show that Maori understandings of the transfer[s] or sales were very much closer to European understandings than the claimants had argued in Muriwhenua.

For example, Māori had allowed transfer of land to third parties without interference, and 'Maori attitudes to the land that had been sold to Europeans illustrate a degree of loss and finality that would not have been appropriate where tuku whenua arrangements had taken place.'[192] Their opinion was that in Muriwhenua it had been 'possible for Maori to transfer substantial rights to Europeans . . . beyond those understood in the narrower tuku whenua position.'[193]

In the Te Raki inquiry district, however, researchers took the view that Māori entering pre-treaty land arrangements had rarely, if ever, consented to permanent alienation of the land claimed in the various deeds. Some acknowledged evidence that Māori on occasions adapted their application of tuku whenua principles, but none argued that Māori had given up their rights to the land subject to the deeds altogether. This was the case even in the Bay of Islands, where there had been a greater degree of contact than elsewhere in New Zealand.

Professor Margaret Mutu of Ngāti Kahu, who was a claimant in our inquiry, said in her evidence: 'For many years before the signing of Te Tiriti and for several decades following, tangata whenua were transacting tuku whenua in terms of their own tikanga.'[194] European arrivals were afforded support and protection under the tikanga of tuku whenua to bring the skills and goods they possessed to the benefit of the community. The 'clear understanding' was that:

> such a transaction was carried out primarily to benefit the hapū and to bind the Pākehā and his descendants into the hapū structures. There also was a clear expectation that when those Pākehā and their descendants no longer needed to use the resources associated with the land, control would return to the hapū. There was nothing in the discussions leading to the transactions which gave those Pākehā guests the right to alienate permanently, or sell their hosts' land. The resources were given for the use of a particular Pākehā and his descendants and the Mana Whenua, the paramount authority, power and control over the land, remained with the hapū.[195]

This was tuku i runga i te aroha – allocation to non-ancestral individuals, such as those who married into the community, or Pākehā settlers and guests.[196]

Dr Merata Kawharu, giving expert evidence on behalf of her Ngāti Rāhiri and Ngāti Kawa hapū, also argued that tuku whenua tikanga was unchanged. In fact, she hesitated to call pre-1840 tuku whenua 'transactions' at all, because this suggested 'buying and selling' when, from the point of view of the hapū, 'far more' was involved. She preferred the term 'social agreements' or 'arrangements' to describe them.[197] According to Dr Kawharu, the things that mattered had not changed despite innovations such as the signing of deeds and the receipt of cash payments. Discussing the early land arrangements made by Ngāti Rāhiri and Ngāti Kawa, she argued:

> In the pre-Treaty period, systems of leadership and resource control . . . continued because they affirmed mana and identity. There was no reason for their whakapapa-defined system of exercising control – mana and consideration of others – manaaki – to change or be superseded by any other system. Hapū members recognised opportunities to engage with Pākehā ideas and processes (e.g. deeds) because they fitted in with current systems. From that basis, land 'deeds' were willingly accepted. However, deeds and subsequent processes that investigated them were also the beginning of a process that ultimately saw significant loss within our hapū.[198]

Taking the example of early arrangements between Henry Williams and a small number of rangatira, Kawharu suggested that they were 'personal and beneficial' not only to the rangatira concerned but to the hapū as well, providing them with access to knowledge, goods, and cash. Māori also entered these arrangements because they 'provided an avenue to demonstrate, highlight or secure mana'. In her view, 'On-going relationships and reciprocity were central to [the] agreements', as indicated by co-habitation on the land and further payments after deeds were signed.[199]

Historian Dr Grant Phillipson agreed that the fundamental values of Māori customary law remained intact in 1840, and that Ngāpuhi were in control throughout the pre-treaty period and indeed, for several years following.[200] Having examined missionary and other correspondence, the testimony given at parliamentary inquiries into New Zealand affairs in 1838 and 1840, and evidence before the Land Claims Commission of 1841 to 1844, he concluded:

> Even from just the English-language documentary record, there is strong evidence the transactions were:
> - limited and personal, in the sense of particular to individual settlers and their families;
> - conditional, in the sense of contingent on continuing benefits to the host community, sometimes in the form of gifts but not always;
> - shared, in terms of continued Maori occupation from time to time for various forms of resource-use, or even just for purposes of transit;
> - under the authority of the protecting chief and the host community, although the settler had long-term occupation and use-rights; and
> - recoverable by the protecting chief and host community if the agreement was violated, or if the settler left, failed to occupy, or attempted to introduce a third party without consent.[201]

The interest acquired by a settler through a pre-treaty deed, according to Phillipson, could at most be seen as conferring adoption into the hapū and a right to use land on the same terms as other members of that community. Customary title 'had not been extinguished'.[202]

Nonetheless, in Phillipson's opinion, some settlers believed the transactions set out in their deeds constituted absolute sales, notwithstanding clear on-the-ground evidence to the contrary in the form of continued Māori exercise of authority and (in many cases) occupation. To resolve this apparently contradictory view, he applied a 'middle ground' model, first developed to explain the Canadian frontier where the 'worlds of native Americans

and Europeans overlapped, and there was a balance of power and mutual need' so that 'peoples had to accommodate each other rather than assimilating or attempting conquest'.[203] Under those circumstances, 'creative, and often expedient, misunderstandings' could emerge, which could then provide the basis for new, mutual understandings. Although there was clearly a measure of self-interest involved in settlers' insistence that their deeds reflected transactions that were actual land sales, in Phillipson's view the 'more compelling explanation for the honest and sustained divergence of views between Maori and (some) Pakeha' could be found in these cross-cultural misunderstandings.[204]

In the Bay of Islands, the focus of Phillipson's analysis, such misunderstandings typically 'revolved around the continued Ngā Puhi occupation or use of "sold" land and exercise of authority over that land'. Whereas Māori continued to exercise their customary rights – for example, by living on the land supposedly sold or using their cultivations or fishing grounds – settlers and missionaries claimed that they were 'permitting' Māori to remain on 'their' property. Such accommodations were not difficult because of the nature of Māori resource use: Māori were typically

> shifting their cultivations every few years . . . using some lands for forest resources, other spots were valuable for fishing so you can have quite different uses of land co-existing . . . with a settler living there permanently and farming a bit of it.[205]

The crucial issue, in Phillipson's view, was who held power, and therefore 'who was authorising whom'. In reality, in pre-treaty times, settlers had little or no choice but to tolerate ongoing Māori occupation of 'their' lands and use of 'their' resources.[206] They could turn a blind eye, try to persuade local rangatira to intervene, or attempt to protect their title by setting aside reserves in an effort to formalise and limit Māori use within their deed area, but they could not prevent Māori from exercising their customary rights within it.

From the late 1830s, Phillipson told us, some settlers (such as Williams and Busby) attempted to insist on what they regarded as their property rights. They still lacked the power to enforce their views, but through their efforts, Māori at least became 'aware of what the missionaries and settlers were asserting as the meaning of the transactions'.[207] Although the Crown, in closing submissions, emphasised Phillipson's conclusion on this point,[208] it did not acknowledge the second aspect to his reasoning: that, although Māori by this time *understood* the settler view of land arrangements, they did not for the most part *accept* that view. On the contrary, the evidence suggests that in this district rangatira were alarmed by settler claims to have purchased exclusive and permanent rights, and were determined to have their own perspective prevail. According to Dr Phillipson, this concern is reflected in the speeches by Rewa and others at Waitangi in which they demanded the 'return' of their lands – a point we will return to later.[209]

Phillipson provided three possible explanations for settlers' increasing assertiveness from the late 1830s. First, as settler numbers grew, the balance of power began to shift to some degree, though it remained decisively in favour of Māori up to the time of te Tiriti and indeed well beyond.[210] Secondly, settlers had such a strong cultural belief in the power of the written word that they assumed their deeds to be valid even in the face of clear evidence to the contrary, in the form of ongoing Māori occupation and use of the lands. Thirdly, by the late 1830s, settlers were expecting the Crown to intervene and therefore to enforce their view of land transactions.[211]

Dr Phillipson provided evidence, for example, that in 1839 the missionary Richard Davis stated that, while Māori had made agreements with settlers (by which he meant sales) for much of the area around the Bay of Islands, they continued to live on those lands. Davis was in 'no doubt', however, that Māori would be 'driven from' the lands and forced back to Kaikohe 'when the Europeans get the upper hand'.[212] William Colenso, writing while Hobson was on his way to New Zealand in 1840, similarly

predicted that Māori would soon be forced from their kāinga near Kerikeri; they had been living on these lands 'for years', but (Colenso assumed), having 'sold' the lands, they would soon have to move to the interior.[213] Phillipson commented that in the Muriwhenua inquiry, Sinclair had interpreted these missionary observations as evidence that Māori had sold their lands and would be forced to move, when (according to Phillipson) they in fact showed the opposite. Māori had entered deeds and stayed on their lands, which left the missionaries and other settlers unable to enforce their view of the transactions and waiting for the Crown or a shift in settler power to tilt the balance in their favour.[214] In Phillipson's view, that balance did not change until well after the signing of te Tiriti; indeed, not until the late 1850s.[215] This is a matter which we explore further in this chapter and in subsequent chapters.

Stirling and Towers also adopted a similar 'middle ground' framework before us to explain what was happening in this region. They argued that the 'fundamental question' was not one of opposite extremes – purely customary tuku whenua versus the fully commercial permanent sale of all the interests in the land – since

> neither end of that spectrum seems tenable in an era of contact and adaptation, during which each party adjusted their behaviour and expectations to accommodate ways that were foreign to them.

Instead, they agreed that Māori and Pākehā were 'meeting on what has come to be called the "middle ground"'.[216] They saw the fact of culture change as undeniable. On the part of Māori, there was the acceptance of innovations such as written deeds, while on the side of the missionaries and other settlers, there was acceptance of customary elements such as gift exchanges and shared occupation that were not part of what settlers understood as commercial real estate deals. Stirling and Towers also pointed to examples in which customary behaviours continued – demands for additional payments, or re-transacting land in the case of absentee 'purchasers'. They argued, however:

> Ascertaining precisely where along the continuum of contact and adaptation the parties to each of the hundreds of old land claims lay is not the most critical issue for the claims now, or then. What was critical at the time was whose understanding of the claims was to prevail; that of Māori or that of Pakeha.[217]

The major point for these researchers (as for Phillipson) was that if Māori insisted on transactions operating in the customary way, Pākehā had no choice but to accept it. However, the colonists were confident that once they could assert rights on the basis of a title granted by the Crown,

> they were free to set aside their relationship with their Māori hosts and to repudiate continued Māori interests in the land, and most did so. This could only be done once the authority of their Māori hosts had been eroded and was no longer capable of being meaningfully asserted.[218]

For this reason – the continuing dominance of Māori – Tony Walzl, in his report on Ngāti Rēhia, saw the pre-1840 land arrangements as examples of tuku whenua, established in a customary context in which Māori held the upper hand. He argued:

> From a Maori perspective, the early land transactions with Pakeha represented 'the commencement of an on-going and mutually beneficial relationship'. The context in which these relationships existed was one in which Maori utterly dominated, and so any Pakeha desire for absolute alienation of the land, as it was understood in the European world, could not be enforced. The land transactions were but one part of a complex relationship which included trade in goods, exchanges of gifts, marriage alliances and further benefits such as education, access to technological advances and employment. There was an understanding, at least on the part of Maori, that the land and its resources were to be shared by Maori and Pakeha for their mutual benefit. This placed these exchanges of land firmly within the wider relationship which

was premised on that same understanding, that is, on the idea of mutual benefit.[219]

Mr Walzl went on to say that few historians would suggest that 'by 1840 there was a uniform understanding held by the Bay of Islands Maori that their land had been sold in accordance with a Pakeha meaning of sale'.[220] While arguing that Ngāti Rēhia continued to regard their transactions as tuku whenua, he acknowledged that rangatira in Kororāreka 'viewed the situation there as being different from their interactions with Pakeha elsewhere and land was granted there much differently'.[221] But this did not mean that there had been a marked transition from custom to English understandings of property sales and rights. Rather, Māori wished to remain in Kororāreka in order to share in the benefits arising from those who had settled among them.[222]

In sum, the expert witnesses before us were overwhelmingly of the view that with pre-treaty land deeds, Māori retained customary rights in those lands and were able to enforce those rights up to and beyond 1840. Even if Māori understood the prevailing settler perspective by 1840, they did not consent to it; on the contrary, as will be discussed later, the desire of rangatira to enforce their understandings while retaining productive relationships with the settlers was a significant factor in their decision to welcome the Crown to their lands. It would be simplistic, however, to suggest that from a Pākehā perspective, all land sales were based purely on commercial factors, as the many instances of marriage demonstrate. On the other hand, in such circumstances, Māori may have encouraged Pākehā to 'buy' land to cement community as well as trade interests. We note the Crown offered no new research on these matters, relying instead on the earlier work of Dr Sinclair and other historians in Muriwhenua, an analysis of the wording of a sample of the deeds, and on their reading of Dr Phillipson's evidence.

We turn now to our consideration of the evidence before us. What can the evidence tell us more specifically about the issues we need to consider with reference to tuku and the degree to which this featured in the pre-treaty land arrangements of our inquiry district? As part of this, we also consider whether the evidence demonstrates that in some instances Māori in this district *had* adopted European conceptions of sale with the pre-treaty deeds and had accepted that, as a result, all their own rights in land and their authority over it (and its occupants) had permanently ended.

Historian Tony Walzl during hearing week 16, the Turner Events Centre, Kerikeri, November 2015. Mr Walzl presented on the commissioned research reports 'Overview of Land Alienation around Whangarei City' and 'Ngati Rehia Overview Report', among others.

(3) *What did early settlers and visitors observe about the nature of pre-treaty land arrangements?*

(a) The 1838 House of Lords Select Committee

The 1838 House of Lords select committee inquiry on New Zealand heard significant evidence about the nature of pre-treaty land arrangements. Although the observers appearing before it expressed a range of opinions, there was a strong thread within the commentary acknowledging

that permanent alienation was unknown in traditional Māori society and that, in many cases, Māori continued to occupy and otherwise exercise authority over lands that had been subject to transactions. These included examples of Māori re-occupying land and entering new arrangements if the settler was absent, of rejecting settler attempts to on-sell the land, and of requiring settlers to make multiple payments in order to secure their rights. Phillipson considered this inquiry particularly significant, since the committee was especially interested in the question of whether Māori intended permanent alienations when transacting lands, and the information it gathered was readily available to the British government and its officials.[223]

The missionary John Flatt, who had lived in the north during 1836 and 1837, told the committee that settlers who entered into land transactions were typically left alone to make use of their property. But if they failed to occupy land or departed from it, Māori considered they had the right to use the land themselves or allocate it to others:

> There is no Form, no Taboo, to Europeans; that is confined to the Natives; it becomes British Property and they look upon it as such; they may hold it as Taboo so far to Europeans for a short Time during a short Absence from the Country, but if the Europeans were to leave it for several Years, and not to cultivate it, I would not be bound to say they would not sell it to a Purchaser after a few Years; and they would look upon the former Purchaser as dead.[224]

Māori could undertake that action even when the original purchaser remained in the district. When the missionary James Shepherd thought he had acquired an island in the Bay of Islands but did not utilise the land, Māori considered he had lost his rights. Questioned on this point by the committee, Flatt explained that the son of the signatory chief repudiated the transaction 'because it was not taken possession of'. When a settler from New South Wales offered four times the price Shepherd had paid, and the land had lain 'dormant for a considerable time . . . [t]he young Chief took Part of the Payment, as much as he had received for it' and laid it at the missionary's door – blankets, axes, some tobacco and other 'Trifles'.[225] This was a common practice in such circumstances: the rangatira had retained his share of the payment so he could return it and strike a new bargain if Shepherd did not fulfil his side. Shepherd protested, but to no avail. Not only had he failed to occupy the land but the original exchange had also been revealed as unequal and unfair. According to Flatt,

> Mr Shepherd objected to take back the Payment, stating that, according to European Purchase, it was his, and he should not take the Purchase Articles back again. The Chief said he should; he, Mr Shepherd, said that was not according to the European Custom, nor theirs, to take it back after it had been parted with. The Chief said he had not given Value for it, or why did the other give him Four Times as much; and he said that if he did not take it back he would take off his Head.[226]

Although Flatt considered this to be only a threat, Shepherd could not risk the possibility of serious trouble. The young rangatira returned his portion of the original payment and then entered a new transaction with the new settler for the better price. As Flatt's account suggests, Māori and settlers were discussing the meaning of land transactions by that time, and while they recognised that they held different tikanga, the settlers did not yet have the power to enforce theirs.

The trader Joel Polack told the committee about his experiences acquiring land at Kororāreka. He entered into several arrangements for small areas of land, the first by his own request and the others (he said) at Māori instigation. Having (he maintained) acquired the land, he was then required to make several additional payments. But in our view, the arrangements Polack described were far less fixed and finite than sales, and were founded on principles of balance and renewal. When rangatira offered him land, they told him,

> Now, remember you are going to get our Land; this descended from our Forefathers; do not think to give us a mere Trifle for it; give us that which we should have. See that

> Stream; so let your Payment be; it goes in various Creeks, and refreshes all the Land about it; so must your Payment refresh all concerned.[227]

The rangatira spoke also of how the goods they had received would wear out, while the land would remain for Polack's children. Polack interpreted this to mean that the rangatira had 'full Knowledge of the Value of the Land' whereas, in fact, he had been incorporated into a cycle of gift-giving by which his payments were distributed among the hapū, and the relationship between giver and recipient was affirmed and renewed. He made significant gifts to the chiefs after the initial payments, and a 'Quantity of Trifles; that even the Slaves on the Land, or born on the Land, might say "I have smoked his Tobacco, 'or "I have had his Tomahawk"'.[228] Phillipson noted that Polack himself was given a share of the payment for a land transaction with someone else as part of this cycle.[229]

The Reverend Frederick Wilkinson, who visited New Zealand for three months in 1837, told the committee that Māori chiefs did not have the right to sell land and would resume it if it was not occupied or used. However, 'if you wish to settle among them they would give you a Piece of Land, and would be happy that you would remain there, and would respect your Property, and not go across it'. He believed that there was some risk that Māori might invite too many settlers to live among them and be left with insufficient lands for themselves. In some instances, they had taken up other lands or gone to live with a neighbouring chief – for example, some Bay of Islands rangatira had gone to live with Pōmare II after entering transactions over their former lands.[230] On the other hand, Wilkinson rejected settlers' claims to have purchased large tracts of land as 'mere pretense' and noted that Māori might move back onto lands if they came to think that the bargain had been a bad one or that the settlers had enjoyed sufficient benefit from its resources. Questioned by the committee about the apparent contradictions in his evidence, Wilkinson maintained:

> There is no written Law; it is all Custom; but they will, when strong enough to do so, resume the Land. I believe they think the best Title of a Man is of very little Consequence if they are strong enough.[231]

The Secretary of the Wesleyan Missionary Society, the Reverend John Beecham, told the committee that he did not have much knowledge of land customs. He did, however, bring a letter from one of his missionaries, advising that the mission had sought to acquire land from a settler but had been obliged first to seek the consent of the chief who had entered into the original transaction. When asked by the committee whether he thought the mission had acquired an inalienable property in fee simple, Beecham replied cautiously as the Wesleyan land dealings were limited and he had no specific case in mind. But he did not think 'we should instruct our Missionaries to sell it without consulting the Natives of whom it is bought':

> [He] rather lean[ed] to the Conclusion that the Natives have no very distinct Idea of the total Alienation of their Lands, but may cherish the Notion of resuming them at some future Period under certain Circumstances.[232]

Not all witnesses shared Beecham's doubts about Māori understanding of transactions with Europeans. His counterpart in the CMS, the Reverend Dandeson Coates, asserted that the mission's land acquisitions were absolute but conceded that it was impossible to explain fully to Māori what this meant.[233] John Nicholas, who had befriended and been invited by missionary Samuel Marsden to accompany him to Rangihoua when the first CMS mission was established in 1815, believed that Māori understood they were parting with land forever. As evidence of this, he said that rangatira had placed the mission under a tapu so that others would not disturb the missionaries or their cultivations.[234] We note here that Marsden, who arranged the Rangihoua transaction, did not himself see it as a permanent sale. He wrote in his journal:

> No Maori at that time had any appreciation of the European concept of title or its transfer, and it was probably understood that the mission people would occupy the land, not necessarily exclusively, while they required it.[235]

The House of Lords committee also heard testimony from John Watkins, a surgeon who had visited New Zealand between 1833 and 1834. He had heard a chief say:

> the Land he had sold to the English was not any more the Land of the Natives; it was for the English; and it was the Case at the Waimati [*sic*], at the Purchase of the Missionary Farm. The Chief called their Attention to that Point; he told them distinctly it was never to return to them again, or their Sons, or their Children after them.[236]

Watkins saw this as evidence of alienation, and he gave another example of Te Wera Hauraki leaving Kerikeri in 1823 after entering an arrangement with the Church Missionary Society. Phillipson told us this was the *only* instance he knew of in which a rangatira left the land after entering an arrangement with settlers.[237] According to claimants, at a time of Ngāpuhi expansion, Te Wera followed in the footsteps of his famous tupuna Māhia and migrated to the Māhia Peninsula to assert his rights there.[238] Even then, Te Wera sent his son back to watch over the Kerikeri lands.[239] In any case, Watkins cited other examples in which Māori clearly did not intend land transactions as sales. He had been offered land to live upon without payment so that he could provide medical services to the community. He also had heard of instances of Māori seeking to regain possession of lands they had allocated to settlers, while they traversed such areas at will.[240]

Undoubtedly, the most important evidence was that of Royal Navy Captain Robert FitzRoy (as he then was), who had spent a short period (10 days) in the Bay of Islands in 1835. Its significance (as we explore in section 6.5) lies in the fact that, after he became Governor, he played a part in validating Māori transactions as sales – contrary to the evidence he gave to the committee.

At the time of the hearings, FitzRoy, who was closely questioned on the matter, argued that Māori retained authority over land that they had allocated to settlers:

> [Q] And if he [a land-selling chief] further disposed of his Rights of Sovereignty over his Land, his Rights of Sovereignty would pass to the Person to whom he disposed of them?
>
> [F] I apprehend they would at first, but whether that would be held good Twenty or Thirty Years hence would be a different Question; for those Natives do not understand parting with their Rights in Perpetuity; at present that would hold good, I have no Doubt.
>
> . . . . .
>
> [Q] When you say that the native Chiefs do not understand that they are alienating Land entirely for successive Generations, with respect to the Purchases made now by Europeans, have the New Zealanders any Sort of Notion, in your Opinion, that the Land will ever revert to their Tribes?
>
> [F] I think they consider it as their Country; they consider the People who come there as we considered Settlers in this Country in former Times, the Lombards, Flemings, or others. We had no Objection to their coming, provided they did not take away from us any Part of our Territory, for they would increase our Resources. If a piece of New Zealand where the English have settled themselves was to be transferred to the British Crown, and the Natives were no longer to have any Right to that Soil or Territory, I think it would put quite a new Face on the Matter.
>
> [Q] Have the New Zealanders any Notion that the Compact is not final, that the Land will ever revert again to their Descendants; do not they consider it vested in Law?
>
> [F] I do not think they do, because they consider that when a European purchases their Land, he is taken from that Moment under the protection of their Tribe. All the Purchases have been with the Understanding that the Settlers are to be protected by the Chief from whom they purchased the Land, which appears to me very much like their considering that they still have a Sovereignty over the Land, though they allow those People to make use of it.
>
> [Q] Do you know whether those Persons have ever done any Act of Infeudation to the former Possessors of this Land? [ie, held it under feudal tenure]
>
> [F] The Settlers have made Presents to the protecting Chief, the Chief under whom they live.[241]

FitzRoy went on to explain that the CMS missionaries had 'allowed' Māori to remain on the land they had purchased for farms; that the 'Transfer has not interfered with their Right of Common'; and that the missionaries considered themselves to hold their properties on sufferance. As to the views held by Māori, FitzRoy maintained,

> It is a Sort of conditional Sale, such as 'We sell them [our lands] to you to hold as long as we shall permit you.' I apprehend it is considered that they [the missionaries] hold those Lands under the Authority of the New Zealand Chiefs; that they settle upon them as their own Property; but under the Protection and Authority of the Chiefs, and that they look up to the Chiefs as their Protectors, and, in fact, as their Masters.[242]

FitzRoy also observed that Māori continued to use the lands freely that they had granted to missionaries:

> The missionaries have never wholly taken away ground from the natives, but always allowed them the run of the land, the right of common as it were, I do not think they at all apprehend at present, that a day will come when they will not be allowed to go about the land as they have hitherto done.[243]

FitzRoy was later recalled to clarify certain points of his evidence. He expanded on his view of the 'Right of Common', which he saw as including rights such as setting up a camp, feeding cattle, and other uses short of permanent occupation. Questioned on the extent of land that had been alienated – much of it along one side of the Bay of Islands Harbour – and the likely impact upon Māori in the future, he reiterated that, as matters then stood, Māori could 'go wherever they please; their having sold Land does not prevent their fishing from its Shore or crossing it in any Direction'.[244] However, that might change with colonisation:

> An Englishman settling in that Country, with Ideas of Property learned in England, might think it very strange that a Tribe of Natives, or any Number of Natives, should cross his Property whenever and wherever they liked, and one of the first Points he would urge would be, that it was his Land, and that they must not trespass upon it.[245]

FitzRoy's understanding of land transactions in the Bay of Islands, as expressed at the hearings, was that Māori were not agreeing to permanent alienations and that the arrangements were conditional in nature. The settlers were welcomed for the resources they brought and were therefore taken into the tribe, accorded use rights, and protected by the chief, to whom they made ongoing gifts. Māori also continued to travel across, live on, and use resources from the lands. Missionaries and other settlers knew that their tenure was far from guaranteed. Māori retained ultimate political authority not only over the land but also over the settlers themselves. Such arrangements were open to misunderstanding because settlers claimed an authority they could not enforce. On one occasion, on the island 'Motou-roa', the settlers had objected to what they regarded as a 'trespass'. They had argued that the land was theirs, FitzRoy explained, but they were powerless to take any action.[246] FitzRoy briefly mentioned that some Pākehā, in contrast, had built houses and set up grog shops at Kororāreka without any deed affirming their arrangements with the Māori community.[247] FitzRoy also thought that sovereignty and authority over the land (and the people who lived upon it) were indistinguishable to Māori.[248]

The significance of FitzRoy's observations was disputed by historian witnesses in the Muriwhenua inquiry. Although Wyatt was heavily influenced by his evidence, Sinclair dismissed it as the opinions of somebody who had visited New Zealand briefly and was incorrect on several points. He thought that, given the length of his stay, FitzRoy must have relied on the opinions of the missionaries and Busby. Additionally, Sinclair considered FitzRoy was motivated by his desire to support the missionaries in their political battle with the New Zealand Company, and that his later actions suggested that he did not really think that Māori were doing anything other than selling their lands.[249] In our own inquiry, Phillipson cited FitzRoy's evidence at length. He suggested that Sinclair's reasoning was flawed, since both Busby and the missionaries firmly

An Implied Understanding that they Should Continue to Cultivate the Ground: The View of Ernest Dieffenbach

'A FAR MORE important question for the Administration to settle is that of the territorial rights of the natives. . . . they are perfectly aware that they possess such rights. They disposed several years ago of the larger part of the islands to Europeans, and they acknowledge the titles of those who have purchased from them. It has been said that the natives are now strangers on the soil, that they have sold all their land, and that nothing remains to them. This is not quite the case. Well acquainted with the nature of their country and the capabilities of the soil in the different districts, they have generally retained such parts as were best suited for cultivation but in some instances they have not made any such reserve. According to European law, the new proprietor would in these cases be entitled to remove the native inhabitants from their land; such, however, can never be allowed in New Zealand, and this point calls for the special interference of Government. The deeds of purchase have almost always been written in a foreign language and in a vague form, and the purchases were often conducted without a proper interpreter being present. Where the natives had made no particular reserve for themselves, the land was sold by them with the implied understanding that they should continue to cultivate the ground which they and their forefathers had occupied from time immemorial; it never entered into their minds that they could be compelled to leave it and to retire to the mountains. There was, perhaps, an understanding between the parties that the seller should not be driven off by the buyer; but this was verbal only, and not recorded in the written document. It would indeed be sad were the native obliged to trust to humanity, where insatiable and grasping interest is his opponent, and where the land has gone through ten different hands since the first purchaser, who perhaps bought it for a hundred pipes, and where not one of the buyers ever thought of occupying it. In transferring land to Europeans the natives had no further idea of the nature of the transaction than that they gave the purchaser permission to make use of a certain district. They wanted Europeans amongst them; and it was beyond their comprehension that one man should buy for another, who lived 15,000 miles off, a million of acres, and that this latter should never come to the country, or bestow upon the sellers those benefits which they justly expected.

'The most vital point in regard to the native inhabitants, where they occupy part of claimed land, and are inclined to retain it, is that the extent of such disputed land should be fixed by legal titles and boundaries, and that they should be protected in the possession of it against the cupidity of the Europeans.'[1]

believed their own land transactions to be genuine purchases. As to the apparent confusion between land ownership and sovereignty, Phillipson's view was that:

> FitzRoy's evidence showed that where this was *Maori* authority, it involved land in ways that a British exercise of 'sovereign' authority would not normally do. This probably makes it more relevant to the points at issue, not less. [Emphasis in original.][250]

At the least – and we agree – this was intelligence readily available to the Crown at the time that should have alerted it to questions about the nature of pre-treaty land arrangements.[251]

(b) Ernest Dieffenbach's observations

Another early visitor who readily grasped that Māori understood land arrangements in different terms from settlers was Ernest Dieffenbach, a naturalist with the New Zealand Company, who sailed aboard the *Tory* in 1839. Key extracts of his account of *Travels in New Zealand*, published in 1843, were quoted by Phillipson, David Armstrong for the Crown in the Muriwhenua inquiry, and Stirling and Towers; these are reproduced

here (see sidebar).[252] Dieffenbach observed that Māori 'acknowledge[d] the titles of those who [had] purchased from them', but far from having disposed of all their land, they 'generally retained such parts as were best suited for cultivation' and believed they had enduring rights to these lands, although this might not be recorded in the deeds. He argued that 'it never entered into their minds that they could be compelled to leave', or that the land might be onsold to strangers who were unaware of and would not respect these informal arrangements. Dieffenbach cautioned against relying on the deeds, which were 'written in a foreign language and in a vague form', and noted that transactions 'were often conducted without a proper interpreter being present'. In Dieffenbach's view, the Crown ought to give legal protection to informal arrangements for shared use, and the commissioners in recommending awards should also consider what land Māori had left to them, even when they did not dispute the legality of the title being sought. Otherwise, 'hardship and injustice' would be inflicted on some hapū.[253]

Again, the validity of this contemporary and critical account was questioned by witnesses for the Crown in the Muriwhenua inquiry. In particular, Armstrong argued that Dieffenbach had not attended a Land Claims Commission hearing and had incorrectly assumed that the commission would fail to respect informal arrangements over reserves.[254] In contrast, Phillipson described Dieffenbach as an 'acute and perceptive observer' who had examined matters all over the country, including the Bay of Islands, and whose views were therefore worth considering.[255] More importantly,

> This type of evidence suggests that the point ought not to have been opaque to the Commissioners. They certainly recognised the element of power at work in the transactions and that Maori had expected *their* view of the transactions to prevail. [Emphasis in original.][256]

(c) The views of early Crown officials

Notable examples were the British Resident James Busby (from 1835 to 1840); the missionary George Clarke senior (later appointed Chief Protector); Edward Shortland, who also became a protector and Private Secretary to Governor Hobson; and Shortland's brother Willoughby, who became Colonial Secretary in 1841 and 'Officer Administering the Government' in 1842. Several of these men had made their own extensive land acquisitions in pre-treaty years.

Other than the evidence before the House of Lords, Busby was the Crown's main source of information about New Zealand in the 1830s. He had arrived in the Bay of Islands in 1833, and as already mentioned, had engaged in substantial land dealings. Most of his initial transactions at Waitangi (in 1834 and 1835) were relatively modest, with his claims ranging from 25 acres (OLC 15) to 2,000 acres (OLC 17). But when the Crown moved towards annexation, he joined the rush to acquire as much land as possible, undertaking negotiations for some very large-scale properties at Whāngārei (25,000 acres at Bream Bay and another 15,000 acres at Waipū) as well as a further 5,000 acres in the Bay of Islands (OLC 21). In all, he would seek grants for nine Waitangi properties totalling 9,465 acres and another three at Whāngārei totalling some 80,000 acres (see discussion at section 6.7.2(10). In other words, he was heavily invested in the Crown endorsing Māori transactions as valid land conveyances under English law.

According to Phillipson, Busby clearly believed these transactions to be complete alienations, even though Māori were sometimes reluctant to vacate the land. Phillipson summarised Busby's understandings as follows:

> His reports to the New South Wales government were based on this belief [that he had acquired clear title]. His letters in 1839 refer to a rush of land speculation, and of missionary purchases to reserve land for Maori. There is nothing in his correspondence to suggest anything other than that he saw all those land transactions as absolute alienations.[257]

Even so, that same correspondence recorded incidents that suggest the matter was less clear-cut than Busby made out. For example, William Hall, who sold him the land for his residence at Waitangi, informed Busby that the deed would stand good only against the claims of other Pākehā, and that he would probably have to pay Māori

British Resident James Busby's house at Waitangi. Although Busby refused to recognise the authority of the Old Land Claims Commissions, he was eventually awarded 9,374 acres at Waitangi, plus £23,000 in compensation. Māori retained only two small reserves of 460 and 586 acres from these grants.

again when he took up occupation.[258] Although Busby had entered into no transactions himself at Kororāreka, he observed that settlers who thought they had purchased land there, later had to accommodate changing customary circumstances. After 1830, as a result of the Girls' War, Ngāti Manu had vacated the town, leaving it to the chiefs of the northern alliance who considered they had a right to make their own arrangements. Busby informed his brother that one settler (Poyner) found his property occupied by one of the northern alliance chiefs, who had 'established himself in the Enclosure . . . and kept him out of possession till the day of his death'.[259] Nor did Ngāti Manu regard their rights as extinguished. As discussed in chapter 3, there was renewed fighting over the township in 1837 (see section 3.4.1); and much later, in 1854, Ngāti Manu joined with Ngāti Hine in demanding payment from the Crown in recognition of their rights.[260]

Edward Shortland was another early official who did not question that Māori were selling their lands. In his book, *Traditions and Superstitions of the New Zealanders*, Shortland suggested that a number of misunderstandings existed between the parties undertaking early land transactions, but he made no mention of Māori intending anything other than a permanent alienation. In his view, while Māori entered transactions because they wanted settlers to live among them, they would not sell their core lands. Difficulties had arisen when lands had been sold in 'secret' by some customary owners, leaving the interests of other parties unextinguished.[261] Considering him a disinterested observer, Phillipson argued that if Shortland had believed Māori perceived their land transactions as conditional, he would have said so. He was not himself a claimant before the Land Claims Commission, so had no personal interest in the outcome of its procedures.[262]

The same cannot be said, however, of the Chief Protector of Aborigines, George Clarke senior, whose views we consider especially influential in the pre-treaty land claims process. In chapter 4, we outlined the instructions of Secretary of State for War and the Colonies, Lord John Russell, in late 1840. In brief, these stated that it was

the duty of the Chief Protector to become conversant with 'native customs', supply the Government 'all such information as may from time to time be required on that subject', and 'watch over the execution of the laws, in whatever concerned more immediately the rights and interests of the natives'.[263] As we discuss further in section 6.4, the protector and sub-protectors played integral roles in the first Land Claims Commission: they were charged with identifying those who held customary rights, bringing any possible opposition to the commission's attention, and attending the hearings to protect Māori interests. According to Armstrong, the commissioners relied particularly on Clarke (who had significant land claims at Waimate) and his sub-protectors for their understanding of Māori custom and their assessment of who held rights.[264]

Clarke often remarked on the difficulties of purchasing land from Māori. He was well aware of the existence of overlapping customary rights, and rights in common, and was concerned that these aspects of Māori land tenure should not jeopardise the security of the grants ultimately to be held by settlers. In his view, if all Māori interests had not been properly identified and extinguished, the title issued by the Crown would be flawed and open to Māori challenge. His biannual reports concentrated on this dimension – the possibility of future opposition. He certainly recognised shortcomings in the conduct of purchases by early settlers (other than the missionaries). On occasion, he also hinted at broader concerns about whether there had been any meeting of minds in the pre-treaty transactions, writing, for example, in February 1841 that 'the greater part of these land transactions were conducted by parties very partially understanding each other'.[265] In August of that year, commenting to the Governor on the New Zealand Company's claim at Port Nicholson, he wrote:

> it was never 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 parting with his land is not only to obtain the paltry consideration which in many cases is given 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.[266]

Here, he was tacitly acknowledging that Māori saw land transactions both in terms of the personal relationships that were established and the potential impacts on the mana and well-being of the hapū. Clarke reported in September 1841 that the encroachment of settlers onto lands that had not been properly acquired was a 'very general subject of complaint' and would be a source of 'much trouble' to Māori, settlers, and the Government in the future.[267] He again alluded to the possibility for misunderstanding:

> the equitable purchasing of a tract of country, even under the favourable circumstances of knowing the language and customs of the natives, has always been attended with great difficulty; yet in the estimation of the majority of land purchasers (ignorant of both the native language and customs), they have accomplished more in the space of a few hours in the way of purchasing land, than the government, under every advantage, can accomplish in as many years.[268]

According to his report of November 1843:

> no purchase could be effected, except by a person possessing some considerable knowledge of the principles by which the claims of the natives are governed, and that to perform such service satisfactorily would require considerable time.[269]

Clarke typically related these observations back to the question of whether purchasers had ascertained to whom the land really belonged, showing less concern for the broader question of whether Māori understood the transaction in terms other than permanent sale. However, as Phillipson noted, the 'other implications are obvious'.[270] Certainly, Clarke was aware that Māori had a different view of land tenure – notably that rights in land might endure despite apparent dispossession. He observed:

> A tribe never ceases to maintain their title to the lands of their fathers, nor could a purchase be considered complete and valid without the concurrence of the original proprietors.'[271]

However, the assertion by defeated hapū that they ought to be paid for lands they had formerly occupied did not give Clarke any apparent pause for thought, other than for the problems that might arise in the colony if such rights were not extinguished as well.

Clarke clearly appreciated that different hapū might assert rights in the same resource, and that extensive claims such as those of de Thierry in Hokianga and the New Zealand Company in Port Nicholson could not be sustained. In July 1840, he informed the Colonial Secretary that, from his knowledge of Māori custom in transacting land,

> it is I presume to say impossible to establish such a claim as that advanced by Baron de Thierry who not only assumes a right to the whole patrimony of two or three chiefs, said to have signed his deed of purchase, but that of a vast number of other independent chiefs above those named by the Baron.[272]

On the question of whether Māori intended a permanent and exclusive alienation of land when they signed land deeds with Europeans, Clarke said little. Crown witnesses in the Muriwhenua inquiry placed some significance on this. In Armstrong's view, Clarke understood what was required to conduct a valid purchase. He argued that Clarke had considerable experience not only in matters of Māori custom and law but also in land purchase. Furthermore, 'Not one of the claims with which he was personally involved appear to have been disputed by the vendors' at the first Land Claims Commission hearings, 'suggesting that he had followed the necessary procedures'.[273] Armstrong did not elaborate on what the necessary procedures were, beyond noting that Clarke was aware of the 'need to identify and satisfy all Maori claimants'.[274] It was implicit in Armstrong's assessment that Clarke's own involvement in land purchase assisted the Land Claims Commission's work, but despite the many examples to the contrary, Armstrong argued that 'nowhere in Clarke's writings on this subject does one detect any hint that the parties to these transactions took away from them radically different perceptions of what had transpired'. On those grounds, Armstrong concluded that Clarke was 'unlikely' to have briefed the commissioners in terms other than of sale and he did not question whether Clarke's own interest in having transactions validated may have coloured his perception of, and advice about, Māori intentions.[275]

On the other hand, Dr Rigby and the authors of the Rangahaua Whanui report on old land claims saw Clarke as seriously conflicted in his official role as Chief Protector, as he was a major land claimant both on his own behalf and as a member of the CMS, whose transactions were under attack. Rigby et al argued that this limited his ability to protect Māori interests; in particular, he was less ready to support the enforcement of the statutory 2,560-acre limit to grants, since he himself (and several other missionaries) had exceeded it.[276] That was also the opinion of Stirling and Towers. They viewed Clarke's silence about the true nature of Māori land transactions as self-interested.[277]

Phillipson agreed that Clarke, along with other protectors and missionaries, had a 'vested interest in the outcome' of the Land Claims Commission process, which was dependent upon their advice and their knowledge of te reo. Clarke, Richard Davis, and James Kemp were all themselves claimants, either on their own behalf or for their families. Their sons were engaged in official roles as well. For instance, Henry Tacy Kemp was the sub-protector attached to the northern commission, and James Davis also worked in that capacity on occasion and sometimes acted as protector. Notwithstanding, the transactions of the CMS missionaries had been so numerous that they drew fire from the Māori speakers at Waitangi (as we explored in our stage 1 report). Dr Phillipson also questioned Armstrong's conclusion that the lack of Māori challenge to Clarke's transactions demonstrated his expertise in such matters. An alternative explanation was the possible reluctance of the rangatira to 'speak frankly' in the presence of the missionary land claimants. Both the

Anglican Bishop George Augustus Selwyn, and the missionary Robert Burrows had observed this.[278]

We note, finally, that New Zealand's first three Governors, whose combined tenure covered much of the first three decades after te Tiriti, all expressed clear views that Māori had not consented to permanent alienation of their lands. Hobson, while addressing a delegation of Sydney settlers in January 1840, expressed the view that Māori 'never were in a condition to treat with Europeans for the sale of their lands, any more than a minor w[oul]d be who knew not the consequences of his Acts'. While Hobson's racial ideology is abundantly clear, so too is the underlying point: Māori could not conceive of permanent alienation, let alone agree to it.[279] FitzRoy, when he became Governor in 1843, continued to hold the view that Māori had not consented to sale. As we will see later, he thought that Māori had given up none of their rights, other than to allow settlers to occupy a portion of their lands, and that they continued to use their lands as before.[280] Grey, who governed from 1845 to 1853 and again from 1861 to 1868, expressed similar views. In 1848, for example, he wrote that the title acquired by settlers was 'in all cases wholly distinct from a Crown Title in a British Country'; and that,

> even in the best cases for the purchaser, the title could not . . . be regarded as more than simply an adoption into the tribe, and a right of holding the land upon the same term as the Natives themselves.[281]

(4) *The CMS transactions*

The CMS had entered its first land arrangement with Māori in 1815, and other transactions had followed in 1819 and during the 1820s as new missions were established.[282] These early transactions reflected a desire by Māori to have missionaries in their midst. As noted earlier, Marsden saw them as conferring a right to occupy land for that purpose.[283] During the 1830s, the number of and area covered by missionaries' land deeds accelerated markedly with a series of transactions by Henry and William Williams, James Kemp, Richard Davis, James Shepherd, and others. In many of these, missionaries sought to acquire land for themselves and their children. Other transactions, covering a substantial area, involved so-called 'trust deeds', which were intended to secure those lands for ongoing occupation and cultivation by the resident Māori populations. In our stage 1 report, we discussed whether Ngāpuhi interest in these arrangements indicated their growing concern at loss of land and authority;[284] here, we explore the effect of such arrangements on their understanding of what land deeds entailed.

In all, 17 trust deeds were drawn up for sites in the North Island, and all but four were in our inquiry district, which included seven properties at Waimate, two at Kaikohe, and one each at Kawakawa, Whananaki, Hokianga, and Taiāmai.[285] According to CMS calculations, these trust arrangements together covered some 50,000 acres around the Bay of Islands, much of it in contiguous blocks surrounding the existing Waimate mission.[286]

Notes supplied by Henry Williams and protector Clarke to the Colonial Secretary in 1840 indicated that these were very well-resourced areas. The first such deed for the district, signed in November 1835 for an unspecified acreage at Kawakawa, described the land as 'generally good, well-watered and timbered'.[287] One of the 1836-to-1837 Waimate deeds referred to 'a valuable portion of land . . . the greater portion of which is of a good quality, many little tracts of which are in a high state of cultivation . . . a good proportion well timbered'.[288] Similarly, the other deeds covered lands that were either heavily cultivated (particularly around Waimate) or contained extensive areas of valuable timber, or both.[289] While some of the lands were sparsely populated – or, in one case, being cultivated by a single whānau – others were inhabited by 'several tribes who hold distinct claims'.[290] Most of the Māori residing in these areas were described as 'good Christians' who were 'perfectly civilised' and employed European farming methods.[291]

Little is known about the actual wording of the deeds, since they were lost in the 1840s (although some brief quotations have survived).[292] According to missionaries such as Williams and Davis, the deeds secured these lands for ongoing occupation and cultivation by the resident Māori populations.[293] Henry Williams reported to his

masters in New South Wales that these arrangements were a device to prevent other settlers from attempting purchase. By using the deeds, disputes would be avoided (which otherwise might have arisen from settlers attempting to buy from only one group of customary owners), and the land would be secured for future generations, even as settlers increased their attempted land-purchasing activities. Williams also presented the deeds as an opportunity to expand missionary influence over Māori populations to protect them from the less savoury Pākehā who were establishing themselves in coastal communities.[294]

In the Muriwhenua inquiry, Dr Sinclair argued that the trust deeds were clear evidence that Māori understood and accepted settler views of land transactions. In his analysis, the missionaries would have very unambiguously spelled out the implications of land sales at that time, and he considered the trust deeds reflected Māori desire to protect themselves from further land losses through sale.[295] Witnesses in our inquiry disagreed – and in fact took the opposite stance. In Dr Phillipson's view, the trust deeds came 'closest' to reflecting in writing what Māori expected of pre-treaty land transactions. However, they could not have

> helped improve understanding of 'sales' . . . since they involved missionaries making the usual payments and getting deeds signed, but with the apparent intention that nothing would change rather than the reverse.[296]

By encouraging Māori to occupy transacted land, the missionaries had signalled something quite different from what other Pākehā – those who also had induced them to sign deeds – had intended.

Phillipson argued that Sinclair had failed to account for the very considerable similarities between the trust deeds and other land transactions undertaken by missionaries, particularly the ongoing Māori occupation of both categories of 'purchase'.[297] Indeed, it appears from Phillipson's evidence that the difference between the two was that missionaries occupied a portion of the land subject to personal deeds, and none of the land subject to trust deeds.[298]

Phillipson, and Stirling and Towers, also rejected Sinclair's view that Māori entered the trust arrangements because they understood and were anxious about permanent land alienation; rather, they agreed that the trust deeds reflected missionaries' concerns more than those of Māori.[299] Stirling and Towers pointed out that, by 1835, the vast majority of land transactions Māori had entered into concerned blocks of a few dozen or a few hundred acres. The only exceptions were James Clendon's trading post at Ōkiato and transactions with the missionaries themselves. Even if Māori saw their transactions as total and permanent alienations, they 'could scarcely have cause for concern' about impending landlessness '[g]iven that the missionaries, by their own admission, so freely shared their lands' with them.[300]

Missionaries' verbal explanations further confused this picture. As Stirling and Towers observed, they presented *both* types of deeds as a means by which Māori could protect land from settler intrusion.[301] Phillipson made the same observation, seeing this as further evidence that Sinclair had not taken sufficient account of the blurring of lines by the missionaries in their land transactions.[302] Moreover, the missionaries presented their 'private' purchases as their intention to secure lands for Māori and missionary children to live on and cultivate together, so by the missionaries' own admission, the transactions represented something other than straightforward alienation. When the missionary Davis was approached by a group who feared that Pōmare II might make arrangements for their lands (presumably contested) without their permission, he advised them to 'sell their district to me and I would directly make it over to them and their children forever'.[303] In the same month (November 1839), he advocated the sale of land at Kaikohe to the CMS as a way of securing it into the future. In this instance, he suggested strengthening the trust deeds, which he feared were insufficiently secure, and instead encouraged Māori to 'enter a compact not to sell their country . . . binding upon the whole of them; that no person be at liberty to sell his land without the consent of a majority'.[304]

As Davis's comment indicates, the view promulgated by missionaries was that their land acquisitions secured a shared future where the prospects of Māori and mission

children were intermingled. Shepherd, who claimed over 10,000 acres in the Whangaroa area, wrote in 1838:

> it has therefore appeared to me most desirable to secure portions of land . . . to the benefit of the natives. This I have done, feeling it to be a duty no less incumbent upon me than to provide for my own children.[305]

Davis informed the CMS:

> It is but too true that purchases of an extensive nature have been made but even in some of them, I can have no doubt but the people who made them had the double end in view viz, of providing for the Natives as well as for their own families.

Davis presented this as a response to Māori land-selling (though, as already noted, in Te Raki the missionaries were responsible for more land dealings than any private speculator). Davis continued:

> Could your missionaries – or ought your missionaries – to have looked on in sullen silence? Certainly not. In the first place they did all they could . . . to secure a future interest for the Aborigines as well as to provide for the maintenance of their own family.[306]

While we have no detailed record of what the missionaries discussed with Māori when the deeds were negotiated, we think it likely that they built on their established relationships with the community and used this concept of a shared future when explaining the transactions to them. In other words, whether the transactions were for the missionaries themselves or intended as 'trust' arrangements, they were presented as securing a future together in which Māori would continue to make use of the land and its resources, while benefiting from the presence of missionaries and their children. As we discuss shortly, this conclusion is supported by the language employed within those deeds that 'described the transactions clearly as tuku whenua'.[307]

The missionaries often asserted that Māori in fact continued to share the land with them long after the deeds had been signed. Henry Williams maintained that Māori had been 'repeatedly invited' to live on CMS land at Waimate and Paihia.[308] And Kemp, for example, told the Colonial Secretary in 1848:

> No natives have ever been compelled to leave their cultivations on the land but on the contrary have been encouraged to reside and cultivate and cut timber as they might require, a system universally adopted in all purchases of the missionaries.[309]

We note that this is almost exactly what then-Captain FitzRoy had told the House of Lords select committee in 1838 when he referred to Māori retaining a 'right of common' in the lands covered by missionary transactions.[310] Another missionary, William Puckey, similarly defended the extensive transactions undertaken by Davis and himself on these grounds; their practice had been to:

> buy more land than we otherwise should, and with this proviso stated in the deed that the natives should occupy it with our own children, thereby doing them a kindness by providing them with homes which they could never alienate from their families.[311]

The missionaries' claims were regarded with some scepticism by other Pākehā. Busby, for one, thought that Henry Williams was being less than truthful in maintaining that they were acting for Māori benefit. Jealous of the 'very fine land' to which Williams had acquired deeds, Busby complained:

> He has been giving out at Korarareka that they are purchasing these extensive tracts *not for themselves but for the natives* – a statement which in the sense he has made it to be understood is I believe absolutely false. [Emphasis in original.][312]

Even stronger criticism of missionary land dealing came later from Governor Grey (see section 6.5), who condemned their 'pretended purchases', which he predicted

Women Rangatira Exercise Manaakitanga at Paihia

While William Williams struggled to confine Māori occupation of the mission site at Paihia to Māori who 'behaved' properly, his wife, Marianne Williams, complained of the lack of moral rectitude and the poor performance of the 'native girls' who worked in her household.

Her correspondence highlighted the early dependence of her family and the mission on Māori goodwill, protection, shelter, and labour – including the manaakitanga of the women she considered servants, but several of whom were high-ranking rangatira, with the mana to offer hospitality, intervene in disputes, and discipline or even kill a war captive. She described how the women intervened when Tohitapu threatened the mission with a taua muru while Te Koki was at Kawakawa. The mission was surrounded, the children frightened, but 'Apo [*sic*] at length put up her good natured face, telling me in her own language that there would be no more fighting today and that she had been making a great fight for us.' And Aden, whom Marianne described as her best servant ('the only girl that has been able to wash the tea things for me'), snatched a gun out of the hands of one of Tohitapu's people.

Aden welcomed Marianne's newborn son, Henry, as 'tangata Maori'. She assisted with the children and washed the household linens; she received a gown made out of a piece of blue print. But to Mrs Williams' consternation, Aden departed within a matter of months. In March, Williams wrote that Aden had, the previous week, killed a 'kuki' who had 'gone on board the ships' and that she was considered 'dismissed [from] our service', having left with the blacksmith.[1]

would result in tribal warfare and disputes with the Government.[313]

As Phillipson observed, notwithstanding their purported commitments to Māori, the missionaries appear to have believed they had purchased the land outright. Accordingly, when Māori remained on the land, the missionaries presented this as an act of benevolence on their part, whereas in effect Māori were continuing to exercise existing rights while allowing missionaries to share the land.[314] For example, Davis argued in 1840 that Māori occupied missionaries' lands 'on sufferance'.[315] Phillipson saw such statements as clear examples of the 'creative and expedient misunderstandings' that could occur in the middle ground. As he noted, what mattered was the power balance: which side had the authority to enforce their view of the transaction?[316]

Though the missionaries did not always encourage or welcome Māori use of mission lands, they had trouble preventing it. Williams favoured occupation by Christian Māori rather than non-Christians. But, as Dr Phillipson observed, 'not just any Christian Maori' could occupy the mission lands; they had to be members of the local community and hold rights in the land, irrespective of Williams' wishes.[317] Though Williams resisted it, non-Christians persisted in asserting their rights, which he had little choice but to accept, despite his claims of success.[318]

While missionaries and other Pākehā readily appreciated the need to consolidate their claims by cultivating the land and erecting fences and houses upon it, they found that this could provoke countermeasures that necessitated additional negotiations, payments, and tolerance of further Māori use. Numerous incidents were recorded indicating that Māori did not view the deeds as restrictive. In 1832, after completing a deed with Hake, Te Ana, and others for Te Karaka, south of Paihia (OLC 669), Williams had sent in workers to begin clearing the ground for cultivation. In response to this – and also to an insult to Hake, who was wrongly accused of stealing from Williams'

brother – a large group of Ngāti Manu began to cultivate the area themselves and erect buildings there. The missionary was obliged to make a further payment – this was compensation for the slight – and Ngāti Manu then agreed to take down the whare. Stirling noted that, while this agreement allowed the CMS to establish a presence on the land, it did not end Māori occupation of Te Karaka.[319] In 1841, Williams told the Land Claims Commission that Māori were still using the area with his permission:

> The Natives [had] been allowed from time to time to cultivate at the 'Karaka' and to sit there for the purpose of fishing which right I still leave with them, but they have no right to sell any of the land again.[320]

A similar arrangement existed for Kotikotinga (OLC 668).[321] Yet, there was no mention of any such arrangement in either deed.[322]

Māori also continued to utilise Te Haumi and Ōpua, which the CMS claimed to have purchased. The Te Roroa rangatira Pūmuka had led a party in cutting firewood at Ōpua for sale. Described by Williams as 'very obstinate', Pūmuka was willing to share the cask of oil they had received in payment and invited Williams to come and collect it. By this act, the missionary believed the chief's 'tutu obstinacy' was 'concluded'; and he was 'much rejoiced to hear this as it restored our confidence and preserved our influence with them'. But Williams had misunderstood the matter. Pūmuka continued to expect to share the resource, and Williams was obliged to negotiate further for the firewood in order to 'settle' the issue 'finally'. Stirling and Towers observed, 'Pumuka's behaviour was consistent with the ongoing relationship established between the CMS and the land's owners and occupiers.' In contrast, Williams sought to 'end' the matter through a 'final' payment.[323]

Other incidents were recorded. When the CMS tried to place some of its workers on the ground at Ōpua in early 1835, their house was burned down.[324] Even the Paihia mission station was not immune from what Williams considered to be 'trespass'. According to the evidence of the Ngāti Manu kaumātua, Arapeta Hamilton, his tupuna, Pōmare II – who had been left out of the arrangements for the lands at Paihia – travelled in a waka taua from his pā at Ōtuihu, landed in front of the mission station, and performed a haka. The party then planted a large mahinga kai (cultivation) along one side of the mission house to demonstrate their rights.[325] Williams attempted to exclude Ngāti Manu but acknowledged the rights of other Ngāpuhi communities to occupy the Paihia mission. As late as the 1850s, well after the CMS had been granted title to the mission, Williams thought that Hemi Tautari 'as a native is entitled to the privilege of continuing in undisturbed possession in common with others who were invited to take up their abode at Paihia and its neighbourhood'. The CMS chose not to honour this agreement and from 1856 – armed with a Crown grant – began to charge the Māori occupants rent.[326]

Researchers referred to other examples of Māori continuing to exercise authority over mission lands well after 1840. Stirling and Towers described an 1848 incident in which the missionary Richard Davis had been required to pay compensation, under threat of muru, after his son violated a wāhi tapu at Waimate (OLC 773).[327] Davis later acknowledged that Māori continued to occupy the land, while insisting that this was 'by permission':

> The demand for payment was not because the land had not been paid for, for that they did not dispute, but for the tapu place, or rather for the tapu of the place, for which they said they had not been paid. But other natives told me it was not a tapued place when the land was purchased, but that it had been made so by people who lived on the land by permission since the purchase, from their having buried a child or two there. This is the true state of the case, a case which cost me dear.[328]

According to Davis, 'in all the land purchases the tapu was paid for separately'.[329] As Stirling and Towers pointed out, long after 1840, Māori would seem to have 'established an entirely new urupā on land claimed by, and awarded [by the Land Claims Commission and the Crown] to, Davis but which they had continued to occupy on a permanent basis'. The burial of their dead on the land

would suggest that Māori did not see their occupation as either temporary or as being under the authority of the missionary.[330]

Phillipson cited another incident, also involving Davis, who acknowledged in 1849 that he could not bring a new tenant onto the mission farm without first seeking the permission of rangatira in the area. While installing a tenant would be the best financial course, doing so without Māori consent would be 'not only injudicious but also dangerous'.[331] Similarly, after Henry Williams was dismissed from the CMS in 1849 (for refusing to give up his extensive personal land claims), he was not free to leave without first consulting Tāmati Pukututu. Phillipson noted that Pukututu – a firm ally of the Crown and a patron to Williams – was furious and threatened to burn down the station so no one else could live there. Pukututu had thought that the relationship was with Williams but now learned that Paihia had been 'let . . . go to people that drive Te Wiremu away'.[332] In the end, the crisis was averted when 'the Kawakawa people consented to Williams' removal inland to Pakaraka', where the hapū planned to plant crops and build whare for their visits, just as they had done at the Paihia station.[333] Even after the Northern War, therefore, tenure still remained uncertain for the missionaries – dependent as much on the continuing acceptance of their presence by the local hapū as on any grant from the Crown. Williams considered his title unimpeachable at law, but acknowledged,

> The value of the [mission family-owned] land of which so much has been said is less than nominal, as all in this District, certainly, occupy alone by sufferance, subject to the will of any turbulent set of boys . . . Any trifling circumstance may lead to the stripping [muru] of a settler, to his utter ruin, and no protection can be afforded by the Govt either to person or property.[334]

(5) *What does the Land Claims Commission evidence tell us about the nature of pre-treaty land arrangements?*

Evidence about transactions given to the first Land Claims Commission (1841 to 1844) demonstrated that Māori continued to act as if they retained possession of and authority over much of the land in question. The commission heard of Māori continuing to live on the land, cultivate it, make use of its resources (such as shellfish beds), control wāhi tapu, and demand additional payments from the resident settlers as part of an ongoing relationship.

The missionaries were not the only settlers to find that Māori continued to exercise their rights; others likewise had little choice but to accept this situation, while nonetheless insisting that they had obtained the freehold and that Māori remained on the land only on sufferance. The Land Claims Commission itself acknowledged that Māori continued to occupy pā and kāinga on lands later judged to have been sold, and to make use of cultivations and other resources. Such use continued largely unremarked into the 1840s and 1850s, and sometimes beyond, unless a problem arose.[335] Governor Grey informed the Colonial Office in 1846 that Māori were 'yet allowed the free use and occupation of the greater portion of the land' subject to pre-treaty transactions, and might yet contest those transactions should settlers attempt to claim possession.[336] In the several examples that follow, we examine pre-treaty transactions in which Māori continued to occupy parts of the land covered by a deed or otherwise asserted their rights; others, such as Shepherd's claim at Upokorau, will be explored in the context of the handling of these transactions by the second Land Claims Commission, and subsequent protests by Māori (see sections 6.7 and 6.8). Here, we are concerned solely with the nature of the transaction at the time at which it was entered into.

(a) Manawaora: Montefiore (OLC 13) and Clendon (OLC 116)

The complex and overlapping nature of some of the pre-treaty transactions was evident in the case of Manawaora in the southern Bay of Islands. In 1830, the brothers Rewa, Moka, and Te Wharerahi of Ngāi Tāwake entered into a transaction with the trader James Clendon. According to the deed, the lands involved encompassed all territories from Manawaora to Ōrokawa, an area Clendon later estimated at some 3,000 acres. He did not immediately take up occupation and, on returning in 1832, was obliged to make another payment.[337] Neither of these transactions

A farm in Manawaora, circa 1855–85. The likely proprietor of the property was James Reddy Clendon, who claimed the land at Manawaora after entering into a transaction in 1838.

resulted in Ngāi Tāwake moving away from their pā, kāinga, or cultivations; on the contrary, Clendon and other settler claimants acknowledged that they remained and continued to make free use of the land.[338]

In 1836, Te Wharerahi granted another trader, John Montefiore, rights to occupy a portion of Clendon's claim at Ōpunga, in the north-eastern corner of Manawaora Bay. After Te Wharerahi had split the money among all Ngāi Tāwake leaders who were 'entitled to share in it',[339] the hapū continued to occupy and cultivate the land as before, sometimes discussing their actions with the trader and sometimes not. Nonetheless, Montefiore regarded himself as having purchased the land outright.[340] William Manery, who worked for Montefiore, told the commission

Trader and old land claimant James Reddy Clendon, who entered into a transaction with Ngāi Tāwake for land at Manawaora in 1838.

that rangatira sometimes sought to 'annoy me a little' by telling him the land was Clendon's.[341] Stirling and Towers understood this as a gentle reminder that the traders' occupancy rights were limited and conditional.[342]

In 1839, Clendon made another agreement with Ngāi Tāwake that involved a much larger payment than on the previous occasions, along with an agreement to give up his claim on the lands occupied by them along with Montefiore. Clendon and Te Wharerahi formalised this arrangement with a new deed in 1841, just before the Land Claims Commission met.[343] Clendon told the commission in 1841:

> I consider the Natives to have independent of Mr Montefiore' about nine hundred acres which includes the Pa where they reside and the Land joins to it. I should think that the Land which these Natives now possess is quite sufficient for all purposes required by that Tribe. My purchase deed is dated the 7 December 1830 and I believe my retransfer to the Natives for their life Interest took place about two years ago. I since made over the Land they now possess to Wharerahi and his children. This was promised about 18 months ago but only completed about 6 weeks since.[344]

In the view of Te Wharerahi's descendant, Shirley Hakaraia, the ongoing cultivation by Māori showed that her tūpuna still considered the land to be theirs and that they 'had no intention of leaving or vacating or alienating' it.[345] Likewise, in the views of Phillipson, and Stirling and Towers, the continued occupation and exercise of authority by Te Wharerahi and his people indicated that they did not see the transactions as straightforward sales.[346] Yet Clendon, viewing himself as the owner of the land, regarded the 1838 agreement as a conditional transfer of rights to Te Wharerahi and his community, under which they could live 'for ever' on land that they were not allowed to sell.[347]

(b) Waikare River: William Cook and Robert Day (OLC 126 – OLC 127)

In 1835, the English shipwrights William Cook and Robert Day agreed to give Kapotai, Pī, and other Waikare rangatira a small schooner in return for rights to land at 'Pakiho' in the Waikare inlet. This was a transaction with many dimensions. Cook and Day had established their business in the inlet, and as already noted, Cook married Kapotai's daughter Tiraha. Māori remained on the land, although Cook, like other settlers, maintained that it was by his permission 'with a clear understanding that I was to have full possession of the whole of the Land whenever I required it'.[348] As he saw it, the agreement allowed Te Kapotai to cultivate the land so long as the hapū did not sell it to others, as the land was an inheritance for the 12 children he shared with Tiraha.[349] Some opposition to the agreement was raised after the schooner was lost at sea,

though Kapotai, Pī, and others continued to endorse the settlers' presence and gave evidence in their support.[350] Māori were still in occupation of the land during the 1840s and 1850s. Cook was forced off during the Northern War. When he returned, Wepiha (another rangatira and the son of Arama Karaka Pī) challenged the right of Cook and Tiraha to part of the land.[351] Other areas at Pakiho also remained under occupation and cultivation at that time.[352]

(c) Ōnoke: Maning (OLC 311) and Young (OLC 539)

We also heard evidence of several instances of Hokianga Māori continuing to occupy lands they had allocated to settlers. After Frederick Maning had been granted rights to occupy land at Ōnoke (at the mouth of the Whirinaki River), Kaitoke, Hauraki, and Rangatira Moetara moved some of their hapū (Ngāti Korokoro, Te Hikutū, and Te Māhurehure) back onto the land. Warren Moetara of Ngāti Korokoro told us that when Maning objected, the rangatira replied, 'Kua pau ke te kaha o to moni' ('the strength of the money has expired'). In Mr Moetara's view, this 'was . . . their way of saying that they still held the mana of that land'.[353] Maning was also obliged to respect their wāhi tapu; in his words, 'it was stipulated that I should fence it round and make no use of it, though I had paid for it'.[354] Eventually (about 1840), Maning married into his host community – to Moengaroa, the sister of Hauraki, but she died in 1847 leaving four children.[355]

In 1828, Moetara also entered into a land deed at Koutu with Captain John Kent, who was married to his sister, Wharo, without giving up all say over the land.[356] At the time of this transaction, according to evidence given before the commission, Ngāti Korokoro reserved the right to land on the beach, although this had not been recorded in the deed. There had been, Moetara said, 'a mutual understanding' that Māori and settlers could share its use.[357] After that initial agreement, Māori and settlers both entered further transactions for portions of the same land. Moetara granted occupation rights to another settler, George Nimmo,[358] while Kent passed his rights on to Francis Mitchell, who in turn passed those rights to Captain Young. Mitchell asked Rangatira Moetara not to 'molest' Young, which Moetara agreed to since Mitchell had paid for his interest.[359] In other words, Ngāti Korokoro accepted that settlers could transfer their rights for money, but new occupants might still consider it necessary to inform the hapū when that occurred.[360] It was later revealed that the original arrangement had been intended for the benefit of Wharo's children; that the sale to Kent (who had died in the interim) had been for a life interest only and so the claim of Young's descendants was rejected.[361]

Similarly, when Te Wahapū rangatira negotiated with the Wesleyan missionaries, they reserved their right to undisturbed access to their tauranga waka and mahinga kai at Whiria, Koutu, and Ōpononi – again, an unwritten agreement, but one freely acknowledged by the Reverend John Hobbs. Claimant counsel interpreted the reserving of such rights as a demonstration of continuing Māori authority, whereas Stirling and Towers considered it suggested concern that their authority might be slipping by this time.[362] Certainly, Māori continued to traverse lands they had allocated to settlers, both here and elsewhere in the district, in order to access their favoured fishing spots and oyster-gathering sites. They considered themselves entitled to utilise these areas whatever the deed might say, even though the adjacent land had been allocated to Europeans for their cultivation and residence.[363]

(d) Te Puke, Ruakākā, Waipū, and Waitangi: Busby (OLC 14, OLC 20, OLC 23 – OLC 24)

As noted earlier, Busby entered substantial transactions during the 1830s for lands at Waitangi and Whāngārei. At Waitangi, Busby's correspondence with his brother Alexander indicated that Māori continued to use the land or assert rights over it. Although Busby represented this as an act of grace on his part, he had trouble denying the same right to those of whom he disapproved. The chief Tohitapu died shortly after Busby had arranged his first deed for land at Waitangi, in 1834. Not only did the British Resident have to make numerous payments to Tohitapu's kin in order to have the body moved away from its resting place near his house but also 'for all the time he was at Waitangi he was obliged to pay utu for the wahi tapu'.[364] In 1835, while reporting to the Government, Busby

rationalised what he had had to accept: that out of benevolence, he had allowed Māori to keep using their whare, which they occupied seasonally when fishing. But when he noticed his enemy Rete (or Reti) among those using the huts, he waited until they had left and then burned the whare down.[365] Rete had previously admitted to a raid on the British Residency, in which goods were taken and shots fired at Busby and his household. According to Busby:

> On purchasing the land I had requested the natives not to abandon their huts but to continue to occupy them as before when engaged in fishing. There was no such reservation in the purchase; but it was altogether an act of goodwill towards them which I considered the party who thus accompanied Rete to my own Land to forfeit.[366]

Māori condemned his actions, and the missionaries warned Busby that 'much ill will had been excited by this proceeding'. Some Māori threatened retaliation, and others – those Busby had considered 'well disposed' – remonstrated with him. But he was unrepentant and threatened to burn down 'any other hut upon my Land' should Rete be allowed to use it. It appears that Rete's whānau rejected Busby's right to do this. Later in the year, he reported that land Rete had given to him as compensation for the earlier shooting incident was likely to be reoccupied and planted by Rete's people. If that should happen, he 'thought it a necessary policy under existing circumstances to remain ignorant if possible of any such attempt'.[367] Phillipson commented that land Busby had purchased was 'occupied by Maori seemingly at will (without disturbing him) while land ceded to him as compensation . . . was outside his control altogether'.[368]

Busby's difficulties did not end there. The following year, Alexander Busby noted that his brother dared not leave the country even temporarily without endangering his possession of the property he believed he had purchased.[369] Then, in 1837, James Busby reported to the Colonial Secretary that the position of settlers was 'in the highest degree precarious'.[370] He complained that the original vendors of his land had been cutting timber, burning off the vegetation, and planting it with crops. As a consequence, Busby had been obliged to appeal to the 'most influential chief of the neighbourhood', who had persuaded most occupiers to depart – with the exception of Rete's whānau. Phillipson suggested that Busby exaggerated the threat to settler security but was 'clearly troubled by repeated Maori use of what he saw as his land'. It is significant that in his later transactions, Busby began to set aside reserves in his deeds, informing his brother that he had done so in his purchase of Te Puke in the Bay of Islands:

> I am to secure to them and their children (there are only three or four families) the possession of the land they have in cultivation as long as they choose to cultivate it, but they are of course to leave [have] no power to alienate it. And when my cattle extend so far they are to fence it in.[371]

His brother described Busby's new practice to the House of Commons committee on New Zealand in 1840 as having 'regranted' a portion of the land 'for their use for ever, so long as they please to occupy it'. Busby had drawn up deeds of grant in their favour at the rate of 30 acres for each man, conveying to them those portions of the property on which they had their settlements. They were not to enjoy full property rights, however. Alexander Busby informed the committee of what his brother had told him: '[T]hey and their children are entitled to use them as long as they please; of course they are not to have the power of transferring it.'[372] While settlers accommodated Māori insistence that they still had rights over land they had supposedly sold, passing on its possession was not one of them.

Busby adopted a similar strategy at Waipū (OLC 24) and Ruakākā (Bream Bay) (OLC 23) where his 're-gifting' confirmed that the vendors might continue to 'dwell upon the land of their birth' and defined the areas on which they could live exclusively. However, while the rest of the land was for Busby to farm, the vendors could use it as well, not only for customary resources but also to run their own stock. In other words, the land Busby considered as 'sold' was to be shared between Māori and Busby's descendants

into the future. John Grant Johnson, who negotiated the Crown purchase of the two blocks in the 1850s, later recalled that Māori (Te Patuharakeke) thought they 'were to continue in possession of all the land which they desired for themselves, and that the rest was to remain for their own and Mr Busby's children'. But in a separate account, Johnson took a different view that threw doubt on Busby's motivations, arguing that he had been trying to thwart the Government's plans to acquire Ruakākā. He claimed Busby had gone among Māori advising them to hold onto the land, but again had expressed the idea that Māori and Pākehā would share the land into the future, promising, 'you may all live on it, it will remain for your children, and for my children'.[373]

In summary then, Busby found that Māori continued to occupy land that he thought he had purchased but which Māori considered an allocation of use rights. His first response was to make informal arrangements to accommodate the practice, and later he attempted to formalise those understandings. It had been demonstrated that he could not keep Māori off the land 'without constant negotiation and effort'; in Phillipson's opinion, 'even then he was a realist enough to know that he could not always succeed'.[374]

Even after the Land Claims Commission had made awards to Busby at Waitangi (OLC 14), Māori continued to exercise authority over the land. At some point, Busby transferred his rights to a portion of it to Mair, who in turn transferred his rights to the shipbuilder and long-time Bay of Islands resident John Irving. In 1848, when Irving attempted to build a house and establish his business on part of the land, Te Tao, the rangatira who had signed Busby's deed, objected. Te Tao identified a wāhi tapu close to the site and warned Irving to stay away or face consequences. Busby acknowledged the existence of the wāhi tapu and conceded that he had made a payment to Ngāti Rāhiri to exempt it from their 'prejudices' but had then run cattle on the site for 15 years without 'any expression of wounded feeling' on their part.[375] Yet Te Kēmara raised another objection to Irving: since the original transaction had been with Busby, the land (Busby reported) was not 'for any other but *myself*, *my children*, and *my relatives*' (emphasis in original).[376] Te Kēmara, whose daughter Ngahuia was married to Irving's son, told Busby that Irving should not be allowed on that particular land.[377]

Busby thought the dispute had arisen at least in part from ongoing tensions emerging from the Northern War. Ultimately, Hōne Heke's consent was required. The view of Heke and his allies was that any further settlement must be confined to Kororāreka, leaving the northern Bay of Islands under Māori control. In December 1848, Heke's close relative Te Haratua led a party of about 20 to the site and demanded that Irving remove the construction materials 'to the other side of the water, for he would not be allowed to build his house there'.[378] A tussle ensued, before both parties turned to Busby to resolve the matter. Te Haratua called on Busby to refund Irving's money and send him away, as the land had been intended for Busby and his family alone. Busby acknowledged that the original deed referred to his children and heirs, but nonetheless claimed a right to sell the land as he wished – though he denied selling the wāhi tapu itself.[379] In the event, it was Heke who resolved the issue when he visited Waitangi in January 1849 and allowed Irving to stay:

> I [Heke] have spoken about the place for the erection of his house it is good. But let there be no more Europeans, let no other seek to come here, let John Irving be the last himself, Busby and Hingston. Let the other Europeans remain at Kororareka. Because the sea is the boundary of the Town of the Europeans that was arranged at the end of the war between the Governor and myself. Should this not be adhered to my good intentions to either will be ended . . . But Irving I am pleased he should build his house here and remain in [?] at Waitangi.[380]

As Phillipson observed, even though Busby and Irving believed they owned the land at Waitangi, Māori did not accept that view and continued to exercise practical authority over it:

> They did not see it as acting by permission. In fact they saw themselves as having the authority over not just the land

> but over the settler, and that they were the ones whose law governed how the land could be used [even though] rights were involved on both sides.[381]

Phillipson added that colonial officials knew of these developments and were 'fully aware of the nature of the Old Land Claim transactions, and that Maori were still either occupying the land and using its resources, or claiming authority over it'.[382]

(e) Additional payments and resumption of land

As already touched upon, one of the indications that Māori continued to treat land transactions in a customary manner up to 1840 and beyond was the requirement for payments and gifts in addition to the goods handed over at the time the deed was signed. If these demands – and the obligations they represented – were not fulfilled to Māori satisfaction, they might reoccupy the land or allocate it to another settler.

The research presented in evidence for our inquiry showed numerous instances of this practice, which were the subject of frequent contemporary comment by Pākehā and Māori alike. Clendon, Polack, Gilbert Mair, and the missionary John King were amongst those who said that they had made more than one payment to the same chiefs for one of their claims.[383] The Wesleyan missionary William Woon, who attended the commission hearings in October 1842 at Waimate, observed that the 'covetousness' of Māori had given CMS missionary Davis 'much pain of mind' as 'portions of land which he had purchased for the Society, and for his own use, were again claimed by them, and they demanded more payment!', including for the land where the church had been built, years earlier.[384] Selwyn later recorded that a second payment was always required.[385] The Catholic Bishop, Jean Baptiste Pompallier, noted that land allocated to settlers might be resumed if 'the price given for [it] was also consumed by the use'.[386] As Taratikitiki explained to the commission when setting out his hapū's dispute with Mair over land at Kohekohe (discussed later), 'the natives frequently demand a second payment for land.'[387]

Settlers were predisposed to regard this practice as 'fickleness' or as opportunistic.[388] In the Muriwhenua inquiry, Sinclair largely accepted those contemporary assessments at face value, arguing that such requests were based on various pretexts, such as the existence of a wāhi tapu within the allocated land, or the failure to pay all right-holders, or they were simply incidents of 'extortion',[389] rather than a worldview still shaped by customary values of reciprocal and ongoing obligation. In our inquiry however, Merata Kawharu commented that the tangible items given as payment were impermanent and needed replenishing for the Pākehā occupant to continue using the land, which provided permanent sustenance and wealth.[390] This concept was expressed by Pōmare II in a whakataukī given to us by his descendant, Arapeta Hamilton:

> Pupuhi te hau te paura o te Pu
> Pakarukaru nga kohua rino
> Tawhewhe ana nga paraiketewhero
> Engari Toitu te whenua
>
> Gunpowder can be blown away by the wind
> Iron pots can be broken
> Red blankets can become worn
> However the land remains forever[391]

Māori asked for further payments for many reasons, though all in some way concerned the ongoing relationship between settlers and their hosts. Sometimes the additional payments were to satisfy those left out of the original transaction. Sometimes they were sought because Māori began to realise that they had been unfairly treated and subsequent settlers might pay more for the land than 'mere trifles' (as the missionaries phrased it). On other occasions, further payments were seen as part of obligations expected of those who had acquired land rights, to replace goods that had been consumed or lost since the original transaction, for transgressions against tapu, or for additional rights such as use of mahinga kai or timber. The history of these arrangements and information about payments were carefully preserved in their memories, irrespective of the deed. On deciding to dissolve a


To all to whom these presents shall come Greeting Know Ye That
To Hold
In Faith and Testimony

An 1819 deed concerning land at Kerikeri for a mission station, signed by Church Missionary Society missionaries Thomas Kendall and John Butler, and bearing the moko of Hongi Hika and Rewa. The deed records that 'forty eight falling axes' were exchanged for '13,000 acres more or less' of land.

relationship, rangatira would sometimes produce the payment and return it to a settler, if the circumstances dictated.[392]

We have already cited many examples of Māori seeking additional payment for land, such as Clendon's account of securing his rights at Manawaora through further payments and the surrender of his interests in a substantial area. Another example was the mission station at Kerikeri, for which the CMS paid Hongi and Rewa 48 axes in 1819, later adding a gunpowder kettle for Hongi,[393] and more gunpowder and a half-gallon of beer for Rewa. Another payment was then required after the missionary John Butler began to cut timber from the land.[394] William Cook recounted in detail how the allocation of Hawenga for his first-born by Pōmare I had involved ongoing obligations, including renewing the goods he had originally given:

> So he made the Harwenga [*sic*] a present to my son George and in three months after I made him a present of two muskets & some time after . . . he gave the two muskets away and came to me again for two more and I gave them to him and some time after he came again then I gave him one more musket and that was all I gave to the Pomare Nui and then his Brother Tawaewae came to me and wanted a Blanket . . . and then third Brother that is Tukikai came to me and wanted a Blanket . . . and then Tawaewae came again . . . he took down my Coat and put it on and that was all I gave to these Brothers.[395]

It was a practice that Cook considered in decline, although as we noted earlier, the relatives of his wife did not consider his 'purchase' at Pakiho to have extinguished their own rights.

Sometimes, Māori reallocated their rights as a response to dissatisfaction with settlers. Again, we have seen several examples, such as the installation of John Montefiore on Clendon's claim at Manawaora. At Kohekohe, though Mair had made an additional payment, he nonetheless found that part of his claim had been reallocated to Captain Wright. Wright, in turn, was required to make another three payments to secure his rights. Taratikitiki told the Land Claims Commission that some of the tribe considered the initial payment to be insufficient.[396]

The evidence before the Land Claims Commission shows that Māori were sometimes still expecting ongoing payments as late as 1838 and 1839, including at Kororāreka, where European presence was strongest and where Māori might have been expected to have greater tolerance for transgressions of customary law.[397] For example, Mangonui demanded an additional payment from Spicer for land on Maiki Hill in 1838. Kitara and Timotiu (alias 'Hackey') gave evidence before the commission that they had signed the deed, were 'satisfied with the bargain', had received the goods, and 'understood' that they had 'parted with the land forever'; but Mangonui refused to endorse Spicer's claim, maintaining that the signature on the deed was not his. He acknowledged receiving a coat, two shirts, and an axe from Spicer but was not satisfied, considering the goods to be no more than 'an earnest'. Although he had asked for a further payment, he had not received it by the time the Land Claims Commission held its hearing.[398]

Spicer refused to give in to Mangonui's demand but, in October 1839, the Kororareka Land Company (in which Spicer was a shareholder) had to make additional payments and accept ongoing Māori occupation in order to secure two acres of township land (OLC 824). Within two weeks of receiving an initial £50 in payment, Hakiro and Wariki had returned it, repudiating the transaction because the company had tried to demolish a raupō hut that Hakiro intended to occupy, notwithstanding the 'sale'.[399] The company, obliged to accept these terms, granted what it described as a 'lease' to Hakiro and his father Tāreha 'for their lives'.[400] But this did not end the company's difficulties, as Hakiro and Tāreha demanded a further payment. They placed the £50 already received in the hands of a settler (Turner) until their dispute with the company was resolved but, in the meantime, also entered into a new set of arrangements for part of the land with a Mr Moore, who transferred his interest to Russell and Smith, who then erected their own houses and a shop on the site. Adding further to the difficulties faced by the company was a third arrangement reached separately between Korokoro and yet another settler (Manheim Brown) for his own interest in the land.[401] Ultimately, in 1842, the company gave Hakiro and Wariki an additional payment of three horses, with a total value of £90, to secure the property minus the portions occupied by Hakiro and Tāreha, and by Smith, Russell, and Brown.[402]

A circumstance that could trigger demands for additional payment was when a settler's rights were transferred to others. In general, land arrangements were seen as establishing personal relationships between a hapū and a settler's whānau, and attempts to transfer rights were therefore resisted – as we saw, for example, in the case of Irving's attempt to settle at Waitangi. Sometimes, Māori would tolerate the transfer of rights, as when Kent passed on his interests at Koutu.

This practice was also tolerated at times at Kororāreka,[403] but on other occasions, new arrivals had to make payments to rangatira to validate their transactions. Joel Polack needed to make several rounds of payments to secure properties there. As Phillipson observed, these transactions reflected a contest between rival Ngāpuhi factions for authority over the town. Tohitapu had installed Henry Williams on the land, but Tohitapu's death in 1833 opened the claim up to challenge. Whangaroa rangatira Te Ururoa installed William Baker on the same land, then Williams sold his rights to Polack. Hōne Heke, claiming Tohitapu's authority, endorsed this transfer, but Rewa of Ngāi Tāwake rejected Heke's claim. Ultimately, Polack had to pay multiple times, to 'Williams, Heke, Tohitapu's wives, and later many other Nga Puhi rangatira'. Dr Phillipson concluded: 'These were not brown-skinned Pakeha conducting purely commercial transactions, no matter how one characterises the behaviours of accommodation and

'Lady Proprietresses' and Signing the Deed

Joel Samuel Polack came to New Zealand in 1831. Initially based in Hokianga, he moved to the Bay of Islands between 1833 and 1834, where he lived until 1845 when he moved to the new capital of Auckland. Polack was popular among the local Māori community in the Bay of Islands and regarded by them as an alternative source to Williams for information, advice, and trade. From 1833 to 1835, he engaged in several early land transactions with Te Kēmara, Korokoro, Heke, and others. He gave evidence about New Zealand to the House of Lords select committee when he visited London in 1838 and that year also published a book of observations on Māori culture.[1] Polack had lived with a 'chief girl' while in the Hokianga, where she remained with her hapū when he moved to Kororāreka – a liaison that Busby used to attack Polack's character. Polack, in turn, was said to have repented his 'former indiscretion'.[2]

Polack observed that women were consulted in public and domestic affairs and were included in war councils. In his book *Manners and Customs of the New Zealanders*, he described (in colourful language) the signing of a deed for land at Kororāreka in which senior women had participated. Hapū were discussing arrangements regarding the allocation of lands to settlers and the items they would receive in return. A chief named 'Arripiro' was speaking of how the land endured while money (and the goods it could buy) would 'dissolve' when he was interrupted. According to Polack:

> This stickler to the rights of man had not ceased his harangue, when apprehensive of its probable prolixity, two of the lady proprietresses addressed us in a similar strain directed to the same object. "I have no garment to make myself respectable of a Sunday, 'said Kohora, the ladie love (wife we must add) of Reti, a chief also interested in the purchase. Rungi-apiti, sister to the chief, also added in her shrill voice a confirmation of the plaintive fact, and that the payment should comprise an article of a similar nature for herself. The argument was concluded by Kamura [Te Kēmara], who spoke for his tribe. "This tree, 'he observed, pointing to one of the numerous peach trees that fronted our residence at Parramatta, "look at it, should a single branch fall, does not another supply its place; if you die, the land you purchase will yet belong to your children, but what will fall to my children" (na tamariki naku) pointing to his tribe, "when your payments have ceased to be serviceable?" The payment was then arranged, and the several articles taken from the store, and laid in the centre of the circle which the chiefs, females, and tribe, had made. Kamura, as head proprietor, distributed to each chief such articles as he knew they required, and in quantity according to the interest they personally possessed in the property, reserving a very minor portion to himself.
>
> The title-deed was then read, describing with minute care, the several boundary-lines, which on being named, was assentingly nodded to by the chiefs most interested in the part described. The deed was then presented to Kamura, in presence of several native chiefs, as witnesses on the part of the late owners, and some Europeans performing a similar service on our part. Kamura then drew his moko or representation of a portion of the tattooing on his face, as his signature, which was followed by the other recipients of the purchase doing the same. Congratulations passed on both sides, the chief, Kamura, declaring that we had become incorporated in his tribe, as an actual possessor of territory in the same district as themselves. The slaves were also well pleased, as a moiety of the articles also fell to their share. On the title deed being signed, as also by the European witnesses, the meeting separated, the natives taking to their canoes, well pleased with the transaction of the day.

According to evidence presented by Polack before the Land Claims Commission for the land concerned (OLC 638), the two women were Tohitapu's widows.[3]

communication on the middle ground.'[404] Rangatira had no intention of abandoning the town to Pākehā, though Heke sought to confine Pākehā to it. The underlying objective at Kororāreka remained one of a shared future and shared benefits.[405]

The trader George Clayton was another who accommodated ongoing customary rights of Māori at Kororāreka. When he acquired a deed to land from an earlier settler (Duke) in 1839, it reserved an urupā, and the rangatira Ewai continued to live on the block in a weatherboard house that Clayton provided.[406] Another trader, Benjamin Turner, had to make an additional payment when he bought a deed for Kororāreka land from Mair, who in turn had acquired those interests from the publican John Johnson. Johnson's original 1827 transaction had been with Kiwikiwi, who had died. Moka and Rewa demanded the payment, saying they had a right to the land after Kiwikiwi's death.[407]

But in many cases, land rights changed hands – even multiple times – without apparent interference from Māori. There may have been circumstances that made these transfers acceptable to them even though the practice deviated from the customary standards. Many transfers (though far from all) took place in the context of Kororāreka and the nearby district where the activities of traders who took on the role of land agents was largely, if not invariably, accepted. As we have noted earlier, Clayton and Spicer, both of whom frequently traded in land, had to make concessions and give additional payments in some instances although, it seems, not all; or if they did, it did not merit mention before the commission.[408] Other onsales often concerned Hokianga lands. In several instances, the parties involved were known to Māori already, but sometimes Māori may not even have realised that land had been onsold until a new owner arrived. It seems likely that gifts were given but unrecorded in many cases. However, historian Paula Berghan's block narratives suggest that this dimension of tuku whenua had undergone considerable modification by the late 1830s, and there were many instances where land was onsold multiple times without any indication of Māori interest. For some Māori, the prospect of future trade transcended the importance of the personal relationship as more settlers arrived. This in turn indicates a greater willingness to forfeit rights than would have traditionally been experienced.[409]

We see this as a largely pragmatic response. If a settler wished to leave, what benefit could he provide in the future? But a relationship might be established with a newcomer – one involving trade, contribution to the well-being of the community, and possibly further payment. We do not believe that the overall tribal authority over land that was subject to transfer was given up. It would have been inconceivable, for instance, that a European purchaser would have a right to allocate land to a hostile iwi or hapū – a right that Dr Belgrave has described as the 'ultimate test'.[410] More to the point, even if Māori were granting more leeway to Pākehā traders than under a traditional tuku whenua model, this neither meant that title had been transferred into a British system of ownership nor that this was accepted by Māori. Rangatira still expected to be able to allocate and use resources, which they now shared with European purchasers and to whom they extended manaakitanga – hospitality characterised by respect, generosity, and care. Under the protective and watchful eye of the local people, European purchasers still had to occupy the land they had acquired and were still expected to share in the underlying goal of enhancing the welfare of the hapū.

(6) *Mana wāhine and signing deeds*

Written deeds were all-important to missionaries and other settlers wanting to establish their rights under British law. The missionaries, in particular, promoted the protocol of formal document signings, with the male leaders sitting at the table and acting like 'gentlemen'. Marianne Williams described how in resolving a dispute, a 'committee was assembled outside in due form; chairs, table, paper, pens and ink being carried out'. The 'two chiefs principally concerned' signed a document promising to bring an agreed payment within a specified time, while '[t]he assembly formed quite a picture outside the

fence.'[411] At the same time, Māori were being told that women could not make important decisions about matters within the wider community. Mrs Williams recorded her reactions when Te Koki and Hamu's son, Rangituke, 'thrust' mats and two kete of potatoes upon her to redress the balance of an offence given. Rangituke had 'looked anxiously' at her and 'asked if it was good', to which she replied: 'women could give no answer, he must wait till Mr Williams came in.'[412] The cultural assumption of missionaries and other settlers was that leadership roles in the public domain should be played by men. Ngāti Kawau claimants point to the example of James Shepherd who failed to recognise the rights of their tūpuna whaea Roera at Tauranga Bay despite their protests. A further payment was made to her father-in-law but the land could not be recovered.[413]

Nonetheless, the status of some Māori women was such that Henry Williams recognised their ability to 'sell' land at Paihia at a time when he and his family were utterly dependent upon their manaaki. As noted earlier, in July 1831, Te Ana Hamu (with Tuperiri) signed a land deed for an area of some 100 acres known as 'Kotikotinga and Karamu' located to the south-east of Paihia, and she joined with three other rangatira in allocating Te Karaka to the missionary.[414] She signed te Tiriti with her tohu and also appeared before the Land Claims Commission. Described there as 'wife of the Chief Pukututu', she gave evidence about two agreements with Williams, who in both instances acknowledged that Māori continued to occupy the areas concerned.[415]

Senior wāhine also participated in the transaction and deed signing with Polack for land at Kororāreka (see sidebar).

Later evidence is sketchy because women were rarely called on within the validation process but would tend to confirm the role they played during the negotiation of these arrangements, even if their names did not always appear in the written record. Generally, women gave evidence only if the senior male relative who had been involved had died in the meantime. In addition to Te Ana Hamu, we note Ngangia and Tiraha, who gave evidence before the Land Claims Commission.[416]

(7) *What do the deeds tell us about the nature of pre-treaty land arrangements?*

In the view of the claimants – and many scholars, researchers, and the Tribunal in previous district inquiry reports – the early land deeds were 'essentially social agreements'.[417] Their cultural milieu and the operative norm through which customary use rights were regulated were more important to understanding what Māori intended than the written text. Merata Kawharu gave evidence on this point:

> Deeds may have been recorded in writing and within a Pākehā agenda from a Pākehā point of view. For Ngāti Kawa and Ngāti Rāhiri, however, they were less interested in the written deeds and more interested in the terms just described [mana and manaaki]. From their point of view, the deeds were a tangible expression of their culturally-framed expectations for recognition – for recognising and enhancing mana at individual and hapū levels. The deeds were therefore entirely conducted on Maori terms.[418]

The assumption among settlers was quite different. For them, the written words were more important than the broader context of the agreement, and indeed more important than Māori intentions. As Phillipson explained it, this reflected:

> a cultural mindset that it doesn't really matter who you are or what your views are, if you've signed a deed you're committed and . . . you will eventually be brought to carry out your obligations that arise from that deed.[419]

To assist our understanding of how transactions were negotiated and handled within the validation process, in generic submissions claimant counsel explored the implications of Pākehā authoring deeds. It was submitted that, the earlier the transaction, the more likely it was to have taken place in te reo Māori and the greater the reliance on the missionaries as translators. Although deeds of sale were later introduced, in counsel's view, 'Given the non-written nature of te reo', they were 'evidence of the transactions, not the embodiment of the substance

Senior women among rangatira who signed the deed for land at Kororāreka, as depicted by Joel Samuel Polack. As well as being a keen observer of Māori society, Polack entered into numerous land transactions.

of them.'[420] And while the deeds may have been 'capable of being understood by both parties, there is ample evidence that they were understood *differently* by both parties' (emphasis in original).[421] Further, even on their own terms, many deeds demonstrated that the drafters recognised that the terms being used in te reo were not readily understood by Māori as meaning a 'sale'. Counsel submitted that the frequent use of the word 'tuku' accompanied by the English wording of 'make over' or 'let go' was a 'very clear concession to Maori law governing transactions' that ought to have alerted the commissioners to the different understanding of the parties of the meaning of deeds.[422] Counsel for Rueben Porter and descendants of Te Whānaupani, Tahawai, and Kaitangata hapū also condemned the commission's failure 'to provide proper and practical attention to Māori language deeds of sale' as a deliberate act in breach of the treaty principles of good faith and active protection.[423]

In the Crown's view, however, the significance of the actual wording used in deeds in this district has been insufficiently acknowledged, both in the research and in claimant submissions. The Crown therefore invited us to revisit the findings of earlier Tribunal reports on this matter. In closing submissions, the Crown highlighted the use of phrases in te reo that could be read as intending to convey the idea of permanence and to give effect to the legal particulars of the English-language deeds. Counsel argued that, while Māori intentions in any given transaction might not be restricted to what was written in the deed, an analysis of the wording did not support a conclusion that 'all transactions were something other than a permanent alienation that transferred exclusive rights to the purchaser'. To the contrary: 'The numerous references to land being given up forever clearly imply that the Māori vendors understood these transactions to create permanent alienations.' Furthermore, the Crown submitted:

> references to the purchaser and their heirs being empowered to do whatever they wish with the land also implies that the vendors were knowingly imparting exclusive rights to the lands and relinquishing any future claim of ownership or authority over that land.[424]

The Crown's submission was accompanied by a draft table setting out the Māori and English text of the deeds it had identified as pertaining to the Te Raki district; this comprised 85 deeds at that stage, with a revised final number of 124 deeds, in all. The deeds spanned the period from 1828 to June 1840. Included in the finalised table were a number of 'supplementary deeds' that had been signed with different Māori parties for portions of the lands transacted. For example, OLC 633 was founded on the 36 deeds drawn up by George Clarke and signed with Rewa, Wharerahi, and others on behalf of different members of the missionary families. The finalised table included a further 18 of these OLC 633 deeds including one signed by Tiro and his wife Te Au, who 'tuku'd a portion of the land called Maitetahi' to Clarke;[425] another 18 of the 19 deeds associated with Richard Davis's OLC 773 claim; and three of the four deeds associated with Charles Baker's OLC 545 claim.[426]

The deeds were sourced from Henry Hanson Turton's *Maori Deeds of Old Private Land Purchases in New Zealand* and cross-referenced with the block narratives undertaken for this inquiry by Paula Berghan.[427] According to a memorandum accompanying the Crown's finalised table, all the extant Māori language deeds had been included.[428] Bay of Islands deeds dominated the Crown's examples, with a preponderance concerning the lands at Waimate. There were also examples from Whangaroa (seven), Hokianga (five), Whāngārei (three), Mangakāhia (one), and Mahurangi (three). The table included two of Busby's deeds and those of Mair, Clendon, Bedgood, and Twaites. The rest were missionary deeds.

Many English-language deeds exist that were unaccompanied by a Māori version or for which that version has been lost. Given that there were more than 500 old land claims in the inquiry district, the existing te reo deeds represent only a limited proportion of the land arrangements negotiated, most of which were accompanied by a written document. While the missionary deeds dominate the Crown's sample, the majority of actual transactions in Te Raki were undertaken by non-missionaries.[429] There were other notable deficiencies; for example, the Crown's table included only two Korarāreka deeds out of the multiple transactions for lands in that area.

The English-language deeds ranged in sophistication and in the practices followed. It was common for entrepreneurs or their agents to persuade Māori to sign blank deeds, as interpreted to them, with the boundaries to be filled in later.[430] In some instances, legal terms were deployed that would have been beyond the comprehension of many Pākehā, let alone Māori coming to grips with a new language expressing alien concepts. Claimant Owen Kingi drew our attention to the wording of the Spickman and Parrot deeds for land at Pūpuke (OLC 878–880) – terms such as 'indentures', 'tenements', and 'enfeoffed' that had no meaning in tikanga Māori.[431] How such terms were explained in te reo, if at all, cannot be inferred from the existing evidence.

The claimants raised significant objections to the Crown's submissions, criticising its reliance on the text rather than the context; the reliability of the translations (the te reo, in their view, being a questionable rendering of the English phrasing); and the limitations of the sample. The claimants argued that a closer and fuller reading of the deeds showed that, as counsel for Ngāti Manu submitted, 'the words in the deeds, on their own, tell us nothing of what Te Raki Māori understood, much less what they intended, by entering into land transactions with Pakeha prior to 1840.'[432] Arena Monro of Ngāti Rēhia said that, given the literacy levels of the time, her tūpuna

> would not have understood what these deeds meant. For this reason, how could they have known that what they had agreed to orally was what they had agreed to on paper? The oral agreement would have been more along the lines of . . . agreeing to loan Pakeha land for them to use, and signed thinking that was what was agreed to.[433]

(a) Laying out the texts – the Crown's analysis

The Crown, based on its examination of the wording of the 85 deeds it had identified to that point, argued in closing submissions that Māori did indeed understand that they were consenting to permanent alienation of land.[434] The Crown highlighted the use of phrases in te reo that can be read as intending to convey the idea of permanence and to give effect to the legal particulars of the English-language deeds.

The Crown's overall breakdown of its initial sample of 85 cases was that:

- 34 used the word 'tuku' or a derivative such as 'tukunga' to describe the transaction in the absence of a word such as 'hoko' or a derivative; but
- in 29 of these cases, the deed also contained phrases such as 'tukia tukua ake tonu te wenua katoa' ('give up forever') and 'kia puritia mariretia e ratou e o ratou tamariki ake tonu atu' ('to be held and enjoyed by them and their heirs for ever') to convey the concept of permanence and exclusivity;
- 46 deeds used the word 'hoko' or a derivative; and
- 69 deeds in all used phrases such as 'ake ake ake' or 'a mua tonu atu' to convey the notion of permanence.

Even when deeds did not use an express phrase, the Crown submitted that other language was used to convey the same idea; for example, the phrase 'tino wakarerea' (entirely alienate) or 'kia ahatia kia ahatia' (to do what he pleases with).[435]

The Crown placed considerable weight in closing submissions on the deed for 'Hihi' that Te Kēmara, Tao, Puku, and others signed; in fact, the Crown cited no other specific examples of what it saw as 'final alienations'.[436] The English wording of this 1836 deed transacting some 500 acres of land with Henry Williams (OLC 523) emphasised that the area now lay within the missionary's control and that of his descendants. The English version of the deed presented to Te Kēmara to sign stated, 'we give over and sell . . . to his children, and his seed for ever, the land called the Hihi, for them to reside on, to work on, to sell, or do what they like with it'. This was translated as 'ka tukua e matou, ka hokona . . . ki ona Tamariki, ki ona Putanga, ake, ake, ake, kia nohoia, kia mahia, kia hokona, kia ahatia, kia ahatia'. Meanwhile, the phrase 'The Sacred places the Warehuinga, Nga Mahanga, the Umutakiura is left out' was rendered in te reo as 'Ko te Warehuinga, ko Nga Mahanga, ko te Umutakiura, ka kapea ki waho'.[437] In the Crown's view, the 'Hihi' deed clearly indicated that Te Kēmara understood the European concept of sale and had agreed to permanently give up all rights to the land except for the named places.

We give several other examples drawn from the Crown's finalised table (following), and provide our own translations and make further comment.

The first deed in the table was dated May 1828 (OLC 698) and recorded an arrangement between Wharepoaka, Waikato, and others with the CMS missionary John King for land at Te Puna. The English phrases were expressed in te reo as follows:

- 'let go and sell' was translated as 'ka tuku ka hoko';
- 'for them for ever to dwell on to sell or do whatsoever they list with' as 'mo ratou mo amua tonu atu kia noho kia hoko kia aha noa';
- 'marks of this transaction' as 'hei tohu ki tenei tukunga ki tenei hoko-nga'; and
- 'this is the payment which we have received . . .' by the phrase 'Ko te utu tenei . . .'[438]

'Utu' would become the standard word used for payment in all the written deeds.

Te Toro, Hamu, and others signed a deed with Gilbert Mair in June 1831 for Te Wahapū at Kawakawa (OLC 306).[439] This is one of 12 non-missionary examples provided by the Crown. A number of phrases intended to give meaning to the concept of 'sale' were included in the text. It was titled 'Memorandum of Sale and Purchase of land . . . right title and interest sold . . . and purchased by', which was rendered as 'He tuhituhi hokonga wenua . . . he tuhituhi no te hokonga . . . mo te hokonga'.

However, the distinction between payment and gift was blurred even in the English text. The phrase '. . . has agreed to purchase, and by these presents has purchased' was translated as 'Kua wakaae kia hokoa a kua hokoa etahi wenua kikonei'; the phrase 'to have received the

English deed	Te reo deed	Our translation
Memorandum of Sale and Purchase of land situated in the Bay of Islands, New Zealand, right title and interest sold by Natives whose names hereunto affixed on the one part and purchased by Gilbert Mair	He tuhituhi hokonga wenua i te Pei o Hairangi i Nutirengi, he tuhituhi no te hokonga o nga tangata maori tokomaha, ko o ratou ingoa kua oti te tuhituhi; Me to Kirepeti Mea mo te hokonga	This written agreement for the sale and purchase of land in the Bay of Islands, New Zealand . . . as written of the sale of many Māori whose names are at the end of this written agreement for the purchase by Gilbert Mair

Table 6.3: OLC 306 deed for Te Wahapu and translations.

said articles set opposite their respective names as good and entire satisfaction for the said lands' was translated as 'kua rite nga utu ki a ratou mo aua kainga . . . amua atu'; and the phrase 'To Hamu . . . for the land . . . as full and sufficient payment for the said lands or possessions . . . make over and give up . . . to the said Gilbert Mair' was expressed as 'Ki a Hamu . . . mo te kainga . . . kua ea te utu mo aua kainga . . . otira ka tukua katoatia ki taua Kirepeti Mea'.[440]

As a result of this agreement, in the English text, Mair was entitled to:

> occupy, cultivate, build upon, or alienate the whole or any part of the said lands . . . to the full extent of the custom or laws observed in the country of the said Kingdom of Great Britain and Ireland.

This was rendered as: 'kua riro i a ia . . . te mahi, te ngaki, te hanga ware, a e hei ano te mea i taua kainga, te tuku atu ki a wai noa atu ranei, pena me to tawahi i te Rangatiratanga o Piritane Nui o Airirani'. Our translation is as follows:

> Because it was left to him, to Gilbert Mair to work, to cultivate, to build on, or to be able to give that land to whomever, as is done overseas in accordance with the [Rangatiratanga] of Great Britain and Ireland.

Here, 'rangatiratanga' appears to have been a translation for 'to the full extent of the custom or laws'.

A deed signed by Tohu with Richard Davis in December 1831 for the CMS families to have land at Waimate (OLC 736) employed the phrase 'kia tukua ake tonu te wenua katoa' to express the English 'on his part and on the part of his Tribe . . . give up for ever'.[441] Although the deed uses 'tukua' – and is to be read as conditional in nature – it goes on to describe the land concerned as 'to be held and enjoyed by them and their heirs for ever'. This is expressed as 'kia puritia mariretia e ratou e o ratou tamariki ake tonu atu'. Our translation is the same, except we would say 'children' instead of 'heirs'. We note, however, that 'marire' can be translated in numerous ways: exactly, absolutely, unequivocally, seriously, essentially, for the most part, deliberately, intentionally, carefully, silently, completely, thoroughly, well and truly, peacefully. Here 'marire' is used to refer to land being 'held and enjoyed' – but Māori signing the deed could have also understood 'puritia mariretia' as meaning 'to be held absolutely', or 'to be held carefully'. The English deed also uses the phrase 'In consideration of which . . . to give as a payment for the above mentioned piece of land', which is translated as 'kia hoatu hei utu mo tana wahi wenua'.[442]

Almost all the deeds made reference to the tamariki of the purchaser – although whether Māori thought that this necessarily excluded themselves is a question we discuss later in the chapter – and used phrases such as 'ake ake ake' and 'ake tonu atu' in an attempt to convey the idea that the arrangement was permanent. For example, Rewa, Wharerahi, and others signed a deed with George Clarke for land at Waimate in 1832, one of the 36 deeds making up his OLC 633 claim. The deed used the phrase 'Kua oti e

English deed	Te reo deed	Our translation
. . . has agreed to purchase, and by these presents has purchased certain lands herein after specified upon payment of the several goods and articles also herein after specified	Kua wakaae kia hokoa a kua hokoa etahi wenua kikonei. Ua oti ia te wakarite nga utu me nga tini taonga me nga mea i tuhituhi ki konei	It was agreed to purchase, and so some of the land here was purchased. He has prepared payment and the many goods that are written (specified) here.

Table 6.4: OLC 306 deed for Te Wahapu and translations.

Rewa te tuku . . . ki ona tamariki me ona wanaunga tetahi wahi o tona Mara' to give effect to the expression 'delivered . . . to his Children and to his relatives a portion of this cultivation'.[443] The deed signed two years later, in September 1834, by Tuwakawa used the phrase 'kua oti nei te tuku e ratou e Tuwakawa ma ki a te Karaka ki nga tamariki a te Karaka ki a ratou wakapaparanga katoa ake tonu atu . . . Kua oti te kainga nei te tuku e Tuwakawa ma' to convey the idea that he would 'let go to Mr Clarke, to the children of Mr Clarke, to all their generations for ever a portion of their land'.[444] Another deed signed by Rewa, Whareraki, and others in April 1837 (also for Waimate) indicated the extent of their tuku; the signatories would 'let go, and sell also, to George Clarke and to his children for ever to do whatever they like with', and this was expressed as 'ka tukua nei e matou ka hokona . . . ki ona tamariki ake tonu atu kia ahatia kia ahatia ranei'.[445] We translate this as 'Given by us and sold . . . to his children for ever to do as they wish'. This latter phrase ('ko ona Tamariki ake tonu atu kia ahatia kia ahatia ranei') was also used in an undated deed included within the Waimate OLC 633 claim to convey the meaning of 'sells to Mr George Clarke and his children for their disposal'.[446] We note that whereas the English wording in the deed goes directly to Clarke's power to sell, the Māori text about doing as they wished could mean any number of things.

A deed signed in August 1834 by Rewa, Te Kuki, and others with James Kemp for 'Tihari', Waimate (OLC 594), made a similar attempt to communicate the idea that the land had gone to Kemp forever by referring to his descendants. This deed stated in English, 'as a true sign to us all . . . have sold to Mr Kemp . . . and to their Heirs forever'; and in te reo, 'hei tino tohu ki a tatou katoa . . . kua oti nei te tuku e ratou . . . ki a ratou wakapaparanga katoa ake tonu atu'. Our translation of the Māori version is 'As a true sign to us all . . . they have completed the giving . . . to all their generations for ever'. The phrases 'This land has been sold by Te Kuki' and 'a payment for the land now sold' were rendered as 'kua oti te kainga nei te tuku' and 'hei utu . . . mo te wenua kua oti nei te tuku'.[447] We would say in back translation 'the land has been given' and 'there is payment . . . for the land that has been given'.

In the English version of another of Kemp's deeds (September 1836), Hongi, Mahu, and others agreed to 'sell . . . a piece of land at Whangaroa for him [Kemp] and his children for ever', which was expressed as 'Ka tuku ka hoko . . . mona mo ana tamariki ano, ake tonu atu, kia hoko kia aha noa, kia aha noa'.[448]

Hamlin's deed of 19 September 1834 (OLC 898) used the phrase:

> e tukua e matou nei taua wahi wenua e huaina Takapuotehara me nga rakau katoa e tu ana e takoto ana ranei ki runga o taua wahi wenua ki a te Hemara me ana tamariki o muri i a ia me o ratou wakapaparanga ake ake ake

to convey, in English,

> give up, renounce and consign for ever to James Hamlin his heirs and successors, assignee or assigns all that parcel of land

> called Takapuotehara with every kind of wood standing or lying upon the same.[449]

We accept these two translations as accurate.

Te Tirarau also engaged with Shepherd for land, in this case for Waitete, Kerikeri (OLC 805), in April 1837. Here the phrase 'made over . . . to be the property of James Shepherd, for him and his heirs for ever' was rendered as 'Kua oti te tuku . . . he kainga oti tonu ki a Hemi Hepara mona mo ona uri ake ake ake'. We translate this as 'The giving is completed . . . a residence for James Shepherd, for him and his descendants for ever'. Later in the deed, the phrase, 'And because the place now made over by Tirarau to James Shepherd is to be for him and his children for ever, therefore we write our names and our marks' was rendered as 'kia oti tonu atu tenei kainga ka oti nei te tuku e te Tirarau ki a te Hepara mo ana tamariki mo ona uri koia matou ka tuhituhi ai ou matou ingoa ou matou tohu'.[450] The idea of permanence – of the transaction being forever – was not explicitly conveyed by the te reo but was, it seems, assumed by the drafter of the deed to be implicit in the reference to tamariki.

(b) Did the deeds in te reo convey the English concept of sale?

The Crown submitted that this language demonstrated that:

> there is no linguistic argument, based solely on the Māori text of the pre-1840 Northland deeds, that all transactions were something other than a permanent alienation that transferred exclusive rights to the purchaser.[451]

We agree that use of the word 'tuku' in a deed does not conclusively prove that the arrangement was something other than a sale. We do not accept the Crown's further conclusion, however, that 'numerous references to land being given up forever' and to 'the purchaser and their heirs being empowered to do whatever they wish with the land' demonstrated that 'Māori vendors understood these transactions to create permanent alienations'.[452]

In our view, the weight the Crown puts on the te reo deeds is questionable. That is not to say the deeds were unimportant. Indeed, they can be viewed as the most significant indicator that Māori were meeting settlers in a 'middle ground' over the question of allocating land rights, adopting a Pākehā practice (signing a pukapuka) without fully understanding or accepting the implications in Pākehā eyes. Within that uncertain space, the relationship could advance, and the transaction could proceed, but that did not mean that both sides shared a common understanding of its meaning. Pākehā, intent on achieving a legal property conveyance, were anxious to prove to their own countrymen that Māori had agreed to sell land. On the other hand, much of the evidence we have considered so far suggests that Māori were still thinking in terms of an agreement based on their usual principles of tuku and exchange. From a Māori point of view, the signing of the deed played a pivotal role in this process of engagement. Reading out the pukapuka, attaching signatures and marks, receiving and distributing 'utu' (which the drafters of the deed intended to signify price) in the form of goods and cash – all had significance. But what about the actual words? How reliable are they as indicating Māori intentions? Did 'hoko' really convey and express the idea of 'sale'? Was the use of 'tuku' an acknowledgement (or an obfuscation) that Māori did not really intend to sell their whenua? Did the frequent reference to 'tamariki' suggest to Māori that their land was gone forever as Pākehā intended – or, to the contrary, that their own rights would continue? What were Māori to understand by 'utu' when used in a deed? If Māori came to understand and accept the British concept of sale as contact deepened during the 1830s, was this reflected in the wording of the deeds they signed?

The effectiveness of te reo expressions at conveying British legal concepts has been questioned in other regions and contexts. The treaty itself demonstrates the potential for a profound mismatch between English legal terms and their translations into Māori, and for an absence of mutual understanding; two peoples 'talking past each other' as the Tribunal in the Muriwhenua inquiry phrased it.[453]

Philippa Wyatt (along with other scholars) has pointed out the dangers of relying too much on written deeds as evidence of Māori intentions. She noted that the written word itself was new and alien to Māori – let alone the idea of 'selling' land and, by so doing, losing all rights for all time in the English system of land 'ownership'. In her view, the 'terms, purposes and consequences of its use in deeds' were all unknown to Māori.[454]

As to a textual analysis of a 'standard example' of the deeds, in Wyatt's view,

> The only firm conclusions that can be derived . . . are that the deeds, though appearing as simply the spoken word of the Maori, were clearly constructed by the missionaries [such as Henry Williams who drafted them] and show considerable interference, that they are obscure in translation as to precise meaning and intent, while the translations themselves appear at the very least questionable.[455]

Wyatt emphasised the primacy of oral agreements over the written deeds as embodying the Māori understanding of transactions. She moreover concluded that the frequent use of the word 'tuku' in those deeds suggested they could not have conveyed the concept of 'sale' to the Māori who signed them – a point also made by various claimant witnesses and counsel.[456]

The use of 'tuku' in sale deeds was seen as especially problematic, given its meaning is better understood as 'make over' or 'let go'. In the view of Takikirangi Smith, as quoted by counsel for the descendants of Whānaupani, Tahawai, and Kaitangata hapū:

> Māori expressed the ongoing connection to the land in terms of customary concepts, such as the fishing line of Maui, and in whakapapa terms. The land could be kept close (pupuri whenua) or released (tuku whenua) but no matter how tightly or loosely held, it was still held; the connection to the land through the ancestral line endured.[457]

Kaumātua Nuki Aldridge argued that there were 'other words in the reo such as awhi, take and hoko that could also have clarified the nature of the transactions.'[458] There is some support for this suggestion in the academic literature; anthropologist Dame Joan Metge argued in the Muriwhenua inquiry, for example, that 'tuku' and 'hoko' traditionally referred to different kinds of gift exchange. 'Tuku' applied to exchanges of taonga when they were formal, public, and tapu, while 'hoko' was used for 'practical', small-scale, and fairly ordinary exchanges, mainly of food items. She suggested the possible association of 'hoko' with ordinary exchange explains why it came to be applied to commercial transactions in the 1820s and 1830s.[459] However, this begs the question of what was understood by those who signed the 46 deeds identified by the Crown in which 'hoko' was used to translate 'sale'. It also leaves unanswered the Crown's submission that other phrases used in combination with 'tuku' could convey the idea of a permanent alienation.

Anthropologist and linguist Professor Bruce Biggs made the essential point many years ago that it is a dangerous practice to ascribe meanings (such as sale) based in one culture to words (such as hoko) used in another, in order to reach quick consensus. He highlighted the difference between the intentions of a translator and how his or her words might be understood by the audience.[460] Biggs called this the 'Humpty-Dumpty principle', a reference to *Through the Looking Glass*, where that character states, 'When I use a word it means exactly what I choose it to mean, neither more nor less.' The result, Biggs argued, is likely to be 'a lot of misunderstanding'.[461] Meaning may change as 'further cultural contacts . . . modif[y] the connotations of the old word', a point which brings us back to the core issue at dispute between claimants and Crown as to whether the British concept of sale was understood by Māori who signed the deeds. As we see it, in their references to 'forever' and future generations, and in phrases describing rights to 'occupy, cultivate, build upon or alienate', the missionaries and traders like Mair were clearly attempting to express ideas about sale or at least permanence. Most scholars agree, however, that the text can only be safely read as indicating what Pākehā wanted from the arrangement – which, in the case of land deeds,

was a discrete, defined property that they could do with as they liked. Of course, Māori wanted something too, but it does not follow that they were giving away all their rights to get it.

Even in the deeds highlighted by the Crown as expressing the concept of permanent alienation, there were ambiguities and plenty of room for Māori to assume that something rather different was happening. For example, the idea of 'noho tahi' (sitting or living together) was acceptable to Māori but, as the Reverend John Whiteley of Kāwhia acknowledged in 1843, they 'would never dream of losing their authority or chieftainship'.[462] So, although the word 'noho' might be used in a deed to convey the idea that the European 'purchaser' could live or stay on the land, it did not preclude the hapū from living alongside him there, nor did it necessarily follow that they had given up all their rights and interests as a consequence.[463]

We have noted the ubiquitous and ambiguous use of 'utu' to mean 'payment', and phrases such as 'by these presents' and 'by these presents purchased'.[464] On the other hand, in a number of instances there was no equivalent in the Māori version for the idea of 'forever' expressed in the English, all of which suggests that concepts such as these were not being conveyed with any regularity. The frequent reference to 'tamariki' is another case in point. It was used by both missionaries and settlers to mean heirs and assigns, and to convey the idea of a permanent transfer of rights into their hands as purchaser. But we have already noted that the children of the early missionaries were regarded as 'New Zealanders' or 'tangata Māori' and as members of the hapū. There were also many transactions undertaken between settlers who had married female relatives of the rangatira signing the deeds. In these circumstances, the concept of 'heirs and assigns' would likely have been understood quite differently by the two parties. We question whether Māori were thinking in terms of letting go all rights in the land forever, or of their future ongoing relationship with the Pākehā and their descendants – in some instances, their own grandchildren.

Another telling point was made by counsel for Ngāti Manu who submitted that '[e]ven on its own terms', the Crown's sample was incomplete. In particular, the Crown had included the Māori language deed used by William Williams on behalf of the CMS in OLC 678 for land at Waimate, dated 4 May 1838, yet it had ignored the deed for OLC 679, which Williams had Māori sign 18 months later, in November 1839. Counsel pointed out that the language used in the two deeds was very similar. In English, the deed for OLC 679 read, 'This is to certify to all men that Ruhe and Kaitara sold for ever to William Williams'. This was translated into te reo Māori as 'Wakarongo e nga tangata katoa kua oti te tuku e Ruhe ma e Kaitara ma oti tonu atu ki a te Parata (Revd W Williams)'. The earlier deed used identical language, except that it did not contain the phrase 'for ever' ('oti tonu atu').[465] While the wording of the two deeds was 'essentially the same', counsel said, their intention was completely different.[466] The deed signed in May 1838 was a 'typical allocation of land use rights', while the later deed was drawn up 'for the sole and only purpose of securing it as a place of cultivation for the Natives'. The distinction between deeds for the church, deeds for the missionary families, and deeds creating a trust for Māori was obscure. The texts were so similar that the Land Claims Commission subsequently failed to discern any difference, discovering the intent behind the transactions only when Richard Davis elaborated on them when giving evidence.[467]

(c) Does the language demonstrate growing Māori consent to 'sale' over time?

Leaving aside the issue of interpreting Māori intention through deeds they did not themselves design, at a time when tikanga dominated, and when the legal effect of attaching signatures to documents was utterly unknown to them, we ask: does the language employed in deeds demonstrate any change in how land transactions were being viewed – as one might expect if they are to be seen a guide to growing Māori understanding of and consent to sale? It seems to us that no such change is revealed. The key words and phrases in te reo Māori used to convey the idea of a final and exclusive alienation remain substantially the same between the early 1820s and the late 1830s, indicating the established views of the Pākehā drafters rather than any evolution in those of the Māori

signatories. The phrases highlighted by the Crown to argue that Māori had gained a fuller understanding of sale were in fact used early on, not only in the late 1830s after a sustained period of contact. For example, 'amua tonu atu' was used in the Te Puna deed entered into by CMS missionary John King and Wharepoaka, Waikato, and other rangatira of Te Hikitū in 1828, and regularly thereafter.[468] 'Hoko' and 'tuku' were sometimes used interchangeably, even within a single deed.[469]

In sum, we accept the Crown argument that the missionary and other drafters of deeds were attempting to convey the concept of permanent alienation to the signatories. However, there was no discernible refinement in the language as one might expect if Māori were also acquiring a greater appreciation and acceptance of the concept. Nor was the wording of a deed intended to convey land on a commercial basis significantly different from a deed intended to place it in missionary hands for retention on Māori behalf. Furthermore, as noted earlier, the majority of deeds were still in English. We do not know in most cases what was said at the time the deeds were signed, nor what assurances were given as to what the future held. Where we do know, the evidence suggests that Māori had been assured that they and their children would remain on the land, not that all their interests had ended.

Most importantly, we cannot know what Māori understood by the te reo terms that the Pākehā who drafted deeds borrowed in an attempt to convey the meaning of alien concepts. While the authors of those deeds may have intended particular words and phrases to mean one thing, Māori would have adopted interpretations consistent with the worldview they held at the time – one bound by values such as manaakitanga and utu in which land arrangements were seen as part of a broader, mutually beneficial social relationship; and where terms that referred to gifting or exchange were seen through that lens, not through one of finite commercial transaction. We reiterate the Tribunal's earlier admonition in the *Muriwhenua Land Report*: 'The Europeans' attribution of new meanings to Maori words and practices does not mean that they had acquired the full or any such meaning in Maori minds.'[470]

In conclusion, then, we cannot accept the deeds as conclusive evidence of Māori intentions.

(8) *Did the discussions about land at the signing of te Tiriti indicate that Māori had come to understand land transactions as permanent alienations?*

As we discussed in detail in our stage 1 report, rangatira after rangatira stood and expressed concerns about land during the Tiriti debates at Waitangi and Māngungu. Many described the land as lost or gone.

In closing submissions, the Crown placed considerable weight on what Te Kēmara said at Waitangi. As we have seen, Te Kēmara had been involved in many transactions. He had insisted initially that Captain Hobson had no greater authority than rangatira, and then said that Hobson – if he were to stay – must agree to return the land taken by Busby and the missionaries:

> O Governor! my land is gone, gone, all gone. The inheritances of my ancestors, fathers, relatives, all gone, stolen, gone with the missionaries. Yes, they have it all, all, all. That man there, the Busby, and that man there, the Williams, they have my land. The land on which we are now standing this day is mine. This land, even this under my feet, return it to me. O Governor! return me my lands. Say to Williams, 'Return to Te Kemara his land.' 'Thou' (pointing and running up to the Rev H Williams), 'thou, thou, thou bald-headed man – thou hast got my lands.' O Governor! I do not wish thee to stay. You English are not kind to us like other foreigners. You do not give us good things. I say, Go back, go back, Governor, we do not want thee here in this country. And Te Kemara says to thee, Go back, leave to Busby and to Williams to arrange and to settle matters for us Natives as heretofore.[471]

In the Crown's view, speeches such as this indicated that Māori in the Bay of Islands did, indeed, understand the concept of 'sale' by 1840 – and further, as Te Kēmara's subsequent actions before the Land Claims Commission demonstrated, Bay of Islands Māori had consented to the permanent alienation of their land.[472]

Te Kēmara's descendants strongly rejected the Crown's interpretation. Emma Gibbs-Smith told us that her

ancestor had not consented to any sale, and that, on the contrary, there were ongoing tensions between Te Kēmara and Henry Williams over the Paihia land. She and other claimants read Te Kēmara's kōrero as indicating a rejection of the European understanding of sale and an assertion that Māori understanding must prevail. Another descendant, Dr Maryanne Baker, pointed to the apparent contradiction in Te Kēmara's words: on the one hand, the land was 'all gone'; on the other hand, the land 'is mine'. She interpreted this to mean that the land was shared. Busby occupied it because Te Kēmara, as host and rangatira, had allocated him rights in the land.[473]

In Phillipson's view, the speeches of Te Kēmara and other rangatira who spoke in a similar vein make little sense unless Māori were beginning to understand the implications of their land transactions should the English worldview prevail. He said it was 'quite clear' that Te Kēmara, Rewa, Moka, and others 'were aware of what the missionaries and settlers were asserting as the meaning of the transactions' and were becoming increasingly alarmed about the implications.[474] This is what they conveyed to the Governor at Waitangi: although they were coming to understand the Pākehā view of the transactions, they did not accept it. 'Their question to the Governor was: what was he going to do about it?'[475] To Phillipson, the speeches at Waitangi and Māngungu demanding the 'return' or protection of their lands were really pleas to the prospective Governor to preserve their lands, uphold their law, and prevent the settlers' way of thinking from predominating. This was the conclusion of the Tribunal in its *Hauraki Report* as well: it saw the chiefs' appeals at Waitangi as 'largely in the nature of eloquent pleas to the governor to preserve their lands for them and prevent the colonists' views from prevailing'.[476]

In our stage 1 report, we suggested several possible sources of Māori concern in the late 1830s including '[d]ifferent Māori and European understandings, disputed or overlapping Māori rights, and rapidly increasing interest in land from new and existing European settlers'.[477] At the least, the speeches at Waitangi indicated a degree of uncertainty about what sale of land meant. In the words of Taonui, 'What of the land that is sold. Can my children still sit down on it? Can they? Eh?'[478] Despite the uncertainty expressed, we also found Māori law still prevailed and that Ngāpuhi were still in a position to enforce it if they so chose:

> Where land was a concern, the question that remains is: how might Māori have expected those concerns to be addressed? To the extent that rangatira had concerns about different Māori and European ways of relating to land and understanding land transactions, we think that Māori retained the capacity to enforce their understandings. Right up to the end of the decade, they had the numbers and the on-the-ground military power. The main factor constraining them was their own desire for the economic and other benefits that Europeans brought, and more generally their desire to maintain relationships, bearing in mind that the largest land transactions involved people who had lived among them for years. They were also aware of British military power, but this in itself was not necessarily a constraint on their continued occupation, cultivation or other use of land that had been subject to transactions.[479]

Like other Tribunal inquiries, we therefore concluded that rangatira who consented to te Tiriti did so on the basis 'that the Crown would enforce the Māori understanding of pre-treaty land transactions, and therefore return land that settlers had not properly acquired'. This, then, was an essential part of the treaty bargain.[480] We do not resile from that position here.

(9) *Why did Māori appear before the Land Claims Commission in support of Pākehā seeking Crown grants?*

The Crown emphasised that Māori often appeared before the first Land Claims Commission in support of Pākehā claimants, apparently confirming that valid sales had taken place. In closing submissions, Crown counsel cited the evidence of Te Kēmara regarding the arrangements he had made with Williams over Te Hihi in 1836. During the Tiriti discussions, as outlined earlier, the chief had lamented the loss of his land. Now, although he had 'every

incentive and opportunity to repudiate the transaction', he supported it instead.[481] He confirmed that it was his signature on the deed, and that he and the other rangatira had 'sold the land' to Williams and received payment. He also confirmed that the boundaries were correct and that the signatories 'understood that [they] parted with the Land for ever'. The deed had been read out before signing, and Te Kēmara was recorded as testifying, 'I fully understood it and was satisfied.'[482] In the Crown's view, Te Kēmara's evidence before the commission (along with the wording of the deed, which stated 'ka tukua e matou, ka hokona ki a te Wiremu, ki ona Tamariki, ki ona Putanga, ake, ake, ake, kia nohoia, kia mahia, kia hokona, kia ahatia, kia ahatia') amounts to 'a clear example of a pre-1840 transaction that was intended by the Māori party to be a full and final sale of land'.[483] If customary usages still prevailed and Te Kēmara and other Māori did not intend for these arrangements to be permanent alienations of the land and resources concerned, why did they apparently tell the commission that they understood and were satisfied that they were parting with that land forever?

There is much we do not know about who witnesses represented, what they were asked, what they said, and how this was interpreted and recorded. In our view, it all must have seemed very odd and unfamiliar to the Māori participants. There was a formal air to the proceedings. But those in charge were not known to them and could not speak te reo (other than the Chief Protector, who was usually in attendance), yet it was these young Pākehā who were asking Māori participants (in effect) whether they stood by their words as written down in the deeds that were now produced. Also, as we discuss in section 6.4, the Land Claims Commission was not at all concerned with Māori customary understandings when considering the validity of transactions. Such information was elicited only incidentally.

Two major explanations were offered by witnesses such as Kawharu, Phillipson, and Stirling and Towers. One concerned the unreliability of the record, which obscured the real intentions of Māori and the divergence between their understanding and that of Pākehā. Dr Kawharu suggested that such divergence derived from the gearing of the land claims process to the 'Pakeha (claimant) side of things'.[484]

Following the work of Wyatt in Muriwhenua, researchers in our inquiry also emphasised the formulaic nature of the commission's record of the evidence, and instances when important kōrero failed to find its way into the commission's minutes. The rhetoric of noted orators such as Te Kēmara and Tāreha was rendered into precise and colourless statements that they had signed the deed, which had been read out, explained, and understood; that the boundaries had been correctly described; that the payment had been received; that they had the right to dispose of the land; that they accepted the land had been 'sold'; that they had sold it to no one else; and their rights to sell had not been challenged by either Māori or Pākehā.[485] Statements to this effect were repeated, with minor variations, by witness after witness. Regarding John Montefiore's claim at Manawaora, for example, Te Wharerahi testified that he had signed the deed, which had been explained 'to them', then he had received the money and divided it among the rangatira 'entitled to a share'. By these actions, he said, 'he thought it was to make a sale of or letting go the land'.[486] On the basis of this and similar evidence, we agree with Phillipson's assessment that:

> the person recording the evidence [was] rationalising and reconceptualising it into brief formulaic statements that expressed, in English, the essence of what Pakeha believed Maori were saying.[487]

Instances were also brought to our attention in which the minutes of the Māori evidence clearly failed to reflect what had actually happened. Notably, in the case of Polack's claim to an island in the Waitangi River (OLC 641), Te Kēmara was recorded as stating that 'I with the rest of the Natives whose names affixed sold the land therein described.' The reference to the 'rest of the natives' had to be crossed out later because Te Kēmara had, in fact, been the sole 'vendor', the others only signing the deed as witnesses.[488] In another case (OLC 605), Tāreha

was recorded as testifying that he had received the money and goods described in the deed, but John King (the missionary claimant) stated that a second payment had had to be made.[489] In numerous instances, neither the Māori witness nor the claimant concerned mentioned that he had married into the hapū with whom he had transacted the land. There were also occasions when witnesses were paid or given promises that they would be paid to appear, inevitably raising questions about the reliability of their evidence to the Land Claims Commissions.[490]

Given these limitations, Dr Kawharu cautioned against placing too much reliance on the testimony of Māori participants in the hearings as a 'full and complete picture of . . . what they expected and understood they were agreeing to'.[491] We agree with her conclusion that the record of the commission's hearings does not comprehensively portray what Māori understood either by the deeds they signed or by their appearance in support of claimants.

The more complex and less probative aspect to what was happening concerns the likely motivations of those witnesses; namely, that they did not object to the claims because they thought they were still exercising their authority in the matter. They wished to retain Pākehā among them and spoke in their support, thinking that they would continue to share the land and its resources. Te Kēmara's evidence must be read in light of Williams' repeated assurances that Māori would continue living on the land, their children and his together. In Phillipson's view, when Māori appeared before the commission and supported the pre-treaty transactions, they were not affirming sales but were affirming the transaction as they had understood it; that is, they had agreed that a particular settler could occupy and use a particular portion of their lands. They expected the commission to confirm their understanding of the transaction, because (in their eyes) Hobson had said it would.[492]

In its statement of position and concessions, the Crown reminded us that the 'accuracy and reliability of any transaction', and whether the associated deeds captured the intentions of the Māori parties, needed to be assessed contextually. At the same time, the Crown acknowledged that the primary evidence was unlikely to enable an assessment of how each transaction was undertaken and the intentions of the signatories – although in its view, the claimants were required nonetheless to establish their rights, case by case.[493] The 'context' argued by the Crown to establish that Te Kēmara had clearly intended a sale when he signed a deed with Williams for the land at Te Hihi is threefold: the wording of the deed itself expressed concepts of possession and permanence; Te Kēmara's kōrero at Waitangi demonstrated that he understood his land to be gone; and his subsequent evidence in support of Williams before the Land Claims Commission.[494]

If the context is enlarged, however, the matter is rather less clear-cut. We have already noted several considerations that should be weighed in any determination of Māori understanding and intent:

- the difficulties in interpreting Māori intentions through te reo written by settlers, especially when those deeds purported to accurately translate English legal concepts for which there was no equivalent in Māori. This opened the possibility of misunderstandings – for example, through language that was intended to convey permanent alienation but could as easily be understood as confirming an arrangement in which the descendants of Māori and settlers would share the land into future generations;
- the critical fact that Māori coming to understand what settlers intended did not mean that they consented. This was made plain at Waitangi when rangatira sought assurances that Hobson would enforce their view of the transactions and accepted him as the Kāwana only after he promised to return the lands;
- the distortions of the record of evidence, reflecting the Land Claims Commission's assumptions and priorities, which (as we will see in section 6.4) were not focused on the customary understanding at the time of the deed signing;
- the ideas the missionaries were conveying to Māori, especially as to future generations and the sharing of resources (and thus also, the motivations of Māori witnesses); and
- the importance Māori placed on their relationships

with the people with whom they entered into 'transactions', as indicated by marriage into the hapū.

When the deed for Te Hihi was signed, in 1836, we think it most likely that the principle of manaakitanga was uppermost within the Māori mind, if not in Williams'. The capacity of Māori to continue to utilise (as they had always done) the sites of particular significance to them within the land they were 'selling' was also proclaimed in the deed, although such promises were largely forgotten by Crown and missionary alike as time passed. Finally, we note the dismay of Tāmati Pukututu, who also signed the deed for Te Hihi and welcomed the Governor during the treaty negotiations. He had not understood that, under English law, his arrangements with Williams were not regarded as personal or enduring. This was only revealed to him in 1850, when the CMS ordered Williams to vacate the mission at Paihia, and Pukututu discovered that the land had been 'let go' not to Williams as he thought, but to a different entity entirely.[495] Puku's understanding of what he was doing when signing deeds with Williams did not, in our view, equate with 'selling' the land.

6.3.3 Was there a middle ground?

As outlined in section 6.3.2(2), several historians giving expert evidence in our inquiry argued that Pākehā and Māori were meeting in a 'middle ground' in a frontier society where both parties were modifying their behaviour to obtain what they wanted from each other. Colonisers had the goods, the new skills, and could provide access to trade and commercial opportunities; the indigenous people had the land – and the women so desired by settlers other than the missionaries. In addition, Māori were also able to provide hospitality, protection, local knowledge, and labour – all essential to the success of early settler endeavours, although the latter was generally negotiated separately. The crux was the desire of both sides for a successful trading relationship. To bring this about, it was necessary for them to find means of communicating to negotiate terms of trade and avoid disputes. Those expectations, and the relationships that were thus forged, had to be mutually understood and mutually acceptable. Although it was possible to trade without cultural change, matters would proceed more smoothly if both sides acquired some knowledge of the language and customs of the other and modified their own expectations and behaviours accordingly.

This academic model of interpretation has gained considerable currency in the Tiriti debate over the interpretation of old land claims and the extent to which there was mutuality of understanding as to what land transactions meant. A 'middle ground', it has been argued, had developed in New Zealand in the 1830s and, in the view of several commentators, it continued to exist well beyond that date.[496] Phillipson, who applied the 'middle ground' model to the Bay of Islands region, described it as 'an important cultural construct unique to frontiers where power was relatively balanced, but groups needed things from each other'.[497]

On the face of it, this is a compelling proposition; there is no doubting that these were years of engagement and adaptation. There clearly had been a shift over time in Māori–Pākehā cultural interactions. However, in our view, some caution is required in the way this model is applied, particularly its application to land matters and the allocation of rights. There is no clear agreement among those who use the concept about its exact meaning, dimensions, and duration. The Crown has used it here and in the Hauraki inquiry to suggest that there had been a shift in Māori understanding and intent when entering into land arrangements before treaty negotiations began. In the Crown's view, therefore, the context in which Māori were acting was no longer purely customary. The further implications are that the concept of sale was accepted by the Māori involved, at least some land transactions were purely commercial in nature, and the Crown was correct in giving such transactions legal effect.

That conclusion was rejected by claimants, some of whom were wary of the idea of a 'middle ground' gaining too much traction. They saw potential for it to be misinterpreted to mean that their tūpuna had surrendered all authority over particular pieces of land and over land in general. For example, Annette Sykes, counsel for many of the claimants, suggested that in pre-treaty New Zealand, 'there was no middle ground there was only Māori

ground'; that is, by 1840, Māori had not yet surrendered substantive on-the-ground authority, and there was therefore no balance of power which they needed to negotiate with settlers.[498] Phillipson, although a proponent of the concept to explain apparent contradictions in Māori (and Pākehā) behaviour, agreed that Māori remained the dominant power and adapted only because they wanted settlers among them. When Pākehā attempted to control Māori, who continued to occupy land they had supposedly sold, they failed. As Phillipson put it, when Māori exercised control over lands that settlers believed they had bought, the settlers 'had to put up with it'.[499]

There seems to us to be an internal tension within a model predicated on a balance of power between peoples but in which custom continued to dominate because Māori remained in control, despite what the written law might say. A question arises, also, as to whether conclusions based on an analysis of the Bay of Islands – where more contact occurred – apply to other regions within Te Raki. Some Whangaroa claimants argued that they did not.[500] We note, however, that, although the Crown relied largely on Phillipson's research into the Bay of Islands to argue that Māori had gained an understanding of 'sale' before 1840, Stirling and Towers (who considered evidence throughout the Te Raki region) also thought that a 'middle ground' interpretation might be usefully applied. Certainly, given the expansion of the missionary presence and the degree of internal movement within the region, we find it difficult to believe that Māori were unaware of what was happening at Kororāreka, Waimate, and elsewhere in the Bay of Islands. This does not mean, of course, that they accepted settler views should prevail in important matters of land and resource use.

The place of Māori women in the supposed middle ground is worthy of special comment too. As we noted earlier, land was often allocated to Pākehā men who married into the hapū yet whose legal rights were created separately by means of deeds, written by men, and addressed to 'tangata' in te reo, but to 'men' in the English texts. Māori women who were married to these early Pākehā arrivals brought with them rights to access land and trade, and protection in both the physical and spiritual realms. We might observe that, while the missionaries recorded their own frequent transgressions against wāhi tapu, the knowledge of local atua and wāhi tapu that Māori wives brought to their Pākehā husbands is unrecorded, as is the assistance they undoubtedly offered in avoiding serious violations of tapu. A number of these early marriages resulted in enduring whānau lines in the region; indeed, we heard kōrero from some of their descendants. Yet, as we see it, while negotiating the middle ground (if such existed) for Pākehā men, these wāhine were being rapidly excluded from it by cultural assumptions being developed about the place of women in the new society. This in turn raises doubts about how far settlers were in fact modifying their expectations and behaviours, as the middle ground required.

In general, less thought has been given to shifts that may have been occurring in *European* understanding and behaviour, and their implications. The obvious danger in terms of treaty interpretation is that, while the concept of a middle ground is readily applied to Māori practice to argue that Māori had come to accept European concepts of sale, any changes in European conduct are ignored – even though Māori might well have interpreted such changes as supporting their own understanding of agreements they had reached with settlers. Phillipson helpfully explored this possibility; in particular, how missionaries and other settlers were effectively forced to accept the continuing exercise of Māori rights. Even after the missionaries had handed over their payments, they found Māori continued to live on the land as before, requiring very significant adjustments on the Pākehā side. While Pākehā rationalised this by saying that they had granted Māori permission to remain on the lands, in fact they had little or no choice in the matter. The Māori view was well known to missionaries and settlers, but for reasons of self-interest and cultural assumptions as to the superiority of British law and the binding nature of deeds of conveyance, they nonetheless insisted that their claims to land transactions could be seen as actual land purchases in the sense with which they (and British officials) were familiar.

The Crown argued that the appropriate focus of this inquiry is:

> the extent to which the Crown, when determining the outcome of these early transactions, conducted a process that was Treaty compliant and which had outcomes that did not prejudice Māori.[501]

We agree that this is so. We also agree that the evidence is such to make conclusions difficult as to the 'precise' understandings that informed every transaction – indeed, in our view, impossible.[502] Yet, this is not a question we can avoid. It is at the core of the claimants' grievances that the underlying principles of the arrangements their tūpuna had made to express their acceptance of Europeans into the community remained customary in nature but that these understandings were transformed by the Crown processes on which Māori had relied into something quite different – to their lasting prejudice. It is also, we think, implicit in the Crown's argument that *many* transactions within the 'middle ground' were commercial in character and permanent alienation was intended; this was indicated by the Crown's emphasis on the language of numerous deeds and the failure of Māori to repudiate their transactions when they were given the opportunity to do so.

In our view, that argument cannot be sustained even if a 'middle ground' existed. Although there might have been a growing awareness among Māori of what Pākehā meant by 'sale' by 1840, they did not accept that the European view should dominate. Māori had adopted written deeds as confirmation of arrangements based on customary law and were ready to make other accommodations for settlers, especially with regard to bringing others onto the land. This may suggest that the importance of commercial and other benefits was increasingly influential, and that in some circumstances there had been some loosening of hapū control – a lengthening of the line that attached them to the whenua. However, the line remained even in the case of Kororāreka or in the case of speculators who 'purchased' through people already well known to Māori. The fundamental values of tuku continued to underpin these arrangements, even in 1840. Māori were not selling their ancestral lands; rather, they continued to view these transactions as allocations of rights to use a portion of the lands and resources under their authority, as part of a personal and reciprocal relationship between hapū and settlers.

6.4 Did the First Land Claims Commission Adequately Inquire into and Protect Māori Interests?

6.4.1 Introduction

As the Crown asserted sovereignty over New Zealand, it took steps to assume control of the country's land market. It declared it would not recognise settler titles unless Crown grants were issued and, as we have seen in chapter 4, established the Land Claims Commission of 1841 to inquire into pre-treaty transactions and determine whether grants should be made. In most cases, it found that settlers had made valid purchases.[503]

Claimants (including in submissions for Ngāti Manu and others, and for the Whangaroa taiwhenua) told us that the Crown had not established the commission to enforce Māori understanding of pre-treaty transactions or to return lands that were 'unjustly held', as Māori had been led to believe at Waitangi. Nor was it set up to protect Māori interests. Rather, they argued, it was established in order to further colonisation by extinguishing customary title, asserting the Crown's radical title, and transferring land to the Crown and settlers.[504] Counsel argued that the Crown based its old land claims and 'surplus' lands policies on the assumption that it possessed radical title to the lands of the new colony, but the Crown had never sought or received Māori consent to introduce this feudal law.[505] Counsel for Ngāti Manu and others said that, because the commission was established on the false assumption that the Crown held sovereignty, its work, by its very nature, denied the legitimate operation of tikanga Māori and imposed Crown hegemony over Māori land.[506]

In generic closing submissions, the claimants developed

their argument that the commission was not established to investigate the nature of Māori rights in pre-treaty transactions properly. Both the legislation under which it operated and its subsequent proceedings were flawed. The commission was not required to determine whether there had been any 'meeting of minds' when transactions took place nor to consider the true intentions of the rangatira entering the transaction. In short, '[t]here was no real provision to investigate the very customary rights the Commission was meant to be extinguishing.' Instead, the commission was established on the basis of an incorrect assumption 'that Māori intended to permanently alienate land' when they had entered into land transactions.[507] This meant that settlers' claims were only rarely disallowed.[508] Counsel for Emma Gibbs-Smith and descendants of Ngāti Kawa, Ngāti Rāhiri, and Ngāre Raumati submitted that the Crown had 'voluntarily closed its mind' to information showing that Māori did not understand land transactions to be sales.[509] The commission made no attempt to determine what might be equitable for Māori, considering only what was equitable for settlers.[510]

Counsel also submitted that the commission failed to identify and protect all customary owners, instead taking evidence from those who had signed the deeds; failed to investigate whether fair prices had been paid; and failed to ensure that boundaries were properly defined in all cases.[511] Where the commission recommended reserves for Māori occupation, the Crown failed to honour those commitments.[512] Counsel additionally submitted that protectors failed to attend hearings and protect Māori interests. Chief Protector George Clarke was himself a claimant before the commission and therefore faced a 'hopeless conflict of interest'.[513]

Crown counsel agreed that the commission had indeed been established on the basis that the Crown held radical title over all New Zealand lands where customary title had been extinguished, but did not accept that this was in breach of the treaty. In his view, 'where Māori had actually sold land to settlers prior to 1840, the Crown considered that it held a full title to that land', and it therefore had discretion about retaining that land or granting title to others.[514] Counsel submitted that the commission had been established to fulfil Hobson's promise to return lands that were unjustly taken. The process aimed to investigate pre-treaty transactions and, where those transactions were considered valid, 'to provide settlers with a title recognisable in British law'. Crown counsel acknowledged that Crown grants gave the settlers permanent ownership over the land and its resources and 'replaced any arrangements which Māori and Pākehā made at the time of the transaction'.[515] The Crown, in other words, had the right to pass laws that would supplant tikanga and establish a Pākehā commission to decide these matters.

The Crown did concede that flaws in the commission's investigation of pre-treaty transactions breached the treaty and its principles, which 'resulted in some hapū of Te Raki losing vital kāinga and cultivation areas'. In its submissions, the Crown generally connected this concession to matters such as its handling of 'scrip' and surplus lands, which we will consider in other sections.[516] However, it did recognise other defects in the commission's processes. The commission was empowered to inquire into the true nature of any land transaction, received advice on these matters, and did not presume that all valid transactions were sales;[517] nonetheless, the Crown acknowledged, the commissioners 'were focussed on determining whether a permanent alienation had occurred rather that conducting a customary rights investigation'.[518] The Crown asserted that the commission had adequately notified Māori right-holders so they could attend its hearings[519] but recognised that investigations 'did not always address whether the vendors had a customary right to the land'.[520] Crown counsel also acknowledged that some of the commission's investigations 'were not conducted in a timely manner',[521] and that a 'large proportion of claims were not surveyed before Crown grants were issued to settlers, leaving uncertainty' as to the exact boundaries of settler, Crown, and Māori lands.[522]

On other issues, the Crown disputed the allegations. It did not accept the claimants' criticisms of the roles played by George Clarke and other protectors, submitting that they had properly investigated and advised the

commission about pre-treaty transactions and that there was no demonstrable conflict between their personal land interests and professional duties.[523] Nor did the Crown accept that the commission had only rarely disallowed settlers' claims; in its view, the number of withdrawn claims demonstrated:

> the Land Commission system protected Māori interests both through its formal hearing process and through the fact of its existence, which deterred claimants from pursuing unjust claims.

When Māori signatories opposed a claim, the Crown said that this was taken seriously and that the claim would be disallowed or that Māori interests would be otherwise protected by excising portions of the land that was being awarded.[524]

We have already found, in chapter 4, that the Crown breached the treaty and its principles when it asserted sovereignty over New Zealand and introduced the doctrine of radical title. In neither case did it fully inform Te Raki Māori of its intentions or obtain their consent. It therefore follows that, not only were pre-treaty transactions governed by tikanga Māori, but so should have been any post-treaty investigation into their nature and legitimacy.

The investigation process was the first true test of joint decision-making and possible interactions between tikanga and British law. It could have taken account of the wishes of Māori rangatira who had allocated lands to Pākehā 'purchasers' as part of their community; it could have involved Māori women as participants; it could have considered future arrangements that resembled leaseholds. It certainly could have provided protections for ongoing occupation and use of pā, kāinga, cultivations, wāhi tapu, timber, fishing spots, shellfish beds, and other mahinga kai by Māori. Above all, it could have provided Māori with an effective say in deciding whether transactions should stand and on what terms.

In this section, we will consider whether the Crown met that test. We examine the nature and effects of the Land Claims Commission investigations, including the legislation and instructions it operated under, and the extent to which its processes did or did not protect Māori interests.

6.4.2 The Tribunal's analysis

(1) *Did Crown instruction and early land claims legislation respect Māori tino rangatiratanga?*

As we discussed in chapter 4, the Crown's terms for acquiring sovereignty over New Zealand were set out in 1839 in Lord Normanby's letter to William Hobson, including directions as to how to deal with existing land transactions between Māori and settlers. In accordance with these instructions, a series of proclamations followed. In January 1840, New South Wales Governor George Gipps extended his jurisdiction to New Zealand, appointed Hobson Lieutenant-Governor, and declared the Crown's refusal to recognise any title to land unless through a Crown grant, which would be issued only after a commission had inquired into the transaction and determined it to be equitable and in the colony's interests.[525]

The New Zealand Land Claims Ordinance 1840 was then passed by the New South Wales Legislature. It asserted the Crown's radical title over New Zealand lands, restated the major points of the earlier proclamation, and empowered the Governor of the colony to set up the commission. The ordinance also set out provisions for the new commission's operation:

- there would be 'strict inquiry . . . into the mode . . . the extent and situation' of the lands being claimed and also into 'all the circumstances upon which such claims may be founded';
- in conducting that inquiry, 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';
- the commission was also to ascertain the price paid, the time and manner of payment, and the circumstances under which such payment was made. No regard was to be given to any on-sale price; and
- evidence from Māori was to be considered 'subject to

such credit as it may be entitled to from corroborating or other circumstances'.

If satisfied that the land had been 'obtained on equitable terms' that were not prejudicial to the interests of British subjects, the commission was to recommend an award of land to the purchaser on a sliding scale reflective of the payment made, but with an upper limit set at 2,560 acres. The scale was meant to establish equity between earlier purchasers (who likely had paid a lower price but had expended more on developing the land) and later arrivals, while the upper limit was intended to prevent speculators from impeding settlement by tying up large tracts.[526] Reflecting the Crown's assertion of radical title, the ordinance also provided that land could not be awarded if it might be required for defensive purposes, or for the establishment of any town or public utility, or if it was 'on the sea shore within 100 feet of high-water mark'.[527] As legal historian Professor Richard Boast noted in the Muriwhenua inquiry, the ordinance was very closely based on an earlier law enacted in New South Wales in 1835 and expressed similar colonial attitudes about the property rights of 'the uncivilized inhabitants of any country' with 'but a qualified dominion over it', deeming them to be non-transferrable.[528]

When New Zealand ceased to be a dependency of New South Wales, new legislation was required to enable the commission's work to proceed. The New Zealand Land Claims Ordinance 1841, enacted in June of that year, was almost identical to the New South Wales measure with one significant difference: leases were included among the kinds of titles that were 'null and void' until investigated and approved by the Crown. The ordinance, introduced by Hobson, stated:

> all unappropriated lands . . . subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants . . . are and remain Crown or Domain Lands of Her Majesty . . . and that the sole and absolute right of preemption from the said aboriginal inhabitants vests in and can only be exercised by Her said Majesty . . .[529]

Hobson had informed Gipps (in October 1840) that many Europeans had started to take up long-term leases from Māori with the intention of circumventing the terms of the then current ordinance. When advised that 'a steady adherence' to the proposed method of investigating claims should solve the difficulty,[530] Hobson pointed out (in February 1841) that these lands still belonged to Māori and that the European parties 'not laying claim to them in fee, do not deem it necessary to prefer any claim before the Commissioners, but continue to occupy and cultivate them as tenants under the chief'.[531] The 1841 ordinance cut off this option by stating in clause 3 that 'in all cases wherein lands [were] claimed to be held by virtue of any purchase, conveyance, lease agreement, or any other title whatsoever', an inquiry had to be made.[532] Gipps, in discussing the necessity of such an amendment to 'stop the evil', declared that it was based upon the 'principle' that:

> uncivilised tribes, not having an individual right of property in the soil, but only a right analogous to that of commonage, cannot, either by a sale or lease, impart to others an individual interest in it; or, in any words, that they cannot give to others that which they do not themselves possess.[533]

The implications for the wider question of the nature of Māori land transactions with settlers seems to have escaped the Governor and his officials. While Gipps was denying that Māori possessed any title capable of alienation, the Crown was establishing a process by which pretreaty alienations could be confirmed. Nonetheless, Gipps correctly anticipated that once it was

> rightly understood that leases from the natives will not be admitted as valid by the Crown after the lands may have been purchased, the practice of taking land on lease will, I apprehend, speedily fall into disuse.[534]

Lord Russell, on succeeding Normanby as Secretary of State for War and the Colonies, ordered Hobson to immediately introduce legislation declaring invalid any direct leasing of land from Māori that had occurred since the January 1840 proclamation.[535]

Commissioners were also directed to ascertain the

validity of transfers of land from original purchasers to derivative claimants who had acquired land from the original Pākehā 'purchaser'. Otherwise, the 1841 ordinance closely followed its 1840 predecessor, repeating its key terms which required the commissioners to inquire into the circumstances of the transaction, guided by the real justice and good conscience of the case. If, having considered the best available evidence, they determined that the land had been 'obtained on equitable terms' that were not contrary to the interests of other subjects, they could recommend that a grant be made. The directions regarding price and acreage were retained, and a schedule fixed that defined the number of acres which 'such payment would have been equivalent to', ranging from sixpence per acre for the earliest purchases to four to eight shillings per acre for those undertaken in 1839. The upper limit of 2,560 acres (unless authorised by the Governor on the advice of the Executive Council) also remained.[536]

We briefly note here that, in 1842, Hobson would try to change the scale and limit of land that could be awarded along the lines of the arrangements between the Crown and the New Zealand Company. According to historian Dr Donald Loveridge, this was an attempt to 'harness the land claims process system more closely to Crown-directed systematic colonization'.[537] Such was the extent of claims ultimately submitted to the Land Claims Commission that Hobson feared 'every available tract of land in the three islands' would be taken and, with it, the Crown's capacity to 'prescrib[e] the limits in which [European] settlements should be formed'.[538] He proposed concentrating settlement in a few districts – Auckland, Hokianga, or the Bay of Islands – and argued that this would speed up the process of issuing grants because survey of individual scattered blocks would no longer be required. To that end, the maximum limit of 2,560 acres was removed, with land from Crown holdings to be awarded instead on the basis of four acres per £1 expended. A storm of settler protest followed, and the Colonial Office was not happy with the abandonment of the limit and the sliding scale.[539] As a consequence, the 1842 ordinance was disallowed, and any awards recommended under it had to be recalculated on the original schedule.[540]

On 2 October 1840, Gipps issued more detailed instructions to the commissioners, appointed the month before, expanding on their duties. These included a direction that notice was to be published in the newspapers at least 14 days prior to investigation, giving the name of the purported vendors, the boundaries, the estimated extent of the land, the names of any opponents, and the place and time of the hearing. A Protector of Aborigines or some person appointed in his place was to attend all investigations to 'protect the rights and interests of the natives'. Attendance of a 'competent interpreter' was also required. Proceedings were to be conducted as far as practicable with 'open doors'. The commissioners were 'absolutely' bound by the terms of the ordinance when it came to examining witnesses and other steps of their procedure but allowed some discretion in applying the scale. Each report was to include a description of the 'mode of conveyance used in the purchase . . . whether a formal deed or otherwise, the parties to it, and the proof'; and a description of the land 'alienated by such conveyance, but not awarded to the claimant' (in other words, the 'surplus', which we discuss in section 6.7). The information needed to be sufficiently detailed to identify the area and prevent 'subsequent intrusion or encroachment'.[541] There was no instruction to the commissioners about reserving kāinga and other places of occupation out of the settler grants, though it seems that Gipps anticipated that any necessary reserves could be set aside out of the 'considerable tracts of land' that would be placed at the Government's disposal as a result of the commission's work. That responsibility devolved on the willingness of the 'purchaser' to acknowledge reserves in their deeds.

The commissioners themselves subsequently asked for clarification of several points. The most important (for our purposes) concerned whether the land could be claimed without presentation of the original deed, which elicited the response that formal deeds were not the only proof of sale. According to Gipps, this had been implicit in his earlier instructions, but he now added that 'proof of conveyance according to the customs of the country and in the manner deemed valid by the inhabitants is all that is required'.[542] Therefore, a written deed was not needed

so long as Māori confirmed that they had assented to the transaction. To be clear, Gipps's answer was directed at the question of whether a written deed was required, rather than the broader question of whether the transaction should be understood on Māori terms. His language made this explicit: '[i]n every case in which the chiefs *admit the sale* of land to individuals, the title of such chiefs to such lands [is] of course to be considered as extinct' (emphasis added). If rangatira admitted the 'sale', its validity was not affected by questions of price, although more compensation might be awarded by the Governor in consultation with the protector. Gipps further instructed that Māori (and those appearing on their behalf) were not subject to fees charged by the commission.[543]

The Australian origins of the New Zealand ordinances clearly throw doubt on the Crown's contention that the Land Claims Commission was set up to fulfil promises made to Māori at Waitangi. The 1840 ordinance was based on earlier New South Wales legislation that had nothing to do with the indigenous inhabitants, and was rather designed to sort out transactions between squatters who assumed that no native title existed under the doctrine of *terra nullius*.[544] As the Tribunal observed in the *Muriwhenua Land Report*:

> This critical difference between the Australian situation and that in New Zealand appears to have been overlooked or disregarded by those responsible for both the New South Wales enactment relating to New Zealand and the Land Claims Ordinance 1841 which copied it. The underlying assumption was that the transactions fell to be considered in the context of English not Maori law, although only Maori law applied at the time.[545]

The presumption was also that the Crown had the authority to intervene in the arrangements that had been negotiated between hapū leaders and settlers. In that inquiry, the Tribunal found the ordinance failed to identify or address the real issue: the true nature of the transactions under Māori law. The ordinance did not sufficiently particularise the nature and scope of the investigation, nor did it require the commission to determine the adequacy of the consideration; the expectation of future benefits; the absence of fraud or unfair inducement; the measures needed to accommodate any special arrangements such as joint use understandings, implied trusts, or service obligations; the sufficiency of other land in the possession of Māori; the certainty that Māori who signed deeds had a right to do so; the clarity of the boundaries; the fairness of the apportionment of land between the parties; the ongoing obligations to be met; and appropriate provisions for reserves.[546]

In the *Hauraki* report, the Tribunal came to a somewhat different conclusion. The Tribunal saw the requirement for commissioners to make strict inquiry into purchases, gifts, conveyances, and leases and 'all the circumstances upon which such claims were founded' as showing that officials 'knew that Maori and Pakeha could have had different understandings of the transactions up to that point'.[547] The Tribunal also placed some weight on the instruction that commissioners be guided by 'real justice and good conscience', concluding that 'the ordinances in principle opened the way for Maori to present evidence of their perceptions of the transactions' while '[a]spects of Governor Gipps's instructions to the commissioners also held open that possibility'.[548] However, in the absence of any evidence of 'discussion in the Land Claims Commission about leases, conditional rights of occupation, joint occupancy, or any other title that might have disclosed Maori intentions other than sale', the Tribunal was 'inclined to share . . . doubts that there was any such discussion'.[549] The Tribunal did not say whether it thought this silence reflected the predisposition of the commissioners and officials, or of Māori themselves.

Our own view is that neither the ordinance nor the instructions required or anticipated any genuine inquiry into Māori understanding of the transactions, with all that entailed. They did not require any consideration of Māori customary law, or of what Māori intended when they entered these transactions, or of whether there had been any meeting of minds. As discussed in section 6.3, Clarke and other officials were aware that Māori and

settlers had different understandings of what the transactions meant, yet the Crown essentially dismissed the Māori view. Instead, the language of the ordinance and accompanying instructions revealed that the transactions were to be understood through the lens of English law – as sales, leases, or some other form of conveyance – and the inquiry was to determine whether Māori had or had not assented. Nor was the standard for measuring assent particularly high. There was no requirement to ensure that the hapū had been consulted and understood the meaning of the transaction. If a deed existed, or two rangatira confirmed that a transaction had taken place and money had changed hands, that was to be considered a sufficient basis on which to extinguish all Māori rights.

Nor did Gipps issue the commissioners with detailed instructions as to how to establish the matter of 'equitable terms' and what a 'sufficient' payment might look like. It was apparently left to the commissioners themselves to decide what their approach would be (with the advice of the Chief Protector) after they had familiarised themselves with the New Zealand situation.[550]

In chapter 4, we discussed the steps taken by the Crown to set up the commission; what Te Raki Māori were told about the Crown's intentions in doing so; what Māori experienced when the first sittings began; and their reaction to this initial display of kāwanatanga. Here, we turn to the question of how the commissioners set about putting into effect their instructions to establish whether a valid purchase had taken place under 'equitable terms'.

(2) *How did the commission operate?*

Gipps had appointed two former military officers, Captain Matthew Richmond and Colonel Edward Godfrey, as commissioners in September 1840, along with a lawyer, Francis Fisher. The latter, whose presence Gipps initially considered to be 'indispensably necessary',[551] never sat as a commissioner and, it seems, acted as a legal advisor only.[552] Godfrey and Richmond, newcomers to the colony with neither language skills nor customary knowledge, would be utterly dependent on the advice of the protectors as to whether Māori rights had been fairly and fully extinguished; and on the accuracy of the translations provided by interpreters drawn from the missionary families.

According to Godfrey, it was the commission's intention to obtain

> from the best sources as full information and evidence as can be procured of the nature of the 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.[553]

As we discussed earlier, a list of claims and notice of the commission's proceedings was sent to George Clarke so he could carry out his duties as Chief Protector as 'defender of the rights and interests of the natives' at the upcoming hearing. Godfrey informed Hobson that 'he took it for granted' that:

> all the necessary information he [Clarke] may deem it proper to obtain will be procured by him from the different tribes whose supposed claims are affected in the list before our first Court day . . . and he will of course be expected to ensure the attendance of such natives and other witnesses he may find it right to call in support of those rights and interests.[554]

Clarke himself thought that a protector should always be present at hearings both to facilitate the commission's work and to maintain the rights of Māori. He advised that the claims should be translated into te reo, and copies forwarded to the chiefs by whom the land was said to have been sold, 'thereby giving them an opportunity of protesting or approving of the claims'. A circular should also be 'widely disseminated' explaining the purpose of the commission. As we discussed in chapter 4, Clarke, in advocating this step, was acknowledging that Māori who were complaining about the 'secrecy' of Crown plans 'respecting both themselves and the country' were expecting to be fully informed on what the kāwanatanga was doing.[555]

Prior to a claim being heard, a sub-protector should also carry out an on-site inspection so that an 'intelligible

The Following

Notices of Hearing

Claims to Grants of Land,
in the
Bay of Islands District

New Zealand Land Commission,

The Commissioners appointed by the Ordinance of the Governor and Legislative Council of New Zealand, 4 Victoria, No 2, to examine and report on Claims to Grants of Land, do hereby give Notice that they will proceed to investigate the undermentioned in the Bay of Islands district, at the Court House in Russell. On the 11th day of October, 1841. And following days, at Eleven o'clock in the forenoon,

All parties interested are hereby summoned to be in attendance with their documents and witnesses, and they are reminded that the fee of Five pounds must be paid to the Commissioners before the investigation of any Claim, or of any opposition to it. Claimants are also required to bring all original Deeds and translations thereof, relating to their claims, with copies of the same, the latter to remain with the Commissioners.

The cases will be heard consecutively.

Case No 66. – James Reddy Clendon, of the Bay of Islands, New Zealand, Esquire, claimant,

220. Two hundred and twenty acres, more or less, situated at Okiato, Bay of Islands, and extending from the Bay of Pipiroa, round a point called Opa-nui, to Ti-roi-patupa, from the Bay Pipiroa, across Ti-roi-patupa, by a marked line and a fence.

Alleged to have been purchased by the present claimant, in December 1830, from the native chiefs Pomare, Kiwi Kiwi, Hauwau, Hihi. And Wareamu.

Consideration – merchandise to the amount of £151 14s. sterling.

Nature of conveyance – Deed in favor of claimant, dated 7th December, 1830.[1]

description of the whole character of the purchase be given at the court when investigated'.[556] In Clarke's opinion, this was necessary because 'the greater part of these land transactions were conducted by parties very partially understanding each other', and 'in many cases but little pains [were] taken to ascertain to whom the land they claimed belonged'.[557] Clarke also advocated that hearings take place close to the areas claimed for ease of access of affected parties. Delayed, Clarke was unable to attend the first hearing himself, but he or a sub-protector attended all subsequent hearings. The commission also heeded his advice as to the need to hold hearings in the district in which claims were located, at least in the case of the Bay of Islands and Hokianga, although the Whāngārei claims were heard in the Bay of Islands or Auckland. We have already commented on the views of Clarke and the role of the missionaries in official proceedings, and this is an issue to which we return later, given the key part they played. A circular was duly prepared for distribution among Māori communities, explaining the commission's

purpose, and the time and place of its sittings. Only a later 'revised version' in English survives. This informed 'land sellers' to attend to give 'correct evidence concerning the validity or invalidity of the purchase of your lands' and to 'Hearken! This only is the time you have for speaking; this, the entire acknowledgement of your land sale forever and ever'.[558]

Two weeks prior to sittings, a notice was published in the newspaper as required by the ordinance. This summonsed 'All parties interested' in the land claims described to attend the hearing 'with their documents and witnesses'. They were also 'reminded' that a fee of £5 had to be paid to the commission before it would investigate any claim or 'any opposition to it'.[559]

Crown counsel argued that it was likely that Māori knew of the commission's activities through their own highly developed networks of communication, even without the prior visit of a protector and distribution of notices – a matter acknowledged by Mr Stirling under cross-examination.[560] However, it is a moot point whether owners whose rights in the land had been overlooked were aware that their interests were in jeopardy in a process that failed to identify tracts accurately; and equally debatable that they were adequately protected by a system that required fees to be paid and was dependent largely on the evidence of witnesses brought by the settlers seeking grants of land, as we discuss next.

(3) *What evidence did the Commission require for a transaction to be validated as a sale?*

Governor Gipps's November 1840 instructions had provided that, even in the absence of a written deed, if rangatira confirmed the transaction, that would be sufficient for it to be treated as a sale.[561] Typically, if two Māori witnesses from the 'selling' party appeared in support of a settler's claim, the commission recommended a grant.[562] Exceptions to that practice were made in a small number of cases, which were approved without such confirmation, generally because the leading signatory had left the area or died.[563] Stirling and Towers discussed 10 such examples, noting that a 'lack of Maori evidence was not fatal to a claim succeeding'.[564] Crown counsel submitted:

> of these examples, there are only two . . . where claims were approved in the absence of Māori evidence in support . . . and only one where a claim was allowed in part in those circumstances.[565]

The two claims that were allowed without Māori support both concerned derivative claims,[566] at Kororāreka:

- OLC 615, initially negotiated by Spicer, had been onsold to John Roberton. One of the rangatira involved in the original transaction, named as 'Ratihati', was dead; one was too old to attend the hearings; and the third ('Puss') was living elsewhere. Since Roberton had built a house and store on his 20 acres, the commissioners had 'no doubt of the said land having been duly purchased' and recommended a grant.[567]
- The commission was also prepared to recommend an award in OLC 430 – a claim brought by Spicer for eight acres originally acquired by Thomas Graham – despite no Māori witnesses being called. Again, this was because the main party to the transaction (Hongi) had died several years before.[568]

Stirling and Towers were critical of those decisions, suggesting that there were other Māori witnesses who might have been called, and arguing (in Roberton's case) that a distinction existed between occupying the land and having purchased it. However, this was never investigated.[569] In another case, John Reid was awarded 30 acres at Mangonui River (OLC 394) in the absence of the deed signatory (who again was 'Puss'). In this instance, Reid failed to pursue his claim before the second Land Claims Commission (Bell commission), and the award was cancelled as a consequence. Six acres were recorded as having reverted to Māori, and no prejudice resulted. It is possible that the rest was retained by the Crown as 'surplus', but the evidence does not confirm this.[570] This, we presume, was the case that the Crown regarded as having been 'allowed in part'.[571] We note that Berghan has identified other instances in which awards were recommended without Māori witnesses appearing to have been called – again, in the case of derivative claims at Kororāreka.[572]

We know of two instances in which the first commission

disallowed a claim when no Māori witness appeared, but where the decision was later reversed. One concerned another derivative claim in Kororāreka (OLC 567), regarding three-quarters of an acre on the beach front. In that case, Godfrey disallowed the claim because Brodie was unable to produce any Māori witnesses, and the 'sellers [were] known to dispute the whole of the frontage to the beach of this claim'. Indeed, the land was part of a fenced compound occupied by Rewa and Moka,[573] and the specific area Brodie was claiming had initially been granted to a settler who had married into Moka's whānau.[574] Nonetheless, Brodie continued to press his claim. In 1846, he appealed to Governor Grey, producing evidence that he had made an additional £20 payment to Tāmati Waka Nene, which had then been shared with the Kororāreka chiefs;[575] on that basis, Grey awarded him an area of seven perches on the water frontage.[576] A decade later, seeking to increase his award, Brodie placed his claim before the second commission (discussed in section 6.7), to whom he explained that Grey's grant had covered the initially disputed area while excluding an undisputed site that he lived on without any opposition from Māori. Commissioner Bell duly increased his award,[577] which according to Berghan, totalled two roods six perches.[578]

The other case concerned the Hokianga settler Marmon, whose seven claims were initially disallowed after he failed to appear or call any witnesses. When Commissioner Robert FitzGerald was appointed in 1844, he reconsidered three of Marmon's claims (OLC 312, 313, and 315) and awarded scrip. FitzGerald rejected another claim (OLC 317) after Marmon's father-in-law, Raumati, explained that he had not intended to sell the land. Raumati believed his payment (two blankets) was for an agreement to keep that area clear of other settlers so Marmon and his whānau could use it. Nonetheless, the Governor later issued pre-emption waivers (discussed at section 6.6) for this and a further area (OLC 316). Ultimately, after Marmon produced another chief to support his OLC 316 claim, Bell awarded him 523 acres.[579] In other words, awards that went against settlers could be changed in their favour later.

In other cases, the absence of Māori support did count against settlers, although the commission might be still disposed to offer them concessions – for example, Gundry's claim to 500 acres at Mangamuka (OLC 209). FitzGerald, who heard this case, was satisfied as to the validity of the original purchase, but decided he could award no part of the land in the absence of Māori testimony and awarded Gundry £500 in scrip instead. Again, the fate of the land is unclear.[580] In another example, Thomas Potter's claim for 80 acres on the Mangonui River (OLC 380) was disallowed when he failed to appear or produce witnesses. He later appealed, and Governor FitzRoy said he would allow the grant if Potter could show that he had the support of the Protector. Potter failed in this, and the claim lapsed.[581]

Stirling and Towers recorded seven claims that were disallowed due to opposition in the hearings:[582]

- As noted earlier, Marmon's claim for Kapakapa, 300 acres at Hokianga (OLC 317) failed when Raumati (his father-in-law) stated that he had not intended to sell the land;[583]
- Brind's claim to Urupukapuka Island of 150 acres (OLC 555). It was based on a transaction that Rewa had rescinded, returning the horse he had received when his demand for a further payment was refused. Rewa told the commissioners that he did not consider the land to be sold. Notably, the integrity of Rewa's evidence was preferred over that of Clendon and Brind;[584]
- Walmsley's claim to 'Taumatakai' in the Bay of Islands (OLC 960) failed when Hikitene said that Tukarangatira, whom he had succeeded, did not have the right to sell the area concerned. In this case, the commission accepted Hikitene's evidence over that of the missionary Charles Baker, who had made and witnessed the original arrangements;[585]
- Brodie's claim to 'Otawaki' in the Bay of Islands (OLC 568) was disallowed on the strength of Korokoro's evidence that he had not intended to sell the island which his hapū continued to occupy, and that he had returned the goods he had received. The transaction had foundered after a breakdown in the relationship between Korokoro and Brodie's agent (Bateman);[586]
- Brodie's claim to 1,000 acres at Matauri Bay and

'Their Word Considered Valid, and an Honest Englishman's Oath . . . Defective'

Brodie's experiences highlighted the importance of relationships in managing land transactions. His 'Otawaki' purchase foundered after his agent, Bateman, assaulted Korokoro. The rangatira returned the money and later told the commission that he had been drunk at the time of the transaction. To Brodie's chagrin, the commissioners believed Korokoro, whom they thought 'a very credible witness'.[1] An infuriated Brodie wrote to the 'Officer Administering the Government' (Willoughby Shortland) complaining that the commission had believed the evidence of a 'native' rather than that of respectable English witnesses. This was not a 'singular case', Brodie grumbled, and was

> in a great measure the cause of most grievous evils in this country . . . that the English settlers have been looked upon as no one, and that the natives have been allowed to escape with impunity, their word considered valid, and an honest Englishman's oath defective.[2]

another 2,000 acres covering the entirety of the Cavalli Islands (OLC 571) was disallowed on the evidence of two rangatira who said they had returned the payment after learning the scale of the land Brodie was claiming, their understanding being that the transaction involved only one portion (named as 'Ocoddee'). Brodie also revealed that, after this dispute emerged, he had withheld the payment that (in his view) was supposed to complete the transaction;[587]

- One of de Thierry's Hokianga claims (OLC 1045), for 3,000 acres on the upper Waimā River, was disallowed on the objection of Mohi Tāwhai that Tiro, who had led the transaction, had received only 'trifling articles . . . as earnest' for a 'small portion of land' in the valley. Tiro himself acknowledged that Tāwhai and others had 'opposed [his] right to dispose of this land';[588] and
- According to Stirling and Towers, it is possible that Reid's Mangonui River claim (OLC 395) was disallowed because of Māori opposition, but the commission recorded 'defective evidence', without giving further detail.[589]

Stirling and Towers also identified several claims known to be opposed by Māori but that were disallowed for a different reason – usually the non-appearance of the settler concerned.[590] Whether the failure to pursue claims related to the existence of that opposition, as the Crown suggested in its submissions, is unknown. The record is almost entirely silent on the matter and while a 'chilling effect' is certainly possible, this remains a matter of conjecture only. There were, however, no instances when the commission recommended the award of land when a signatory to a pre-1840 deed denied the transaction. We therefore accept the Crown's point that, 'where Maori [signatories] did voice their opposition, this mattered'.[591]

On other occasions, some customary owners (other than the deed signatories) objected that they had not been parties to the transaction. According to Stirling and Towers, the commission usually responded by excising the interests of those who objected, but mainly left it to surveyors to determine where those competing interests lay.[592] More rarely, the commission required that a further payment be made to extinguish the objectors' rights.

In general, Stirling and Towers were critical of the degree of investigation undertaken by the commission when presented with conflicting Māori evidence on rights. For example, when Kokia opposed Greenway's claim to 200 acres on the Waikare River (OLC 202), the commission's award excluded 'any portion' belonging to him, while commenting that his interests were 'supposed to be very trifling'. Nothing in the record indicates how the commission reached that conclusion; it is not in the notes of evidence, nor was Kokia questioned on the matter. It seems most likely to have been the assessment of the protector, but, as noted by Stirling and Towers, if the record is to be believed, Kokia was not given an

opportunity to refute that view.[593] The survey did not occur until the late 1850s, taking in 117 acres. By that time, the land had been onsold (to Waetford), and there is no indication of any opposition. It is apparent that Waetford had, as he informed Commissioner Bell, 'submitted to a large curtailment of the original purchase in order to prevent dispute with the Natives in their present excited state respecting their lands as well as in future'.[594] As we discuss further in section 6.7, this was a rare instance in which the exclusions set out in the first commission's awards were respected and worked in Māori favour. Of course, Kokia's land was still not reserved, but it remained in Māori hands.

Stirling and Towers drew attention to a 'similar lack of inquiry' in other cases, including Palmer's derivative claim to 20 acres of land at Waimate. Ngere, who was the father of the two signatories, reportedly opposed the claim, but his objection was discounted on the strength of their evidence that he had no rights there. No evidence was called other than that of the two signatories brought by the claimant as witnesses, and Ngere himself was not questioned. The claim was deemed valid, although ultimately it was never surveyed, and the land reverted to (or, rather, remained with) Māori.[595] In the case of Nicholas and Chadwick's claim for 700 acres on the Waimā River, no further inquiry was made into assurances by the claimants' witnesses that those within the tribe who opposed the transaction had 'no right whatever to make any opposition'. Again, the deed was validated.[596] There was a similar lack of investigation into the claims of Tio, whose opposition to a transaction with Marriner, at Te Kauere in Hokianga (onsold to Cooper), came to light as Marriner's witnesses gave evidence. Again, Tio himself was not called upon, and the land was duly awarded to the claimant.[597]

The Crown acknowledged flaws in the process, but counsel reiterated that Stirling and Towers had not identified any cases in which a sale was validated against a *signatory*'s objection.[598] Counsel took particular issue with their characterisation of the commission's investigation of the overlapping claims of Maning and Captain Clarke at Kohukohu as 'very limited'. According to counsel,

> The claims were clearly complex involving disputed evidence from Māori . . . The Commissioners heard and considered this competing evidence as well as taking advice from the Protectors . . . As Stirling and Towers note, the claims were sufficiently complex to require the recall of at least one witness. The Crown submits the process followed was robust, allowed Māori with competing rights the fair opportunity to voice their interests and ended in a fair result.[599]

The claimants challenged that view, pointing out the complexities in that case largely derived from subsequent on-sales of the land that involved subdivisions. The investigation had focused on the sequence of transactions while giving only limited attention to customary rights.[600] In this instance, the commission examined who held those rights to determine which of the various claimants to whom the land had been 'sold' was entitled to a grant, and to which portion of their overlapping claims. We note that, notwithstanding their criticisms of aspects of the commission's conduct of the case, Stirling and Towers in fact described it as 'exceptional' with regard to the evidence that was sought from Wharepapa, Tarewarewa, and other rangatira as to their relative interests.[601]

Contemporary comment also indicated that Māori often had to be paid to appear as witnesses, throwing doubt on the integrity of the process and raising a question (which we touched upon earlier) as to how their appearance in support of settlers is to be interpreted. What Europeans saw as bribery through their cultural lens, Māori might well see as part of the ongoing obligations created by their allocation of lands.

Brodie complained before the 1844 House of Commons select committee on New Zealand that, while Māori 'vendors' would admit to bona fide transactions, 'nearly all the parties who took their claims up before the commissioners had to pay the natives a certain amount to make them actually tell the truth'.[602] Brodie blamed the commissioners for this state of affairs, since it had become known that 'if a native disputed any land, and the case came before their Court, the chances were that the Commissioners would give it against the Europeans'. This had given Māori

the upper hand and, Brodie said, 'there was hardly a case brought forward but something extra was given to the natives'.[603] If settlers 'had . . . not paid the natives something extra, their claims would have been disputed and like my own, never reported upon'.[604]

Brodie was not alone in making this sort of allegation. For example, S M D Martin, an old land claimant in Coromandel, who was to become editor of the *New Zealand Herald and Auckland Gazette* and the *Daily Southern Cross*, also suggested that 'payment to witnesses, and bribes to natives, to give evidence in his favour, or at all to appear before the court, which they will not do without good payment' was necessary.[605] Thomas McDonnell, who claimed to have purchased most of Hokianga, also complained of attempted 'extortion' by Māori; their opposition, he believed, was motivated by their desire for an additional payment. He told the 1844 select committee that Māori had been 'perfectly satisfied' at first, but they came to him after the Land Claims Commission hearings and asked what he would give them if they now wrote a letter to Commissioner Richmond in his support. McDonnell refused their demands, saying that he would not let any of them 'pick a hole in [his] coat'. According to McDonnell, they had written the letter regardless, admitting that they had 'wanted to get something from the Capitaine'. Like Brodie, he saw this as common practice encouraged by the commission process, with Māori perjuring themselves 'in many instances'. McDonnell was questioned by the committee on this point:

> [Q] . . . Do you mean to say that they have generally refused to confirm purchases made of them on good consideration and on fair terms?
> [A] They wanted generally to get a portion back . . . they say, we have sold everything, and if we had kept it we should have got so much more, and so on.
> [Q] Do you mean that generally . . . they have come forward to upset purchases made on consideration, and which they consider themselves to have made?
> [A] They are not apt to consider those sales good; they say they have thrown away the land, and they never knew its value 'till now; but if they thought that by coming forward to upset the sales, they would do it instantly.
> [Q] If they thought they could get the land back again?
> [A] Yes; and this has been the cause of so much perjury in the natives.[606]

When questioned about the commission's treatment of the evidence, McDonnell expressed indignation. He had heard of instances where a commissioner had 'actually stated, that he would sooner take a native's word than a European's'.[607] McDonnell petitioned the Government in 1856, again alleging that Māori had never questioned his right to the land he claimed to have purchased until

> they were informed that the Commissioners had instructions from the Queen to reinstate them in the land formerly sold . . . when urged on by certain European settlers living amongst them.[608]

Certainly, Clarke thought that the commission was determined to see justice done to Māori,[609] but the Chief Protector also feared that the ratification process had not been good for the 'character of the natives'. In his June 1842 report, he lamented that 'bribes' had been employed 'for the accomplishment of the designs of Europeans'. This had resulted in an 'unfavourable view' being held of Māori even though the blame mostly lay with unscrupulous Europeans.[610] In his next report, Clarke repeated his observation that Māori conduct in the hearings had caused 'a great alienation of feeling between the parties, and a disposition in some cases has been manifested to get returned to them lands which they formerly sold'.[611] Commissioner Godfrey himself acknowledged that 'pretty generally the natives have required some present to induce them to undergo our examinations'; but in contrast to Clarke, he was convinced of the integrity of their testimony. He reported that in very few instances – where they had been seduced by tempting offers from Europeans to sell the same land to two different parties – they would, perhaps, give their evidence in favour of the greatest bribe, even if offered to them by the later purchaser. But

such cases had been most rare and only occurred when the morality of the buyers appeared quite as questionable as that of the sellers. Otherwise, Godfrey considered that Māori witnesses were 'deserving of the most entire credibility'.[612]

As noted earlier, in the great majority of cases, at least *some* Māori evidence (two witnesses) in support of the claim was necessary for the first Land Claims Commission to recommend a grant. If Māori came before the commission and said they *did not* sell the land in question, the commission respected that, usually putting aside a section of the claimed land for them. However, Māori witnesses were brought to the hearings by the settlers wanting a grant, and it was rare for a signatory to a land deed to repudiate it. The attendance of those who had been left out of the transaction was dependent on the sub-protectors, or on word of mouth, in a situation where it was usually far from clear which lands were under scrutiny.

The extent to which sub-protectors investigated claims prior to hearings and were proactive in uncovering opposition is disputed. The existing evidence is sketchy and open to interpretation. In March 1841, a lengthy report was submitted on Kaipara by the sub-protector, who had been given a list of claims to investigate. According to Armstrong, pre-hearing investigations of this kind were repeated elsewhere. For example, in April 1841, Godfrey submitted another list of claims to Clarke requesting him to sort them by district, suggest appropriate locations for their investigation, and give advice on how best to ensure the attendance of Māori witnesses. Clarke sent in his classification on 20 June and a few days later also supplied the commissioners with 'translations of protests against the claims of different individuals in the Bay of Islands, Hokianga, Waimate and Wangaroa [*sic*] from different chiefs'.[613] Records of these protests have not survived, and it is unclear whether the chiefs concerned were brought before the commission, or how consistent or thorough such investigations were, but we accept Armstrong's point in the Muriwhenua inquiry (and of Crown counsel in ours) that some prior inquiry had been carried out in these instances at least.[614]

Still, serious questions remain as to the commission's reliance on just two Māori witnesses to validate a transaction; this was a serious deficiency in the Crown's process that severely limited the commission's capacity to determine whether there had been wide acceptance of the arrangements under consideration. Further, the evidence recorded at hearings of those witnesses was slight and the examination apparently rote, without any detailed investigation of what the transaction had meant to Māori.[615] Stirling and Towers described it as 'brief and formulaic' and generating very little evidence; the Government itself described the investigations in many cases as 'pro forma'.[616] As a result, the commissioners 'frequently failed to uncover key aspects of the transaction, let alone the nature and extent of [the] customary rights within each claim'.[617] Phillipson agreed. In cases where Māori appeared before the commission to support 'their' settlers, the investigation was 'brief, pro forma, and not designed to bring out the complexity and range of their actual views'.[618]

Nor did the commission seem to understand the significance of such evidence it did hear about the Māori view of transactions. Phillipson identified several cases in which the commissioners were told that the Māori continued to live on the land 'as if nothing had changed', and yet they still ratified these transactions as sales. Similarly, occasions where Māori had entered multiple arrangements over the same land also 'did not give the Commissioners much pause'. While making limited recommendations about reserves (a point we return to later), the commissioners assumed that settlers had completed valid purchases, and that instances of continued Māori occupation were in essence 'acts of grace' on the part of the settler.[619]

The most serious shortcoming was the failure to give proper recognition to tikanga, even though there is no question that this had been in effect when transactions had been entered into. Even a casual – though astute – observer such as Dieffenbach appreciated that the unexpressed trusts or shared-use arrangements underlying many of the deeds entered into by Māori should be given legal effect, but the commission had no powers to do this, even if they were so disposed. Yet there was no real investigation into how Māori understood the transactions, or why they continued to occupy and use sites, or

why they made other demands of the settlers they had placed on their lands. Matters such as whether the deeds expressed in te reo what the drafters had intended were not examined at all.

In sum, the ordinance and the commission process operating under it failed to recognise and give effect to customary law regarding the nature of these transactions and failed to ensure that Māori who had been left out of transactions or opposed them had a real opportunity to express their opposition and defend their rights. This was despite Normanby's 1839 instruction that Māori must be protected in their possession of land and defended in the exercise of their own customs; despite official acknowledgements that Māori and settlers did not share an understanding of what these transactions meant; and despite officials having ready access to information showing that the concept of land sale had been unknown in traditional society.

(4) *How effective were provisions for identification of Māori owners?*

The Crown has acknowledged that not all those with customary rights were identified before transactions were approved by the Land Claims Commission. The Crown conceded that the commission was 'not set up to determine customary ownership of any lands transacted' and 'rarely considered whether the Maori parties . . . were the rightful owners'; however, '[it] could consider the impact of any ongoing arrangements particularly where they might invalidate the claim'.[620]

The aspect of customary tenure that caused Chief Protector Clarke and the commissioners the most anxiety was the overlapping rights of different hapū and rangatira. Their concern was to protect both Māori and future purchasers of land that had been granted in circumstances where native title had not been fully extinguished, either because some groups had not received payment or because boundaries were poorly defined. According to Clarke, this was a very real problem, compounded by European purchasers with scant understanding of who had rights, and who made little effort to apprise themselves of the real state of affairs.[621] This was a concern voiced also by Attorney-General William Swainson. In 1849, he condemned the ordinances and Gipps's instructions of November 1840 regarding Māori witnesses, concluding that, as the commissioners were not required to 'ascertain that the land claimed had been purchased from the true native owners' but 'only that the claimants made a bona fide purchase from certain native chiefs', this had resulted in flawed titles. Gipps's instructions, in his view, had weakened rather than strengthened the commissioners' obligation to determine the right and entitlement of Māori vendors to convey the land.[622] The result was that when the Crown made awards 'in conformity with the commissioners' recommendations, it was not granting an absolute title as against all the world but only against the Crown itself'.[623]

The first step in attempting to remedy the problem had been to require sub-protectors to visit the district, prior to hearings. They did so to ascertain who held rights, to determine whether there was any opposition to the claims about to be investigated, and to ensure the attendance of witnesses. In April 1843, the Crown took further measures intended to verify that the rights of Māori had been 'completely extinguished' before a grant was issued. The 'Officer Administering the Government', Willoughby Shortland, informed Clarke that, in future, two reports would be required, the first from a surveyor stating whether the survey had been interrupted 'by the natives on the ground of ownership, and whether any claim [had] been preferred by them, or on their behalf, for any part of the land'. The protector of the district would supply the second report, affirming that 'after due inquiry', he was 'satisfied of the alienation of the lands by their former owners'.[624] According to Armstrong (in evidence to the Muriwhenua inquiry), no surveyor reports have been found. In his view, this was likely the result of a lack of surveyors rather than destruction of the record;[625] however, he considered that the fragmentary records that do exist suggest that the sub-protectors were active in carrying out these inquiries. On one occasion, sub-protector Kemp informed Clarke about the difficulties he had encountered in obtaining information on Mair's claim in the Bay of Islands. Like others, Kemp maintained that Māori had to be paid before

they would attend the hearings, stating that 'the obstacles are so great in the discharge of this duty, that without the promise of a consideration the chiefs decline giving assent to the claims in which they may be interested'.[626] In three other recent cases, he said, he had been obliged to meet the demands made by chiefs 'upon his private means'.[627]

Stirling and Towers questioned Armstrong's conclusions. They were able to locate fewer than 10 protector certificates, which were in a standard format suggesting this was no more than a form-filling exercise. All the certificates showed was that 'no claims of ownership [had] been preferred' to the protector. While Kemp had to pay chiefs to attend hearings to give their assent, it is less clear that he actively investigated customary interests and sought out opponents to the grant. Protectors had to be satisfied that 'rights of the natives therein have been completely extinguished', but they were required only to make inquiry 'amongst the reputed aboriginal proprietors'.[628] This may well have meant only those who had signed the deed, with the protectors relying on any possible opposition surfacing when the boundaries were walked.[629] We therefore doubt how effective this extra layer of scrutiny was in protecting Māori interests. In any event, Governor FitzRoy relaxed the requirements within the year; as a result it was no longer necessary for the boundaries to be inspected, and the protector only had to confirm that he 'believe[d]' there to be no opposition to the claim.[630] When the Governor began issuing unsurveyed grants, as discussed later, that protection was negated completely.

The failure of these protections meant that, for most claims, the commissioners continued to rely on the word of two Māori signatories as a basis for concluding that a sale had taken place, so long as the signatories confirmed that they had understood the contents of the deed, that they were the rightful owners, and that they had received the payment as promised. This standard was unlikely to uncover whether others had rights or objected to the transaction. Unless there was a specific objection from the signatory rangatira – for example, that they had not received full payment or had not intended to let go of the land – or alternatively, unless the transaction had taken place after Gipps's January 1840 proclamations, claims up to 2,560 acres would be validated with excisions made in cases where objections from competing hapū surfaced.

(5) *Were the requirements for survey carried out?*

According to Commissioner Godfrey, Māori opposition to claims was largely the result of defective deeds which failed to define boundaries accurately. In 1843, responding to criticisms from Clarke, he observed,

> [the] boundaries [in deeds] have been loosely described in English, nay, frequently confessed to have been inserted by the purchasers after the signatures of the deeds by the natives; then indeed the natives [although] admitting a sale of some portions have boldly and in every instance with apparent truth denied the extent of land alleged to have been alienated; upon these occasions they have declared that although they do not and never did understand the boundaries then read to them from the deeds, they can, however, and willingly will point out to the surveyors the lands they actually sold.[631]

Charles Terry (an early settler and newspaper editor) also noted that Māori had been persuaded, in many instances, to sign English-language deeds that were largely meaningless, with 'blanks for boundaries'. These had been

> filled up without such boundaries ever being seen, much more measured, but stating so many miles on each of the cardinal points of the compass, and the document then interpreted by Europeans to the natives, according to what the latter may have intimated their meaning to be of the sale.[632]

Settlers' failures to define boundaries clearly, or exaggeration of boundaries, had mattered less in pre-treaty times: Māori knew which lands they occupied and which they had allocated to settlers' use. If settlers had written much larger areas onto the deeds, this had had little practical effect, but it acquired its full significance later, once the settlers sought exclusive rights to the whole area covered by the deeds, or the Crown claimed ownership of the lands so described in excess of what had been granted.

The commission's work did little to solve this ongoing problem. The absence of surveys would undermine the effectiveness of the first Land Claims Commission throughout its operation, causing delays in issuing grants and resulting in a legacy of confusion and obfuscation for Māori. At the end of the process, they still might have little idea about what lands the Crown considered to have been sold, and this remained the case until the work of the Bell commission some 20 years later. The immediate cause was the imprecision and overlap of deeds, but this was compounded by a lack of survey personnel. The problem was greatest at Kororāreka where there was particular difficulty in deciding the exact boundaries of the areas claimed, which when totalled, exceeded the amount of land in the town. By early 1842, Godfrey had come to realise that in 'many cases', the Pākehā claimants had failed to measure their allotments, and deeds had been signed without any statement of the extent of the area being claimed and only a rough description of where the boundaries ran. The result was a gross exaggeration of what had been supposedly purchased, and 'as the natives, when examined [were] incapable of describing quantity', the commission was unable to 'safely recommend a specific grant to one individual without the likelihood of encroaching upon the claim of another'.[633] While Godfrey did not mention it, such claims must also have encroached on the rights of Māori who had not been party to the transactions or who retained wāhi tapu and other rights in the town area.

The solution proposed to Secretary of State for War and the Colonies, Lord Stanley, in September 1842 was to allow private survey, subject to the approval of the Surveyor-General – or, if preferred, the issue of scrip in the vicinity of Auckland. It was anticipated that this would result in a considerable augmentation of the Crown estate, since it would assume the total area of the original claim as well as relieving the Crown of the costs of surveying grants. However, according to Armstrong, these plans did not come to fruition because the underlying problem – the lack of qualified surveyors – was not solved, and because of the 'intransigence' of the settler claimants. As he explained it, many wanted to delay any survey and final grant, in the apparent hope that the Crown would amend its unpopular surplus lands policy and award them their entire claim.[634]

In responding to delays in defining the boundaries, Crown officials were mainly concerned with the problems for settlers. But the lack of timely survey would prove a serious issue for Māori too. Crown counsel suggested that delays in surveying grants meant only that any prejudice was similarly delayed.[635] In our view, the consequences were likely more serious than that. As Crown counsel rightly noted, Māori continued to occupy lands despite the issue of unsurveyed grants, apparently unaware that the Crown now regarded their rights as extinguished in the entire area described in the deeds, even if only some of that land had been granted. As we discuss later, in 1840 Māori were made the promise that lands unjustly taken would be restored to them, and then in 1844 were further promised that surplus lands would be returned. This proved not to be the case. By the time surveys were undertaken and the Crown's view of the transaction was revealed, the power of Māori vis-à-vis a settler Government was much reduced, and their ability to call on the rangatira who had been involved and to enforce their view of the matter was largely gone.

(6) *How did the commissioners view equity and how did they establish that transactions had taken place under 'equitable conditions'?*

In preceding sections, we outlined examples of Māori making demands for further payments after entering land transactions, many of them drawn from the testimony heard by the first Land Claims Commission. There were also plenty of instances of deeds being signed for the same land or for overlapping portions of it. In their report of May 1842, the commissioners noted that difficulties in defining boundaries were compounded by multiple 'sales' of the same land: 'natives have repeatedly sold portions of land twice or thrice over, and can generally assign some native usage for such acts'.[636] Phillipson pointed out that this should have been 'cause for concern' since the 'Commissioners were finding according to the equity of

the case, that Maori had intended an absolute alienation of land'.[637] Not only were boundaries and acreages unclear, but so – to the commissioners – were the 'native usages' that permitted Māori to assert rights in lands supposedly sold.

Demands for additional payments sometimes came from hapū and rangatira who had been left out of the original agreement for various reasons, including absence at the time of the transaction. Crown historians have tended to see this as sufficient explanation but as we have previously discussed, not all instances involved competing claims from those whose rights were unaccounted for and unextinguished. Phillipson noted that there were 'frequent instances' of rangatira either demanding further payments or entering multiple transactions over the same land. The case of Clendon and Montefiore (discussed earlier) was one such instance. Polack's multiple payments in Kororāreka was another. In yet another case, Māori entered a transaction with Dr Ross in the mid-1830s, then another transaction with Busby over the same land, all the while continuing to live on it. As Phillipson observed, '[o]ne dimension of these re-sales [was] that Maori considered that they still had rights after placing the settlers on the land', a critical point that was either missed or discounted by the commission and its advisers.[638] As a consequence, in our view, the commissioners did not fulfil their obligation to assess the meaning and validity of the transactions in terms of Māori usage.

The matter of 'equity' or fairness also seems to have been rarely considered even in respect of the price paid to Māori. In 1840, George Clarke raised this question, commenting that de Thierry's extravagant claims would mean the 'whole patrimony of a tribe had been acquired for a nominal consideration from a few individuals without regard to the rights of most of the owners'.[639] When this possibility was referred to Gipps, he responded that if rangatira admitted the 'sale', its validity was not affected, and that the title of those chiefs was extinguished, although more compensation might be awarded by the Governor in consultation with the protector.[640] We heard of no instances of additional compensation being required for a signatory of a deed who acknowledged that the payment had been accepted. As noted earlier, the commission disallowed de Thierry's claim for 3,000 acres on the upper Waimā River (OLC 1045) but was likely swayed by evidence of Mohi Tāwhai's opposition at the time the deed was signed rather than his subsequent objections to the 'trifling' nature of the payment, which he considered an 'earnest' only. In general, officials seem to have given very little credence to Māori allegations that payments had been unfair, attributing such complaints to their growing appreciation of the monetary value that Europeans placed on land.[641]

The record of the commission's proceedings indicates that the question of fairness of price was raised with only one settler: Busby. Regarding Busby's Waitangi claim (OLC 16), for which he had paid a lower price than for most of his other land acquisitions, the commissioners asked whether he considered that he had given Māori a 'sufficient and fair value' at the time of the transaction. Busby replied that he thought he had given 'more than any other person would have'. Further questioning again elicited that he had paid a fair price, but he gave no reason as to why it was so much lower than for his adjacent purchases. Two days later, he was similarly questioned about his Te Puke claim near Waitangi (OLC 20). There, too, he considered his payment 'more than an adequate consideration', particularly since he had reconveyed the 'most fertile portion of it to them'. This was about one-tenth of the land he claimed and was for Māori occupation only, and could not be sold to another European.[642] When subsequently asked the same question about OLC 21 in western Waitangi, he replied that he could not answer categorically but thought Māori had been satisfied by the price and had been the 'gainers' by selling to him in preference to any other. Under further questioning, Busby stated that he believed Māori would not have received half as much from anyone else.[643] The commission did not pursue the matter of fairness of payment further with Busby, instead recommending grants totalling 3,264 acres (which was later greatly increased) for his various Bay of Islands claims. There is no record of the commission directly raising fairness of price with any Māori at all.

In fact, what was equitable and what was not was

defined neither by ordinance, nor instruction, nor by the commission itself. The only guidance related to fairness between older and newer settlers (expressed by the sliding scale set out in the land claims ordinances). This reflected the Australian origins of the legislation, which was designed to protect the older, 'genuine' settlers as opposed to more recent speculators. While the ordinance directed commissioners to be guided by 'real justice and good conscience' rather than 'legal forms and solemnities', the *Muriwhenua Land Report* found that this wording had more to do with the law on fraud and the requirement for land sales to be evidenced in writing among an illiterate settler population than with protection for Māori.[644] After its early examination of Busby, all further commission engagement with issues of equity and 'real justice' had to do with balancing settler interests.[645] If Māori had been paid the amount stated in the deed, the transaction was treated as valid and equitable, and the omission of other customary owners was addressed by a reduction in the area for which a grant was recommended. The result, as Stirling and Towers observed, was that 'not one of the more than 500 Northland old land claims was rejected on the grounds that it was inequitable'.[646] In our view, the commission's failings in this respect were particularly prejudicial to Māori when it is remembered that:

- rangatira were not selling; rather, they were allocating or sharing usage rights in the expectation that this would lead to an ongoing, mutually beneficial relationship, possibly involving future payments and certainly involving future material benefit to their people; and
- settlers' claims often covered far greater areas than the rangatira believed.

(7) *Did the commission turn a blind eye to evidence of fraud?*

A number of claimants in our inquiry – descendants of Te Whānaupani, Te Tahawai, and Kaitangata hapū (Wai 1968) and of Te Tahawai and Ngāti Uru hapū (Wai 2382) – have alleged that the marks and tohu of their tūpuna, attached to Whangaroa land deeds, were forgeries, and that the Land Claims Commission failed to investigate this matter.[647] These allegations concerned three tūpuna in particular: Hemi Kepa Tupe, Hāre Hongi Hika, and Te Ururoa.

Claimant Rueben Porter gave evidence about his tupuna, Hemi Kepa Tupe, a rangatira who was taught to read and write at Kemp's mission.[648] Mr Porter contrasted three deeds entered into with James Shepherd (OLC 802, 807, and 808) – in which Tupe's agreement is signified by an 'x' – with Tupe's signatures on he Whakaputanga and several letters written to Busby and Kemp in the 1830s. Mr Porter also referred to other deeds that Tupe signed with a different tohu.[649] Additionally, in a letter written to Busby in 1839, Tupe had expressed concern about the extent of land transferring into the hands of Pākehā, suggesting that he was against selling. This accumulation of evidence had led Mr Porter to question whether the marks on the sale deeds were genuine.[650] He also discounted the significance of Hemi Kepa Tupe's appearances before the first Land Claims Commission, apparently to confirm the Shepherd deeds, and raised concerns about the role of Henry Kemp (son of James Kemp), who had not only drafted and translated the deeds but also translated for the commission. Mr Porter noted, too, the rote character of the evidence of Tupe and other Māori witnesses, describing the lack of variation in the record as 'astonishing', which caused him to doubt its accuracy.[651]

Similar concerns were raised by Nuki Aldridge with regard to deeds supposedly signed by Te Ururoa and Hāre Hongi Hika for several areas in Whangaroa and the Bay of Islands.[652] Mr Aldridge said Hāre Hongi Hika knew how to read and write, and again the 'x' that appeared on some deeds and the tohu on others contrasted with the signatures and tohu with which these rangatira signed he Whakaputanga.[653] Mr Aldridge made the further point that Hāre Hongi continued to use the land and make demands for ongoing payments.[654] He acknowledged, though, that Hāre Hongi appeared before the commission and gave evidence that he had signed some of these deeds. Our own scrutiny of the record shows that he did so in respect of Baker's OLC 548–549 and Kemp's OLC 597 claims, leaving several other claims for which there is no record of his presence. In all cases where he did appear,

Whangaroa rangatira Hemi Kepa Tupe. He was the son of Hineira and Houwawae (the elder brother of Hongi Hika) and thus was closely related to Hāre Hongi Hika and Ururoa. Tupe had been taught to read and write at James Kemp's mission and was one of three rangatira from Whangaroa to sign he Whakaputanga with his signature. Tupe is identified as entering into three land deeds with the missionary James Shepherd. These deeds are marked only with an 'x'.

his evidence followed the usual format. We note that for Kemp's OLC 600 claim, Hāre Hongi did not appear even though he was named as a participant in the transaction.

We are not in a position, however, to come to a definite conclusion. We cannot know whether particular tohu were falsely drawn or if crosses were fake. Nor can we be certain whether letters were penned by those whose views were expressed or if they were written on their behalf.[655] But given the circumstances that the claimants raised before us, their suspicions that forgeries had taken place are unsurprising. We agree that there were many defects in the procedures followed by the commission, that the

record of what was said at the hearings clearly failed to capture all the kōrero, and that it was often formulaic in nature. What was asked and how it was recorded reflected the point of view of the British settler and British law, not Māori and Māori law. We also accept claimant criticisms of the commission's over-reliance on the missionaries as advisers (in their role of protectors) and interpreters, especially when their own family interests were involved. Notably, interpreters who worked for the commission and the protectorate also worked for Pākehā claimants – a dual role that Governor Grey would condemn as a conflict of interest on their part.[656] Henry Kemp occasionally interpreted when his father (James) was the claimant, apparently to the disgruntlement of other settlers.[657] Deeds, too, are unreliable evidence of what Māori understood by them; they only indicate what Clarke and other missionary drafters intended (as discussed earlier in section 6.3).

(8) *What steps did the first Land Claims Commission take to ensure that Māori retained their pā, kāinga, and cultivations?*

One of the criticisms claimants in our inquiry levelled against the first Land Claims Commission was its failure in most cases to set aside and protect reserves for Māori out of the transactions it validated. In cases in which a reservation had been formally recorded, this would usually translate into a reserve being made, but informal arrangements were likely to be ignored and occupied sites were unprotected. Claimants told us that, under the Crown's own laws and policies, it was not entitled to take lands that Māori 'occupied and used'; on the contrary, it was obliged to set aside reserves ensuring that Māori retained sufficient lands for their ongoing sustenance. Yet, the Crown failed to meet even this minimal requirement.[658]

Crown counsel, on the other hand, submitted that it was unaware of any grants to settlers that contained lands occupied by Māori (for instance, as kāinga, cultivations, pā, or urupā).[659] Counsel did concede that it had taken surplus lands without requiring proper survey or considering the adequacy of Māori landholdings and that, as a result, some hapū had lost vital kāinga and cultivations.[660]

Māori retention of lands 'essential, or highly conducive, to their own comfort, safety or subsistence' was a key Crown obligation stated within Normanby's instructions and reaffirmed by his successors. Lord Russell instructed Hobson in January 1841 that the Surveyor-General was to define lands 'essential' to Māori and that the Protector of Aborigines was to ensure that these areas were to be held inalienable for their future needs.[661] That obligation was not expressed in the Land Claims Ordinance 1841, which spoke only of the need to safeguard any land that was required for defence, townships, or any public purpose, and what compensation should be paid in such circumstances. Gipps anticipated that the work of the Land Claims Commission would result in substantial expanses of land being placed in the hands of the Crown, out of which reserves could be made for Māori for their use or benefit, but his direction on the matter was to Hobson and did not affect the work of the commissioners themselves.[662] As we will discuss further, the commissioners deferred the matter of such protections to time of survey and to the Governor. They included very few reserves in the awards they recommended in the first instance, even when evidence indicated that settlers were claiming land that included cultivations, kāinga, fishing spots, or wāhi tapu. As a result, some settlers were able to acquire extensive landed estates, while little or no provision was made for Māori who – the commissioners were told – also lived on the land. Awards to Busby, Henry Williams, and James Kemp are cases in point, and will be examined in some detail later in this section and in section 6.7.[663]

In effect, the commissioners only set aside areas for Māori occupation and use in cases where their reservations had been formally recorded in deeds. Occasionally, areas were set aside when Māori owners objected to the inclusion of a particular site on the grounds that it had never been allocated to the settler concerned. This happened at Waimate (OLC 633), for example, where the commission recommended an award of 1,500 acres to George Clarke 'excepting the two Acres which the Chief Piripi Hamangi [Haumangi] states he did not sell'.[664] The recommendation for another of Clarke's Waimate claims (OLC 634) excepted 'the part belonging to the Chief John Hake' for the same reason.[665]

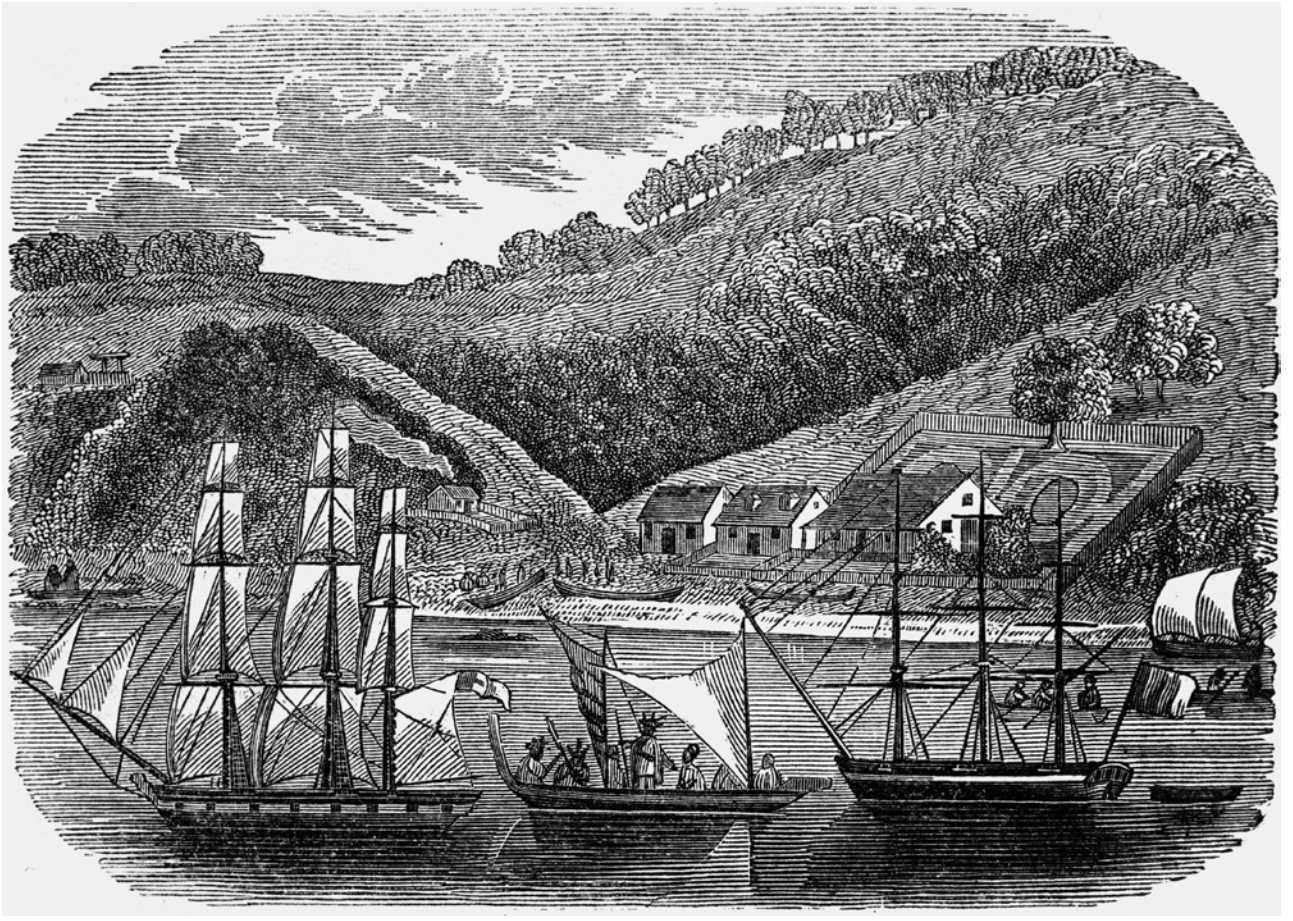
Sometimes, Māori objected that the claim included land belonging to them, but they had not been involved in the transaction at all. In those circumstances, the commission usually excluded it from the award. The commission responded to Māori objections to Clendon's claim to 'Manawara' in the Bay of Islands (OLC 120) in this way with a recommendation for an award of 60 acres 'on the condition that it excepted the portion claimed by Kohowai and called "Kokowau"'. Kohowai had appeared before the commission, objecting that his land lay within the boundaries of Clendon's claim, and that he had never sold or received any payment for it.[666] The commission's handling of that case contrasted with its treatment of Ngāi Tāwake over Montefiore's claim at Manawaora (OLC) 13). In that instance, because Te Wharerahi acknowledged the 'sale', and there was no reservation stated in the deed, the commissioners awarded all the land concerned to Montefiore and left nothing for the Māori who continued to live there.[667]

Another example was the commission's handling of the two wāhi tapu on Polack's Kororāreka claim (OLC 638).[668] Heke gave evidence that a larger burial site was excluded from the transaction with Polack, while a small wāhi tapu within its boundaries was still to be respected. The understanding reached over this area proved especially vulnerable. One of the other rangatira involved in the transaction, Charles Korokoro, agreed: 'The great Wahi Tapu on the beach was distinctly excluded in the purchase at that time', adding that 'the small wahi tapu, also on the Beach, we understood Mr Polack would not use'.[669] Powditch gave evidence that both sites had been included in the transaction but he thought that Polack was not to use either until the tapu had been lifted. He admitted, however, that he 'did not know the Maori language sufficient to understand the arrangement'.[670] Polack himself informed the commission:

> Though purchasing the Wai tapu I was not allowed to build upon it, or make any use whatever of that ground, – while the tapu existed, but possessed the right to make use of it, whenever the native scruples gave way, which a few years generally brings about, thus a part of this very tapu land, on which the Custom House is erected, was made into a garden in 1838, by Mr Spicer giving a small amount for the natives taking away the tapu. Mr Spicer abandoned his claim, as the right of purchasing the tapu belonged solely to me. Numerous claimants to land in New Zealand possess this power of after purchase of tapu land, situated within their purchases.[671]

Rewa and the other northern alliance chiefs who opposed Heke's claim and had entered into their own arrangements with Polack (after expelling him twice) also said that 'the Sacred Places on the beach . . . were never sold'.[672] As a result of this evidence, the commissioners' award to Polack excepted the large wāhi tapu inside the boundaries but made no mention of the smaller, even though it had been agreed that it should not be used until the tapu had been removed. Korokoro, Powditch, and even Polack had stated this to be the general understanding. Māori had objected to the 'sale' of the large wāhi tapu, and while the commission specifically excepted it from the award, it otherwise took no notice of evidence of the oral agreement that indicated that Māori 'vendors' wished to have both wāhi tapu respected.[673]

Almost invariably, informal accommodations by oral agreement were not reflected in the commission's recommendations. We have already given the example of Pahiko (OLC 127), where William Cook gave evidence of his agreement with Te Kapotai leaders to the effect that they would continue to cultivate the land but would not sell to others. The land (from his point of view) was his property and an inheritance for the children he had with Tiraha, his Māori wife, although their existence was not mentioned at the time. Cook considered himself free of obligation to the wider hapū.[674] Nor did the commission make any provision for continued Māori occupation or use of lands awarded to Henry Williams and the CMS, despite the existence of numerous trust arrangements and promises that Māori could occupy and use the land. At Karaka (OLC 669), south of Paihia, Williams gave evidence that he had 'left' Māori the right to cultivate and fish, as they continued to do 'from time to time', but not to sell the land to any other. But this arrangement was not reflected in the commission's recommendation that 60 acres be granted



Kororāreka Bay, with Joel Polack's residence on the shore.

to the CMS, an award that was confirmed by Hobson and gazetted in August 1842.[675]

In fact, in all of Williams' sizeable personal claims, no reserves (other than four wāhi tapu) were referred to in the deeds signed, the hearings, or the commissioners' reports. This is despite clear evidence of Williams and other missionaries accepting that Māori would continue to occupy and use the lands, as part of a shared legacy for missionary and Māori children. Even with the wāhi tapu, which lay on the boundaries of several blocks claimed by Williams, there was considerable inconsistency in the recommendations. Having received evidence (through deeds and Williams' testimony) that at least three were specifically excepted from his claims,[676] the commission responded by excluding them from some of its recommended awards but including them in others.[677]

Definition and protection of these areas thus depended on Williams' survey of his grants. He had made six personal claims (OLC 521–526), for which the first commission recommended a total grant of 7,010 acres, based on his expenditure as set out in the New Zealand Land Claims Ordinance 1842. When the ordinance was repealed, the

grants had to be amended, and the commission imposed the statutory maximum of 2,560 acres. As we discuss in section 6.5, Governor FitzRoy then intervened, resulting in a total grant of 9,000 acres.[678] In 1852, Williams had Puketona (OLC 526) surveyed and finalised under the Quieting Titles Ordinance 1849 (also discussed in section 6.5), resulting in a grant of 2,000 acres and the Crown retaining 300 acres as 'surplus' from the area surveyed. This grant was not called in at the time of the Bell commission and remained valid. The plans (which noted three reserves) and the application for grants for OLC 521, 522, 523, and 525 (surveyed as a contiguous block encompassing just over 5,000 acres) and for OLC 524 (2,000 acres) were later submitted under the Land Claims Settlement Act 1856. No Māori opposition had been met on the ground at that later date, and Williams and various family members received grants for the 6,830 acres found to be contained in those claims on survey. Williams was also entitled to 1,025 acres survey allowance, which he selected out of Crown surplus derived from the claim of William Williams and from Crown-purchased land at Puketona and elsewhere.[679]

In total, only 239 acres were set aside in three reserves out of the extensive Williams' estate at Pākaraka, despite his assurances that Māori might remain on their lands. The reserves included two of the wāhi tapu that had been excluded by deed and subsequent award – Ngā Mahanga (29 acres) and Umutakiura (25 acres) – plus an area of cultivation, Ngahikunga (186 acres) along the fertile Waiaruhe Valley. Rigby noted, however, that neither Pouērua (an area of considerable importance to Marupō and Te Kēmara's people, and to Ngāpuhi as a whole) nor the lakeshore kāinga at Ōwhareiti were included in the land remaining in Māori ownership.[680] This was because the deed for 'Pourewa' for an estimated 3,000 acres (OLC 522), signed on 21 January 1835, made no mention of any reserve. Neither were the wāhi tapu Tomotomokia and Warehuinga given protection, while the Crown set about purchasing Ngahikunga three years after it was reserved. This area was then bought by the Williams family for £93 or 10 shillings per acre, as provided for by the Land Claims Settlement Extension Act 1858 (discussed at section 6.7). We note that the Crown had paid Māori £50 for this so-called reserve the year before.[681]

Nor were all cases of continuing occupation or use revealed during the commission's investigations. Sometimes, these issues came to light only years later as settlers attempted to occupy the lands they believed they had purchased, or the Crown sought to assert its claim to 'surplus' lands. We have already mentioned an example at Waitangi respecting a portion of land containing wāhi tapu that had been awarded to Busby, onsold to Mair, and onsold again to Captain Irving, only for Māori to oppose Irving's attempts to occupy the site.[682]

In many cases, as we will see in section 6.7, lands that had been excepted from the transaction later ended up in the hands of the Crown or settlers. So, too, did the numerous kāinga, pā, and cultivations that had not been mentioned in deeds and therefore were not reserved in Crown grants. It did not have to be that way. The commissioners were aware that Māori continued to occupy and use many of the lands that settlers were claiming, and that Māori therefore ought to be protected. In 1842, they made this very significant recommendation in their annual report:

> in instances innumerable, the natives have been allowed, and frequently encouraged, to remain upon the lands; with an assured promise, or understanding, of never being molested. Their cultivation, and fishing, and sacred grounds, ought, therefore, to be in every case reserved to them, unless they have, to a certainty, been voluntarily and totally abandoned. If some express condition of this nature be not inserted in the grants from the Crown, we fear the displacement – under this authority – of natives, who, certainly, never calculated the consequences of so entire an alienation of their territory.[683]

In the commission's view, awards should not be converted into actual Crown grants until exceptions for cultivations, kāinga, fishing spots, and wāhi tapu had been inserted into them – yet they did not ensure that such sites were mentioned in the awards they recommended. As we discuss further at section 6.5, when FitzRoy arrived as the new Governor in 1843, the recommendation for grants to make such exceptions was still before the Government

for consideration, but he proceeded to issue unsurveyed grants which, with limited exceptions, made no mention of lands to be reserved to Māori. FitzRoy was aware of the issue and could have accepted the advice of officers who had actually heard evidence about continued Māori occupation, but instead proceeded to issue grants as if Māori interests were completely extinguished. As Phillipson pointed out, it was open to the Governor to at least insert a saving clause excepting '[a]ll the pahs, burial places and grounds actually in cultivation by the natives' in any grants he approved; indeed, he did so with respect to grants he issued to the New Zealand Company in Wellington and elsewhere, unlike in the north.[684] This may have been because these grants were for much smaller areas. But it left Māori in an extremely vulnerable position at the next stage of the old land claims process (the Bell commission), when the awards were taken as they had been written, without acknowledgement of oral agreements or the 'innumerable' instances of ongoing but unrecorded occupation. We will discuss the impact of this in section 6.7.

(9) *Inter-racial marriages and the Crown's process for the validation of deeds*

Marriages that were intended to bring settlers into the hapū and ensure the future continuation of the rights of hapū members, those of their children, and of their grandchildren were rarely raised before the first Land Claims Commission. This omission throws even more doubt on its capacity to comprehend Māori intentions. Invariably, settlers pursuing their claims before the commission brought as their witnesses two of the senior male rangatira who had signed their land deeds. If the relationship was working well between the wāhine and the settler, it seems there was no reason for its existence to be raised; or if it was, the commission did not consider it worthy of recording. Neither did old land claimants mention their marriages in giving evidence, even though continuing 'native occupation' might be acknowledged – and explained away as 'by permission' (see discussion at section 6.3.2).

Only when a relationship was in some way problematical, or when there was a specific objection to the land going to a settler who had been married into the hapū, was the matter brought up by witnesses and recorded. Claims were disallowed in these circumstances. We have identified a handful of examples only.[685] At Waimate, Aperahama and Wiremu Kīngi repudiated their deed gifting land at Pukenui to Peleg Wood, who had been married to Aperahama's sister. The relationship had ended, the couple had failed to occupy the site, and in fact Wood did not pursue his claim through the Land Claims Commission. The two chiefs appeared nonetheless, making it clear that circumstances and the land arrangements had changed:

> We were willing at the time that they should possess it, as we understood they intended to live upon it but since then we know that they do not live comfortably together and have never resided upon the Land and being fearful that Peleg Wood might sell the Property and leave our Sister destitute we do not now agree to give him the Land and wish to cancel the Deed we gave him.[686]

We note also the objections raised by Hua. His daughter was married to Christopher Harris who claimed land at Motukaraka (OLC 1016) on behalf of their son, 'a native of New Zealand', in 1843.[687] Harris maintained that the land was his if the boy died but that 'Hua shall have the full use of the lands during his native life.' Hua was adamant, to the contrary, that he 'did not give it entirely over' to his grandson; his wish was

> that he may possess it in common with our other descendants, but he cannot sell it to any person, not even to the Government, he has merely a right to live on it during his life time.[688]

No deed was presented and Harris's claim was disallowed. The daughter's name was unrecorded.[689]

Ihipera (Isabella), the daughter of Raumati, was married to Marmon, who had a number of liaisons with local Māori women. They included Hauauru, another of Raumati's daughters, with whom Marmon had a child, Mere, in 1826. Five different deeds for sites in the Hokianga had been signed with Marmon, who explained

to the commission why he had been supposedly able to secure 200 acres at Kaiwhakarau (OLC 317) for only one pair of blankets: 'he [Raumati] gave it to me because his daughter is my married wife'. Raumati, however, denied anything other than having agreed not to alienate the land to someone else, and the claim, again, was disallowed. Finally, in 1880, the land was retained by the Crown.[690]

Likely there were other instances – as in the case of Peleg Wood – when settlers did not bother pursuing claims, knowing that their ex-in-laws would object.[691] It was only a generation later that the extent to which settlers were marrying into the land began to be revealed within the record of the Crown's validation procedures. As settlers with Māori wives sought to have grants issued in their names, or as the children themselves brought forward their claims, whānau were confronted by a choice to be made in a world increasingly controlled by settler values and laws. Sometimes, objections were raised. If a settler sought the grant in his own name, Māori might protest that they had intended the land to go to the children, their own grandchildren, and their nephews and nieces; that it had not been 'sold' to the settler in his own right to be disposed of as he wished. Sometimes, too, the hapū objected that the land was to be shared with them, not owned exclusively by any offspring. On the other hand, at this time rangatira also attempted to ensure that informal marriage gifts were confirmed by providing the documents so valued by Pākehā. Deeds were drawn up and written statements made to formalise gifts of land for the children, so that grants could be approved and issued in their names. This was done in the context of surveys and desperate attempts to have reserves recognised under the rules by which the Bell commission operated. We discuss this further at section 6.7.

At the same time, Māori women found themselves largely excluded from the official record of land arrangements and validation of them. As noted earlier, with few exceptions, Pākehā missionaries and settlers had not sought their signatures to deeds, nor seated them at the table, putting paper and pen before them. The exclusion of women was then entrenched by the Crown's procedures to establish the validity of transactions. Purchasers (men) brought Māori witnesses (men) to attest to deed signings, and did so before the commissioners (men). Women witnesses were extremely rare, though again there were exceptions, usually when male rangatira were unavailable. Otherwise, the first commission simply failed to acknowledge the marriages underpinning the claims of many settlers or their participation in transactions assented to by the hapū.

6.4.3 Conclusions and treaty findings: the first Land Claims Commission

In essence, a treaty-compliant approach required Crown and Māori agreement on the nature, shape, and processes of any investigation into pre-1840 land transactions. It also required shared decision-making on the claims before the Land Claims Commission in which due weight would be given to tikanga Māori. The investigation process would ideally determine the relative rights of Māori and settlers to occupy, traverse, use, and exercise authority over the land in question. It might have recorded the ongoing obligations of Māori and settlers to each other, providing a means by which those rights could be protected and enforced in a post-1840 context. None of these things happened.

A number of important promises had been made to Māori during their discussions with Hobson at Waitangi, Māngungu, and Waimate: a full investigation of past transactions, the return of lands unjustly held, and the protection of Māori interests. However, the setting up of the Land Claims Commission had more to do with asserting the Crown's radical title and the need to regulate and fund colonisation than with Māori rights and interests. The similar ordinance passed in New South Wales and the January 1840 proclamation suggest that this was the case. Nonetheless, the commission's work was the main means by which those promises to Māori would be realised – or in event of its failure, come to nothing. The legislation was, however, flawed, making a positive outcome in which the Crown fulfilled its treaty obligations to Māori unlikely. Despite a general acknowledgement by the Colonial Office that Māori customs must be recognised, there was a presumption that land could be fairly purchased, regardless

of strong evidence before a major British parliamentary committee, and information readily available to officials, that the concept of sale was not fully understood or accepted by Māori.

We do not accept the substance of the Crown's argument that the land claims ordinances of 1840 and 1841, and the process they established, truly allowed for an investigation of whether pre-1840 transactions were understood by Māori as intending something other than sales. It is true that clause 3 of the 1841 ordinance contemplated claims for lands held by 'lease agreement or any other title whatsoever' as well as by sale. That section also stated that it was 'expedient and necessary in all cases' that inquiry be made into the 'mode' by which the land had been acquired and 'circumstances under which such claims . . . are founded'. Crown counsel submitted, 'This language did not presuppose sales occurred in all cases.'[692]

However, in our view, the wording of the ordinance was belied by the official practice. All discussion about the ordinance and the duties to be performed by the commissioners was cast in the language of sale and purchase. As counsel for Ngāti Manu pointed out in her submissions in reply, 'other "key aspects" of the instructions received by the commissioners indicate the Crown's focus was on purchase rather than 'any other form of alienation'. For example, the commissioners were directed to 'specify in each report the mode of conveyance used in the *purchase* from the Natives' (emphasis added). In every report on a claim they were also to include 'a description of the land alienated by such conveyance but not awarded to the claimants' – in other words, the 'surplus' to which the Crown would be entitled only in the case of a ratified purchase. Accompanying Gipps's October 1840 instructions was a sample form for the commissioners to fill in for those reports. This referred only to 'purchase' and required the commissioners to give details such as 'date of alleged purchase', a statement specifying whether a 'bona fide purchase' had been made or not, the names of the 'sellers', and confirmation that 'A Deed of Sale' had been 'executed by the above-named Chiefs'.[693] The reports required of protectors from April 1843 onwards obliged them to certify that they were 'satisfied that all aboriginal rights thereto have been extinguished'.[694] We cited earlier the circular that was published before hearings, calling on 'land sellers' to give evidence about their 'land sales'. Again, there was no mention of any other type of conveyance.

Counsel for Ngāti Manu argued on the strength of documents such as these that:

> The Crown, based in New South Wales, assumed that a full, final, and exclusive 'purchase' was sought by the Pākehā claimant and this was the only form of transaction envisaged by the Commission.[695]

We agree with that general conclusion. Leasing was incompatible with the Crown's land fund model, while settlers preferred the chance of gaining a freehold title. Only in a few instances did claimants bring a conveyance other than by deed of sale to the commission for investigation. There was one claim for a validation of a gift and no claims for any leases, although there were clear instances where it was the timber that was desired by 'purchasers' rather than the land itself. No discussion of, or recommendation for, the validation of a lease rather than for a full, final, and exclusive grant has been identified within the commission process. In fact, the commission generally rejected the few claims brought before it that were based on a transaction that did not conform to the usual model of purchase – and notably failed to give effect to the trusts that underlay many of the missionary deeds.[696]

Despite Gipps's instruction that 'proof of conveyance according to the custom of the country' be established, there was no explicit direction within the Land Claims Ordinance 1841 to that effect – or indeed for the commissioners to 'consider . . . whether there was a contract in terms of mutual comprehension', as the Tribunal put it in the *Muriwhenua Land Report*.[697] Within the procedures established to investigate the validity of transactions, the instruction from the New South Wales Governor was indeed the only explicit official recognition that different customary practices may have operated. We do not agree with the Crown's reading of that direction that the commissioners were required to consider whether the transaction was in accordance with custom.[698] In our view,

it was directed to the protection of settler interests rather than those of Māori; and what Gipps meant was that the commissioners could still deal with the claim if the deed of conveyance had been lost, destroyed, or even had never existed. Nor did the ordinance give any guidance about what was 'equitable', or how to settle questions of grantor title, fairness of price, or boundaries.

The commission's inquiry into how Māori regarded their arrangements with settlers was inadequate, even though there was considerable evidence available to officials of the time that the question of 'sale' was in doubt. Even when the testimony before the commissioners suggested that something less than a permanent and exclusive alienation had been intended (for example, when Māori demanded further payments, or were still occupying lands for which they had signed deeds), the commissioners failed to investigate further or, it seems, appreciate the implications in terms of the underlying title. Phillipson pointed out that by 'selling' land more than once or continuing 'in innumerable instances' to live in their pā and kāinga, and utilise cultivations, wāhi tapu, and fishing spots, Māori made it clear that they did not consider them 'sold' in the European sense:

> They had not intended to alienate them, they still possessed them, and there was a risk that if the grants were not very carefully executed, they would lose these things that they had never intended to alienate. Furthermore, the settlers knew this also and some had promised Maori that they would never be disturbed. Taken together, it is difficult to see how the Commissioners could have accepted that there had been, in all cases that they approved, an absolute alienation of a piece of land. It is equally difficult to perceive how Maori could have testified to such, believing (as the Commissioners reported) that they could still live on and use it.[699]

What weight, then, can be given to the apparent affirmation by many Māori witnesses at commission hearings that they had understood the deeds they had signed and had indeed 'sold' the lands described to the settlers in whose support they were testifying? The Muriwhenua Tribunal looked at the question in this way:

> Maori . . . affirmed these transactions as they understood them to be – that is, that use rights were given in return for ongoing support . . . for so long as the land could not be packaged and shipped away, it would necessarily remain where it had always been, with the ancestral hapu.[700]

That point would be made by Waka Nene at the Kohimarama Rūnanga in 1860. He said that, at the time of the signing of te Tiriti, Māori had begun to

> cast about and to think, perhaps we shall lose our lands. But no, the Pakeha said, Friend, let a portion of your lands be for us. The land has not been put on board their ships and carried away. It is still here with us.[701]

This was the nature of their tenure system and their world. Their affirmation was given in the expectation that the descendants of Māori and settlers would live together, and the benefits to a shared community would continue. No amount of early missionary or settler explanation was likely to change their view of the meaning of the arrangements into which they had entered. Indeed, some missionary actions gave support to their view of the matter, as did the practice of settlers marrying into the local community (often to close female relatives of the rangatira signing the deeds). The best that a Pākehā 'purchaser' could do to define his ownership was to fence in the land he considered he had acquired – or a portion of it – and build a house upon it, although that might not go unchallenged. We have cited examples where such houses were occupied by Māori, or pulled down because they did not consider their rights to have been displaced. On this basis we do not accept the Crown's view that occasional denial or repudiation of an agreement by rangatira was evidence that they saw their other transactions as sales. In such instances, rangatira were instead denying the existence of a valid agreement granting usage rights. As we have seen, this was usually because the Pākehā involved had in some way failed to honour his side of the agreement and maintain the relationship.

We have no doubt that the Crown intended that fraudulent transactions would be overturned as a result of

the investigation process. It is clear that the commissioners heeded the objections of signatories who repudiated a transaction because they had not received the full price. Also, when a section of customary owners complained that they had not been included in payments, the disputed area was excised from the grant. However, in our inquiry district, as in neighbouring Muriwhenua, only a minimal affirmation was required for transactions to be considered valid and equitable. Unlike the Spain commission, which looked into the large and politically important claims of the New Zealand Company in Wellington, New Plymouth, and the top of the South Island, there was no detailed inquiry into most cases.

Both land ordinances stated that the commissioners were to investigate whether valid purchases had taken place under equitable conditions and terms, and Gipps, Stanley, and other Crown officials had said that this should include questions of price. But there was no guidance as to how this was to be assessed. The schedule was not directed to that purpose, being concerned with the fair distribution of land among Europeans, and 'equity' between 'genuine settlers' and later speculators, rather than the protection of Māori;[702] and there is very little indication that the commissioners attempted to ascertain what would have been a fair payment for the land under consideration. Though the question was asked of Busby in the first hearing, the matter was then dropped and seems not to have been raised with any other settler. However, the commissioners were prepared to accept the word of Māori witnesses that they had regarded an initial payment as a deposit only, and their repudiation of the transaction when further payment was not forthcoming.

Contemporary commentators noted that Māori were gaining an appreciation of the economic value placed on land by settlers in the two decades before annexation, and there is support for this proposition in recent research.[703] But the main issue for Māori was not the size of the initial payment but the future benefit – the expectation that settlers would bring prosperity that would be shared by both parties and by their children together. The idea that Māori should benefit from settlement and the rising value of the land they retained as a consequence of settlement was a cornerstone of Crown policy, as expressed in Normanby's instructions to Hobson, yet there was no provision in the 1841 ordinance to ensure that sufficient land was reserved so that this could happen. The commissioners were aware of the need for Māori to have their pā, kāinga, and cultivations reserved to them, but rarely made that a condition of grant. We have to ask, why not? A blanket recommendation to that effect was made but to rely on that without specifying further in the actual awards proved fatal; it was not respected by the Governors with whom the final responsibility rested, while the idea of making sufficient provision to ensure that Māori would be able to benefit from the rise in economic value as settlement progressed does not seem to have occurred to the commission officials at all, and indeed, was not legally required of them. The missionary trust deeds came the closest but were given no legal status by the commission process.

The Crown has argued that there was no conflict of interest in the protector (and sub-protectors) being land purchasers as well as officers entrusted with looking after Māori interests, provided they were not acting in an official capacity when their own transactions were under investigation.[704] As we discuss further in the next section, this was not a view shared by Governor Grey; he attacked the missionaries (and their performance as protectors) for their very extensive land purchases. Although Grey's motives were questionable, we have doubts whether it was in fact possible for Clarke and his juniors to act as both advisers to the commission and advocates for Māori, and to put aside their own interests as land purchasers.

While Clarke did raise the general issue of whether Māori and settlers understood each other, and whether Māori intended permanent alienation, he did not do so in specific cases. His reports to the commission suggest that his major concern was to secure the titles granted by the Crown to settlers and missionaries, and it was this that motivated him rather than justice for Māori in their pre-treaty land arrangements. It was necessary that customary interests be properly extinguished so that titles issued to settlers were unimpeachable. It is hardly surprising, then, that Clarke and the other protectors interpreted events and evidence in a way that supported their own view of

what transactions meant for the good of the colony and of Māori themselves. Nor, as Dr Phillipson commented, was it 'necessary for men like Clarke, Kemp and FitzRoy to have been liars or cheats, for a false impression of the transactions to have been created'.[705]

We accept Phillipson's point that there 'may have been an essential double standard operating here'. Whatever the justice of a case when customary rights were contested, if settlers had paid one or other party for the land, then Crown officials – and on their advice, the commissioners – took the view that the settlers' interests had to be considered and protected, and that custom could not be the sole determinant of what was valid.[706] As evidence of that double standard at work, Phillipson cited a dispute over rights at Kororāreka, and Kemp's later description of Waka Nene and Pene Tāui as speaking in 'the most decided manner, explaining their own views as to the injustice of the claim *even as a mere native case*' (emphasis added).[707] The inference to be drawn is that for officials and Europeans in general, Māori views of what transactions entailed were of a secondary and lesser importance. In fact, there was little or no attempt to ensure that custom was given any weight at all.

Te Raki Māori generally retained other lands at this time, but we agree with the Muriwhenua Tribunal's conclusion that this is hardly the point.[708] The transfer of land at the Bay of Islands, in particular, was sizeable: some 123,113 acres or 29 per cent of that district (see section 6.1.3). For some hapū, such as Ngāti Torehina[709] and Te Kapotai,[710] this was almost the whole of their most valuable land, though the impact may not have been immediately apparent to them because of their personal relationships with the 'purchasers' and their continued ability to access their fishing spots and specific favoured sites. Nor was the scale of the land transfer apparent to officials: there was no inquiry into the numbers of Māori affected by pre-treaty transactions; or the extent of land and resources that had transferred out of Māori hands; or the nature, location, and amount that was left to different hapū. The Crown has conceded that this was a failure of duty and a breach of the treaty.

Dr Phillipson has argued that the 'fundamental issue is one of confiscation',[711] and we agree. In other inquiries, the Tribunal has generally reserved the term for Crown expropriation of land under the New Zealand Land Settlements Act 1863, its amendments, and the regulations issued under them. The Muriwhenua Tribunal, for example, drew a distinction between the tradition of confiscation long held by claimants in its district and technical confiscation, which applied only to those who had taken up arms against the Government.[712] In its view, there was nonetheless 'little difference . . . in terms of outcome' between the two cases. In both situations 'the long-term economic results, the disintegration of communities, the loss of status and political autonomy, the despair over the fact of dispossession [were] much the same.'[713]

On other occasions, Crown demands for 'cessions' of land for what it considered to be wrongful acts such as muru (rather than rebellion) have been at issue. In Kaipara, for example, claimants argued that the means by which the Crown had acquired Te Kōpuru from Te Parawhau chief, Te Tirarau, discussed in chapter 4, 'effectively amounted to a form of confiscation.'[714] At the time, Hobson described the land as 'ceded to Her Majesty as compensation for damages', but Lord Stanley had condemned the action as a 'forced cession' of 'questionable propriety'.[715] The Tribunal considered the muru to have been 'lawful under customary law, as understood by Māori', and the cession as a punishment inflicted without adequate inquiry, but refrained from making a specific finding on the matter.[716] The Tūranga Tribunal (2004) went further in considering the 'deed of cession' of more than one million acres, required of Te Kooti and the Whakarau in 1868, as being 'in substance a confiscation' obtained 'under duress' from persons who did not represent all customary owners.[717]

These cases involved compulsion and punishment (Hobson had been ready to send troops to enforce the cession in 1842). Can other Crown actions resulting in loss of land and autonomy be likewise described as an effective confiscation though they might lack this punitive character? The Tūranga Tribunal offers some guidance on this question in its assessment of the 1873 Native Land legislation and the related legislation that

followed. While acknowledging that it 'may go too far' to call the system that had been imposed 'raupatu', the Tribunal concluded that it 'breached both the spirit and the intent of the Treaty's title guarantees'. The legislation was 'expropriatory':

> First, rights traditionally vested in the community to decide matters of title were taken away and given to the Native Land Court. Secondly, community title including crucially the right to control alienation, was extinguished. No compensation had been paid for these takings. All of that certainly was raupatu in breach of both the property and control guarantees in article 2.[718]

In our inquiry, claimants have raised the issue with reference to the Crown's taking of the 'surplus' land as discussed in later sections of this chapter. However, in our view, the question of whether a confiscation or raupatu was committed must also take into account the Māori lands granted to settlers by the Crown. Under tikanga, the pre-1840 transactions were not absolute alienations but rather conditional allocations of rights to land and resources with an underlying Māori title remaining in effect. That was the law as understood and enforced by Māori institutions at the time of transaction; the primacy of tikanga was not diminished by modifications in the form of what were essentially social arrangements and the growing appreciation by rangatira that Pākehā held a different view. Their speeches at Waitangi indicated that they had not accepted such a view – as did their continuing occupation, if they wished, of lands 'sold' – even at Kororāreka where the allocation of rights in small, defined lots of land to satisfy Pākehā expectations most closely resembled commercial sales. Customary imperatives remained in play even there.

Ngāpuhi had not ceded sovereignty, nor had they been told or agreed that the tikanga under which they had entered into agreements with settlers (at a time when the Crown had assumed no authority in Te Raki) would be supplanted; neither had they agreed that the power to decide questions of land rights would transfer into the hands of men appointed by the Governor. In light of all this, we think that the granting of tens of thousands of acres to settlers in such fashion did amount to something akin to confiscation – if not in terms of British law, then certainly in breach of the guarantees in article 2 of the treaty.

We might not have reached this conclusion but for the fact that the Crown knew that Māori could not permanently alienate their interests in land. However, the principle of 'recognition and respect' for Māori law and custom was largely overridden as the imperial project of bringing order to land ownership in New Zealand on British terms got under way. At this point, respect for tikanga was subsumed. In the processes that the Crown developed subsequently to finalise its grants, Māori were never able to recover from the position in which they were placed by the early Land Claims Commission, which was conducted by officials in accordance with their own point of view and not that of Māori.

Many considerations made it imperative that the Crown should legislate to ensure that hapū whose lands were granted to settlers, at the very least, retain their cultivations, kāinga, and 'occupied sites'. That was clear from Normanby's instructions, the concerns expressed by Māori at Waitangi, the promises made to them; and warnings from missionaries about the plight of hapū. Some hapū were already landless and obliged to seek shelter from friendly chiefs – and others would be in a similar position once British views became embedded. But the Crown failed to legislate or to take other effective practical steps during its process of ratifying these early transactions to ensure even this minimum was met, let alone the retention of lands and resources for future development and well-being as the treaty required. It remains to be seen whether Māori whose authority and lands had been taken in this way were later compensated adequately for that loss. We discuss this question at section 6.8.

We find, therefore, that the Land Claims Ordinance 1841 was inconsistent with the guarantees in article 2 of te Tiriti, in breach of te mātāpono o te tino rangatiratanga, te mātāpono o te houruatanga/the principle of partnership, and te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect.

The Land Claims Ordinance 1841 failed to:

- provide a parallel role for Māori alongside the British commissioners in determining whether pre-treaty transactions were valid and ensuring that Māori intentions were understood, respected, and safeguarded;
- give effect to the promises made by the Crown's representative to Māori at Waitangi and Māngungu, both verbally and within te Tiriti;
- acknowledge and incorporate reference to tikanga (customary law) in a meaningful way, and give weight to tikanga in assessing the purpose and nature of the transactions alongside British law;
- ensure that all customary owners of land involved in each transaction had been identified and had consented to transactions involving lands in which they had interests (as only two witnesses were required to confirm a 'sale'); and
- require the commissioners to ascertain the nature of those transactions as Māori understood them, thus limiting the nature and effectiveness of their inquiry, and impeding determination of the real character of the transactions as undertaken under tikanga at the time.

These failures facilitated the conversion of conditional occupation rights into absolute conveyances under British law.

The Land Claims Ordinance 1841 also failed to give guidance as to fairness of price, specify the measures needed to give effect to joint Māori–Pākehā occupancy arrangements and underlying trusts, or require commissioners to protect kāinga and other sites in active Māori occupation, investigate equity of outcome, advise on the sufficiency of land remaining in possession of hapū, and ensure that reserves were specified and protected in grants.

These shortcomings were not offset by the involvement of protectors, who were concerned more with securing the titles granted to settlers and the progress of the colony than with ensuring justice for Māori. The Crown was thus also in breach of te mātāpono o te matapopore moroki/the principle of active protection and te mātāpono o mana taurite/the principle of equity.

Māori were prejudicially affected by these failures which resulted in the transformation of allocations of land made under tikanga for the use of settlers into permanent alienations under British law. In our view, this was an expropriation of tino rangatiratanga and whenua carried out on an unjust basis in breach of the guarantees of article 2 of the treaty.

6.5 Did Governors FitzRoy and Grey Adequately Protect Māori Interests in their Handling of Pre-Treaty Transactions?

6.5.1 Introduction

When Robert FitzRoy arrived in the colony in 1843 to take up his position as Governor, the pre-treaty land claims investigation process was far from complete. Nationwide, commissioners had reported on about half of the claims before them, and very few grants had been awarded. FitzRoy sought to accelerate the process by appointing a new commissioner, allowing a single commissioner to issue reports (instead of two as previously), and making grants of lands that had not yet been surveyed. He also reviewed some of the commission's earlier decisions, in some cases awarding grants where the commission had recommended none and in other cases increasing the acreage.[719] FitzRoy's successor, George Grey, was highly critical of these policies, both for the uncertainty they created and for their unfairness to Māori. In 1849, after a failed effort to have FitzRoy's grants overturned in court, Grey brought into force a new ordinance aimed at validating them instead, provided they were surveyed, and provided no Māori could successfully challenge the original transaction in the Supreme Court.[720] We will discuss their policies regarding surplus lands and waiver of the Crown's claimed right of pre-emption in separate sections.

Claimants told us that FitzRoy sought to speed up the process of awarding title to settlers in spite of advice that Māori interests had not been fully extinguished,[721] and that his actions were an 'egregious' breach of treaty

principles.[722] Counsel asserted that, under the ordinance, FitzRoy had neither the legal authority to make grants of unsurveyed land nor grants in excess of 2,560 acres.[723] Counsel for the Ngāti Rehua and Ngātiwai ki Aotea claimants said their tūpuna received no compensation under Grey's 1849 ordinance for the losses they had incurred as a result of FitzRoy's 'free-wheeling approach to Old Land Claims'.[724]

The Crown told us that FitzRoy had legal authority to issue the grants, in accordance with the Crown's prerogative power to make grants of 'waste land'.[725] Nonetheless, Crown counsel also acknowledged that, in terms of treaty principles, FitzRoy's decision to proceed with unsurveyed grants was 'wrong and caused prejudice to Māori'. In counsel's view, the decision reflected a significant shortage of licensed surveyors in the colony.[726] The Crown argued that Grey's 1849 ordinance mitigated the effects of his predecessor's decision by restricting unsurveyed grants to '1/6 of the land described', and by providing a legal avenue by which Māori could obtain compensation if their customary title had not been extinguished.[727] Ultimately, the Crown submitted, in most cases any prejudice was delayed until the late 1850s or early 1860s when the Crown completed surveys and issued grants. Prior to that time, Māori continued to live on and use the lands.[728]

In this section, we will consider why FitzRoy intervened, and who benefited. We will then consider Grey's responses, and their effect, before determining the extent and seriousness of any breach of treaty principles.

6.5.2 The Tribunal's analysis

(1) *Why did Governor FitzRoy intervene in the commission process?*

The Land Claims Commission begun hearings in January 1841, yet by December 1843 when FitzRoy became Governor, there was still much work for the commission to do. It had yet to report on many of the claims, and grants had to be surveyed before they could be issued. By May 1843, the commissioners had reported on 554 of the 1,037 claims before them nationally, and had made limited progress since. Very few of the grants that had been recommended had actually been issued. This was partly because of the lack of surveys on the ground, partly because one of the commissioners (Richmond) had been moved to another job, and partly because Hobson's temporary successor Shortland had decided to defer the issue of grants until his replacement arrived.[729]

FitzRoy wanted to accelerate matters. As noted, he appointed a new commissioner (Robert FitzGerald), brought into force legislation enabling cases to be decided by one commissioner rather than two as previously required, and waived the survey requirement. He announced that it would be impossible to survey the awards 'without causing such extreme delay as would be ruinous to the parties', and therefore instructed that walking the boundaries was no longer necessary. Grants were now to be issued on the basis of an 'eye-sketch' and on descriptions contained in the commissioners' reports – although the commissioners had already acknowledged these as inadequate, based, as they were, on descriptions in deeds that they considered largely 'unintelligible'. FitzRoy's decision meant that no one knew exactly the location of an awarded acreage within a claim that had been deemed valid but had been reduced to comply with the scale set out in the ordinance. It also meant that any reserves were undefined and so were vulnerable to loss in the future. In 1856, the select committee appointed to examine the settler petitions regarding old land claims concluded that FitzRoy's grants were 'full of defects' and 'most of them contained no particular description of the specific portions of land intended to be conveyed.'[730]

Stirling and Towers commented that, at first, settlers were pleased with FitzRoy's decisions, but:

> In the long run it created an immense amount of uncertainty and delay in resolving what it was that had been transacted, claimed, awarded and granted and, more importantly for Maori, what had not.[731]

Notably, FitzRoy began intervening in the work of the Land Claims Commission. Exercising the Royal prerogative under the Royal Charter of 1840, which delegated 'full

power and authority . . . to make and execute . . . grants of waste land . . . to private persons', and believing that clause 6 of the Land Claims Ordinance 1841 gave him express permission to do so, FitzRoy also revisited numerous claims already investigated and reported on by the commissioners.[732] As noted earlier, in some instances awards were recommended for claims that had been previously disallowed. More commonly, the earlier awards were increased, often beyond the prescribed limit of 2,560 acres, for settlers whom FitzRoy deemed to be 'really deserving'.[733] This generally meant those he judged to have contributed to the 'public good' (such as missionaries) or to the colony's economy (such as long-established settlers who had invested in buildings, timber-milling machinery, jetties, and so on).[734]

Phillipson described the process instituted by FitzRoy, during which no new evidence was sought, as 'tortuous'.[735] The Governor first required Executive Council approval of these supposedly 'really deserving' cases, which were next sent to FitzGerald for re-examination on the basis of the written reports from the first commission hearings. FitzGerald then sent a new recommendation for FitzRoy's approval. FitzGerald's reports were usually 'brief and lacking in detailed reasoning', and Stirling and Towers suggested that he 'generally extended the awards as desired by the Governor', doing 'little more than rubber-stamp the claim'.[736] Nor have any cases of refusal by the Executive Council been brought to our attention; indeed, according to Stirling and Towers, members of the Executive Council, under pressure from settlers, had attempted to have the 2,560-acre limit repealed as disastrous, shortly after FitzRoy's arrival. The Governor had rebuffed that effort on the grounds that it could

> hardly be expected that individual interests . . . shall be made paramount to the general rights of the aboriginal inhabitants, and the British subjects, for whose reception these Islands are in course of preparation.[737]

He was prepared to make exceptions in certain cases, however.

FitzRoy's intervention in the awards recommended by the first commission came under attack from Godfrey, FitzGerald (for reasons we will explain shortly), and later, from Governor Grey. Especially noteworthy was the criticism levelled by Godfrey, which revealed significant flaws in the processes of the first Land Claims Commission, as well as raising fresh concerns about FitzRoy's proposals. As Phillipson explained it:

> Godfrey pointed out that he had actually heard the evidence, that the awards were not limited simply by the ordinance but also represented the amount he thought fairly acquired (a crucial point), and that it would be dangerous to simply extend them on the basis of the papers. Godfrey's position was remarkable, given that he was supposed to have judged so many transactions as valid. In fact, they were not. The main problem, in his view, was that there were unpaid Maori owners whom the purchasers knew about and indeed had made them promises of future payment. To grant the actual claimed land rather than the commissioners' awards, therefore, would lead to grantees being expelled, or, if Maori 'be weak or isolated', injustice for Maori.[738]

Phillipson argued that,

> If Godfrey was correct, then the Commissioners had committed a very dangerous, almost unconscionable act. They must have known that they were judging whole transactions to be valid. Any acres not awarded to a claimant within the bounds of a 'purchase' would be Crown land, not unsold Maori land.[739]

FitzGerald, despite his willingness to recommend increases in most of the awards brought to his attention, and despite what Stirling and Towers characterised as his 'notoriously' pro-settler approach to pre-treaty transactions, also at times refused to do the Governor's bidding, with the result that he was removed from office on 31 March 1845.[740] What seems to have triggered the dispute between the two men was FitzRoy's handling of awards at Kawau Island. Against all of the land commissioners'

advice that there was no valid claim, FitzRoy granted the entirety of the island to the settler Taylor (in a derivative claim from Beattie), and a smaller area of the Kawau foreshore, containing the entrance to a valuable copper mine, to another influential settler, Whitaker. After his sacking, the former commissioner accused FitzRoy of making false declarations that had resulted in Māori being 'knowingly and wilfully defrauded' of their property rights. The Governor, FitzGerald alleged, had asked him to 'overstep the bounds of [his] duty as a Land [Claims] Commissioner', which he had refused to do.[741]

In 1847, responding to criticism from his successor George Grey, FitzRoy explained his reasoning in issuing grants before they were surveyed. As he saw it, Māori might not have seen the pre-treaty transactions as sales at the time, and nor had they come to accept them as such; but eventually they *would* come to accept the European view – partly as a result of becoming more 'civilised' and partly because of population decline, which would inevitably tip the power balance towards settlers. When that moment came, FitzRoy anticipated that Māori would make a 'willing and permanent cession' of lands within Crown grants that had previously been reserved to them either by deed or by oral agreement. According to the memorandum explaining his policy,

> When once the land is validly transferred by its aboriginal owners to European purchasers and surveyed, the main difficulties are overcome [a future state, after survey]. It is a mistake on the part of Governor Grey to suppose that native pahs, cultivations and burial grounds were not generally excepted from the sales of land to early settlers. This is just one of the points on which the authoritative interference of British ideas of landed property may be most prejudicial. The old settler, on friendly terms with his aboriginal neighbours, makes his way by degrees, and gradually obtains a willing and permanent cession of even those places, after he has succeeded in establishing a general right to a certain piece of land. But he never attempts to take land by force. To do so would be his ruin, by raising a host of enemies.
>
> The pahs, sacred places, and favourite resorts, for whatever purposes, were either reserved by the natives verbally when they sold the land, in most instances, or they were specially mentioned in the deed or agreement.
>
> The adjustment of all these matters should be left chiefly to private arrangement and the mutual self-interest of the parties concerned.[742]

Phillipson described FitzRoy as believing his grants to be 'perfectible', a term adopted by Stirling and Towers as well.[743] In our view, this goes some way towards explaining why FitzRoy, despite the opinions he expressed before the House of Lords select committee in 1838, was now acting as though pre-1840 transactions were absolute sales. In essence, he continued to acknowledge that Māori retained significant rights in land purportedly bought by settlers and indeed, in many cases, continued to utilise it as before; but they nonetheless would ultimately and inevitably acquiesce to the settlers' view of things and consent to final alienation, even of those places that were most important to them, such as their pā and wāhi tapu. They would, he thought, agree to accept more payment (in his words, in 'mutual self-interest'). He seems to have persuaded himself that this was an acceptable outcome and in line with the usual kinds of arrangements into which Māori and their settler neighbours entered. Those wishing to gain Crown grants just had to be patient. FitzRoy expressed no special obligation on the Crown to ensure that Māori retained their pā, kāinga, cultivations, and wāhi tapu in line with Normanby's instructions and the treaty, nor any obligation to ensure that legal protection be provided for the numerous reserve, trust, and shared-use arrangements he acknowledged to be implicit in the pre-treaty transactions.

Knowing that not all Māori rights had been extinguished, FitzRoy maintained that he had worded the grants 'very carefully'. In his view, the grants did not confer a freehold title and nor did they protect the settler against Māori claims to the land; rather, they conferred protection against any claim by the Crown or other settlers.[744] With respect to Māori, FitzRoy's view was that the settlers did not need the protection of Crown title, since

they could continue to rely on the 'good faith and traditional usages' of the Māori occupants until such time as those occupants either accepted the settler's ownership or declined in number. As Phillipson observed, this 'was a remarkable policy, and one that was ultimately to the severe detriment of Bay of Islands Maori'.[745] In our view, the basis for it was also remarkable – a cynical response to the protection offered to Pākehā under tikanga. Its legal subtleties were certainly lost on settlers, who considered themselves to possess an unfettered freehold title, notwithstanding any ongoing relationships with Māori.

The Crown has argued that FitzRoy, when acknowledging there remained unextinguished interests, was discussing reserves only, rather than saying that he considered entire transactions as less than final.[746] That may be so, but in our view, this misses the point. The land claims commissioners had judged transactions to be valid even though they knew that Māori interests had not been fully extinguished. FitzRoy also chose to treat these transactions as purchases even though he was aware that Māori remained in occupation, and instead of protecting them in their sites of significance, he encouraged settlers to purchase them out. Any area not awarded to a settler claimant within the bounds of a 'purchase' which he or she failed to acquire subsequently would be Crown land, not unsold Māori land. We agree with Phillipson's assessment that this was a dangerous and unfair practice.

(2) *Who benefited from FitzRoy's extended grants?*

According to Stirling and Towers, FitzRoy's interventions resulted in 12 grants for claims that had been previously disallowed, and many more grants were increased in area. Of the 230 grants he issued, only 42 were surveyed beforehand.[747]

The CMS missionaries were the most prominent beneficiaries of the Governor's willingness to increase the acreages granted. The award for Henry Williams' family was, for example, increased to 9,000 acres, in part because Williams was considered to have paid for much more land than the maximum grant allowed, and in part because he had done:

> far more for the advancement and improvement of the aboriginal race, and in fact for the general interests of the colony at large, than any other individual member of the missionary body.[748]

In other instances, the deserving character of the missionary claimant was simply assumed; for example, there was no reason recorded for the increase in James Kemp's grants.[749] Briefly stated, Kemp was initially awarded 1,354 acres at Kerikeri (OLC 595) and a further 2,284 acres at Whangaroa (OLC 599–602) so as to comply with the 2,560-acre limit. FitzRoy increased the grant for OLC 595 to 5,276 acres and those for Whangaroa to an estimated 4,000 acres; an aggregated total of 9,276 acres.[750] Although Kemp's entitlement came under sustained attack from Grey, and his grants were declared void, ultimately he (and family members) received grants totalling 6,954 acres in the Bay of Islands and another 2,722 acres at Whangaroa.[751] (We discuss this matter in more detail at section 6.7.2(4)).

Several other CMS missionaries also received extended grants. John King, Richard Davis, and George Clarke had initially been granted the statutory maximums for their claims. FitzRoy increased all: King's to 5,150 acres (for OLC 603–606 between Kerikeri and Tākou Bay);[752] Davis's to 3,000 acres (for OLC 773 at Waimate);[753] and Clarke's to 5,500 acres (for OLC 633–634 at Waimate).[754] FitzRoy noted that Clarke had paid £3,000 for his claims and improvements – in his estimation, enough under the sliding scale of the ordinance for a grant of 26,000 acres. Ultimately, Clarke would receive grants totalling 7,010 acres, leaving a substantial surplus for the Crown, while the two small reserves recommended by the first commission for Piripi and John Hake seem to have been subsumed.[755]

FitzRoy reversed the first commission's disallowance of John Orsmond's claim (OLC 809) for land near Waimate. Organised by his brother-in-law and fellow missionary, James Shepherd, the claim had been disallowed because Shepherd, as the original purchaser, had already been granted the maximum acreage allowed by the ordinance. As a result of FitzRoy's intervention, a grant was issued

to Orsmond for 2,560 acres. Shepherd himself had been awarded land well in excess of the statutory maximum for his seven claims at Whangaroa and the Bay of Islands as a result of the commission's recommendation (5,330 acres, after the recalculations required by the disallowance of the 1842 ordinance), and this was approved – but not extended – by the Governor.[756] According to the Surveyor-General, Charles Ligar, Samuel Ford's award in the Bay of Islands was increased to 3,492 acres, and he received a £1,725 scrip credit out of that total.[757] Charles Baker's awards also were increased beyond the statutory maximum to over 6,000 acres for his various claims at Waikare, Kororāreka, and Mangakāhia. At Waikare, the award was increased from the original recommendation of 872 acres to the full extent claimed of 1,212 acres (later increased to 1,260 acres by the Bell commission); and at Mangakāhia from 1,316 acres to 5,000 acres, despite the opposition of senior Te Parawhau chief, Te Tirarau.[758]

Other 'deserving' cases were those settlers whose economic activity and investment were thought likely to benefit the colony. Long-established and prominent settlers such as Mair, Clendon, and Busby fell into this category, as did some more recent arrivals such as Alexander Brodie Sparke, who had entered into substantial transactions in Mahurangi.

Mair's Whāngārei grant (OLC 307) serves as an example of the reasoning behind, and implications of, the allowance and expansion of the award when, if the usual practice had been followed, it would have been disallowed. Mair was granted the land despite evidence that Māori continued to live there, and although he had only completed part of his payment before the deadline imposed for valid claims.[759] There was also a boundary dispute with other settlers, the Carruths, who had been put on a portion of the same land by many of the Māori who had entered the agreement with Mair. All this ought to have alerted officials to the possibility that Mair's dealings had not been equitable, and that Māori had not seen themselves as selling the land.[760]

As it stood, the commissioners were predisposed to treat Mair generously even before FitzRoy became involved. They reported that they were 'desirous to make this claim an exception to their general rule of decision', which would have found the transaction to be invalid because it had not been completed before the January 1840 proclamation. They deleted the usual phrase in the printed form that comprised part of their report, that the claimant had 'made a valid purchase from the Native Chiefs', stating instead that Mair had 'obtained a grant' from them.[761] They gave two justifications for their decision to approve the claim notwithstanding these irregularities: the price of £300 as stated in the deed (this was later shown to be questionable);[762] and Mair's subsequent expenditure of a 'very considerable sum' (an estimated £1,020) on improvements.[763] The commissioners therefore recommended a grant for 1,200 acres, calculated on price paid as set out by the 1842 ordinance. They also recommended the standard coastal exclusion of land '100 feet from the high-water mark', and the further exclusion of four reserves designated in the deed ('Tikiponga, Kote Pareka, Kei Otepapa and Kotehone'), which together comprised an area that Mair estimated at some 150 acres.[764] The boundaries were not described, being 'uncertain and disputed', but the 'natives [could] point them out'.[765]

Despite this dispensation, Mair had not been pleased, objecting that he was entitled to far more, given what he had spent. Godfrey and Richmond reminded the Colonial Secretary that Mair, strictly speaking, was entitled to no grant, since his transaction had not been completed before the January 1840 proclamation and what was more, 'it was owing to our knowledge that various works had been completed on the land . . . more than the evidence he produced' that a grant had been recommended at all.[766] The award was upheld but then had to be recalculated (and reduced to 782½ acres) when the 1842 ordinance was disallowed. Mair again protested, filed two new claims, and asked that the award be put before the Governor for reconsideration. FitzRoy agreed to 'examine the subject more fully and write to him again'.[767]

It was duly placed before Commissioner FitzGerald, who proved sympathetic, judging Mair (who was in debt to the Auckland merchants Brown and Campbell) to have

been 'much impaired by the delay in the settlement of his land claims, and . . . entitled to every consideration'.[768] FitzGerald also claimed that an additional payment of £150 made in 1842 'was upon promissory note and should also be considered'.[769] Stirling and Towers argue that this was incorrect; that Mair may have made such a promise but there was no evidence of a formal promissory note predating the January 1840 proclamation. The case was being judged on Mair's later correspondence, not on the evidence that had been heard by the first commission, and it was on that basis and FitzGerald's recommendation that the Governor approved a grant of 2,560 acres. Added to his existing Wahapū award of 394 acres in the Bay of Islands (OLC 306), this brought Mair's holdings to more than the statutory maximum, and there were still the two new claims to consider as well.

The issue of a grant for OLC 307 in October 1844 enabled Mair to transfer the land to his creditors, Campbell and Brown, prompting a strongly worded protest from Hōne Heke. As tensions mounted in the district, the chief urged Mair to be 'circumspect', warning him against raising the British flag there 'without due authority'. And he should stop his other offences as well: placing other settlers on the land and selling the cattle raised there without permission, desecrating a wāhi tapu, and failing to complete the payment that had been promised. Clearly, Heke did not consider hapū authority over the land at an end. They had a say in who was 'bestowed' upon it and in the stock that had been paid to Mair by the new purchaser:

> It was us who bestowed the land yet later on in these days you have invited some strange Europeans to go and occupy. This is not right . . . Now concerning a certain block of land which you did not complete payment of formerly, You have bestowed upon it a strange European. That also is improper. And the sacred place where you have been stripping bark off the tree is wrong. Eru Pohe will arrange for you to get the necessary trees on unconsecrated land. Do not you people misunderstand the position of my younger brother [i.e. taina] Eru, whom I have placed in authority to deal with all matters whether good or bad. Concerning the cows for the payment of your land. You have disposed of them to a strange European at Wairoa. You have also acted wrongly in this . . . Cease therefore to invite the European indiscriminately to come to that place. Only allow a few to settle there. Otherwise I shall be very angry – very wroth indeed – leave me a portion, a half of my kainga – do not appropriate the whole.[770]

Map of the land boundaries at Wahapū in the Bay of Islands claimed by Gilbert Mair, 1834. Also charted are Polack's claims and 'Aborigines land' (Māori land) as well as a sketch of Mair's 'dwelling' as it was in 1838. The tupuna whaea Hamu joined several others in signing the deed with Mair for Wahapū.

That plea went largely unheard, and the Northern War broke out soon afterwards. Ultimately, in 1853, Mair's OLC

307 claim was surveyed at 1,798 acres, with the question of what reserves should remain in Māori hands not fully resolved. In a later investigation of the boundaries of the grant, Wiremu Pohe said that three of the reserves were outside the surveyed area, but there was some confusion about the fourth (Kote Pareka), which Pohe could not identify. He lived at a place called Parekai within the deed boundaries, but stated before the commissioner that 'neither he nor any other of the native sellers [laid] claim to it as one of the reserves in question'.[771] The commissioner declined to approve Mair's grant until the location of Pareka was clarified, but Surveyor-General Ligar disagreed, ruling that it was up to Mair himself to determine whether the reserve was surveyed.[772] Ligar accordingly approved Mair's grant, still naming the four original reserves as excluded even though three were outside the boundary and the other was unlocated. The kāinga occupied by Wiremu Pohe was not considered at all. As Stirling and Towers commented:

> [T]he entire claim passed to Mair, with nothing left to Maori . . . the grant was not simply perfectible, it was perfected.
>
> In these ways, claimants and the Crown progressively eroded the few Maori exclusions that had been explicitly identified by the Commission. This left very few reserves or exclusions to be dealt with by Commissioner Bell when nearly all of the remaining unsurveyed claims were finally surveyed and granted, and the Crown's surplus identified. The unprotected unextinguished Maori interests – the general exceptions that Godfrey had advised be made, and which FitzRoy argued were catered for – vanished more quickly.[773]

Why some other settlers were likewise considered deserving of generous consideration was even less explicable. Stirling and Towers questioned, for example, why Powditch was awarded £1,500 in scrip for a claim (OLC 383–385) to 3,000 acres at Whangaroa. The first Land Claims Commission had disallowed the claim when Powditch failed to appear. There was, Stirling and Towers wrote, 'also clear evidence of extensive Maori opposition, which the first Commission was made aware of but which was not recorded . . . as the claim was never heard'.[774] In 1844, Powditch appealed to FitzRoy for a grant as compensation for his 'distress' at having been 'driven from Whangaroa'. FitzRoy concluded, without any apparent foundation, that Powditch could have 'without doubt' proved the validity of his claims.[775] From the Crown's point of view, the award of scrip would have to be recovered from Māori. Even though Powditch's Paripari claim had never been investigated, in the 1870s the Crown would take 2,253 acres to satisfy the scrip it had issued.[776] This was in addition to 907 acres awarded by the Bell commission to derivative claimants, Snowden and Shepherd, and surveyed within Powditch's claim between 1861 and 1862.[777] We return to Powditch's claim at section 6.7.2(6).

(3) *What was the impact of Governor Grey's policy on pre-treaty claims?*

Governor Grey is discussed at various points in this report, in the context of the Northern War, his more general role in how the Crown dealt with Māori aspirations for autonomy, his attack on the protectors, and his impact on land purchase policy. Here we discuss his observations on pre-treaty land transactions and more particularly, his response to FitzRoy's policies. He strongly condemned FitzRoy's decisions to extend settlers' land grants and to issue grants without defining the boundaries or excluding areas such as wāhi tapu. He was also highly critical of what he regarded as FitzRoy's special treatment of the missionaries, which he regarded as a factor in the outbreak of the Northern War (see chapter 5) and to waive the Crown's pre-emptive right (see section 6.6). Grey recognised that Māori who entered pre-treaty transactions had not intended to give up all rights in the lands concerned. In his view, they intended only to grant settlers lifetime interests in lands they would continue to use. He predicted more conflict as settlers grew in number and attempted to enforce their view of the transactions. Indeed, this was a repeated theme in his dispatches to the Colonial Office. Yet, even as he recognised that the Crown's handling of the claims of early settlers was creating injustice for Māori, he

was ultimately able to offer very little in the way of remedy or protection of their interests.

(a) Grey's understanding of the pre-treaty land transactions

The views expressed by Grey in his 1846 to 1848 dispatches, and the rebuttals by FitzRoy, Williams, Clarke, and other missionaries, are central to our assessment of the Crown's exercise of responsibility with regard to the old land claims in a period in which a fair solution might still have been realised. Grey's attacks on FitzRoy and on the missionaries may have been politically motivated, but his objections require serious consideration.

On 21 June 1846, shortly after his arrival in New Zealand, Grey began to throw doubt on the fundamental basis of the Crown's handling of pre-treaty transactions. He referred to the 'pretended purchases' of the missionaries and the 'large claims to lands, *said to have been purchased* from the natives' (emphasis in original). These, he argued, would 'yet give rise to native wars, if not to disputes between the Government and the natives'.[778] Grey then sent the Colonial Office a copy of Godfrey's 1844 letter, in which the former commissioner criticised FitzRoy's policies and raised concerns about Māori with unextinguished rights, including those who had been dissuaded from appearing before the commission by promises of future payment. Grey asserted that closer settlement of land would result in conflict, as Māori who had not been paid would 'invariably spring up and contest the purchase when Europeans go upon the land'.[779] He singled out Clarke for especial reproach, arguing that he had personally benefited from the expanded grants after advising FitzRoy to dismiss Godfrey's concerns.[780]

In his following dispatch of 24 June, Grey targeted Kemp's expanded award as an example of Māori dispossession. He argued that Māori rights should have been safeguarded before the grant was made. As it stood, no reserves had been set aside to protect any pā or cultivations they might be using, or any lands that might be needed for their descendants.[781] FitzRoy responded with the explanation we discussed earlier: that he knew that there were Māori still occupying lands that had been granted; that continued Māori occupation had generally been the subject of oral agreements at the time of the original transaction; and that his plan was for the grants to be 'perfected' over time as Māori numbers dwindled, and they came to accept the superiority of the European title system and institutions.

On 25 June, Grey sent the Secretary of State for War and the Colonies, William Gladstone, his infamous 'blood and treasure' dispatch, in which he argued that FitzRoy's extension of the grants and issue of pre-emption waiver certificates (which we discuss separately in section 6.6) were 'not based on substantial justice to the aborigines', nor to the settlers, and that it would require 'a large expenditure of British blood and money' to put the settlers in possession of the lands granted to them.[782] The 'old settlers' were incensed, pointing out that they had been living peacefully on their claims for many years, often alongside the Māori occupants.[783]

Grey decided to challenge the validity of the grants through the courts but then changed course, instead attempting to secure (in 1847) a voluntary surrender by the missionaries of the land in excess of their original 2,560-acre awards. He informed Bishop Selwyn, whose help he had enlisted, that the grants were to the best of his 'deliberately informed judgment, opposed to the rights of the natives', and that his intention was to return the excess lands to the 'original native owners or their heirs'.[784] The missionaries could select their 2,560-acre allotment from within the original claim as they wished, with the stipulation that they could not include 'any lands which the natives' could 'now justly claim or which they might require for their use', or that were needed for public purposes.[785] Some missionaries were willing to make this sacrifice, but Williams, Kemp, and others were infuriated by Grey's allegations and determined to defend their honour: in Phillipson's words, 'Not a jot of land would be returned to Maori until the Governor either proved or withdrew his accusations.' The attempt at voluntary settlement therefore failed and Grey returned to his original course, attempting in 1848 to overturn Clarke's grant in court.[786]

Queen v Clarke

In March and September 1836, George Clarke entered into a transaction with Waka Nene, Patuone, and others for an estimated 4,000 acres of land at Waimate (OLC 634). In May 1843, Commissioners Godfrey and Richmond, acting under the Land Claims Ordinance 1842, had recommended an award of 1,908 acres, 'excepting the part belonging to the Chief John Hake which was not sold to claimant'. When the 1842 ordinance was disallowed, the award for Clarke was recalculated and the award amended to 2,560 acres – the maximum set by the Land Claims Ordinance 1841 – and gazetted on 21 June 1843. FitzRoy subsequently referred Clarke's award to Commissioner FitzGerald who recommended that it be increased to 4,000 acres, and a grant was issued for that acreage on 16 May 1844. A second grant for 1,500 acres also issued on that date, as had been originally recommended by Godfrey and Richmond in April 1843.

In 1848, the Crown, under Governor Grey's instigation, challenged the legality of FitzRoy's extended grants to Clarke, 'mounting in the whole to 5,500 acres', arguing that they had been issued unlawfully, contrary to the provisions of the Land Claims Ordinance 1841, and 'ought to be declared void and annulled'.

The Supreme Court gave judgment in Clarke's favour in 1848.[1]

The court accepted the argument of the Attorney-General (Swainson) that Commissioner FitzGerald's recommendation that the grant be extended was 'illegally made' and his report 'vitiated', since the Land Claims Ordinance 1841 stated in clause 6 that 'no Grant of land' should be recommended in excess of 2,560 acres 'unless specially authorised thereto by the governor with the advice of the executive council'. In this case, the commissioner at the time of making the recommendation had not received any such authority.

However, the Supreme Court found that the illegal nature of Commissioner FitzGerald's report had no effect upon the grant to Clarke. This was because the 'chain of principles' governing the case was as follows:

- The New Zealand Charter 1840 placed in the hands of the Governor 'full power and authority', in the Queen's name and on her behalf, subject to 'any instructions which may from time to time be addressed to him . . . to make and execute . . . Grants of waste land . . .';
- such prerogative could only be 'taken away or restrained within the colony, by the express words of an Ordinance (or statute)';
- the Land Claims Ordinance not only contained 'no such express words, restraining the exercise of the prerogative, so vested in the Governor, but contained a clause expressly saving the prerogative'; and, therefore,
- 'Governor FitzRoy, even if he departed from the spirit of the Ordinance in making a Grant of more than 2,560 acres' still could do so legally.

The Privy Council overturned that decision in 1851 on the following reasoning:

- Commissioners Godfrey and Richmond had recommended in 1843 that only a portion of the land claimed – namely, 2,560 acres – should be granted.
- Commissioner FitzGerald had not been authorised by the Governor in Council to recommend a grant exceeding that amount.

FitzGerald's report had been admitted by the Supreme Court to be 'inconsistent with the Ordinance under which it was made', and therefore, 'as the grant professed to be in confirmation of that report, it would necessarily fall to the ground'. However, since the judges considered there was a provision in the New Zealand Government Act 1840, under which the

Charter of 1840 was granted, that the prerogative of the Crown would not be affected, the Governor had the authority to make such a grant.[2]

The Privy Council, in contrast, was clearly of opinion that, whatever the authority of the Governor might be, 'this is not a grant professing or intended to be made, as a matter of bounty or grace, from the Crown, but it is only intended as a confirmation of that report, which was made under the authority of the Ordinance. The grant is founded upon the report, and the report is founded upon the Ordinance. It is clearly contrary to the terms of the Ordinance, and, therefore, the grant must fall.'[3]

More recently in *Proprietors of Wakatu v Attorney General*, the Supreme Court has found that the Crown's prerogative conferred upon the Governor in connection with Crown grants was 'confined to grants made from the waste lands "belonging" to the Crown and was subject to regulation, including as to price, contained in the Royal Instructions. There seems no scope for an expansive view of a power to make grants under the prerogative, such as that taken in the Supreme Court in *The Queen v Clarke*.'[4]

Despite the Privy Council decision in 1851, Clarke (and family members) would ultimately receive grants totalling 7,010 acres as a result of the process undertaken by the second Land Claims Commission. This was because Commissioner Bell considered that the Quieting Titles Ordinance 1849 had 'given validity to all grants, and it was sufficient that [he] should deal with these [Clarke's grants] according to the provisions of the Land Claims Settlement Act [1856] notwithstanding the fact that in reality the grants had by the Judgment of the Privy Council been already absolutely made null and void'.[5]

By this stage, Grey had come to the view that Māori had intended to grant only lifetime interests to the missionaries and their children. A few months before the court hearing, he wrote to new Secretary of State for War and the Colonies, Earl Grey, informing him that Clarke's deed of sale (which he enclosed) suggested that:

> the natives frequently only sold the land to the missionary and his children for ever, and that it is by no means clear that they understood that they gave an absolute title to the land such a Crown title conveys, and that as these lands were, in many instances, not sold until it was known that emigration to New Zealand was about to commence, it was to be anticipated that so soon as the natives had expended the trifling and comparatively useless property they had acquired, they would repent the bargains they had made . . .[787]

The Governor also informed Earl Grey that the land grants were 'opposed to the rights of the natives' who, he believed, might yet be 'in some cases . . . the rightful owners of the land'. Tāmati Waka Nene had raised this issue with the Governor, informing him that Māori wanted to occupy lands in the Bay of Islands that had been 'included within the boundaries of one of the Church Missionary land claimants'.[788] Grey had referred the matter to the Surveyor-General, who had reported back that the 'whole of the grants had been drawn in such a form that none of the officers of the Government knew what lands had been conveyed by the Crown'.[789]

The Supreme Court heard *Queen v Clarke* in January 1848, and delivered its decision in June, ruling that a Crown grant was the best title that a subject could possess and that it could not be set aside except by specific legislation. In the Court's opinion, since FitzRoy had made the grant using his powers of Royal prerogative, he had not been obliged to adhere to the recommendations of the first Land Claims Commission.[790] Grey immediately indicated his intention to appeal the decision to the Privy Council. According to Clarke's lawyer, Grey believed that the Supreme Court had 'overlooked the most essential points

in the case!!!' and that his client had 'only purchased a life interest from the Natives and not the fee simple'.[791] Williams, on hearing of this, wrote to Earl Grey, outraged that the Governor was now raising a 'new objection'. The original deeds had been 'thoroughly examined' by the commissioners, who had found no fault, Williams said. What was more, the deeds were in the Māori language and clearly stated that the signatories had 'let go' and sold the land to the missionaries and their children 'for ever, for ever, for ever', to dwell upon, to work, to sell, or to do with what they will.[792]

Grey did not think, however, that Māori were reading these words in the way represented by the missionaries; in his view, the missionaries were being adopted into the hapū and holding lands on that basis. In a letter to Earl Grey on 17 October 1848, Grey explained why he thought that FitzRoy's expanded grants had to be set aside. Put simply, he said, the transactions on which the grants rested had not been absolute alienations based on English property law, but conditional arrangements based on custom. Grey informed Earl Grey that he considered it

> probably a duty upon behalf of the Crown, towards the Aboriginal population of this Country, to do its utmost to support their rights in this case, which will establish a precedent for the disposal of a very large amount of property which, in as far as my own power of understanding the subject goes, the Crown ought to take from one class of its subjects to give to another.[793]

This was an important acknowledgement.

Governor Grey then set out the reasons for this conclusion:

> That previously to New Zealand being declared a British Colony, many persons had made purchases or pretended purchases of lands from the Natives, which were conveyed by Deeds of various forms, the deeds frequently conveying the lands named only to the original purchasers, his children and their relatives.
>
> The Titles so obtained were in all cases wholly distinct from a Crown Title in a British Country; the lands purchased were, I believe, in no instance surveyed, the seller produced no Title deeds, and in no way proved that he was the real owner of the property.
>
> No person protected the rights of minors or absentees. The purchaser had no guarantee that he would be supported in possession of the property, and in the vast majority of the cases, the purchases or pretended purchases so made were mere speculative bargains, and even in the best cases for the purchaser, the title could not I think be regarded as more than simply an adoption into the tribe, and a right of holding the land upon the same terms as the Natives themselves hold lands. Clearly a barbarous people in their condition, could have no notion of a tenure of land, other than that recognized in the Country.
>
> The contracting parties to these bargains were also but imperfectly acquainted with their respective languages, and the Natives possessed that reckless desire of immediately acquiring European Goods, with that perfect disregard for the future which is common to all barbarous minds.[794]

Grey then turned to the matter of the Crown's responsibilities, arguing that it had 'stepped in between two classes of its subjects to interfere arbitrarily for the settlement of certain questions'. The law establishing the commission had set out

> various requirements . . . which were to be fulfilled before a grant could be issued . . . intended in a great degree to prevent the Crown from unjustly, or without due consideration, taking the Natives' property from them, and giving it to an European.

Yet, in his view, those safeguards had been overturned when FitzRoy had expanded the grants. A finding by the commission that a purchase was bona fide only meant that the transaction had not been fraudulent, and in no instance had it recommended a grant for more than 2,560 acres.[795] (Grey was wrong in that assertion, but recommendations by the first commission exceeding the statutory limit were rare.)

Grey referred again to Godfrey's 1844 letter in which the commissioner had acknowledged that his recommendations reflected the existence of unextinguished interests; and that he

> frequently regulated the amount of the grants he had recommended, by the quantity of land, which making fair allowance for the claims of opposing native rights, it had appeared probable to him that the Native Sellers were free to dispose of.

He had warned the Government that:

> [its] proposed course could not be pursued without great injustice to the Natives; as the tracts of land claimed were also extremely extensive, had never been surveyed, [and] were only defined by imaginary boundaries.

In nearly all instances, these were 'wholly unknown to the Commissioners'. Grey drew the obvious conclusion: it was 'clearly impossible therefore that they could ascertain whether or not a valid purchase had been made of such tracts'. Nor did they 'pretend to have done so'.[796] We agree with Phillipson that this was a 'damning indictment of the Crown's handling of the pre-Treaty transactions, and a recognition that something must be done to avert injustice to Maori'.[797]

Another dispatch followed, in November 1848, prompted by a threat of conflict in the Bay of Islands arising from the opposition of Hōne Heke and William Hau to a proposed expansion of settlement to the northern side of the bay, and from incidents of wāhi tapu being violated. Grey concluded that the Crown had not acquired the kind of interest in the land that would allow it to grant it, and was critical of the inclusion of cultivations, kāinga, and wāhi tapu in lands granted to settlers (in this case, Busby) as contrary to Crown policy. Grey considered the situation unjust to Māori, but he had no immediate solution and ended up doing nothing other than use it as ammunition in his attack on FitzRoy.

Grey told the Colonial Office that these incidents lent weight to fears of conflict emerging as settlement progressed. He reiterated Godfrey's views, arguing again that Māori had not intended to alienate their wāhi tapu and pā, and that the commissioners had known this. Had surveys been carried out at the time, the wish of Māori to retain such areas would have been made apparent. An appeal against the Supreme Court's ruling was therefore urgent as 'an Act of Justice to the Native Race'.[798] He suggested that, had the missionaries voluntarily surrendered their grants, he could have 'arranged with the natives for the occupation of the rest of their lands by Europeans', albeit this would have required a purchase by the Crown. In his view, the Crown had made absolute grants of land which 'in no respect belonged' to it, and nor did the Crown have any claim to any 'surplus' from these transactions.[799]

In July 1849, Grey brought another case to the Supreme Court. The process of grant he challenged this time appeared to be even more defective than that pursued in the case of Clarke. James Beattie's claim for Kawau Island had been disallowed by the first commission because the arrangement had taken place after the 1840 proclamation, but FitzRoy overturned that decision in 1844, initially making a grant for 2,560 acres and then increasing the area to encompass the whole island (4,630 acres), awarding it to John Taylor, who had bought Beattie's interests.[800] The Supreme Court refused to overturn a Crown grant issued by the Governor, even though (Grey objected) 'it conveyed nearly double the quantity of land . . . it had been ascertained the grantee was entitled to' and 'greatly exceeded the quantity . . . prescribed by the Ordinance'.[801] Protesting that the Court's decision left the majority of grants in an uncertain state, and urging the importance of a 'speedy general and conclusive settlement of the whole question', Grey decided to legislate rather than appeal the finding.[802] He did so despite the seemingly 'insuperable difficulties to be overcome', the first of which he had characterised in his October dispatch to Earl Grey as 'taking land from one class of the Queen's subjects to give to another'. That was from Māori to settlers, but there were third-party interests to consider as well – settlers who had purchased original grants or portions of them.[803] The result of this attempt to locate and define the grants that had been issued, while

taking account of competing rights, was the Ordinance for Quieting Titles to Land in the Province of New Ulster (Crown Titles Ordinance) 1849.

(b) What was the effect of the Crown Quieting Titles Ordinance 1849 and did it assist Māori?

Grey's ordinance declared all grants approved on behalf of the Crown in the North Island to be valid, thereby putting an end to doubts about the legality (under English law) of FitzRoy's expanded and unsurveyed grants (and indeed, to any lingering doubts about other grants issued under the ordinance and as a result of FitzRoy's waiver exemption proclamations).[804]

Introducing his measure to the Legislative Council in August 1849, Grey stated that many grants had been issued that had not been made 'in conformity with the laws and regulations' in force at the time; and the 'greater number' of such instances involved grants issued under the Land Claims Ordinance. Grey had failed in his effort to bring finality to purchases under FitzRoy's waiver exemption policy (see section 6.6), and these needed 'quieting' too. They came under his proposed legislation, but he said nothing of these claims.

Grey told the Council that the 'great majority' of grants were 'irregular in a variety of ways', and the resulting 'uncertainty' of title was a serious detriment to the interests of New Ulster. Among those irregularities was the issue of grants in which native title had not been fully extinguished and likely to result in 'mischief' to settlers or 'injustice' to Māori.[805]

The recent decisions of the Supreme Court in *Queen v Clarke* (June 1848) and *Queen v Taylor* (July 1849) had upheld the legality of FitzRoy's two grants; yet, in Grey's opinion, there remained many points unresolved which made such grants practically valueless if not 'void from uncertainty'. Given the difficulty of the local government declaring such grants illegal in the absence of judicial opinion in support, and the delay entailed in obtaining an Act of the British Parliament or pursuing a challenge through the Privy Council, Grey had decided instead to declare all grants made by Her Majesty's representative under the public Seal of the Colony as valid. He told the Legislative Council that he proposed this course of action in the interests of a 'speedy, general, and conclusive removal of . . . doubts', but that he did so without expressing his opinion upon the Court's decisions in case it proved necessary to appeal them at a future date.[806]

Governor Grey acknowledged to Earl Grey that his measure did not, and could not, do justice to Māori.[807] Rather, his intention was to 'affirm the validity of the Crown grants which had been issued to Europeans while 'inflict[ing] the least possible amount of injustice on the native'.[808] A basic legal protection was offered. Māori could challenge the commission's decisions and FitzRoy's subsequent extensions in the Supreme Court on the basis that their customary title had not been extinguished. In such cases, a judge could order the payment of compensation or, if Māori refused to leave their lands, the Crown could offer the settler land of equivalent value elsewhere. But Grey admitted that Māori could have little confidence in the courts on such a sensitive subject as customary title.[809] The ordinance also offered limited advance on the question of reserves; these could be set aside within settler claims, but only if the reserves were already mentioned in the deed and subsequent grant. In those cases, a commissioner would be appointed to inquire into the matter and ensure that such reserves were properly defined. There was still no requirement for settlers to undertake surveys; in effect, they could enjoy all the benefits of a freehold property while Māori-occupied sites remained undefined and vulnerable.[810]

Phillipson's opinion was that '[o]n paper' the ordinance appeared to offer some prospect of Māori and settlers arriving at settlements that protected customary rights, but only if Māori could raise the funds to go to court and then were fortunate enough to have their case heard by a judge with the requisite 'ability, knowledge, and cultural empathy'. Ultimately, in Phillipson's view, the ordinance 'achieved nothing', at least for Māori.[811] Stirling and Towers agreed that the Quieting Titles Ordinance 'appeared to be a reasonable solution' but also concluded that it had little impact in terms of Māori interests.[812]

The Crown is incorrect in its statement that the ordinance restricted the 'land conveyed in FitzRoy's unsurveyed grants . . . to 1/6 of the land described in the grant'.[813] Rather, the ordinance specified that the quantity of land to be conveyed by grant (when surveyed) was not to 'exceed *by more* than one-sixth part thereof the quantity of land' (emphasis added) to which the grantee was entitled.[814] This was an incentive for settlers to survey the grants, not an effort to limit the impact on Māori.[815] Ultimately, the full awards recommended by the first commission and the expansions of FitzRoy were endorsed and increased (as an incentive to survey), and the Crown got to keep any surplus, which in Clarke's case, amounted to 1,914 acres.[816]

According to Stirling and Towers, only 20 claimants throughout the whole of New Ulster had utilised the Quieting Titles Ordinance by the time the Land Settlement Act 1856 was passed, bringing in a new process for confirming the grants.[817] Berghan's block narratives identified three occasions on which the ordinance was employed by Pākehā claimants to clarify the boundaries of their grants:

- OLC 453: by Sparke at Mahurangi, concerning the 3,334 acres awarded to him as a result of FitzRoy's intervention;[818]
- OLC 526: by Williams at Pākaraka, in which his grant was 'corrected', discussed at sections 6.7 and 6.8; and
- OLC 728: by Carruth at Whāngārei, resulting in an adjustment from 950 acres awarded to 938 acres on survey in 1851.[819]

Only one instance has been identified of the Commissioner for Quieting Titles performing his duties with respect to the definition of reserves (in the case of Mair's grant at Whāngārei, OLC 307, discussed at section 6.7.2(3)); and here the commissioner failed to locate and survey the reserves mentioned in the deed, with the result that Mair got his grant without any being defined.[820]

No example has been found of Māori themselves bringing a case under the ordinance, which can have hardly surprised Grey who had suggested that Māori were 'too poor to contest their rights in a Court of Law'; had 'no knowledge that they possess[ed] such rights, against the Crown, nor of the steps by which they would enforce them'; and likely had no confidence in an institution that lacked the expertise on such a subject.[821] Māori contemplated using the ordinance to contest a grant to Abercrombie, Nagle, and Webster for Aotea (Great Barrier Island, OLC 36), but despite Grey's support, their efforts to gain compensation via that means came to nothing. On the contrary, the main beneficiary of the old land claims process in respect of Aotea was the Crown itself, as we outline later.

Webster, Nagle, and Abercrombie had claimed the whole of Aotea through a deed signed in March 1838 by 17 Hauraki rangatira and two from Ngātiwai. The first Land Claims Commission found that most of these rangatira had rights only on the northern part of the island (from a line north of 'Akatarere', Hirakimata (Mount Hobson), and the Whangapoua Stream). The only rangatira with rights south of this had received insufficient payment and did not accept the transaction. The deed also reserved 'Pukeroa' and all Māori settlements and cultivations. Godfrey recommended that no grant be issued, on grounds that the payment was incomplete, Māori were opposed, and Webster had already been granted his 2,560 acres elsewhere.[822] FitzRoy reversed this decision, as in his view it was 'a case of extreme hardship', and 'great benefit would accrue to the colony' if the settlers were able to take up their claim, particularly if they were able to achieve their goal of operating a copper mine on the island. He therefore resolved to treat this as 'a special case'.[823]

Having referred the claim to the Executive Council and Commissioner FitzGerald, FitzRoy awarded each of the claimants unsurveyed grants exceeding 8,000 acres, for a total award of 24,269 acres, about one-third of the island's land area, including the copper and the island's best kauri resources.[824] This seems to have been decided over FitzGerald's objection that there was insufficient information for him to recommend a grant, and that, based on the payments they had made, the three men were entitled to a total of just 8,611 acres.[825] The grants did not make any exclusions for settlements and cultivations.[826] The land was subsequently mortgaged, and when the mortgagee attempted a survey in 1850, the Māori occupants – led by Tara and Tāmati Waka Rewa – objected. The mortgagees protested that they had advanced large sums on

An Ordinance for Quieting Titles to Land in the Province of New Ulster, 1849

Preamble

Whereas since the Proclamation of Her Majesty's sovereignty in and over the Islands of New Zealand various Laws Ordinances Royal Letters Patent and Instructions have from time to time been in force relating to the disposal by the Crown of lands within the Colony, prescribing the terms and conditions on which such lands should be alienated and disposed of, and limiting and appointing the power and authority of the Governor for the time being to make grants of the same in the name and on behalf of the Crown: And whereas during such period . . . numerous grants of land within the Province of New Ulster have been made, in the name and on behalf of Her Majesty . . . And whereas in many cases doubts are entertained whether such Governor or other officer was duly authorised and empowered to make such grants . . . on behalf of the Crown, and whether such grants were otherwise made in conformity with the regulations . . . And whereas numerous grants of land claimed under the provisions of the Land Claims Ordinance . . . have also been made, wherein the land of which the grantee is recited to be entitled to a grant forms a part only of the whole quantity claimed to have been purchased by him from the aboriginal native owners . . . And whereas certain cases have already been submitted to the judgement of the Supreme Court, and it is essential to the prosperity of the colony that such doubts should in all cases be removed with the least possible delay: Now, therefore, for the more speedy removal of such doubts, and for the effectual quieting of Crown titles:

Be it Enacted and Declared . . .

1. Every grant of land within the Province of New Ulster sealed . . . on the behalf of the Crown . . . shall be deemed and taken to be a good, valid, and effectual conveyance of the land purported to be conveyed by such grant . . . Provided always that in case the land comprised in any such grant shall not be set forth and described by definite metes and bounds, the quantity of land deemed to be conveyed by such grant shall not exceed by more than one-sixth part thereof the quantity of land to which the grantee shall be therein recited to be entitled.

2. Provided . . . that if it shall be proved to the satisfaction of a Judge of the Supreme Court that the native title to the land . . . hath not been fully extinguished, it shall be lawful for any such Judge to award to the native claimant or claimants proving title to the same, such sum or sums of money in satisfaction of the claim . . . as shall appear to such Judge to stand with equity and good conscience . . . provided that proceedings before such Judge shall be commenced on or before the 1st day of January, 1853.

. . . . .

4. Every sum of money so paid shall be chargeable and charged upon the land in respect of which the same shall have been awarded . . .

5. . . . every such grant . . . shall . . . confer upon the said grantee, his heirs and assigns, the right of selecting out of the whole of the land included within the boundaries named in the grant the quantity of land to which he may be so recited to be entitled

. . . . .

9. . . . in case the person or persons entitled to such right of selection shall meet with any serious obstruction . . . from any native claimant, it shall be lawful for the Governor, or other the officer . . . on being satisfied that it would be expedient so to do, to grant to the persons entitled to such right of selection other land within the province of equal value . . .

. . . . .

12. And whereas in certain of the said Crown grants an exception is made from the land comprised therein of 'sacred places,' or land claimed by a certain native or natives therein mentioned, but the particular piece or parcel of land so excepted is not particularly set forth and described: Be it enacted that it shall be lawful for the Governor . . . to ascertain, by means of an inquiry to be made in that behalf by a Commissioner to be appointed for that purpose, the particular piece or parcel of land so excepted . . . and at the request of the grantee named in any such grant . . . to cause a description of such piece . . . to be endorsed upon such grant. And every such description shall be deemed and taken to define the land so excepted from such grant as aforesaid.[1]

the security of Crown grants, 'a part of which land it now appear[ed] . . . to be disputed; in fact, . . . it never had been alienated'.[827] Tāmati Waka Rewa (of Hauraki) in turn complained that the payment was incomplete.[828] Grey enclosed this correspondence plus (again) Godfrey's 1844 criticism of FitzRoy's policy with his dispatch to the Colonial Office, drawing Earl Grey's attention to the case 'as one which fairly illustrates the difficulties experienced in the adjustment of these claims'. He informed the Secretary of State that the only course available was to refer the claimants to the Supreme Court under the Quieting Titles Ordinance.[829]

Tāmati Waka Rewa was advised to come to Auckland to discuss the matter with Crown officials, but without result. A year after the matter was first raised, the Acting Native Secretary, Major Nugent, was instructed to send Rewa to the Native Counsel (Donnelly), who had been appointed to assist Māori in the Supreme Court. Donnelly was informed that Rewa was 'naturally anxious' that 'his present visit should not be nugatory' and was directed to 'instruct him in the proper method of preferring his claim'.[830] Apparently, nothing concrete happened, because Rewa was to visit a third time. Acting Attorney-General, Thomas Outhwaite, now recommended that the chiefs negotiate directly with the mortgagees for compensation in order to avoid the cost of litigation, Nugent noting that he had not himself suggested such a course 'as by doing so, I might be suggesting a breach of the Native Land Purchase Ordinance'.[831] Rewa's third visit, at the Governor's invitation, was equally unproductive. Nugent recorded that 'nothing has yet been done towards the settlement of his claim'. He instructed Donnelly to 'forthwith take steps in accordance with His Excellency's command to have the matter brought before the Chief Justice in the way pointed out by the Quieting Titles to land, in New Ulster'.[832]

It is not clear whether any further steps were taken, but it is apparent the grievances of Tāmati Waka Rewa, Tara, and their hapū were not addressed. As we describe in chapter 8, by the 1850s practically the entire island would be alienated from Māori ownership through a combination of validated pre-emption waiver transactions and Crown purchasing. The 1849 ordinance was not fit for purpose. Māori were entitled to compensation at best, not the return of land, except in extreme cases. Nor had the reserves recommended by the commissioner been noted in the grants that were ultimately issued, so the special

commissioner had no role. In the end, Māori had been advised by the Crown's own officer to avoid the Court and ultimately, Grey seems to have dropped the matter.[833]

Phillipson, and Stirling and Towers (in our inquiry), and Armstrong (in the Muriwhenua inquiry) all agreed that Grey's attempted solution had achieved nothing, despite the Governor's acknowledgement of the significant flaws in the old land claims process. They concluded that the ordinance failed because it was permissive rather than compulsory. There was no penalty for failing to survey by a given date and no real incentive for grantees to do so. The inducement in the ordinance – land equivalent to one-sixth of the grant – was not sufficiently attractive since using it would also carry risks. Potentially, grantees would be exposed to inquiry as to whether Māori title had been fully extinguished, and they would lose the surplus land to the Crown in any case.[834]

Therefore, almost no one came forward to quieten their titles, preferring to keep their old grants which had now been declared valid, and exercise, instead, what Stirling and Towers referred to as a kind of 'roving right' over the larger undefined area. Other Europeans were prevented from taking timber and resources in the meantime, and entrepreneurs such as William White in the Hokianga, and Mair's successors – Brown and Campbell – at Manaia, used their undefined grants to profitable effect.[835]

The ineffectiveness of Grey's solution stands in stark contrast to his many statements on the failure of the Crown to protect Māori rights. It protected settler rights and was designed to bring order to colonial land titles – an object of importance to the Crown – rather than providing Māori with a path to protection of their ownership.

In 1851, Earl Grey referred the decision of *Queen v Clarke* to the Privy Council, where the case was determined on narrow legal points rather than the more fundamental issues about the transactions and whether Māori had intended an absolute alienation, as Grey had proposed. Nor did the law lords directly address the question of the Royal prerogative and its limits.[836] Nevertheless, they overturned the earlier decision, agreeing with Grey that Clarke's grant was invalid. They found that the grant had not been made as a 'matter of bounty or grace, from the Crown', but rather was intended only to confirm the commission's report and recommendation under the Land Claims Ordinance. FitzRoy's extended grant was 'clearly contrary' to the terms of the ordinance and therefore, 'the grant must fall'.[837] By this stage, Grey had enacted the Quieting Titles Ordinance, pre-empting the Privy Council's decision.

Though Clarke's grant had been deemed inoperative, his claim still remained and would proceed through the Bell commission. Stirling and Towers argued:

> Once he [Clarke] surrendered his overturned grant (just as other claimants surrendered grants deemed to not hold good) and surveyed his claim, he received even more land than before. Hundreds of other claimants were treated with similar generosity. Maori received next to nothing.[838]

We return to these allegations later in the chapter.

6.5.3 Conclusions and treaty findings: the old land claim policies of FitzRoy and Grey

The Crown accepted that the decision of Governor FitzRoy 'to proceed with unsurveyed grants [of land] was wrong and caused prejudice to Māori'.[839] We consider this an important concession. However, Crown counsel also argued that any prejudice that arose only occurred in the late 1850s and 1860s because Māori continued to occupy their lands in the interim. We reject that view, because we consider the prejudice was more far-reaching than the loss of land; Māori also lost the opportunity to ensure that their view of these transactions and the obligations they entailed was embedded in law.

Although Māori might continue to utilise the lands they had thought to share, as far as introduced law was concerned, they now did so on sufferance of the Pākehā owner unless a reserve was specifically mentioned in the deed and the recommended award and ensuing Crown grant. As we have seen, this was rarely the case, because

often such arrangements had been orally agreed and not recorded in the commissioners' recommendations. While the commissioners were aware of ongoing Māori occupation, they relied on the Governor to ensure that every Crown grant contained a general exception for pā, kāinga, and cultivations. That general protection did not materialise, and in terms of colonial law, Māori had been dispossessed of those areas, along with the rest of the lands they had allocated to settlers.

FitzRoy's decision to increase and issue grants before they were surveyed therefore compounded the damage to Māori rights already caused by the commissioners' practice of validating transactions they knew to be incomplete. His policy established a basis for settlers to proceed to complete their purchases over the years that followed. It was soon clear to them that the Crown would not intervene to protect remaining Māori interests, and that they could 'by degrees' remove any such impediments to the full enjoyment of their freehold title. Even when exceptions had been stated within the grant, they were now vulnerable to private arrangement – such as in 1844, when Polack was able to 'complete the purchase' of the tapu land in his Kororāreka claim (OLC 638) on payment of a 'present' to the chiefs who had undertaken the original transaction.[840] FitzRoy saw no problem with this way of proceeding, despite the clear instructions of Normanby and his successors that all areas of occupation, cultivation, and wāhi tapu should be preserved in Māori possession. Accordingly, FitzRoy informed the Colonial Secretary that he had no objection to a settler's 'purchasing of the "tapu"',[841] and the Surveyor-General confirmed that lands acquired in such a manner could transfer to the settler concerned so long as Māori agreed.[842]

In all, FitzRoy's policies aimed at addressing delay and confusion in the granting of titles only produced more of both. More importantly for our purposes, his policies failed to protect Māori and instead denied them their rights. FitzRoy knew and acknowledged that Māori had not intended their rights to be extinguished, yet he proceeded on the basis that they would inevitably accept this to be the case, and that in the meantime their rights deserved no more than the informal recognition that settlers might be prepared to give. We agree with Phillipson's assessment that FitzRoy's policy was 'remarkably cynical'. Despite urgings by others that Māori should be protected in possession of their lands, and although protection was a cornerstone of the treaty and British policy, the Governor 'did the opposite'.[843]

FitzRoy went ahead with his expanded and unsurveyed grants (and at least one that was unlawful) despite commissioners' warnings that Māori had not alienated their kāinga and other valued sites, despite warnings that Māori would be 'displaced' unless the Crown provided some protection, and despite information that in some cases the settlers had not even completed a valid transaction. Even though the grants FitzRoy made came under legal challenge and were not surveyed for many years, his policy ultimately separated hapū from lands they had intended to share with settlers, not sell entirely. When FitzRoy's grants were later endorsed by the Bell commission, Māori found their informal arrangements abrogated, and lands not explicitly reserved to them were transferred out of their hands. The long delay between FitzRoy awarding the grants and the Crown or settlers surveying the land was not to their advantage. Instead, as we will see in a later discussion, a new generation found themselves having to defend any hapū rights that remained, within a legal framework that had been unknown to their parents and grandparents when the original transaction had taken place. Exacerbating the prejudice, Crown officials invariably discounted their efforts on the grounds that they had been mere children at that time and could not now repudiate a sale undertaken by their forefathers.

Furthermore, FitzRoy had exceeded his powers, although this thorny constitutional issue took many years for the courts to decide. The conferral on the Governor of Crown prerogative powers was limited by the Charter of 1840 and the Royal Instructions; and the Charter explicitly withheld the power to affect Māori rights of occupation and succession to land. The Privy Council overturned the Supreme Court decision in *The Queen v Clarke*, finding that the prerogative 'could not be resorted to in cases where the grant in issue was based on the report of a Commissioner made under the Land Claims

Ordinance'.[844] There was some ambiguity in the Privy Council decision which did not explicitly address the larger issue of whether the Crown could expand grants as an 'act of grace', but in the words of the Supreme Court in the more recent *Wakatu* decision, there was 'no scope for an expansive view of a power to make grants under the prerogative'.[845]

At a crucial time for the development of the treaty relationship, the courts (colonial and imperial) remained preoccupied with Grey's sustained efforts to discredit the policies of Governor FitzRoy and the purchases of the missionaries, while Māori interests in the midst of all this were entirely overlooked. Grey's Quieting Titles Ordinance was a 'dead letter'. Despite his repeated identification of the significant injustice to Māori that had been caused by the Crown's handling of pre-1840 land transactions, and the need for a 'speedy general and conclusive settlement' of the issue, he took no steps to strengthen the Quieting Titles Ordinance when it was shown to be of very limited assistance to Māori or to introduce another more effective measure before his departure in 1853.[846]

Both FitzRoy and Grey knew that Māori interests remained unextinguished in lands over which grants had been issued; both realised that the failure to define the boundaries of those grants and any reserves they might contain left the whole matter in an uncertain state. But neither Governor had a solution that did not entail the sacrifice of Māori rights so as not to interfere with private settler interests. Grey was well aware that Māori did not fully appreciate what their transactions would mean in the long run and did not have any real means of achieving redress except by force; he frequently expressed criticism of the extension of awards and made repeated reference to Commissioner Godfrey's objections to that policy; and he denounced the failure to protect Māori in their kāinga, cultivations, and wāhi tapu – and yet nothing substantive happened during his watch. The wāhi tapu about which he had seemed so concerned were not protected; there would be no more reserves defined on survey beyond those specifically recorded in the original deed; extended grants were not finalised but neither were they effectively overturned. In the end, missionaries and several prominent settlers would retain the full extent of the properties that had been allowed by FitzRoy's extensions. Phillipson summarised, in our view correctly, that: 'An important opportunity for justice had been missed, and Nga Puhi suffered the consequences.'[847]

Accordingly, we find that:

- the Crown through Governor FitzRoy's actions in expanding grants beyond commissioners' initial recommendations, issuing grants where the commissioners had recommended none, and issuing unsurveyed grants for the benefit of settlers breached te mātāpono o te tino rangatiratanga and te mātāpono o mana taurite me te mātāpono o te matapopore moroki/the principles of equity and of active protection.
- Despite acknowledging the injustice to Māori on the one hand and the Crown's duty to support their rights on the other, Governor Grey failed to do anything effective to ensure that those rights were protected. The Crown Quieting Titles Ordinance 1849 aimed to remove uncertainty about settlers' title in Crown granted lands, but provided inadequate protections for enduring Māori customary interests. By enacting the ordinance, the Crown was therefore in breach of te mātāpono o mana taurite me te mātāpono o te matapopore moroki/the principles of equity and of active protection.
- Grey offered little more to Māori in terms of ensuring occupied sites and wāhi tapu were reserved in grants to settlers despite his clear acknowledgement of the Crown's duty in this regard. That failure was in breach of te mātāpono o te matapopore moroki/the principle of active protection.

6.6 Was the Crown's Pre-Emption Waiver Policy in Breach of the Treaty?

6.6.1 Introduction

In chapter 4, we discussed the basis of the Crown's pre-emptive right – that is, to be the only purchaser of Māori land – and FitzRoy's decision to waive that right in 1844. In taking this step, FitzRoy issued two proclamations. In

his 26 March proclamation, the Governor stated that he would 'consent, on behalf of Her Majesty the Queen, to waive the right of pre-emption over certain limited portions of land in New Zealand'. A number of safeguards were put in place for Māori. A waiver would not be issued for pā, urupā, or as a general rule, 'any land required by Maori for their present use'. There was provision for 'tenths' to be set aside and held by the Crown 'for public purposes, especially the future benefit of the aborigines'. The Governor was required to consult with the Chief Protector of Aborigines before agreeing to waive pre-emption in any instance. Lands had to be surveyed. No grants were to be issued if regulations had not been observed.[848] If a grant was confirmed by the Crown, the settler concerned would be required to pay a fee of 10 shillings per acre as their contribution to the land fund and for general government purposes. The proclamation of 10 October 1844 reduced that fee to one penny per acre.

FitzRoy also tried, a few months later, to limit the total acreage to be purchased under a waiver. Prompted in part by the large areas being claimed in the vicinity of Auckland once the per-acre fee had been reduced, he issued a notice (6 December 1844) declaring that 'certain limited portions' meant a 'few hundred acres'.[849]

At first, 'purchases' under waiver certificates were dealt with under separate legislation and different procedures from those for pre-treaty transactions, although there were similarities between the two systems. After 1849 and the passing of the Quieting Titles Ordinance and subsequent legislation, the Crown's handling of purchases that had been made under FitzRoy's two proclamations was brought into line with its procedures for validation of pre-treaty transactions.

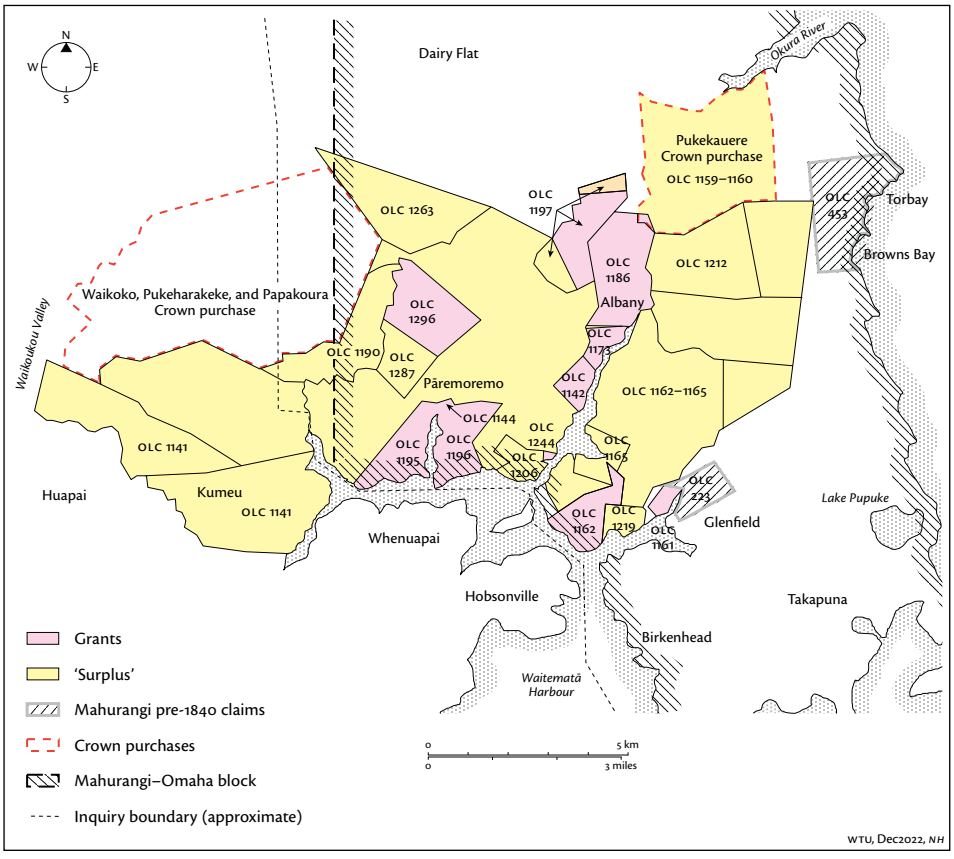
Claimants alleged that the Crown failed to fulfil the obligations that came with pre-emption. In the claimants' view, the potential benefits of FitzRoy's policy were negated by the failure to fully and consistently apply regulations intended to protect Māori – including reservation of pā, urupā, and cultivations; the setting aside of 'tenths' for public purposes, in particular to support Māori; and limitations on the area that could be purchased to a 'few hundred acres'.[850] Even though conditions intended to protect Māori had not been met, waiver transactions were nonetheless confirmed.[851] This resulted in a substantial loss of land and resources.

In total, claimants say 24,149.87 acres transferred out of the hands of Te Raki Māori under this policy.[852] Particularly affected were hapū with rights in Mahurangi and the gulf islands where the waiver proclamations gave settlers the 'opportunity to formalise their illicit arrangements to their advantage' and, in some cases, acquire land through a range of 'dubious tactics'.[853] Hapū who submitted that their interests and lands had been adversely affected by the implementation of one or both of the pre-emption waiver proclamations include Ngāti Rehua/Ngātiwai ki Aotea, Ngāti Manu, and Ngāti Rongo.[854]

The significance of the Supreme Court decision in *Proprietors of Wakatu v Attorney-General* and its application to old land claims and pre-emption waiver purchases was an important aspect of the generic closing submissions concerning these issues. Claimant counsel acknowledged the clear differences between the *Wakatu* case and the situation in the Te Raki inquiry district as to scale of land alienation and specific promises made, but submitted that the finding of the Court had application in two respects: that the Crown had a fiduciary duty deriving from its right of pre-emption and that this applied to the setting aside of reserves. Counsel argued that the failure of the Crown to identify and protect occupied lands subject to old land claims in Te Raki was 'a breach of the fiduciary duty that arose from the Crown monopoly on land.'[855] With reference to pre-emption waivers and the promise to set aside reserves, claimant counsel also argued:

> where lands were transacted under pre-emption waivers in this Inquiry district the Crown had a fiduciary duty to ensure that the tenths were set aside, and maintained for the future benefit of Māori as promised.[856]

In light of these arguments and the complexity of the Supreme Court decision we sought further submissions from parties on whether *Wakatu* has relevance to issues in our inquiry.[857] A number of the claimant submissions were received in support of the proposition that the decision

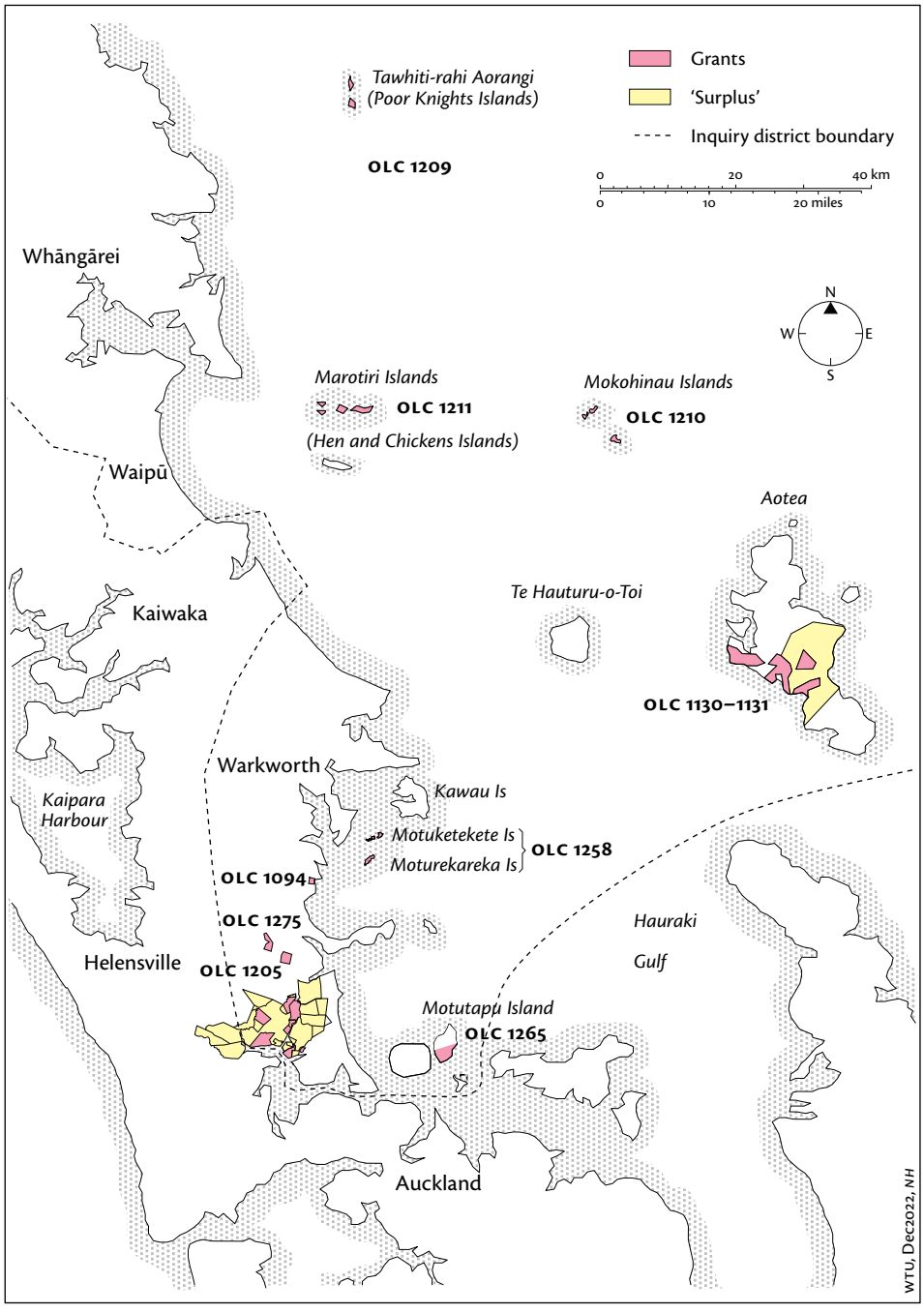


Map 6.5: Pre-emption waiver claims and 'surplus' land at Mahurangi.

did indeed have relevance to the historical circumstances of Te Raki.

Several claimant counsel argued that the Tribunal is itself the most appropriate forum to determine whether the *Wakatu* decision is applicable to the Te Raki claims and what, if any, relevance it may have on findings related to breaches of the Treaty. Lyall and Thornton submitted: 'The *Wakatu* decision is important to Tiriti jurisprudence because it identifies the scope of duty that was imposed on the Crown under the Treaty'.[858] This would include fiduciary duties where they are raised as in the instance of protection of Māori lands such as kāinga and wāhi tapu, in use at the time that purchases were being validated. A number of claimant groups made submissions that, while 'private law fiduciary duties are outside the jurisdiction of the Waitangi Tribunal', the decision in *Wakatu* is useful to determine where a duty may arise in the Treaty claim context and that the decision may assist the Tribunal in its inquiry into whether any alleged breaches can be made out.[859] Our conclusion that Te Raki Māori did not cede sovereignty is not seen as precluding a fiduciary duty as 'in *Wakatu*, cession of sovereignty is not the starting point nor is it a mandatory factor for establishing a fiduciary duty'.[860] Counsel emphasised that it is the assumption of responsibility and not cession of sovereignty that gives rise to fiduciary duties in common law.[861]

Other claimants argued that the treaty creates a fiduciary relationship (or something in the nature of a fiduciary



Map 6.6: Pre-emption waiver claims and 'surplus' land in inquiry district.

relationship) imposing orthodox fiduciary duties (single-minded duty of loyalty, to act in good faith, not to make a profit, avoidance of conflicts of interest, and not to act for own benefit). They cited the *Lands* case and other pre-*Wakatu* decisions to describe these elements as 'well-established.'[862] The general tenor of their submissions was to recognise the Crown's general fiduciary obligation to Māori. Counsel for Ngāti Rahiri ki Waitangi and Ngāpuhi Nui Tonu adopted an 'expansive' approach, arguing:

> a possible implication [of *Wakatu*] is that the fiduciary duty has a general application and could relate to the Crown's conduct with respect to Māori in all matters pursuant to the Treaty.[863]

Counsel for the Mangakāhia Claims Collective and Te Tai Tokerau District Māori Council submitted that trust or trust-like arrangements can be identified in Te Raki and that:

> The Crown breached enforceable obligations to reserve land in trust for the benefit of the Maori customary owners where the land had been taken under Old Land Claims and a surplus remained after investigation by the Old Land Claims Commission. It is to be noted that in Maori discussing the prospect of commissioners sitting pre 1840 land transactions 'all they agreed to was that there would be a proper investigation and that lands 'unjustly held' would be returned to them The Crown had no right to take that remainder land for itself.[864]

Counsel identified three elements of 'certainty necessary to the creation of a trust' in the context of old land claims in Te Raki. First, the Crown assumed responsibility under the Land Claims Ordinance to ensure any sale was just and equitable.[865] Leaving aside the question of whether the process of inquiry under the Ordinance in fact extinguished customary title creating Crown demesne, counsel submitted that the Crown 'effectively took assignment of the remainder land' ('surplus' lands from old land claims and pre-emption waiver purchases).[866] Secondly, the Crown was obliged to hold that land which it was not itself legally entitled to, in trust for the original Māori owners or at least offer it back to them.[867] It was also argued, on the basis of its right of pre-emption, that the breach arises because the consideration was not equitable and the Crown did not return the land but continued with its alienation.[868] Counsel argued that a resulting trust should arise in the case of old land claims following the intention of the parties.[869] They cited *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* to argue that an extinguishment of native title 'by less than fair conduct or on less than fair terms' was 'likely to be a breach of the fiduciary duty widely and increasingly recognised as falling on the colonising power'.[870]

The Crown has conceded that its policy of taking surplus land derived from pre-emption waiver transactions breached the treaty and its principles 'when it failed to ensure any assessment of whether affected Māori retained adequate lands for their needs'.[871] This failure was 'compounded by flaws in the way the Crown implemented the policy'.[872] However, the Crown did not accept that the *Wakatu* decision applies in the circumstances of the Te Raki inquiry district, or that the question of whether a trust similarly existed falls within the jurisdiction of the Tribunal. The issue before the Supreme Court in the *Wakatu* proceedings was

> whether the Crown is liable in private law today in respect of legally enforceable equitable duties to the successors of those who sold land to the New Zealand Company prior to the treaty.

By contast, the Tribunal's jurisdiction is concerned with whether the Crown breached the treaty and its principles in respect of its investigation of pre-Treaty transactions. Crown counsel submitted:

> The Tribunal can find the Crown to be in breach of Treaty principles in this inquiry irrespective of the outcome of the legal issues determined in the Supreme Court's *Wakatu* decision.[873]

In other words, the Crown argued in favour of a restrictive approach to matters that can be cognisable in the Tribunal.

Further, in the Crown's view, 'the case is to be distinguished on certain key facts', notably with regard to the promise of 'tenths' which in the Supreme Court decision was found to give rise to 'certain equitable obligations by virtue of the Crown's part in the legal process', resulting in a very extensive grant to the New Zealand Company. The old land claims in Te Raki were far more numerous, much smaller in scale and did not entail promises of 'tenths' making the two situations 'materially different'.[874] Counsel made no specific comment on the matter of pre-emption waivers and the promise of 'tenths' in that context.

In the following section, we focus on the impact of the Crown's waiver policy in our inquiry district, how the policy was applied, and what steps were taken to ensure that Māori rights were respected and actively protected. We also consider whether the Supreme Court's decision in *Proprietors of Wakatu v Attorney-General* has application to the issues in this inquiry arising from old land claims and pre-emption waiver purchases. We turn first to the question of why FitzRoy introduced and then modified the policy before examining how far settlers and Māori in Te Raki took up either of the options offered by FitzRoy.

6.6.2 The Tribunal's analysis

(1) *Why did FitzRoy decide to waive the Crown's right of pre-emption in March 1844?*

In chapter 4, we discussed the basis of the Crown's pre-emptive right – that is, to be the only purchaser of Māori land – and FitzRoy's decision to waive that right in 1844. By this point, most settlers in New Zealand resented the Crown's exercise of pre-emption or monopoly of purchase of Māori land. They lobbied against the first New Zealand Land Claims Ordinance and sought to win Māori support for a reversal of Crown policy by telling them that they were being denied their rights as British subjects to deal with their lands as they saw fit. The Hauraki Tribunal has pointed out that by 1844, there was also growing support for direct purchase in official circles. No 'surplus' lands had been yet identified and there were only limited successful Crown purchases for on-sale; nor were there sufficient funds to finance government and further land purchase for colonisation. In fiscal crisis and faced with mounting criticism from both Māori and Pākehā 'allowing direct purchase of Maori land by settlers seemed to offer a way out' (see chapter 4, section 4.3.2, for our discussion of the Colonial Office instructions to FitzRoy on Crown pre-emption and its waiver).[875]

On the day of his official arrival, FitzRoy was met by delegations of Māori and Pākehā. The assembled Ngāti Whātua and Waikato chiefs addressed the Governor, expressing their 'attachment to the British Government; a respect for British laws and British institutions'; but they complained, too, that they had thought pre-emption meant only that they were to offer the land first to the Queen. Instead the Government was denying them the rights of British subjects that they had been promised at Waitangi.[876] After offering Māori assurances regarding surplus lands (as the *Southern Cross* reported, promising 'most unequivocally and with the utmost sincerity' that they would be returned),[877] FitzRoy told the chiefs that he had been

> instructed to enquire into the working of the system of Pre-emption, which had been originated solely with a view to their benefit, and that, if upon enquiry it was found to be to their disadvantage, it should be discontinued.[878]

FitzRoy indicated further that 'that their protectors were no longer to purchase any lands from them on account of Government, they would act as their protectors solely'. It might be that the Government would cease purchasing land altogther but it would take time to effect 'so great a change'. In the meantime, it would be of 'immediate and mutual benefit to the Europeans and Natives' if they were permitted to enter into short-term leases of land.[879]

At a public meeting held on the same day, FitzRoy also received an address from 'The Inhabitants of Auckland' complaining about the effects of pre-emption; by denying Māori their right as British subjects to sell land to whomsoever they pleased, settler lives and property were being jeopardised. The colony would never prosper unless

Māori 'goodwill and friendship' were ensured and this would not be achieved while the Government continued its 'objectionable' practice of buying land from them at the lowest possible price and reselling it to Europeans at the highest.[880] In his response, FitzRoy again indicated his intention to waive the Crown's pre-emptive right:

> No one is more desirous than I am myself, that the natives of New Zealand should enjoy the full rights of British subjects as soon as they are sufficiently advanced in civilisation.
>
> The power of selling their land to whom they please, was withheld from them by the Crown for their own benefit. I am authorized to prepare for other arrangements more suitable to their improved, and daily improving condition.[881]

Soon afterwards, FitzRoy received two written addresses from Ngāti Whātua and Waikato rangatira again expressing their dissatisfaction with pre-emption, and their wish to be able to 'sell' small areas of land directly to settlers.[882] Several weeks later, in February 1844, Hokianga rangatira identified as Moses Mahe and William Barton (Wiremu Pātene) published a letter with similar statements. The letter was dated 5 February 1844, and referred to the treaty debates at Waitangi stating, 'it was not then intimated to us that the Queen should have the exclusive right to purchase our waste lands'. They claimed that they had understood 'that the Queen should have the first offer; but should we not come to terms, we should sell our waste lands to whomsoever would purchase them'. The rangatira complained that they were unable to pay their debts because of the collapse of the timber and land trade.[883]

On 22 March 1844 (after returning from Wellington where he had made a limited waiver in favour of the New Zealand Company), FitzRoy presented his more general proposal to the Executive Council where it was debated over the course of two days before being approved. On 26 March 1844, he issued his '10 shillings an acre' proclamation waiving Crown pre-emption where settlers wished to acquire 'limited portions of land' directly from Māori and provided certain conditions were met (discussed below). The same day, he called a 'Meeting of Native Chiefs' at Government House to explain the new rules. He told those gathered that the 'chief reason' for the earlier restrictions had been to 'prevent Europeans from buying great quantities [of land] at once' so that Māori had 'none left to cultivate for raising food'. The new rules would enable them 'to sell those parts of your lands which you wish to sell, without injuring yourselves now, or causing injury and injustice to your children hereafter'. FitzRoy continued,

> There is no longer any objection to your selling such portions to Europeans, provided that my permission is previously asked, in order that I may inquire into the nature of the case, and ascertain from the protectors whether you can really spare it, without injury to yourselves now, or being likely to cause difficulties hereafter.[884]

Te Matua approved the Governor's intentions as 'very good' but also cautioned: 'it will be necessary for you to have a watchful eye over your people as well as the chiefs over their people'.[885]

It was not until mid-April that FitzRoy informed the Secretary of State for War and the Colonies, Lord Stanley, of the steps he had already taken. He had been obliged to act without his 'express sanction,' he told Stanley, because the matter was urgent; if he had delayed:

> 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 alone we stand firmly in New Zealand, would have been lost.[886]

'FitzRoy's enthusiasm,' the Hauraki Tribunal remarked, 'was taking him further [and we might add, faster] than the intentions of his masters in the Colonial Office.'[887] The Secretary of State responded to FitzRoy's dispatch that the Governor had 'taken the serious responsibility of waiving, on the part of the Crown, an important stipulation of the original treaty', but Stanley's main concern remained for the finances of the colony rather than the Crown's responsibiliy for the welfare of Māori. He predicted that the waiver would make the Crown's acquisition of land

more difficult and 'encourage the disposition on the part of the natives to make exorbitant demands'. However, he acknowledged 'the cogency of the motives' by which FitzRoy had been influenced and was 'not prepared at this distance to condemn, or disclaim the arrangement' which his man on-the-ground had made – and so, gave it his approval.[888]

Governor FitzRoy's intention was to promote settlement and, as he saw it, satisfy both colonists and Māori in doing so. Māori, however, should not be permitted to denude themselves of all their lands, or as Normanby had expressed it in his 1839 instructions, be the unintentional authors of injuries to themselves. The regulations set out in the March 1844 proclamation stated that the Crown's right of pre-emption would be waived 'over a certain number of acres of land at or immediately adjoining a place distinctly specified' to be defined by applicants 'as accurately as may be practicable'. FitzRoy's multiple concerns were illustrated by regulation 2 of the proclamation. The Governor would agree or refuse to waive the Crown's right as he considered 'best for the public welfare, rather than for the private interest of the applicant'. In making that judgement, he would

> fully consider the nature of the locality, the state of the neighbouring and resident natives, their abundance or deficiency of land, their disposition towards Europeans and towards Her Majesty's Government.

(This was a discretion he later exercised in refusing a waiver for lands 'belonging to the Kawakawa or Wangarei tribes' who had committed a muru.[889]) The Protector of Aborigines would also be consulted 'before consenting in any case' to a waiver. There was a firm commitment under regulation 3 that no title would be granted for any pā or urupā, nor for land required by Māori 'for their present use; although they themselves may now be desirous that it be alienated'. In other words, these lands were excepted from the purchases to be undertaken rather than reserved within them. However, regulation 5 also provided that 'one tenth part, of fair average value, as to position and quality' was to be set aside out of all land purchased under certificates of waiver and conveyed to the Queen for public purposes, 'especially the future benefit of the aborigines'. In addition to the purchase price, the applicant was to pay 10 shillings per acre to the Government as a contribution to the land fund and government purposes. Deeds of transfer were to be filed at the Surveyor-General's office so that the necessary inquiries could be made and 'notice given in the Maori as well as in the English *Gazette* that a Crown title will be issued, unless sufficient cause should be shown for its being withheld for a time or altogether refused.' There was to be a minimum period of 12 months between the applicant receiving the Governor's consent and the issue of a Crown grant.[890]

(2) *Why did FitzRoy change the regulations in October 1844?*

While settlers welcomed the Governor's acknowledgement of the right of Māori to sell to whomever they wished and their own right to make direct purchases, they denounced the regulations as hastily devised and objected strenuously to the high fees and the need to set aside a tenth of the land for reserves. The charge of 10 shillings per acre was discouraging settler interest outside Auckland and only five waiver certificates had been issued in the Te Raki region under the March regulations.[891] The *Southern Cross* – a leading advocate for direct purchase – complained that it was 'scarcely fair on the part of Government to demand the payment of a sum of money and reserve a portion of the land besides'.[892] It suggested also that 'The Native is . . . the best Title in New Zealand, and that which will ensure the most peaceable possession.'[893] The implication was that a Crown grant might not be necessary at all.

In the key two-day meeting held at Waimate in early September 1844, rangatira raised the question of 'the right of selling to Europeans', along with that of customs duties, and other matters of pressing concern.[894] Historian Rose Daamen observed that the fact that rangatira were reported to be anxious for information about whether they would be given the right to transact their lands with settlers indicated 'that information regarding the

Governor FitzRoy's 'Penny-an-Acre Proclamation', 10 October 1844

PROCLAMATION. By His Excellency Robert FitzRoy, Esquire, Captain in Her Majesty's Royal Navy, and Governor and Commander-in-Chief in and over Her Majesty's Colony of New Zealand and its Dependencies, and Vice Admiral of the same, &c., &c., &c. Whereas by a proclamation bearing date the 26th day of March, 1844, it was notified to the Public that the Crown's right of Pre-emption would be waived over certain portions of Land in New Zealand; – and whereas the terms and conditions set forth in such Proclamations on which the right of pre-emption would be so waived, have in some cases been disregarded, either by persons making purchases of land from the Natives without first applying for, and obtaining, the Governor's consent to waive the right of pre-emption, or by much understating the quantity of land proposed to be purchased from the Natives: – and whereas, certain persons have misrepresented the objects and intentions of Government in requiring that a fee should be paid on obtaining the Governor's consent to waive the right of pre-emption – on behalf of Her Majesty – who, by the Treaty of Waitangi, undertook to protect the Natives of New Zealand – and, in order to do so, has checked the purchase of their lands while their value was insufficiently known to their owners.

And whereas, the evil consequences of misrepresenting the motives of Government, and asserting that to be a mark of oppression – even of slavery – which is in reality an effect of parental care – are already manifest; – and are certain to increase seriously if the cause be not removed.

And whereas, the Natives of New Zealand have become perfectly aware of the full value of their lands – and are quite alive to their own present interests – however indifferent at times to those of their children.

Now, therefore, I, the Governor, acting on behalf of Her Majesty the Queen, – do hereby proclaim and declare, that from this day no fees will be demanded on consenting to waive the right of pre-emption: – that the fees payable on the issue of Crown Grants, under the following regulations, will be at the rate of one penny per acre; and that – until otherwise ordered – I will consent, on behalf of Her Majesty, to waive the right of pre-emption over certain limited portions of land in New Zealand – on the following [12] conditions.[1]

proclamation had not been widely distributed'.[895] The following month, Clarke, who had initially praised the new system as resulting in 'tranquillity' in every district,[896] advised the Governor of the 'increasing disquietude of the natives at the Bay of Islands, Hokianga and Auckland' over a range of matters including pre-emption.[897] In an about-face, Clarke now suggested that the peace of the country could not be secured without 'something being done to admit of their alienating such portions of their land as they can very well spare, without injury to themselves and their children.'[898]

By this time, it had become apparent that many purchases were being concluded without waivers having first been secured, thwarting competitive bidding. The area purported to have been purchased under waiver certificates was also often understated in order to minimise the Crown's charge of 10s per acre.[899] On 1 October 1844, FitzRoy issued a further proclamation stating that the Crown's right of pre-emption would 'in no case' be waived if applicants had failed to 'strictly' comply with the regulations and that all titles claimed by 'virtue of purchases, or pretended purchases from the Natives' were 'absolutely null and void' unless confirmed by a Crown grant. Nor would a grant be issued for more than 25 per cent for 'any mistake in the estimate of the quantity applied for' and would incur a penalty of 'double fees for the excess'.[900] In

effect, the Proclamation constituted an acknowledgement on the part of the Crown that the March regulations lacked the sanctions necessary to ensure their observance.

A further proclamation bringing in new regulations followed on 10 October 1844. Governor FitzRoy called a meeting of the Executive Council, read out Clarke's letter (mentioned above) as evidence of 'the very great dissatisfaction of the natives with respect to the restrictions placed on the sale of their land' and proposed amending the pre-emption waiver regulations.[901] The idea was discussed by the Executive Council with Clarke in attendance and promptly approved. Questions were raised about proceeding without sanction from the Colonial Office, unless there was some 'pressing emergency', but the council was willing to defer to FitzRoy's greater knowledge of the state of discontent among Māori, in which he was supported by Clarke.[902] The new proclamation was issued the same day.

The October proclamation made only minor changes to how the existing system operated but significantly reduced the fees to one penny per acre. Under the new regulations a Crown grant would not be issued until a year after certified deeds of sale and survey plans had been lodged with the Colonial Secretary (rather than on receipt of the waiver certificate as formerly required). Daamen considered this an important change since it gave a better opportunity for objectors to appear.[903] The preamble is also particularly noteworthy; it set out the various ways in which settlers had flouted the previous proclamation, but then, having blamed them for spreading rumours about the Government's intentions, in effect gave them what they wanted. Defending the decision to expand the scheme, FitzRoy advised Stanley that ending the pre-emptive waiver system would lead to a revolt by Māori.[904]

Two months later, by way of a notice in the *Daily Southern Cross*, the Government again found it necessary to remind those seeking a waiver of the Crown's pre-emptive right of purchase that it was 'indispensable to comply, most scrupulously, with all the said conditions'. Since many applications had been rejected 'in consequence of inattention to these conditions', a very short form of application had been devised. It required purchasers to provide 'the name or names of the chief or chiefs, and tribe, or tribes, interested in the sale, who have a right to dispose of the said land, as accurately as may be practicable'. Pre-emption would not be waived 'in respect of land of which a purchase . . . has been made previous to the consent of the Governor having been formally obtained'. It also specified that by 'a limited portion of land, not more than a few hundred acres is the quantity implied'; a grant of the Crown alone gave a legal title; the waiving of pre-emption 'without distinct specification in favour of any body, has the effect only of opening that portion of land to public competition'; and lists of applications for pre-emption waivers would be published in the *New Zealand Gazette*.[905]

(3) *Waiver regulations in practice in Te Raki*

The 10-shilling proclamation of March proved of limited interest to both Māori and settlers in Te Raki as elsewhere in the colony. According to Rose Daamen, only 57 pre-emptive waiver certificates were issued for about 2,337 acres across the country; the areas involved ranged from 9.5 perches to 200 acres, and most were located in the Auckland area.[906] In Te Raki, there were only five instances identified by Stirling and Towers. There was far greater uptake of the penny-per-acre proclamation announced in October: a national total of 192 certificates were issued over 99,528 acres. Most were for areas of between 100 and 1,000 acres (although multiple applications by some purchasers increased their individual entitlements up to 4,500 acres), and again they were concentrated in the wider Auckland area.[907] The outbreak of the Northern War interrupted the scheme in the Bay of Islands and adjoining districts, but there remained strong interest in Mahurangi and the gulf islands, largely driven by Auckland settlement and the possibility of exploiting mineral resources. According to our calculations, the Crown – after the Matson and Bell inquiries (which we discuss in section 6.7) – would ultimately award settlers grants for 14,400 acres across Te Raki under the October penny-per-acre regulations, plus an additional 4,245 acres of scrip land; and would claim another 20,877 acres for itself as 'surplus' in the Mahurangi district (including Aotea and other gulf islands).

In practice, in issuing waiver certificates FitzRoy relied

heavily on the advice of Chief Protector Clarke. Yet, Clarke offered only limited comments on waiver applications, such as 'know of no objection' or knew of 'nothing to prevent'.[908] Such carefully circumscribed assessments appear to have been offered without investigation into whether the vendors were the sole and rightful owners or as to 'their abundance or deficiency' of land.[909] In a few instances, Clarke did seek additional information or clarification or consents, but as the need arose rather than in accordance with a defined consultative or investigative procedure. Mostly he (and the Crown) relied on his existing grasp of customary rights in the region.[910] Stirling and Towers found only one occasion on which Clarke insisted upon the vendors giving a written indication of their willingness to 'sell'.[911]

The regulations also were silent on the matter of adequacy of consideration, and there is no evidence to indicate that either FitzRoy or Clarke investigated prices.[912] Yet, clearly, the assumption had been made that Māori would benefit from the 'market' that the pre-emption waiver would supposedly create. That intention was further undermined by the issue of waiver certificates for arrangements already in place despite regulations to the contrary, meaning that the competition and economic benefit for Māori intended by FitzRoy largely failed to materialise.[913]

An examination of the procedures for obtaining a pre-emptive waiver in Te Raki reveals several questionable practices on the part of both purchasers and officials. For example, an application lodged by William Twohey for a waiver over 2,000 acres in the Whāngārei district was approved following intervention by and support from the Colonial Secretary. Clarke had initially raised concerns that the Māori owners had been involved in a recent muru at Matakana and fighting in the Bay of Islands. However, after Sinclair advised FitzRoy that he had known Twohey for three years and that he was 'deserving of a waiver', Clarke changed his mind, stating that he did not now see 'the same objections'.[914] In the case of Tawhiti Rahi, Mokohinau, and Marotiri (discussed further at section 6.6.2(6)), one applicant was able to lodge and secure pre-emption waivers over each island group, while another family was able to secure four waivers that embraced 3,100 acres.[915] What was more, evidence indicates that the Governor approved applications in the full knowledge that purchase arrangements, in clear violation of the regulations, had already been completed. In some instances, settlers had even stated on their application forms that they sought waivers in order to allow them to complete such arrangements.[916]

Attempts to tighten the regulations under the proclamation of 10 October 1844, and a clarification that 'certain limited portions' meant a 'few hundred acres' in the Governor's notice of 6 December 1844 did not result in any improvement in the manner in which the regulations were implemented or in more effective protection of Māori. According to Daamen, purchasers continued to enter into and conclude purchase arrangements in advance of applying for waiver certificates; applications frequently failed to specify accurately the location and boundaries of the lands involved; the areas for which waiver certificates were sought were often under-stated; efforts to establish all the rightful owners were sporadic at best; the Chief Protector of Aborigines continued to rely on his personal knowledge of the vendors and lands involved; no defined limit was placed on the areas that could be acquired, while the informal 'few hundred acres' limit was readily circumvented; and – contrary to FitzRoy's explicit assurances – neither pā, urupā, lands required for present and expected future use, nor tenth reserves were formally identified and reserved.[917]

We note, in particular, Aotea (Great Barrier Island), where regulations were evaded yet purchases were ratified, resulting in the transfer of a large proportion of the island out of the hands of local Māori. There had been one major old land claim on the island, that of Abercrombie, Nagle, and Webster, discussed at section 6.5.2(3). Of the waiver certificates issued for Aotea lands, the most significant were to Frederick Whitaker and John Peter du Moulin under the one-penny-per-acre regulations for the purchase of 1,500 acres (OLC 1130) and a further area 'not exceeding 2,000 acres' (OLC 1131).[918] By putting in separate applications in this way, Whitaker and du Moulin avoided the limitations on the size of purchases, but even

as separate transactions, they exceeded the 'few hundred acres' mentioned in the 6 December notice.[919] There was only one deed of purchase for the total land sought by the two men. This had been signed with Tāmati Waka, his wife Te Arikirangi, and Poenga, and bore the marks of Poenga, Rangitiaka, and Pirangi. The consideration paid to Māori had comprised goods, including 'a Cutter complete with Dingy', items of clothing, blankets, tobacco, two oars, and guns and ammunition.[920]

The area sought by Whitaker was described as 'commencing about half a mile to the northward of Wangapurapura and running across the island and extending to the southward within a quarter of a mile of Okupi', an area that exceeded 10,000 acres, or in other words 'the bulk of the southern two-thirds of Aotea' and a much larger area than indicated on Whitaker's sketch map.[921] The land sought by du Moulin was also vaguely defined. After receiving the waiver, he informed the Colonial Secretary that the purchase area had been incorrectly described and should not have included the southern portion of the island, which belonged to a hapū uninvolved in his original transaction.[922] Additionally, an inaccurate sketch map had been used. He therefore requested an amendment. Despite this confusion, du Moulin estimated that the newly defined area of land remained 2,000 acres and as a consequence, he was not required to seek a renewed waiver. As Stirling and Towers remarked, 'It appears a little too coincidental for the area actually included in the transaction to be exactly that covered by his pre-emption waiver.'[923] Whitaker and Moulin ultimately got 6,463 acres between them and the Crown over 15,000 acres of surplus land for purchases under waiver certificates issued for just 3,500 acres. Māori got goods and cash valued at £172, or one shilling per acre for the area estimated in the waivers, but a woeful rate of less than twopence per acre for the huge area that was ultimately taken.[924] No ten per cent reservations were set aside.[925]

Other settlers, too, applied for pre-emption waivers for lands in Aotea: Anderson and Chalmers, separately, for lands to the north of Whitaker and du Moulin's claim; and McDonald and Hunter for lands in the southern part of the island, excluded by du Moulin's earlier amendment.[926] While these settlers do not appear to have pursued pre-emption waivers further, others applied; namely, Warbrick, Coates, and the three Mitford brothers. Warbrick's application was easily rejected by FitzRoy for the size of the proposed transaction, but the others were remarkably uniform – each for an area of an estimated 1,000 acres. And in all of them, FitzRoy crossed out the words 'one thousand' and awarded 900 acres, for a total of 3,600 acres, or the whole estimated size of the remaining portion of southern Aotea. Stirling and Towers suggested that, though 900 acres was pushing the boundaries of FitzRoy's criterion of 'a few hundred acres', the revision at least brought the figure back into the 'hundreds'.[927] In the end, neither Coates nor the Mitfords completed their transactions, so they were disallowed; however, it is clear the regulations were being interpreted and applied in a way that benefited the colony or the settlers, but not Māori.[928]

The speculative intent of the applicants alarmed the Colonial Secretary. Commenting on the application by McDonald and Hunter, he asked FitzRoy whether granting out so much land in the island to a few individuals would be beneficial to the colony. Influenced by this advice and announcing himself as concerned about 'so much impropriety of conduct' with regard to the island, FitzRoy decided not to grant further waiver certificates for Aotea until he had received advice from England.[929]

(4) *What Grey did: the creation of three options for settlers*

Although no grants had been actually issued by FitzRoy for any of the areas claimed to have been purchased throughout the colony under the waiver proclamations, Lord Stanley reluctantly accepted what the Governor had instituted on the ground. In a dispatch dated 30 November 1844, he gave 'distinct but reluctant consent' to FitzRoy's March proclamation, which he considered to be confined to a particular district. He subsequently ordered Sir George Grey to recognise any purchases under the second proclamation as well but strictly prohibited any such waivers in the future.[930]

On his arrival in November 1845, Grey immediately

denounced the pre-emptive waiver purchases as 'at once unjust to Her Majesty's subjects of both races, and improvident in the extreme'. In reports to the Colonial Office, he strongly condemned FitzRoy's exercise of power as Governor in these (and other) matters, which he believed would be challenged through the courts. He informed the Secretary of State that 'various complicated disputes [had] already arisen between the natives and various persons who have purchased lands from them under the terms of my predecessor's proclamation', and that the Crown's pre-emptive right of purchase provided a means of 'controlling' Māori.[931] Formally ending the scheme in June 1846, Grey acknowledged that Māori had not benefited from the competition that the pre-emption waiver policy had been intended to provide. Many of the purchases had been conducted in 'the most careless manner'. Buyers had evaded the regulations with official connivance; the limit of 'a few hundred acres' had scarcely been observed; public notification of the issue of waiver certificates had not taken place; transactions had been concluded in advance of applications for waiver certificates; and where payment had been made in part or in whole in goods, their value had been overstated to the disadvantage of the Māori vendors. And he was 'not satisfied that the Governor was authorised in law to waive the Crown's right of pre-emption over a small, specified tract of land in favour of one individual'.[932]

There would be no more waivers, but Grey considered it necessary also to settle the claims of legitimate purchasers who had abided by the regulations. In a notice dated 15 June 1846, he announced that all claimants under the proclamations were required to submit to the Government 'all papers' – deeds, documents, and surveys – connected with their purchases for investigation. Failure to present papers, such as waiver certificates, within the specified period of three months would result in a claim being disallowed.[933] It was further declared:

> as evasions of the regulations and conditions under which the certificates of waiver were issued had in many places taken place, the Home Government would be consulted before any final decision was come to respecting such cases.[934]

This 'exterminating process' was accompanied by a measure intended to induce the claimants under waiver certificates to abandon or compromise their claims.[935] The Land Claims Ordinance 1846 authorised the payment of compensation in debentures to 'certain Claimants'; that is, settlers who had made purchases under FitzRoy's waiver system and were willing to come under the provisions. The preamble of the ordinance stated that no Crown grant could 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, and that the terms and conditions prescribed by the . . . Proclamation [of 10 October 1844] have been duly complied with.

A commissioner was to be appointed to examine and report upon all claims to compensation from settlers who had bought lands under pre-emption waivers. The ordinance repeated the instruction to the old land claims commissioners that they were to be 'guided by the real justice and good conscience of the case', but the body of the legislation was concerned solely with the claims of settlers. The commissioner was directed to ascertain the price paid to Māori, the transaction costs involved, and the cost of any improvements placed upon the land in question. He was not otherwise required to establish whether the original transactions had been conducted in full accord with the pre-emption waiver regulations. Nothing further was said about whether the vendors were the rightful owners, and neither was the question considered of whether their rights and interests had been fully and fairly extinguished, nor whether they had received the protections intended by FitzRoy. In all, the ordinance failed to make any express provision relating to the 'complicated disputes' that Grey claimed had arisen.

In essence, Grey's 1846 ordinance assumed that the initial issue of a certificate and the production of a deed and survey showed that a legitimate purchase had been made and that any outstanding questions of native title could be dealt with later. Once the claim had been confirmed and

compensation awarded in the form of debentures, clause 10 provided that the land concerned would be 'deemed and taken to become part of the demesne land of the Crown, saving always the rights which may hereafter be substantiated thereto by any person of the Native race'. The onus was on Māori to establish whether any customary rights remained, but the ordinance made no provision for a mechanism enabling them to do so. Provision was then made in clause 11 for settlers to repurchase from the Government any land they were actually occupying at the rate of £1 per acre (with credit for expenditure on improvements). Clause 14 further undermined the position of Māori. It stated that, since tenths reservations 'cannot in many cases be conveniently made', settlers whose purchases were confirmed could purchase those lands as well. The ordinance described the tenths as 'set apart for public purposes', not, as FitzRoy had originally specified, for the 'future use' and 'special benefit' of Māori. Any tenths not purchased in this way were also to be absorbed into the surplus land.[936]

Land Claims Commissioner Henry Matson, who was appointed under the 1846 ordinance, commenced his investigations in December 1846.[937] At first, he had little to do. Grey considered his measure to be 'extremely fair and liberal',[938] but settlers proved reluctant to bring their claims under its provisions, preferring to hold out for a grant rather than compensation, and unwilling to pay the Crown for lands they thought they had already purchased.

Meantime, the new Secretary of State, Earl Grey, reinforced Stanley's instructions. On 10 February 1847, he approved the steps Governor Grey had undertaken in June the preceding year, including calling in claims within a specified period. He agreed that FitzRoy had been 'plainly exceeding his lawful authority'; but while the waiver arrangements were 'most impolitic', the 'faith of the Crown' must be kept insofar as it was 'pledged to the purchasers'. He noted that Crown grants should be issued only to those who could 'prove in the strictest manner' that they had 'completely and literally satisfied the requisitions of the proclamations in every particular they contain'. However, the instructions had been issued in ignorance of the steps that the Governor had already instituted under his 1846 ordinance, and there were significant divergences between what Earl Grey directed and what Governor Grey had already done. In particular, Earl Grey instructed that the settler claimants should be required to prove to the Attorney-General that 'the natives . . . were . . . the real and sole owners of the land which they undertook to sell'; and that the grant, if issued, must expressly state that it barred Her Majesty's title and only transferred to the grantee 'any right to the lands which at, or previously to the date of the grant, may have been vested in the Queen'.[939]

Governor Grey had also initiated a further legal challenge to FitzRoy's actions as Governor in April 1847. In Grey's view, the right of pre-emption had been acquired by reason of the treaty, but this did not include the right to waive it. He argued:

> it is a power which must entail injustice and suffering upon the natives, which must lead to abuses, which could not be exercised with such discretion as to render it beneficial, and which is so palpably opposed to the interest of the native race, that Great Britain, in accepting it, must have incurred much obloquy from foreign nations and from future times. Moreover, it is believed that there is no instance on record in which Great Britain has obtained by treaty a like power from any uncivilised nation.[940]

He sought, successfully, a ruling from the Supreme Court (*Queen v Symonds*) to the effect that those who had purchased land directly from Māori under a pre-emption waiver certificate had no legal rights, but that such rights could only be secured from the Crown. In its ruling issued on 9 June 1847, the Court confirmed that pre-emptive waiver certificates did not convey a title: only the Crown could issue valid titles. It was therefore to the Government that certificate holders had to turn to secure a legal title to lands that they had acquired from Māori.[941] In fact, this had been clearly stated in both of FitzRoy's proclamations, which had 'reminded' the public that:

> no title to land in this colony, held or claimed by any person not an aboriginal native of the same, is valid in the eye of the law, or otherwise than null and void, unless confirmed by a grant from the Crown.'[942]

Based on this ruling and having received Earl Grey's instructions, the Governor decided to offer three different options for the settlement of the waiver claims. He informed the Legislative Council that he did so reluctantly and, it seemed, at the expense of Māori interests:

> I have for many reasons experienced great difficulty in arriving at this determination, for I cannot but remark, that Her Majesty's Government have recorded it as their opinion, that many of the claims which are about to be adjusted, are unsupported by equity, justice, or public policy . . . On the other hand, however, I must admit, that the claims of the bonâ fide and industrious settler require, under all the circumstances of the case, a most indulgent consideration from the Government, and that this may be afforded to them, I am prepared to adopt a plan, which, whilst it will secure to the real settler the greatest possible facilities, will extend to all the land claimants far greater advantages than they would have been entitled to under the instructions I have received.[943]

Under the first option (following Secretary of State Earl Grey's instructions), the Attorney-General was required to certify that the applicants had complied fully with the regulations and that the Māori vendors were 'according to native laws and customs, the real and the sole owners of the land which they undertook to sell'.[944]

The second option entailed the process that had been established by the Lands Claims Ordinance 1846 – either for compensation, or if in actual possession, for repurchase from the Crown including tenths, provided the entire claim did not exceed 200 acres.

Alternatively, they could follow a third course: new regulations to be introduced by the Governor. These stated that that an absolute Crown grant would be issued to claimants under the 10-shilling-an-acre ruling if they had strictly complied with the terms of the government notice of 15 July 1846; if their claims were investigated and reported on favourably by the commissioner; and if they paid the remainder of the fees due within one month of such report. If the total quantity of a claim did not exceed 200 acres, the reserve tenths could be included at £1 per acre. The same option was also extended to the one-penny-per-acre waiver purchasers but was limited to blocks of up to 500 acres if the land was located within 20 miles of Auckland. The option was not available in case of any land the title of which was disputed by Māori. Surplus lands – areas which had been obtained under a waiver but over the limit of 500 acres – would 'revert' to the Crown (or in our view, would be taken by it).[945]

None of these options would offer effective protection to Māori, as we explore next.

(5) *Investigation of pre-emption waiver claims under Grey's options*

Notwithstanding Grey's assertion that 'numerous instances' had been brought before him in which Māori had been 'most cruelly and unfairly dealt with' by waiver certificate holders, only limited inquiries were made. In practice, the investigations conducted by Matson and Attorney-General Swainson were as limited as those conducted by Godfrey and Richmond into the pre-treaty transactions.

Matson, a military officer who had fought in the Northern War,[946] evinced little interest in or understanding of Māori land tenure and was instead focused on technicalities, such as whether deeds and maps had been submitted on the date specified. Following the ordinance under which he was acting, his inquiries were aimed towards settling the claims of the holders of waiver certificates and not towards establishing whether Māori vendors had been in any way disadvantaged by the way the purchase negotiations had been conducted or the regulations applied. His investigations were unsystematic when assessing whether those Māori who had 'sold' the lands were the sole and rightful owners, whether all customary

rights had been extinguished, whether the consideration had been adequate, and whether the transactions 'completely and literally satisfied' FitzRoy's regulations. Matson did attempt to establish that vendors had been paid as agreed, but this had everything to do with establishing the entitlement of a settler claimant to compensation and not the adequacy of the consideration.

The clear instructions of the Secretary of State had been to establish the legitimacy of transactions with Māori, but procedures under Grey's three options shared many of the flaws we have already identified with regard to the investigations of the old land claims. Once more, only those named in deeds were called as witnesses. As to their evidence, it was again limited to confirmation that they had indeed been involved in the sales represented by the deeds and had received payment. Matson's line of questioning, which relied on what had been accepted already when the exemption certificate had been first issued, elicited nothing of unextinguished rights in the lands – whether of named or unnamed Māori – nor of rights surrendered by agreement. Such circumscription 'could only ascertain that those named on the deed had been paid the amount stated on the deed'.[947] Daamen argued that, in ensuring the validity of claims, Matson used brief notes from Clarke, himself given to perfunctory investigations.[948] And again, there were potential questions of conflict of interest: Matson frequently relied on evidence from ex-interpreters Davis and Meurant, despite their involvement as agents in some of the transactions. It is little wonder (Stirling and Tower suggested) that, 'In the end, no claim was rejected on the basis that the vendors were not the sole or true owners of the land.'[949]

Investigation by the Attorney-General, as Earl Grey had specified, proved no more effective. Swainson, too, was reliant on Clarke's doubtful assessments. Again, the process involved no examination of whether Māori rights to lands had been properly extinguished, nor of unextinguished rights, let alone the rights of hapū not involved in original deeds. For all practical purposes, Swainson 'simply accepted the granting of a pre-emption waiver as proof of validity of the vendors' exclusive rights to the land'.[950]

(6) *Two case studies: Waiwera and Mokohinau (and nearby islands)*

Robert Graham's claim at Waiwera, heard under the terms of the Land Claims Ordinance 1846, was an example of the rubber-stamping nature of the Matson commission. In 1844, the Auckland merchant had applied for a pre-emption waiver certificate for Waiwera, a small block of about 20 acres that included the geothermal springs. Its status was a matter of debate. Whereas the Colonial Secretary had thought the land to lie within the boundary of the 1841 Mahurangi purchase, FitzRoy had understood the block to be 'a spot belonging to the Natives *within* the Government Land but not *belonging* to the Government though *surrounded* by public property' (emphasis in original). This suggested that he believed it reserved for Te Hemara and Ngāti Rongo.[951] The purchase had proceeded nonetheless.

By the time the claim came before Matson for investigation, Graham had fulfilled the survey requirement. Te Hemara, Roa, and Peta, as parties named on the deed, appeared. Rote questioning confirmed that they were party to the agreement (Te Hemara declared that the land had 'belonged to me and my Tribe'),[952] had received goods in return, and there was no other claim to the land. On this basis, Matson awarded Graham all 20 acres claimed, after his payment of £2 for the reserve tenths. Māori rights were not considered further, despite customary usage of the springs which were 'a *wai tuku ora o te iwi*, a place of healing waters for the peoples of Ngāti Rongo and therefore a highly important site'.[953] Nor was it interrogated that firearms had comprised part of the transaction goods, even though Earl Grey had directed that such claims be disallowed. Stirling and Towers noted that Graham's claim 'reflected Governor Grey's modified view on the subject, that rejected "too strict an adherence" to Earl Grey's instructions'.[954] Guns and ammunition were as irrelevant to the Matson inquiry as ongoing or unextinguished Māori rights in the land.

The case of Joel Polack's pre-emption waiver claims to Tawhiti Rahi (Poor Knights Islets), Mokohinau (Fanal Islets), and Marotiri (Chicken Islets) also raised

the question about the use of munitions as transaction goods. Polack submitted three separate waiver claims for the island groups, although only one purchase deed was involved. On 20 December 1844, he filed for a waiver of pre-emption over 'Tawiti rai' (Tawhiti Rahi), proposing a purchase from the chief, Hokianga, and others from the 'Whangaruru' tribe, although he did not particularise which hapū. Clarke saw no objection but advised that consent should be obtained from all Whangaruru Māori since everyone had a 'partial claim' (the interests of any other Māori were not considered). On 14 January 1845, with Polack's assurance given on this matter for FitzRoy's attention, a waiver certificate was issued for a maximum of 400 acres.[955]

Polack's second waiver application, made on 14 January, was for the 'Pokohinu and Mototiri (Chickens) groups of islets', which he sought to purchase from 'the Chiefs of the Ngati te wai tribe'. FitzRoy agreed to a waiver for 'Poko-hinou, or Moto-hinou (the Fanal Islets), but not over Morotiri (or Chickens)'. The latter was at first refused as Whāngārei hapū involved in a muru dubbed the 'Matakana affair' had made claim to it. On 27 January, Polack received a waiver certificate covering 'Pokohinou or Motu Hinou (the Fanal Islets)' for a maximum of 400 acres, but shortly after, believing the Matakana difficulty to be then overcome, he continued to pursue a waiver of pre-emption for Marotiri (Chickens). His second – and successful – application was expanded to name not only Ngātiwai but also Te Kapotai vendors. Polack was issued his third waiver certificate on 10 March.[956]

The single purchase deed, dated 16 January 1845, covered all the island groups of Polack's pre-emption waiver claims. It was problematical on several fronts: it pre-dated the issuance of two of Polack's waiver certificates; only a copy was extant (according to Polack, the original was lost to an explosion during the Northern War); and there were complexities to the names of the islands beyond spelling variations (as an example, Mokohinau is both the name of the group as well as its largest island),[957] which would play out subsequently. Payment (valued at £122 14s, by Polack's later calculation) involving goods, debentures, cash, and guns was made to the two different Māori groups. Measured against Polack's gain of an estimated 1,400 acres by means of pre-emption waivers, the Māori transactors received approximately 1s 9d per acre.[958]

With the aim of commencing mining and agricultural activities, Polack next began pressing the Government for Crown grants to the islands, although he had not complied with a number of regulations. His application of 1 May 1846 included two sketch maps and a request for the survey requirement to be waived as, he claimed, there was no safe beach for landing (although how this squared with his mining ambitions was a moot point). Polack had advertised his purchases in te reo in the *Kahiti o Niu Tireni* but he had failed to name the island groups accurately and, in fact, published it after completion of the transaction.[959] Despite the provision of neither deed nor survey, and although the regulations prohibited grants until 12 months after their submission, Governor Grey referred Polack's application to an Executive Council committee for consideration. The committee, consisting of the Colonial Secretary, the Attorney-General, and the Colonial Treasurer, lacked even the advice of the protectorate, which Grey had abolished. It soon produced a report described by counsel for Ngāti Rehua and Ngātiwai ki Aotea as 'wholly inadequate' and a reflection of the committee's 'lack of capacity to deal with land, customary rights, and Māori affairs'.[960] However, it put Polack's claim on hold. The report confirmed that the islands had not been purchased already by the Crown, but in the absence of a deed, the committee could not say whether Polack's purchase had been made fairly and properly.[961] It recommended no Crown grant be issued until Polack had met all the requirements of the second waiver proclamation for filing of deeds and survey.

Polack again insisted that survey was impossible but did send in a copy of his deed, prompting Governor Grey, having informed the settler that his was a peculiar case unprovided for by the Government, to seek advice from the Secretary of State. Grey's main concern was that Polack had seemingly been allowed to purchase for speculative purposes islands likely to be required for reasons

of public utility. Among Grey's other stated concerns was the use – though not illegal per se – of 'munitions of war' as transaction goods. Of Māori interests, he wrote: 'I do not feel satisfied that the vendors ever really intended to part with these Islands, nor do I know that they had either any or the sole right to dispose of them.'[962] Earl Grey responded that no Crown grant could be issued that involved firearms as payment if they were to be used unlawfully or against the Government – of relevance to Polack because, according to the Governor, the munitions in his transaction goods were linked to the Northern War, as seven of the eight recipients were of the 'rebel party'.[963] Whether Polack knew the fate of the guns and was complicit was unknown but at the least, Grey thought him 'guilty of an act of very great imprudence'. As to the consideration paid, Grey advised it was 'manifestly insufficient',[964] although in monetary terms, 1s 9d per acre was on par with many other waivers of pre-emption.

The claims to the island groups came before the Matson commission, but Stirling and Towers noted: 'It is unclear whether any investigation of the deed produced by Polack took place and thus whether any Maori evidence was produced by him in support of his claim.'[965] It seems that the fairness of the claims was assumed, resting 'solely upon the willingness of Maori to enter into the transaction' in the first place.[966] The claims were disallowed – for failure to survey, predictably, not for deficiencies in consent or the consideration paid.[967]

Polack's deed was questionable as were his activities under the waiver of pre-emption in his favour; yet as the law stated under the 1846 ordinance, the Crown considered itself to own the islands once Matson had disallowed the claims for lack of survey. Contributing to the Crown's interest in this instance was the tantalising possibility of mineral wealth. After consideration of a letter from prospectors Whitaker and Heale about an island in the Chicken group, in 1849 the Executive Council concluded that their request to mine for copper should be granted, provided the islands were Crown property. The Surveyor-General investigated and declared they were indeed so. The claim of the Crown rested wholly on the supposed extinguishment of Māori customary rights in Polack's deed. No further referral to Māori was considered necessary, nor were Grey's qualms about the validity and completeness of the transaction raised. In the end, Whitaker and Heale did not proceed with their mining endeavours, as an exploratory foray failed to find deposits. Another prospector, Merrick, was given permission to operate on Marotiri but he, too, was unsuccessful, and his lease was terminated by the Crown in July 1850.[968]

Polack continued in his attempts to acquire the islands but was told he could not. Grey laid out the reasons: FitzRoy's pre-emption waiver proclamations had been ruled illegal by the Supreme Court, making Polack's transaction illegal also; and (somewhat illogically) the purchase pre-dated the waiver being issued. Additionally, the potential mineral wealth was to be of benefit to all subjects, not monopolised by one.[969] When the persistent Polack advised he would take his claim to England, Grey reiterated his views.

That same year, in 1849, other Māori claims to the islands began to surface. Tawatawa, Kapotai, and other Bay of Islands chiefs protested Polack's deed, offering to sell the islands themselves. Another claim was lodged by Wakatiro of Te Waiariki at Ngunguru, prompting the Government to place an advertisement in *The Maori Messenger – Te Karere Maori* calling on all parties concerned to come and make their claims before the Resident Magistrate at Kororāreka.[970] In October 1851, Resident Magistrate W B White informed the Surveyor-General that Wakatiro 'would accept the offer made to him by the Governor of £20 for Motiti (Hen and Chicken Islands)',[971] which elicited a circumspect request from Ligar for 'all the correspondence on the subject of the islands', as he noted there were 'many other claimants besides the chief named'.[972] But no further consideration on the matter occurred until Polack's claims to the islands were submitted to the Bell commission as the settler Government revisited the disallowances under Grey's options (see section 6.7.2(3)).

(7) *Overall results of investigation of pre-emption waiver purchases under Grey's options*

The results of Matson's commission were later assessed by a select committee under the chair of Alfred Domett set up to investigate settler complaints about old land claims and pre-emption waiver purchases in 1856. The committee found that across the nation, of the 62 claims tendered under the 10-shilling-per-acre proclamation, 49 received Crown grants, nine were disallowed for non-payment of fees, and two for lack of survey plans, while two more remained unsettled. Most pre-emption waivers related to the Auckland and Northland regions. No figure was given for the acreage that had 'reverted' to the Crown.[973]

Under the penny-an-acre proclamation, a further 189 claims had been lodged nationwide, but only 53 resulted in Crown grants. Of the remainder, 21 were settled through compensation; 80 were disallowed for non-compliance with Grey's notice of June 1846, and 28 for non-compliance with FitzRoy's pre-emption waiver proclamation of October 1844; while seven were disallowed or abandoned with no explanation given.[974]

According to the committee, investigation under Grey's system had resulted in awards for only 14 claims in Northland, after expenditure of £467 17s in debentures. This netted a total of 7,074 acres for the Crown at a cost of approximately 1s 4d per acre; but in the case of the many disallowed claims, the returns were better still, with 21,829 acres gained by the Crown for an outlay of £196 3s 4d in compensation.[975]

So, despite the Matson inquiry being 'largely a process of settlement between Crown and claimants alone, with little heed paid to Maori interests', most settler claimants met with no success.[976] As the Crown began to assert rights of lease and sale in the disallowed (and still unsurveyed) claims, many settlers continued to petition the Government for redress. From a Māori perspective, their ownership of the land had gone, and the only question was whether it had gone to the settlers or to the Crown.

In 1856, the Domett committee concluded that the disallowance of waiver claims because of failure to comply with Grey's regulation to send in survey plans had been unjust (only three months had been allowed). The committee also observed that, while the Attorney-General had not disclosed the reasons for refusal of claims, his application of regulations 'may in some cases have been somewhat stringent'.[977] It therefore recommended another investigation and 'any proved injustice be remedied'.[978] By this, the committee meant any proved injustice to the settlers whose claims had been disallowed, not Māori to whom protections had been offered but which had not eventuated, nor Māori whose rights remained unextinguished.

As we discuss further at section 6.7, special provisions for the settlement of waiver claims were included in the Land Claims Settlement Act 1856 and the investigations undertaken by Bell.

(8) *Does the Supreme Court's decision in Wakatu have any application to old land claims or pre-emption waivers?*

(a) What the Supreme Court said

In its decision in *Proprietors of Wakatu v Attorney-General*, the Supreme Court of New Zealand considered the Crown's fiduciary obligations in relation to an award of land made under the Crown's right of pre-emption, and the promised creation of reserves, in the Northern South Island. The case concerned land that was initially the subject of deeds of purchase between the New Zealand Company and Te Ātiawa and Ngāti Toa rangatira in 1839 ('the Nelson purchase'). These deeds included an agreement that one-tenth of the land within the purchase area would be reserved and held in trust for the Māori customary owners while 'occupation reserves' were also created later by agreement with the Crown.

Following the signing of the Treaty of Waitangi, including article 2 expressing the Crown right of pre-emption, these deeds of purchase were rendered of no effect by reason of the Land Claims Ordinance 1841 unless confirmed as having been conducted 'on equitable terms' after investigation by Crown commissioners.[979] An agreement was reached between the imperial government and the

company in November 1840 under which the reserves promised by the company for the benefit of Māori were to be vested in the Crown. The Crown also reserved the power to make further provision for Māori that seemed 'just and expedient for the benefit of the Natives'.[980] This enabled the Crown to insist on the exclusion of lands that were occupied or deemed necessary for Māori support ('occupation reserves') from its grant to the company.

An investigation of the Nelson purchase was conducted under the Land Claims Ordinance 1841 by Commissioner William Spain in 1844. He found that the purchase had been made on equitable terms, clearing the land of native title and enabling it to be vested in the Crown as demense lands to be granted to the company under the authority provided to the Governor by the 1840 Charter and Instructions to Hobson.[981] The Spain award was the basis of a Crown grant to the company of 151,000 acres in July 1845, but also required it to reserve one-tenth of the land granted to it for the benefit of the Māori owners of the district, excluding existing pā, urupā, and cultivations. Town and suburban sections of the tenths reserves, amounting to 5,100 acres, had already been surveyed, and were shown on plans annexed to the award. This left 10,000 acres of rural land to be incorporated into the tenths reserves.[982] However, the Crown grant was subsequently changed in 1848 after protests from the company, and the promised reserves and exclusions were not given full effect, and were further diminished subsequently by exchanges and grants undertaken by the officials managing them.[983]

Before the Supreme Court in 2015, Rore Pat Stafford (alongside the Wakatū Incorporation and trustees of Te Kahui Ngahuru Trust) argued that the Crown breached trustee and/or fiduciary obligations that it owed to the particular hapū and whānau who held aboriginal title to the land acquired by the New Zealand Company, by failing to ensure the creation of the full reserves set out in the 1845 grant, and to ensure the exclusion of pā, urupā, and cultivation grounds.

The Supreme Court found, by majority, that the Crown owed fiduciary duties to reserve 15,100 acres for the benefit of the customary owners and, in addition, to exclude their pā, urupā, and cultivations from the land obtained by the Crown following the 1845 Spain award.[984] In her reasoning, Chief Justice Elias found that the fiduciary obligations owed to Northern South Island Māori were the obligations of a trust.[985] Justice Glazebrook agreed that the dealings between Māori, the company, and the Crown had created a trust, finding that the company had intended to set up a trust as a part of the Nelson purchase, and the Crown by virtue of the 1840 agreement had then taken on the company's trust obligations.[986] Justices Arnold and O'Regan, while agreeing that the Crown assumed fiduciary obligations in relation to the Nelson purchase, found that it was unnecessary in the circumstances of the case to determine whether these obligations were in the nature of a trust.[987] Justice William Young, in a minority decision, found that no fiduciary duties arose in the circumstances of the case.[988]

The Supreme Court's decision referred extensively to the reasoning of the Canadian Supreme Court in *Guerin v The Queen* [1984] 2 SCR 335. In her reasons, Chief Justice Elias wrote:

> The obligation to act in the interests of the Indian band in *Guerin* is entirely comparable with the obligation which arose through alienation under the Land Claims Ordinance through the terms approved in Spain's award. As in *Guerin*, fiduciary obligations arose because the Crown acted in relation to 'independent legal interests' (in *Guerin*, as in the present case, existing property interests) and on behalf of Maori. The Crown's obligations in the present case are, if anything, amplified by the nature and extent of Maori property and its recognition in New Zealand from the first engagements of the Crown in the Treaty of Waitangi.[989]

The Court noted that it made its finding of fiduciary duties on the particular facts of the Nelson purchase and 1845 Spain award. In her reasoning, Chief Justice Elias observed:

> [n]one of this is to suggest that there is a general fiduciary duty at large owed by the Crown to Maori. It is to say that where there are pre-existing and independent property interests of Maori which can be surrendered only to the Crown (as

> under the right of pre-emption) a relationship of power and dependency may exist in which fiduciary obligations properly arise.[990]

It was recognised by Arnold and O'Regan that the principles set out in the *Guerin* decision could have a broader application in New Zealand than the particular facts of the *Wakatu* decision, while leaving any determination of such an application to be considered if and when it arose:

> We acknowledge that, on the basis of *Guerin*, it can be argued that the Crown has fiduciary duties to Maori arising from the Treaty of Waitangi and/or from the Crown's right of pre-emption. We base the duty in this case on the particular dealings between the Company and Maori and the Crown and the Company and to express no view about a broader basis for such a duty.[991]

(b) The Tribunal's analysis

The Supreme Court found in *Wakatu* that, where there has been an assumption of responsibility, fiduciary duties may arise notwithstanding any questions about sovereignty. A trust may be imposed even though that had not been the intention and may still arise by operation of the law. However, sovereignty in and of itself did not lead to fiduciary obligations in the common law, so whether it was ceded or not is irrelevant to the issue under consideration. We agree with claimant counsel that it is the assumption of responsibility that gives rise to circumstances that may bring about a 'sui generis fiduciary duty', which is independent of any question of sovereignty itself.

The notion of fiduciary duties being recognised in the context of historical transactions between the Crown and Māori is an outcome of *Wakatu* that is relevant to the Te Raki Inquiry even though the material facts and context may be different. However, *Wakatu* does not state that a fiduciary relationship arises solely from the Treaty but rather because of a particular set of circumstances.[992] Similarly, pre-emption alone does not confer a fiduciary obligation as articulated in *Wakatu*, nor does vulnerability, dependence, and imbalance in power. These may be relevant considerations but are not enough in themselves to generate a fiduciary duty in common law; something additional is required. In the case of *Wakatu*, the Crown had entered into specific engagements by reason of the November 1840 agreement and the 1845 grant to the company following Spain's award and it took direct responsibility for the administration of the tenths and occupation reserves thereafter. The question is whether similar circumstances exist here.

We begin by noting that the Tribunal has long recognised a fiduciary duty owed by the Crown in what might be described as a political sense, deriving from the idea that such an obligation may arise as a consequence of a social contract.[993] One of the strongest statements of this kind is to be found in the *Te Maunga Railways Land Report* with reference to public works takings and offer backs. The Tribunal in that context discussed the 'fiduciary obligation of the Crown under the Treaty of Waitangi' and identified 'the fiduciary obligation of the Crown actively to protect Maori ownership of land unless Maori owners are willing to sell it at an agreed price.'[994] *The Muriwhenua Land Report* also cast the Crown's obligations in terms of a fiduciary relationship in the higher sense as part of its governance:

> It was basic in the assumption of rights of settlement and governance that Maori interest would be protected, and Maori would be treated fairly, equitably. And in accordance with the high standards of justice that a fiduciary relationship entails.

Such responsibilities arose in part from the 'marked imbalance in knowledge and power' between the two parties.[995]

The Tribunal looked specifically at the nature of any fiduciary duties owed by the Crown in the Turanga Township inquiry. Claimant counsel sought to show that the Crown had fiduciary obligations arising both from, and independently of, the treaty. At that time, 1995, the New Zealand Courts had not considered 'the existence of an aboriginal fiduciary obligation independently of statutory reference to the principles of the Treaty'. Accordingly, and '[i]n deference to the courts whose function it is to

declare the common law' the Tribunal found that it 'must wait for an authoritative decision from them on the question.' The Tribunal went on to quote Sir Robin Cooke in the New Zealand Māori Council case that the 'relationship between the Treaty partners creates responsibilities analogous to fiduciary duties' and in *Te Runanga o Wharekauri Rekohu Incorporation v Attorney-General*: 'the Treaty created an enduring relationship of a fiduciary nature akin to a partnership'.[996] There was no suggestion that the Crown's fiduciary duties arose independently of the treaty or had their source in the common law; but, the Tribunal noted, this did 'not foreclose the possibility at some future time the New Zealand Court of Appeal might so hold.'

The Supreme Court did not go so far in *Wakatu*. It drew a clear distinction between the sort of political trust whereby the Crown may be said to be a trustee as part of its governance and fiduciary obligations in a legal sense.[997] As we noted above, the Court was not required to, and expressly did not consider, the question of whether there was any general fiduciary duty owed by the Crown to Māori under the Treaty; it did, however, open the legal door to a fiduciary duty being recognised in other historical transactions between Māori and the Crown. We think it unlikely that the circumstances that gave rise to *Wakatu* will be confined to that case.[998]

A number of possible situations in which the *Wakatu* decision may have relevance have been argued by claimant counsel. Thornton and Lyall submitted that the Royal Instructions limited the Crown to the purchase of wastelands and required the protection of occupied lands. In their words:

> This fiduciary duty would have required that in connection with the taking of surplus lands, the Crown was obliged to determine what lands were not being used by Māori and reserve those lands, protecting them by making them inalienable.[999]

Naden, Roughton, and Shankar also identified legislative sources of the assumption of responsibility element found in *Wakatu*.[1000] Counsel argued that the Crown assumed responsibility towards Māori by way of: the Tiriti o Waitangi, the 1840 Charter for New Zealand, the instructions contained in the dispatch of the Lord Russell, and the Land Claims Ordinance 1841 which was supposed to ensure that all pre-1840 transactions were conducted equitably and without injustice.[1001] In our view, however, these were all political undertakings creating a trust in the higher sense. While these were important statements that equitable obligations had been assumed, they did not give rise to a recognisable fiduciary duty in common law. Unless something additional was done in the private law sense – an active step to assume responsibility in respect of a particular transaction such as vesting and setting aside lands – the decision in *Wakatu* is not applicable.

We consider the elements of trust raised in the submission of Hirschfeld, Sinclair, and Tūpara to be more directly applicable to the decision of *Wakatu*. However, in order for the case to apply, it must be shown that there was an assumption of responsibility sufficient to give rise to a trust or trust-like arrangement followed by a breach of that trust. As we see it, the equitable obligations that are undertaken in the Land Claims Ordinance are, by themselves, insufficient, but they do provide a necessary context for the Crown's assumption of responsibility towards Māori and to behave equitably.[1002] The claimants must then demonstrate an assumption of responsibility particular to a transaction in order to show an intention to create a trust or trust-like arrangement, that the land (in this case the 'surplus') was held for the benefit of the claimants, and that the Crown committed a breach of trust by appropriating it for its own benefit. While the Crown did briefly contemplate creating reserves out of surplus lands and FitzRoy made a verbal promise of their return we do not think that a fiduciary duty had been created and then breached in the sense contemplated in *Wakatu*. This is not to say that the Crown's taking of the surplus was not unconscionable in treaty terms, simply the circumstances are too different from those considered in *Wakatu* for that decision to be clearly applicable.

The strongest case for the application of *Wakatu* would seem to us to be the failure to set aside reserves when specifically promised. Such promises or obligations were expressed in a number of circumstances.

We agree with the Crown that the situation in Te Raki was 'materially different' from that at *Wakatu*. Notably, the scale of many old land claims in Te Raki involved small acreages – and as claimant counsel acknowledged – in such circumstances it is unlikely that existing occupation rights were affected by the validation of the 'purchase.'[1003] However, there were other instances in which old land claims involved thousands of acres. In any event, the differences in the facts and the surrounding circumstances do not mean that the reasoning of *Wakatu* may not have application elsewhere. The fiduciary duties found in *Wakatu* are not dependent on the pre-1840 transaction but on the Crown's assumption of responsibility through the Land Claims Ordinance, the November 1840 agreement, Spain's award and the specific conditions of grant which required the company to reserve tenths and except occupied sites.

An analogous situation may be seen to exist in certain instances in Te Raki where awards set aside reserves but they were not put into effect; however, it should be observed that the failure to reserve 'occupied' land may not give rise to a fiduciary duty in every instance. It was certainly a duty in the higher sense, a cornerstone of Crown policy as set out in Normanby's 1839 instructions which failed to be realised, or adequately protected within the awards of the land claim commissioners. The question to be answered is whether the Crown's assumption of responsibility was of such a nature to attract fiduciary duties in common law. It could be argued that the reservation of occupied land was an incidence of an exercise of a right of pre-emption which was justified in the treaty context by its protective elements but the issue is complex and yet to be further tested in the courts. There may also be instances in which the Crown agreed to set aside reserves as part of its own direct purchases in an inducement to sell and then failed to keep that promise which might rise to a fiduciary duty on the basis of its pre-emptive powers under article 2 of the treaty. We will explore such instances in chapter 8 of this report.

In the following we look more particularly at a third set of circumstances; the case of the 'tenths' that were supposed to be set aside as part of pre-emption waiver purchases. The structure of FitzRoy's pre-emption scheme raises questions about the Crown's fiduciary duties in a way that was not explored in *Wakatu* but in which that decision may still apply. As noted earlier, the Supreme Court finding did not presuppose a blanket assumption of fiduciary obligations. As we observed earlier, more is required. Relevant circumstances might include the following: the assumption of responsibility; an inducement to enter a transaction accompanied by a broken promise or a failure to perform a condition; appropriation of lands; unfair or unconscionable conduct; and where there is conduct or facts that demand further explanation. All of these conditions were present to some degree in the case of pre-emption waivers.

It might be argued that the waiver of pre-emption was in itself a breach of fiduciary duty. But we think that this is unlikely to be tenable, since the Crown was acting not as a trustee under common law but in governance only. Also the scheme arose as a solution to the dissatisfaction that Māori as well as settlers felt with slowing Crown purchases in the region. FitzRoy's decision to waive pre-emption under certain conditions was guided, if not compelled, by the wish of Māori to sell land directly to private purchasers. They disliked pre-emption as interfering in their relationships with settlers and depressing the price of land, thus there was apparent consent for FitzRoy's measure although we consider this to have fallen short of the gathered hui when te Tiriti had been signed at Waitangi and Māngungu.

It was expected that prices would be dictated by market forces and FitzRoy advised Māori to seek the best price rather than accept the first offer made for their land. Nonetheless, the Governor and Crown officials were aware that the wrongs the powers of pre-emption were supposed to prevent might arise in the context of private transactions. The protective measures found in the scheme and announced in his proclamations of 26 March and 10 October 1844 indicate that the Crown had not disclaimed its responsibility to protect Māori. Instead, FitzRoy attempted to balance multiple interests reframing the overarching objectives of the right of pre-emption in a manner that preserved the Crown's duty of protection.

As outlined earlier, the proclamations required the Governor to consider a range of factors when exercising a discretion to approve or reject an application for a waiver made to his office. He had to consult with the Protector of Aborigines in each case before agreeing to waive pre-emption. No waiver would be granted that resulted in the alienation of pā, urupā, or lands in 'present use'. The implementation of the scheme was to be overseen by protectors who would also ensure that tenths would be reserved and that there was sufficient land left for Māori use after the purchase. Non-compliance with the regulations set in place was a constant issue throughout the operation of the pre-emption waiver scheme. Often officials, including the Governor, turned a blind eye to their infringement and where they did not, often the Crown kept the lands concerned as 'surplus'.

This brings us to the matter of the tenths in particular where we think there are analogous circumstances to those of *Wakatu*. Regulation 5 of FitzRoy's March 1844 proclamation required purchasers to convey one-tenth of their purchase to the Crown for 'public purposes, especially the future benefit of the Aborigines'. The management of such reserves, it was conceived, would be entrusted to a committee that consisted of the Governor, the Bishop, the Attorney-General, the Commissioner of Crown Lands, and the Chief Protector of the Aborigines.

The language of regulation 5 was imprecise, but we do not think that this detracts from the undertaking of the Crown to hold the land in trust. FitzRoy had also given explicit assurances to Māori rangatira that the land would be set aside for their benefit, announcing at the gathering in front of Government House:

> one-tenth of all land so purchased is to be set apart for, and chiefly applied to, your future use, or for the special benefit of yourselves, your children, and your children's children. The produce [income] of that tenth will be applied by Government to building schools and hospitals, to paying persons to attend there.[1004]

Such assurances created a reasonable expectation that the land would be set aside for the long-term and enduring benefit of Māori who should have been able to rely on those statements. Governor Grey dismantled the scheme, however, and with it the tenths. Section 14 of the Land Claims Act 1846, provided that, since in many cases the tenths could not be 'conveniently made', they could be purchased from the Government by private individuals at the rate of £1 per acre instead.

It is our view, that a fiduciary duty might be considered to exist in common law in the case of the tenths. Although the waiver had removed the Crown's exclusive monopoly right, FitzRoy's scheme had introduced fiduciary duties in new ways. The Crown was still in a position of overall responsibility. The proclamation and the Governor's assurances expressed a duty Māori could reasonably rely on. The promise of tenths served as an inducement for sale and (along with exclusion of pā and other sites of occupation) was a condition of purchase under the scheme, Grey was not at liberty to dispose of or appropriate the tenths through the subsequent passage of legislation. *Guerin v Queen* to which the Supreme Court referred extensively in its *Wakatu* decision concerned a failure to fulfil a condition and that was the case here. We know of no instance in which Te Raki Māori received either tenths or the income for their benefit. Insofar as tenths reserves were to be set aside and held in trust for Māori, fiduciary duties would seem to arise in respect to their creation and management and the Crown appears to have breached this duty when it appropriated land and money out of the subject matter, its trust-like arrangement.

We think there is, then, a foundation for the Crown to consider whether it owes these duties under the ruling in *Wakatu* and should take steps to address its responsibilities as a fiduciary; or for cases to be brought before the courts by claimant groups affected by the disposal of the tenths reserves supposed to be set aside under the pre-emption waiver scheme. However, as stated in *Wakatu*, this must be determined on a case-by-case basis.

6.6.3 Conclusions and treaty findings: the waiver of pre-emption

FitzRoy believed that waiving the Crown's pre-emptive right of purchase would allay growing resentment and

discontent on the part of both Māori and settlers and would also foster the economic development of the colony by reducing the role of the State in the economy.[1005] He acknowledged that Māori had thought that the Queen was to have only the first choice of land. He also consistently emphasised that pre-emption had been intended to protect Māori and the importance of retaining the 'moral authority' of the Government; a difficult matter when it was using its monopoly position to its own advantage. FitzRoy's policy was an attempt to resolve that contradiction by removing the Crown's direct involvement in land purchase while retaining a supervisory role and a means of generating income for government purposes.

British settlers had been increasingly impressing upon Māori that a Crown monopoly on land-buying was inconsistent with the Treaty's guarantee to them of all the rights and privileges of British subjects and FitzRoy's own frequent allusions to article 3 and of his desire to see that promise fulfilled highlighted the inherent contradictions in the treaty as interpreted by the Crown. Pre-emption waivers were intended to resolve that tension as well.

Māori and settler dissatisfaction with the '10s an acre' system introduced in March 1844, the growing tensions in the north and the realisation that the new regulations had failed to have their intended effect or were being deliberately avoided were all factors leading to FitzRoy's '1d per acre' proclamation in October. According to Crown historian Dr Donald Loveridge, the decision reflected FitzRoy's disenchantment with the land fund system of colonisation on the grounds that it was failing 'to attract either capital or the right kinds of settlers'.[1006] In our view it also was a surrender to the demands of settlers who were actively undermining Crown efforts to protect Māori from the pressures of colonisation.

FitzRoy did not disavow the Crown's duty of protection when he waived its right of pre-emption but that step – and Stanley's response to it – threw further doubt on the importance of this aspect of the policy. In modifying pre-emption, the Governor attempted a number of safeguards, prohibitions against the purchase of pā and urupā and land required for their use, the setting aside of tenths blocks – intended to ensure that they retained sufficient lands for their future welfare – and a delay in the issue of grants intended to allow time for objections and also to encourage long-term relationships between settlers and Māori. Later, FitzRoy also attempted belatedly to put a limit of a 'few hundred acres' on the land that could be acquired under waiver certificates.

However there were shortcomings in both sets of regulations. They did not require a preliminary survey to be made, nor were purchasers specifically required (until FitzRoy's notice of December 1844) to establish that they had identified all the rightful owners of the land concerned. There was no mechanism to ensure that the vendors would retain sufficient land for their needs other than scrutiny by an over-extended Protector of Aborigines. Further, the regulations did not require the owner of the lands concerned to consent to a waiver of the Crown's pre-emptive right, only for the actual transaction of the land in question. Often – contrary to the regulations in place – this had been arranged before a waiver had even been granted.[1007] Nevertheless, the proposition that the Crown was free, without Māori involvement, to grant waivers to settlers, reflected the Crown's presumption of its own sovereignty in New Zealand and the sidelining of Māori authority over their own lands. Avoidance of this regulation undermined the economic benefits of waiver purchases for Māori. The effectivenes of intended protections was similarly undermined by failures in their implementation.

Taken as a whole, the Crown assumed that it could unilaterally alter or depart from the provisions of the treaty, based on its own interpretation of article 2 of the English text, which differed from what Māori had been given to understand. There is no doubt that officials in the Colonial Office understood that the pre-emptive waiver scheme would constitute a unilateral amendment of its treaty guarantees though it would not be absolved of its duty of protection.[1008] There is no doubt, too, that Māori were dissatisfied with the Crown's pre-emption policy, which they condemned for depressing prices; but beyond the initial reception of delegates from a different tribe and the later hui at Waimate, Te Raki Māori were not consulted regarding the changes or any new protections.

Certainly they were not consulted with as an assembly in the same way as they had been in February 1840.

Our final conclusions as to the Crown's actions in waiving its pre-emptive right in favour of individual purchasers must wait upon our assessment of the later legislation passed in 1856, the commission it established, and the extent to which Māori rights were considered and protected. It was still possible at this point that Māori who had not participated in a transaction might have their rights addressed, but there was no clear avenue for them to do so.

What is clear to us, however, is that the Crown considered the title of Māori participating in 'sales' under waiver certificates to be extinguished, notwithstanding that purchasers often had failed to follow regulations, as discussed later. Even though the investigations by protector Clarke (in approving the waivers) and Commissioner Matson and Attorney-General Swainson (in validating them) were defective, Māori were considered to have sold the land concerned. Disallowance of settler claims for non-compliance with the regulations did not affect that status; instead, such land and areas described in the deed but in excess of the Crown grant were considered to have 'reverted' to the Crown. This was a significant shift from FitzRoy's promise to Māori regarding pre-treaty land claims that any surplus lands were to return to the original owners, which we discuss in the next chapter. This had seemed to disavow any intention on the part of the Government to take these lands for itself, unless Māori no longer wished to claim them. In both instances, the idea that land 'reverted' – whether to Māori (as FitzRoy had promised in the case of old land claims) or to the Crown (as asserted in the case of pre-emption waivers) – was a reflection of the Crown's assumption of the radical title. While Grey's 1846 ordinance acknowledged that there might be Māori who had not participated in waiver transactions whose rights were unextinguished, the Crown set about issuing mineral licences and on-selling the lands it considered itself now to own.

It is well established in treaty jurisprudence that the Crown's right of pre-emption created a fiduciary obligation. In our view, waiving that right did not relieve the Crown of that obligation; indeed, the regulations introduced under FitzRoy's proclamations, though deficient in several respects, reflected the Governor's awareness and acceptance of that fact. However, his protections proved inadequate – evaded by settlers or abandoned as their interests increasingly came to dominate in Crown policy. Notably, purchases beyond the few hundred acres described in FitzRoy's notice of 6 December 1844 were approved, and grants endorsed later by both FitzRoy and Grey. There was no assessment of whether lands were being acquired that Māori would need for their own sustenance and no tenths were set aside. Waiver certificates were also approved for 'purchases' already negotiated, negating the competition that was supposed to benefit Māori vendors.

Both the Secretary of State and Governor acknowledged the danger posed to Māori and the Crown's responsibility to ensure that no harm was inflicted upon them by excessive and inappropriate land purchase. Earl Grey's instructions regarding the settlement of pre-emption waiver purchases had clearly stipulated the Māori vendors must be 'according to the native laws and customs, the real and sole owners of the land'.[1009] But an effective process had not been created and in many cases, the assent of all rightful owners had not been established. Governor Grey's condemnation of the pre-emption waiver proclamations as injurious to Māori – and of FitzRoy and the protectorate, in general – failed to produce anything substantive; as with the old land claims, nothing effective was done to remedy the injustice he had repeatedly identified. The measures he introduced were concerned with the interests of the settlers – by his own admission at the expense of Māori, even though he had railed at the injustice FitzRoy's waivers had inflicted upon them.

Grey's 1846 ordinance undermined the tenths provisions – a crucial acknowledgement of the Crown's continuing duty of protection despite the modification of its pre-emptive right – and the investigations under his three options perpetuated failures to identify all rightful owners properly, establish that a fair price was paid, and ensure that Māori retained their valued sites and sufficient lands for their use. We agree with the assessment of Stirling and

Towers that 'Once again, what had appeared to be a robust process on paper turned out to be largely ineffectual in reality, and again Maori paid the price.'[1010]

We find therefore that:

- the administration of the waiver policy was deeply flawed from the outset, Crown scrutiny was deficient to the point of negligence with the result that intended protections set out in FitzRoy's proclamations were able to be evaded, and expected benefits failed to materialise in breach of te mātāpono o te matapopore moroki/the principle of active protection.
- Governor Grey's Land Claims Ordinance 1846 and his options of August 1847 for the settlement of waiver claims favoured settler and Crown interests over those of Māori in breach of te mātāpono o mana taurite/the principle of equity and te mātāpono o te matapopore moroki/the principle of active protection.

We leave our findings on surplus land until the next section.

6.7 Were the Bell Commission and the Crown's Policies on Scrip and Surplus Lands in Breach of the Treaty?

6.7.1 Introduction

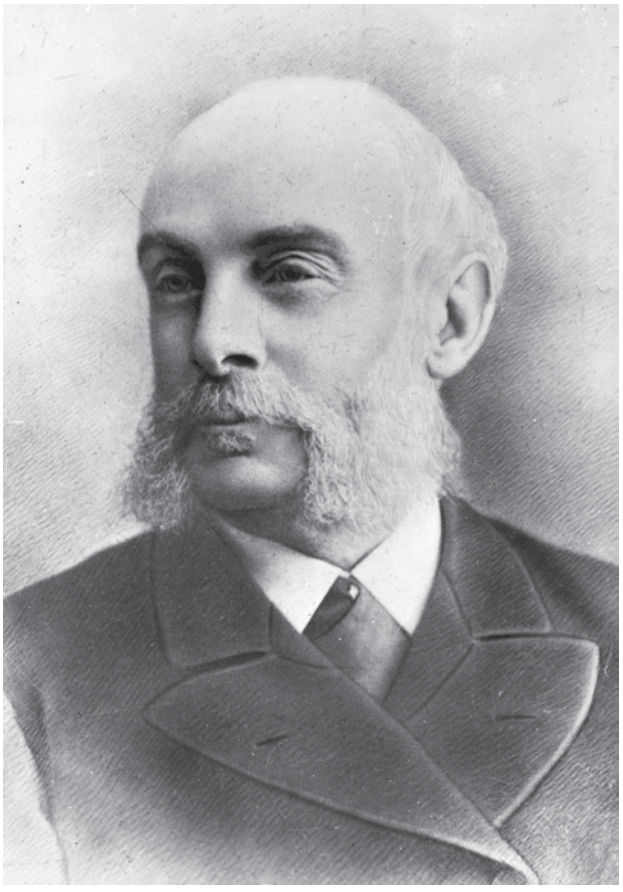
By the mid-1850s, a decade and a half after Hobson had promised to investigate the old land claims and return Māori lands that had been unfairly taken, considerable uncertainty still existed. Crown grants had been awarded for many of the claims, but not surveyed. Under the doctrine of radical title, which we have found to be in breach of the treaty and its principles, the Crown had laid claim to significant areas of 'surplus' lands but in all but one case, had made no attempt to enforce possession. Nor had it sought to assert its claim over lands it had acquired through 'scrip' on the ground (see key terms in section 6.1.2). In many cases, Māori continued to live on and use ancestral lands, not knowing that in terms of colonial law, those lands were now the property of the Crown, or settlers.

The settler Parliament had begun to operate in 1854 and immediately began to assert a right to legislate over matters affecting Māori. The Land Claims Settlement Act 1856 was enacted to bring finality to all remaining old land and pre-emption waiver claims, enabling settlers' grants to be confirmed, and the Crown to claim its portion. In 1857, the second Land Claims Commission was established under the former New Zealand Company agent Francis Dillon Bell. He confirmed or increased grants for many of the old land claimants in this district, and his decisions also resulted in the definition of what lands the Crown owned by reason of 'scrip' and its claim to the 'surplus' for both pre-treaty and pre-emption waiver 'purchases'.

The recommendations of the second Land Claims Commission resulted in grants totalling 159,461 acres being awarded to settlers in the case of old land claims, while the Crown netted some 51,980 acres of 'surplus' lands.[1011] By our calculation, the finalisation of pre-emption waiver claims resulted in the transfer of 14,400 acres to settlers and a further 21,168 acres to the Crown, which also acquired another 4,245 acres after surveying 'scrip' lands in this district (see section 6.1.3).

Claimants saw the policies concerning surplus and scrip, and the decisions of the Bell commission, as compounding earlier treaty breaches that arose from the Crown's assertion of radical title and the failure of the first commissions to investigate Māori understandings of the transactions properly or to protect unextinguished Māori interests.[1012] Claimants said that the Bell commission and the legislation it operated under failed to address the shortcomings of the first commission and FitzRoy's interventions; failed to provide reserves for Māori; failed to respect or uphold shared-use and trust arrangements; and rejected or dismissed evidence from Māori.[1013] Bell's overriding concerns were to secure surplus land for the Crown and to bring finality to the old land claims.[1014] Ultimately, the Crown took the surplus lands in breach of promises of their return made at Waitangi in 1840 and Waimate in 1844.[1015]

Claimant hapū who raised specific concerns about the Crown's scrip policy and practice include Te Māhurehure, Te Ihutai, Te Kapotai, Ngāti Hau, Ngāti Manu,



Francis Dillon Bell, who served as the Commissioner of the second Land Claims Commission between 1857 and 1862. Bell was a former New Zealand Company agent and, in his position as Land Claims Commissioner, was responsible for confirming or increasing grants of many old land claimants.

Te Parawhau, Te Uri o Te Pona, and Te Whakapiko. Claimants submitted that the policy had undermined the economy by drawing settlers away from the district and leaving land in an undeveloped state.[1016] The long delays in finalising scrip claims impeded proper scrutiny and created uncertainties over locations, boundaries, reserves, and other matters.[1017] Claimants submitted that the Crown took lands that had not been subject to valid transactions,[1018] and took more land than the scrip awards entitled it to do.[1019] In a number of blocks (including Motukaraka, Orira, Rawene, Papakawau, Powditch's Whangaroa claims, and Baker's Mangakāhia claims), claimants regarded their lands as having been confiscated or illegitimately taken.[1020] Claimants also said that John White, who managed the Hokianga surveys, dismissed concerns raised by Māori,[1021] and had a familial conflict of interest that the Crown did not address.[1022]

The Crown conceded that it had breached the principles of the treaty by claiming surplus lands without first ensuring that Māori had adequate lands for their future needs; by failing to investigate the claims for which scrip was given; and by taking decades to settle the titles and assert its own claims.[1023] The Crown also acknowledged that it had not adequately explained the surplus lands policy to Māori when it was first introduced, and that its implementation 'created significant hostility between Māori, settlers and Crown officials'. Many Māori had no knowledge that the Crown had claims to the surplus lands, and this caused 'Considerable protest and confusion' when the Crown ultimately took possession of the land, which in many cases, Māori had returned to or never left.[1024]

The Crown did not accept that its assertion of radical title, on which the surplus lands policy was based, was in itself in breach of the treaty. (We have dealt with this issue in chapter 4.) Nor did the Crown consider:

- that it had led northern Māori to believe that all surplus lands would be returned;[1025]
- that there was clear evidence of significant concern about surplus lands among northern Māori in the early 1840s;[1026] and
- that Governor FitzRoy had made significant promises regarding the return of surplus lands that the Crown failed to honour.[1027]

The Crown submitted that claims to surplus lands were investigated through the Myers Royal Commission of Inquiry (1946 to 1948), and all claims were settled in 1953

through the Maori Purposes Act 1953.[1028] With regard to scrip, Crown counsel submitted that on many occasions, it received less land than it had paid for.[1029]

The Crown's concessions and acknowledgements, although significant, did not address all the claimants' concerns. In this section, we will consider the nature of the promises made to Māori about the return of surplus lands; the purpose and actions of the second Land Claims Commission; and the impact of the surplus and scrip policies on Māori communities in Te Raki. We will consider the Crown's submission about the Myers commission and the Maori Purposes Act 1953 in section 6.8.

6.7.2 The Tribunal's analysis

(1) *Did the Crown mislead or break promises to Te Raki Māori over its 'surplus' lands policy?*

In his 1839 instructions to Hobson, Lord Normanby outlined three, inter-related but also potentially contradictory objectives for the new Crown Colony Government: protection of Māori, funding the colonial project, and controlling land use and settlement. As the Tribunal explained in the *Hauraki* report, Normanby assumed that Māori had already parted with vast tracts of land in many parts of the country, and he aimed to prevent any repeat of the New South Wales experience in which settlers with large holdings would 'sprawl across the colony to the detriment of sound economic development and security'. This, then, was a significant practical motivation behind the Crown's decision to operate the land commission process as it did, whereby no pre-treaty transaction would be recognised until it had conducted its own title determination process, through which settlers would be limited to 2,560 acres for any valid purchase. In the Hauraki Tribunal's view, it was implicit in these instructions that the Crown would find some land acquisitions invalid and therefore leave them in customary ownership. In particular, Crown officials doubted the legitimacy of the 'huge' South Island and Cook Strait purchases, as well as some of the larger Bay of Islands transactions. But, in the assessment of that inquiry, the instructions also implied that the Crown would retain any 'surplus' above the 2,560-acre limit from lands that it judged to have been legitimately alienated; and in addition, that the Crown intended to make use of those lands to advance colonisation, either by making grants to settlers or by using the land for public works.[1030] The underlying legal principle, as we have already discussed, was that from the moment of its assertion of sovereignty, the Crown would also acquire radical or underlying title to all New Zealand lands, subject to the 'burden' of Māori customary rights.[1031]

During the Tiriti debates, rangatira certainly expressed considerable concern about the lands that missionaries and other settlers were claiming to have purchased, and they sought assurances that the new Governor would enforce their understanding of the transactions – in their words, 'return' the land. Hobson's response, that 'all lands unjustly held would be returned',[1032] was, in our view and in that of earlier Tribunal inquiries, a critical assurance which undoubtedly influenced the rangatira to sign. We agree with the assessment of the *Hauraki* report that those who signed at Waitangi and Māngungu 'expected to get back much of the land claimed by traders and others, and that much of this land would remain in customary Maori tenure'.[1033]

The 1840, 1841, and 1846 Land Claims Ordinances established commissions to determine whether settlers had made valid and equitable purchases from Māori. The surplus lands policy was implicit in these measures. The commissioners could determine that land had not been legitimately purchased, in which case it would remain in customary ownership. But they could also determine that land had indeed been acquired on equitable terms, and then award only a part of it to the settler.[1034] Gipps later elaborated on the surplus lands aspect of this policy in his instructions to Hobson. On 2 October 1840, he explained that the commission must give precise descriptions of lands 'alienated . . . but not awarded to the claimant';[1035] and on 30 November 1840, he specified that '[if] the chiefs admit the sale of land to individuals . . . the title of such chief to such lands are of course to be considered

as extinct whether or not the whole or any portion of the land be confirmed to the purchasers'.[1036]

Again, however, no effort was made to explain the 'surplus' policy to Māori, though they were certainly aware that the Crown was taking steps to address the old land claims question.[1037] Busby, George Clarke, and several settlers, as well as FitzRoy himself, described keen Māori interest in the question of what would happen to land that was not awarded to 'their' settlers. Busby informed the Colonial Office that during the debate of the Land Claims Ordinance 1840, in which Busby himself had participated, a Māori from Hokianga (whom he did not name) had been 'introduced by some person' into the gallery of the New South Wales Legislative Council. On his return to New Zealand, the Māori witness had created 'the greatest excitement and indignation amongst his countrymen, by his account of the proceedings he had witnessed'. As Busby explained it, northern leaders believed that the Crown intended to take for itself the lands that missionaries and others were occupying, and were incredulous at this prospect.[1038] Although the fate of those lands had not been specifically discussed during the New South Wales debates, the Crown had been accused of intending to confiscate them.[1039] According to Busby, a delegation of Christian Māori visited their pastor Richard Davis 'and asked if it were indeed true that the British government intended to take possession of their lands?' Davis assured them that it was not. Nonetheless, Busby added,

> The sentiment has been universal amongst the natives in the neighbourhood of the Bay of Islands: that if the Queen (according to the enactments of the Land Claims Bill) deprived her own children of their land, it was only because she was not yet strong enough, that she did not interfere with theirs.[1040]

Busby was writing early in 1845, shortly before the Northern War broke out, and was tracing the history of Māori concerns about surplus lands, which he saw as relevant to rising tensions. Clearly, he was not impartial, but nonetheless it is worth considering his suggestion that Māori were alarmed about the Crown's apparent intention to interfere with their arrangements with settlers. In a letter published earlier in the *Bay of Islands Observer*, he had argued that 'no sophistry could convince the natives of the justice of the proceedings of the government which should despoil a purchaser of their land of his property'. The chiefs had assured landholders of their 'determination . . . to support them in the possession of it against the government'. This, as Busby explained, was because Māori lands had been 'expressly sold by the chiefs to the missionaries, in order that the sons of the missionaries might be the friend and neighbour of the sons of the chief'. Others had been married to the 'daughters of chiefs from whom they [had] purchased land, or [had] families by them'. As a result, there was a 'union of interests between the natives and the settlers' that Busby argued could not be disturbed, except by military force.[1041]

Māori concerns about the Crown's intentions had undoubtedly been inflamed by some settlers, who alleged that officials were being deliberately deceitful and who argued that the policy was unfair to Māori and settlers alike.[1042] We noted earlier, Clarke's warning in this regard, and also that some Māori were hoping that their land would revert to them through the work of the commission – as Clarke saw it, no matter how 'fairly purchased'.[1043] S M D Martin, magistrate and local newspaper editor, referred to the injustice of a policy under which the Crown might declare:

> that the surplus lands which Europeans might have fairly purchased from the natives, but for which they had not given a sufficient consideration, would revert to the Government, and not to the native who was presumed to have been cheated or overreached.[1044]

Inadequacy of price was a matter for increasing Māori complaint but not, in fact, considered by officials as a reason to disallow claims, while settlers protested about the implication that they had swindled Māori.[1045]

'Abominable and grossly unjust . . .'

SMD Martin began his editorship of the *New Zealand Herald and Auckland Gazette* with an open letter to Governor Hobson criticising the Land Claims Ordinance 1840, passed in New South Wales:

> To crown the infamy of the whole concern, the surplus lands, instead of going back to the natives, the parties alleged to have been injured, are strangely enough declared to be the property of the Crown. We are tried, because we are said to have stolen the natives' property; when our crime is proven, the property is taken from us, but instead of being restored to the natives from whom we stole it is kept by the Judge himself. Abominable and grossly unjust as this act is, with the exception of Mr Hannibal McArthur, every one of the members of the Botany Bay Council approved of it.[1]

It would be difficult, too, to explain why the Crown should be entitled to any land if the money paid had entitled settlers only to so many acres. Another settler, Charles Terry, argued that 'whatever portion [was] disallowed' ought to 'revert' to Māori as a matter of 'equity':

> It is not the value of such lands that gives to this question its importance, and contingent consequences, but it is the impression and feeling which it will create among the aborigines, of the character and justice of the government which has so recently assumed the sovereignty of their native land, and under whose laws and institutions they and their posterity are henceforth to live.[1046]

Clarke and FitzRoy also made observations about the dangers inherent in any Crown attempt to keep the surplus for itself. Writing soon after the end of the Northern War, Clarke suggested that it was only assurances from the missionaries to Māori that the Crown's proceedings were 'merely matters of form and theory' that had 'prevented the northern chiefs from rising . . . to vindicate their independence'. According to Clarke,

> The smothered feelings of disaffection were in consequence manifested only in threats to oppose, even to the death, every attempt by the government to interfere with their lands . . .
>
> This opinion was still further strengthened when it became known that the surplus land confiscated under the sanction of the 'Land Claims Ordinance' was to be appropriated and resold, for the benefit of the government, and not restored to the natives, as the original proprietors.

What was more,

> not only the natives, but their advisers also, very much misunderstood the Treaty of Waitangi, if it really gave power to the local government to become, as it were, general plunderers, or to enact measures having a tendency to weaken the natural sense of justice which always inclined the natives to maintain inviolate their engagements with Europeans for the sale of land, when fairly and equitably made.

In Clarke's opinion, the Government's attempts – to which Māori had strongly objected – to on-sell land acquired through the extensive pre-treaty transactions of the missionary William Fairburn had undermined their 'morals' by giving the 'sanction of official authority' to 'objectionable principles of action'.[1047]

FitzRoy had been concerned about the surplus lands issue even before he left for New Zealand, regarding it as an act of injustice to Māori. This reflected his appreciation (expressed before the House of Lords select committee in 1838) that Māori land transactions were not intended as absolute alienations but rather as a conditional sharing of the land and its resources with settlers. In his view, Pākehā had chosen not to challenge that understanding because doing so would have provoked Māori opposition to their settlement. This put the Crown in a difficult position. In

May 1843, before departing for New Zealand, FitzRoy had sought clarification from the Colonial Office, indicating his reluctance to assert any Crown claim to the surplus lands. Referring to the land ordinances, he asked:

> To whom should land now belong which has been validly purchased from New Zealand aborigines, but which, exceeding a certain specified quantity, cannot be held, under existing laws, by the original purchaser?

His own conclusion, reached after 'deliberate consideration', was that the surplus land 'ought to return to those aborigines from whom it was purchased'. The crux of the matter, he believed, was that Māori might still be occupying those lands and had given up no rights, except to the extent that they had allowed the settler also to occupy a portion:

> Suppose that a fertile tract of land, 10,000 acres in extent, had been validly purchased from a populous tribe of aborigines by a settler of 1830. In effect, notwithstanding such purchase, not a native is or has been dispossessed of any practical benefit, except that of sale.
>
> Each uses the land and its produce as before, the only sensible difference being, that the settler also uses it as he pleases; but he, for his own sake, avoids interference with the native huts, their sacred burying-places, their cultivated grounds, and general habits.[1048]

On the settler being restricted to a grant of, say 3,000 acres, the Government would sell the rest to numerous newly arrived emigrants 'unacquainted with the native habits or customs, but fully alive to British rights of property'. When that happened, Māori would be 'disturbed, obliged to move, be disappointed, and hate the Government, whose conduct ought to be . . . such as to ensure their respect and attachment'. FitzRoy argued that 'justice' to Māori, who at the 'time of selling such extensive tracts of land did not know their value . . . nor foresee the consequences to themselves', might require the dispossession of settlers; and that the Crown could 'lay no claim whatever to the surplus land in question'.[1049] FitzRoy's views are revealing for several reasons, not least that he appears to have accepted that the Crown could validate pre-treaty transactions as sales, even while acknowledging that Māori had not understood them as such and had retained most rights for themselves.

Lord Stanley, in reply, said he assumed that FitzRoy was referring to transactions in which the payment had been sufficient and had been 'untainted by any such fraud or injustice' that would render them invalid before the Land Claims Commission. In such cases, any land over the 2,560-acre limit belonged to the Crown. Māori could not be the owners since their interests had been legitimately extinguished, and the buyer could not be the owner because the law did not allow it. It followed that such land was 'vested in the Sovereign, as representing and protecting the interests of society at large'.[1050] In other words, such land would become available for the purposes of sale and settlement.

While that was the legal principle, Stanley also gave FitzRoy the discretion to return the land to Māori were that best for the colony. He acknowledged that, in practice, 'difficulties' would 'probably arise'. Should Māori be still in possession of such lands, or 'solicit the resumption of them' prompted by 'feelings entitled to respect', it would be FitzRoy's duty to:

> deal with the original proprietors 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.

Stanley was aware that such a return would be FitzRoy's inclination.[1051]

FitzRoy demonstrated this immediately on his arrival in New Zealand. He later recorded that he had found excessive discontent in the northern part of the island; that Māori were dissatisfied by

> their having heard that the lands actually bought by settlers, but not to be retained by them under the new order of things, were to be taken by the Government and eventually resold to other parties.[1052]

As we discussed in earlier chapters, the 'inhabitants of Auckland' had presented him with an address in December, asking for their titles to be issued and objecting to the Crown's claim to the surplus on the grounds:

> it would be highly unjust towards the natives, and, at the same time, highly impolitic, as the natives lay claim to such surplus lands; and the forcibly taking possession of them by the Government would be attended with the very worst consequences.[1053]

FitzRoy agreed that it would be 'improper' for the Crown to claim the surplus lands under such circumstances. He had also received a petition from Māori, to which he responded (according to the *Southern Cross*) with a verbal promise, addressed to a gathering of rangatira at Government House that:

> an investigation would be made regarding all lands purchased from them by Europeans, and after allowing certain portions of these lands to such Europeans in accordance with certain arrangements, and upon certain principles, all the surplus lands should revert to the original native owners, . . . but that in the event of the original owners not being discovered, the surplus lands would be claimed and held by the Crown.[1054]

The editor of the newspaper saw this as an unequivocal and most sincere statement that any surplus lands would revert to Māori, and that the Crown was to 'act as Umpire . . . for the purpose of Justice solely', while its purported claim to the 'Lion's share' was 'abandoned'.[1055] Both the address and FitzRoy's response were enclosed in his dispatches.[1056] That same promise was recorded by the CMS missionary, James Kempthorne, following discussions with FitzRoy on 'Native Lands' in December 1843 and January 1844. The surplus would be returned, 'except in cases where the question of the ownership might excite feuds'. In such instances, the purchase would be 'made complete by and under the Queen's name'.[1057]

The matter was raised again at the Waimate hui attended by Ngāpuhi rangatira on 2 September 1844. Crown counsel argued that this discussion was the Governor's initiative rather than broached by Māori themselves.[1058] FitzRoy met privately with the leading chiefs after the public hui, but there are no detailed minutes of this discussion. Based on what was recorded, Crown counsel argued that Māori had failed to raise the issue with FitzRoy and seemed to be unconcerned.[1059] However, according to the journal of William Cotton (the bishop's chaplain), William Hau had been charged with raising 'all the native causes of complaint' in the private discussions. One of these matters was '[T]he land which has been sold to Pakehas, or rather that portion of it which is over and above the quantity granted to each claimant according to the established scale'. This was to be 'no longer taken possession of by Gov but revert[ed] to the original owners'. Cotton saw this as 'just', remarking that he had never understood 'the old way of proceeding'.[1060]

The account published in the *Southern Cross* also suggested that the question was of concern to Māori. The chiefs who had attended the Waimate hui had been anxious to obtain information on various issues, such as:

> the right of selling to Pakehas, and the decision of who should retain the surplus lands of the claimants . . . [A]ll these matters were freely & amicably discussed, and settled to the entire satisfaction of the Natives.[1061]

According to Phillipson, a commitment to return the surplus was also implicit in a letter written by FitzRoy to Heke the following month, in which he stressed the protective aspect of the limitations placed on the size of grants to settlers.[1062]

Dr Phillipson noted that the Governor did not explicitly mention his promise to return surplus lands in his dispatch of 16 September 1844 to the Colonial Office, in which he reported on the hui,[1063] although he did send a copy of the newspaper account of his discussions with Ngāpuhi at Waimate.[1064] The following month, he informed Lord Stanley of the strength of Māori opposition to the Crown's claim to be the owner: that Māori were suspicious of the Crown's intentions and angry that the settlers to whom they had 'sold' land had not received grants. They had been 'exceedingly irritated' when the Crown attempted

to take up surplus land out of Fairburn's claim, and it was 'quite impossible to make them comprehend our strictly legal view of such cases'.[1065] To have insisted on that view would have been exceedingly unwise, he continued:

> The natives would never have allowed it to take effect; and the attempt to do so would have injured the character of the Queen's Government very seriously, if not irretrievably; so tenacious are the natives of what they consider to be strict justice.[1066]

Crown counsel, in closing submissions, argued that FitzRoy had outlined his 'future intentions' for the surplus lands at a time when few grants had been made and the first commission was still conducting its hearings. Counsel also suggested that FitzRoy had not entirely abandoned the Crown's claim to the surplus lands, and that based on the contemporary evidence, '[T]here must be some doubt as to precisely what FitzRoy actually said' at Government House and at Waimate.[1067] In essence, counsel argued, this was a policy under development, without official sanction, and FitzRoy had not informed the Colonial Office of any promises to return the lands.[1068] Further, there was 'no evidence that Northland Maori were concerned about the status of the surplus lands', nor had they raised the issue with FitzRoy at Waimate or elsewhere.[1069] We do not accept these arguments. To us, there is little doubt as to what FitzRoy intended and gave Ngāpuhi and other Māori to understand: that land in excess of the scale would be returned to them. This had been specifically recorded in Cotton's journal. Also indicating that such a promise had been made were the report in the *Southern Cross*, which was sent to the Colonial Office; FitzRoy's public reply to the address from Auckland settlers; and Martin's editorial comment.[1070]

Nor do we accept the Crown's argument that this was a policy in development, without official sanction. To the contrary, it was a matter to which FitzRoy had devoted much thought and to which he attached considerable importance from the very beginning of his appointment. This was signalled by his correspondence with the Colonial Office in which he set out his considered views on the subject, and Stanley, in reply, had granted him discretion to respond with 'utmost possible tenderness', which could extend to returning the lands in cases where Māori remained in occupation or sought their resumption.[1071] Instead, we agree with Phillipson: Lord Stanley did not intend that *all* surplus lands be returned to Māori but he had granted the Governor broad discretion under which those lands could be returned 'on a fairly significant scale'.[1072]

Māori were entitled to rely on the commitments FitzRoy made directly to them, that these lands would be returned (and that their authority would be respected in other ways as well, as discussed in chapters 4 and 5). Contemporary observers agreed that his promises to Māori were 'explicit, public, unequivocal and repeated'.[1073] Why exactly FitzRoy failed to make categorical mention to the Colonial Office of his particular commitment to Ngāpuhi about the surplus is not known; perhaps he thought his intentions on the issue were abundantly clear, since he had discussed the matter with Stanley and been granted discretion. Certainly, no counter-instruction or rebuke was ever issued. In any event, we agree with claimant counsel that:

> It was not necessary for FitzRoy to report to the Colonial Office his promises to Māori to return surplus lands to them for those promises to be valid and binding upon the Crown.[1074]

As it happens, FitzRoy did not take any steps to fulfil his commitment to Māori, leaving the matter in abeyance. He made no attempt to define or sell the surplus land, but neither did he take steps to ensure its return. His failure to act on his promise would ultimately cause significant harm to Ngāpuhi and other Māori involved in pre-treaty land agreements. If Governor Grey knew of FitzRoy's Waimate promise, he did not act on it. He did attempt to overturn FitzRoy's expanded grants to the missionaries

and said he would return those lands to Māori, sending officials to the north to assure them on this point.[1075] The possibility of the Crown keeping any of that land was not something Grey seems to have contemplated, but as discussed in section 6.5.2, his own efforts to give clarity to the situation were ineffective and gave no real assistance to Māori – neither to Tāmati Waka Nene at Kerikeri (nor to Tāmati Waka Rewa at Kawau).

In practice, the failure of successive Governors to address these issues left Māori with a false sense of security. In many cases, they continued to occupy and use lands that the settlers had claimed and the Crown had awarded; and they continued to believe that this was their right, in accordance with the pre-treaty agreements they had reached with settlers. It was not until the late 1850s, when the Bell commission was established, that the Crown would seek to define and take control of the surplus lands; in some cases, Māori still did not know of the Crown's claim until the late 1860s onwards, when they placed their lands before the Native Land Court. By that time, power had shifted into the hands of the colonial Legislature and Government officers, who were only too willing to enforce the Crown's claim to the surplus lands. As we discuss next, the Bell commission readily overruled Māori protests that their title was unextinguished, and rejected requests that the land be 'returned'. As Bell repeatedly explained, Crown ownership of such land was now 'the law'.

(2) *What were the purposes of the Land Claims Settlement Acts 1856 and 1858?*

The historian W H Oliver has described the Crown's implementation of its old land claims settlement policy as 'contradictory, vacillating, dilatory and unintelligible.'[1076] By the mid-1850s, most grants had still not been surveyed, and consequently neither had the exclusions for Māori specified in the deeds or acknowledged more generally by the first Land Claims Commission. The awards that had been exchanged for scrip (see section 6.7.2(5)) were undefined. Even in instances where a survey had been undertaken, grantees had generally marked out the area they had been awarded, rather than the whole of the area found to have been sold, leaving any surplus to which the Crown might lay claim undefined also. Doubts remained, too, about the integrity of grants made under pre-emption waiver certificates, despite the investigations undertaken by Matson or by Attorney-General Swainson. Grey's Quieting Title Ordinance had done very little to resolve these issues, and the continuing lack of clarity was recognised as an impediment to both the future development of land-based resources and the Crown's land purchase operations. The increasing purchase activities of Crown officers were a further complication, sometimes overlapping with undefined grants or with 'surplus' lands. The Chief Native Land Purchase Commissioner, Donald McLean, had instructed Bay of Islands Native Land Purchase Commissioner Henry Kemp in 1855 to buy 'fresh tracts' of land and to inform himself of what land was already alienated to settlers in order to avoid repurchase.[1077]

When the newly established settler Parliament first met in 1854, the Bay of Islands member, Hugh Francis Carleton, referred to the uncertainty around pre-emption waiver claims and he recommended the establishment of a new commission to bring finality to the matter.[1078] Soon afterwards, Commissioner of Crown Lands William Gisborne also raised the issue in a report to the Colonial Secretary, in which he noted the unresolved complications arising from unsurveyed or otherwise unresolved old land claims. On occasion, grantees who had been awarded some hundreds of acres 'assert floating rights over . . . thousands of acres, as their grants determine no specific piece, and as the boundaries in it are those of their original claim'; on other occasions, 'vast tracts are left unoccupied' and '[n]ative claims, which in many cases have never been wholly extinguished, are revived in full force, and become a fruitful source of confusion and discord'. Gisborne recommended compulsory surveys to define settler and Māori interests on the ground, and also that 'some provision . . . be made for satisfying native claims that might be found to arise in respect of the surplus lands to which the Crown would be entitled'. More broadly, he

suggested the establishment of a new commission to deal with any cases that were still disputed; however, no cases where grants had been issued should be reopened, since this would result in 'conflicting claims on the part of the Crown, on the part of the natives, and on the part of the Europeans'.[1079]

In 1856, a House of Representatives select committee was appointed to 'consider . . . the nature and extent of Outstanding Land Claims, and the best means of finally disposing of the same'.[1080] The committee, chaired by Alfred Domett, condemned FitzRoy's decisions to revisit the awards of the first Land Claims Commission and issue unsurveyed and 'imperfectly described' grants.[1081] It also criticised FitzRoy's 'experiment' in waiving the Crown's right of pre-emption as well as Grey's subsequent policies with regard to the purchases under that system; in the committee's view, Grey's notice of 15 June 1846 had been issued with 'the avowed design of extinguishing . . . claims summarily and arbitrarily'. As noted earlier, it also thought the regulations had been too strictly enforced and too many claims disallowed.[1082]

The committee's report then outlined the 'extensive and complicated' situation that existed:

> The grants are often bought and sold, the re-purchasers still preferring [making] their claims. Some of the grantees are in possession of the lands granted; but a great part of those claimed are unoccupied by any one. Some portions have been resumed by the natives; and some, where the native title had 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 any one; 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 their supposed rights.
>
> Some of the claimants, whose claims have been disallowed by the Commissioners, are still urging them; the limit of 2,560 acres is a ground of dissatisfaction with others; some have taken grants for what they could get, but under protest; and some, about fifty, have not yet taken out the grants prepared for them, which are still lying in the office after a lapse of ten or twelve years.[1083]

By this stage, the colonial Government considered itself as having a right to the 'surplus' and was enforcing this where it could, although confusion about boundaries and general pragmatism meant that payment might be deemed necessary, too, in situations where Māori continued to occupy or use the land.

The committee stressed the pressing need for certainty of title, concluding that it was essential to establish a special court or tribunal with 'ample powers' to 'determine and finally adjust' all matters connected with old land claims and pre-emption waivers. In its view,

> Nothing less than a verdict, backed by all the authority and weight of a body representing the opinions of the whole community, will convince such claimants that finality or conclusiveness has been arrived at, and that all hope of further successful agitation of the matter would be idle. And this perhaps formed one of the greatest difficulties encountered by Sir George Grey in his attempts to settle the claims, that no enactments of his, especially with popular institutions looming in the immediate future, could absolutely fix the point where decision would be actually final, and appeal or reversal really unattainable.[1084]

All imperfect grants should be called in for investigation, the old grants cancelled, and (following the example of the Crown Quieting Titles Ordinance) fresh ones issued that could be greater in size than the acreage granted by one-sixth to allow natural boundaries to be followed instead of survey lines. All the land in the old grants should be retained, even though many of those issued by FitzRoy might not be 'strictly legal'. In the committee's view, the practice of issuing scrip meant that it would now be unfair to reduce the size of grants of those who had not taken up that option.[1085] Nor should disallowed or lapsed claims be re-opened. The report also stressed the need for surveys. The boundaries of 'all lands claimed' ought to be clearly marked in an 'unmistakable manner', because it was 'absolutely essential that in every case it is decisively

ascertained whether any obstruction to the occupation of the land would be raised by native owners or claimants'. Only a 'positive attempt' to define claims 'on the ground itself' would reveal this information.[1086]

Pre-emption waiver claims should be reconsidered also, and 'any proved injustice be remedied'. However, in the committee's view, restrictions should be placed on the acreage granted to a waiver claimant (not on the acreage that could be deemed 'sold' – a distinction that resulted in a sizeable 'surplus' for the Crown). It recommended that the terms set out in Governor Grey's third option of 10 August 1847 (discussed at section 6.6.2(4)) should be applied in all cases of lands to be granted under waiver claims. A number of reasons were given:

- these purchases had been permitted on 'a most erroneous principle, and one clearly detrimental to the general interests';
- the home government had given its 'imperial fiat to Sir George Grey's proceedings';
- any grants that the claimants would 'legally have been entitled to' barred the right of the Crown only and did not extinguish 'the claims of any European or any native whatever'; and
- the payment of five shillings per acre 'relieved the claimants from the obligation of proving their strict compliance with the proclamations'.

Five shillings per acre should then be paid for a maximum grant of 500 acres and 'the title of the natives proved, to the satisfaction of the Commissioners (as in all other cases) to have been extinguished'. The committee noted one further complication:

> But as in many of these penny an acre cases, including most of those affecting the most valuable lands, the lands, as your Committee is informed, have been resumed and re-sold by the Government, wherever such claims are found to be good, it will be necessary to compensate the claimant.[1087]

For the new court's decisions to be accepted and to be final, the committee continued, it was essential that it be composed of men of the highest integrity. The committee therefore recommended that two judges of the Supreme Court be included in a panel of no more than six commissioners. Those selected ought to be 'men of judgment, firmness, and discretion', who would:

> combine energy with the utmost caution; who will act with a vigilant eye towards the preservation of the public interests on the one hand, and the obligation to administer strict justice to the [Pākehā settler] claimants on the other.

The 'humble' should not be denied redress, but the 'property of the whole community should not be carelessly tampered with, or lightly squandered or frittered away'. Significantly, there was no mention of Māori interests, even as a matter to be weighed in the balance.[1088]

(a) The Land Claims Settlement Act 1856

Except for the recommendation that Supreme Court judges be appointed, the Land Claims Settlement Act 1856 closely followed the select committee's suggestions. The Act provided for more than one commissioner but only Francis Dillon Bell was appointed. This, in our view, was a watering down of the committee's recommendations and an indication that speed of decision-making was considered paramount. We observe, too, that there was no provision for a Māori commissioner (something that would have to wait another 60 years, until the appointment of Ngāti Maniapoto leader John Ormsby to the Native Land Claims Commission in 1920). Nor was there any official with responsibility to safeguard their interests.

Bell was closely identified with the colonial project – as a former New Zealand Company agent; a land purchaser commissioned by Governor Grey; and a member of the Wellington Provincial Council, the Legislative Council, and the House of Representatives, where he had served as Colonial Treasurer in the Sewell ministry (in 1856).[1089] He cannot therefore be regarded as an impartial arbiter between opposing Māori and settler claims.[1090] Nor was this the intention of the legislation.

Passed by a settler Legislature increasingly impatient with the slow rate at which Māori land was being acquired, the Act was intended to provide a final settlement of disputed grants and at the same time increase the acreages

that could be ultimately claimed by the Crown as surplus. This new commission was given greater powers than its predecessor, including the capacity to compel the attendance of witnesses and production of documents and, most importantly, evidence of a proper survey. Failure to comply with these requirements would result in the voiding of existing grants. At the same time, claimants were offered generous allowances in order to persuade them to surrender their old grants and make the largest claim possible, ignoring any informal arrangements with Māori outside the written deed.[1091]

Under section 9, commissioners held full power to hear and determine all claims that might have arisen under the earlier ordinances, and 'all claims whatsoever to land or compensation arising out of dealings with the aboriginal inhabitants of the Colony prior to the establishment of British sovereignty' or from FitzRoy's pre-emption waiver proclamations. There was no intention of opening up the question of whether a transaction had been valid or not. Section 15 prohibited the commission from investigating claims in a number of circumstances including, under section 15(2), when claims had been 'allowed wholly or in part, and in respect of which the claimant shall have accepted . . . compensation in money or debentures, or a grant of land'. The commission could not reopen claims that had lapsed or been disallowed (except in pre-emption waiver cases). Section 16, however, provided a mechanism (by Attorney-General notice in the Government *Gazette*) for calling in and reconsidering 'voidable grants' that had not yet been surveyed, along with those 'over which it may be alleged that the Native title has not been extinguished'. The cut-off date was 1 July 1858. In these cases, the commission could require a survey, endorse the grant, or cancel it and issue a new one (sections 17 to 23).

Section 23 provided for the issue of new grants which, if possible, should be for the area of the cancelled grant plus up to one-sixth, but in other circumstances could be less than the original grant (for example, if the surveyed boundaries were smaller than the original grant, or more than one settler was claiming the same land). When several grants had been made of the same tract, the commissioners were to make a division they deemed 'best adapted to meet the justice of the case'. The commissioners also had the discretion to exercise their powers in any instance the Act had not already provided for, as they may 'judge best adapted to meet the justice of the case but as near as may be in accordance with the provisions of this Act'.[1092] Under section 38, no land could be included in a grant unless it was 'proved to the satisfaction of the Commissioners that the Native title is extinguished'; and section 39 provided that, if settlers covered the cost, the Crown could buy out any remaining Māori interests.[1093] As Professor Boast has observed, the section was silent over what would happen if Māori did not allow their interests to be extinguished in this way.[1094]

There was a clear presumption that pre-treaty transactions were sales and that Māori customary interests were in the nature of ownership rights, which endured only where Māori actually occupied and used the land, or where they had not consented to the original transaction, in which case boundaries might be adjusted. There was no recognition of the original intent behind the transaction – that Māori and settlers would share the land for ongoing benefit.

Sections 29 to 31 of the Act dealt explicitly with pre-emption waiver claims. As recommended by the select committee, claimants could purchase land granted by way of settlement of their claims at a rate that did not exceed five shillings per acre; grants were not to exceed 500 acres, including any land awarded as compensation for losses sustained by reason of non-settlement of claims; the price of any land awarded as compensation was to be not less than one shilling nor more than 20 shillings per acre; and grants were not to exceed the area specified in the original claim. The Act made no reference to the disposal of tenth reserves.

Survey requirements and incentives were a key mechanism. Section 40 repeated the requirement that no land could be granted unless it had been surveyed and it stipulated that the boundaries must be 'marked out upon the ground'. This was potentially a costly exercise for blocks that were steep or covered in bush, but one that the Crown (under section 44) incentivised by providing for settlers to receive an acre for every 10 shillings they had spent on

surveys and maps; this was in addition to the standard allowance in land for such charges at a rate of one shilling and sixpence per acre.[1095]

In 1857, Bell introduced rules that further clarified the survey requirements. Significantly, rule 17 made it clear that settler claimants would have to survey the entire boundary of their original transaction with Māori, except in cases where it greatly exceeded 'the maximum quantity to be granted'. Their compensation would be calculated based on the 'area actually surveyed, whatever . . . the amount awarded in the claim'. Rule 18 allowed the commission to order new surveys; for example, to connect up boundary lines so as to create a contiguous block, with a further allowance in land to be calculated 'with reference to the contract prices at the time for work of a similar description executed for the Government'.[1096] Survey incentives were again strengthened in 1858 (discussed next).

As the *Muriwhenua Land Report* observed, the Act provided very limited protections for Māori customary rights, and no means to remedy the defects that had plagued the old land claims process from the beginning. The Act did not require that adequate reserves be set aside for Māori; did not provide for any investigation into the true nature of the original transactions; did not require any protection for conditions imposed on those transactions such as joint-use or trust arrangements (express or implied); did not require an examination of claims not investigated by the first commission but for which scrip had been awarded; and did not even require that Māori be heard on matters such as the area to be reserved or granted to settlers and the Crown. Rather, the Act's principal purpose was to protect settler interests by facilitating a final settlement of their claims.[1097]

(b) The Land Claims Settlement Extension Act 1858

Bell praised the first Act for encouraging settler claimants to survey the maximum area possible. In his view,

> It was fortunate that the General Assembly determined to make the survey allowance large, for although a great quantity of land has been thereby absorbed, it produced the advantage of early surveys and encouraged their extension so as to comprise the whole of the land originally bought from the Natives. Even the gain to the Crown of the surplus land thereby secured, is nothing in comparison with that of facilitating the termination of the long suspense and doubt in which the claimants were involved. And I have been assured by not a few of them that the result will be the renewal of energy and hope, and the speedy cultivation of much land that has hitherto lain waste.
>
> The progress made in the surveys has enabled a plan to be compiled of the country on the western shore of the Bay of Islands as far up as Whangaroa; this will shortly be connected to the Northward with the Mongonui surveys, and extended to the West Coast by the survey of the Hokianga scrip claims: placing the Government for the first time in possession of a general map of that part of the Province of Auckland, showing the position of the old claims, and of the blocks purchased for the Crown.[1098]

Bell now sought to enhance the position of settlers and the Crown further. On his advice, additional incentives to have claims surveyed and validated were enacted. In particular, section 3 of the Land Claims Settlement Extension Act 1858 allowed claimants to exchange their claim for Crown land in the same province. Section 8 again undermined the provision of reserves that had been left so vulnerable by earlier failures of Crown policy. It provided that, where a reserve had been set aside in the original grant, and Māori were 'willing to surrender such reserves', the Crown could obtain a cession of the land and include it in the grant, for which the grantee was charged 10 shillings per acre. Professor Boast saw this as a clear statutory assertion that land subject to old land claims was a category of Crown land.[1099] Bell had no doubt of this and, as we shall see, was prepared to override the private accommodations that had been made between settlers and Māori as to where boundaries ran and what land was excised.

Under section 9 of the Extension Act 1858, if the exterior boundaries of a claim or grant exceeded the 2,560-acre maximum, the Governor (on the commissioner's advice) could allow the settler to buy the surplus, again at

a rate of 10 shillings per acre. The right would expire if not used within six months. Bell stated that he had thought it his 'duty to submit' this suggestion since the 'person who extinguished the native title [had] the best right' to buy the 'considerable surplus' that the Government had gained without cost. He argued that 'an advantage would accrue to the public' out of this measure and that it was 'very much required in a few small claims to settle them fairly'.[1100]

Bell had also advocated on behalf of settler claimants whose applications had been previously disallowed because they had been unable to pay fees, or could not produce a deed even though Māori admitted the sale.[1101] Section 15 was intended to address these 'exceptional cases' which did not come within the criteria of the 1856 Act. Claimants who could now supply the required evidence, or otherwise show undisturbed occupancy, were able to make a claim to the commission. The scope for applications was also expanded by section 2, which extended the time limit, and section 13, which allowed for grants to be made to 'half caste' children.

(3) *What did the Bell commission recommend in terms of settler grants and Crown 'surplus'?*

The legislation was intended to tidy up uncertainty about title, encourage survey, and convert doubtful Crown grants into valid ones. While section 15 has been interpreted as preventing the Bell commission from investigating the validity of transactions already confirmed by its predecessors, some grants remained voidable. It was Bell's application of the legislation that most severely circumscribed Māori capacity to challenge earlier awards. Bell himself proceeded on the basis that all pre-treaty transactions had been legitimate sales, and besides was eager to maximise the land held by settlers and the surplus available to the Crown. He therefore acted to suppress any effort by Māori to revisit the first commission's findings, or to make any claim to own any portion of the land covered by the original deed. He also considered that the Quieting Titles Ordinance had removed all doubts as to the legality of FitzRoy's grants, which he endorsed, embedding the injustice to Māori about which Commissioner Godfrey and Governor Grey had been so concerned. Boast has pointed out that 'Bell acted on the quite explicit assumption that the surplus lands belonged to the Crown.'[1102]

Bell was aware that FitzRoy had advocated the return of those lands to Māori, but in his view,

> There never was any doubt that the Imperial Government considered the Crown was entitled to the surplus land; and Lord Stanley expressly declared in May 1843, in answer to a question by Captain FitzRoy before he assumed the Government, that the excess in a claim over the quantity granted would revert to the Crown. . . . Lord Stanley, contemplating the extinction of the native title over all the land comprised in the exterior boundaries of a claim, said with respect to the excess – 'the hypothesis being that it neither belongs to the aboriginal owners nor to the purchasers, it must be considered as Demesne of the Crown.' This must be conclusive against Governor FitzRoy's opinion.[1103]

In fact, Stanley's instruction to FitzRoy had been rather less clear-cut than Bell suggested. Stanley had directed FitzRoy to act with the 'utmost . . . tenderness' towards Māori and 'humour their wishes' if possible. What is more, Stanley assumed that a thorough investigation would have taken place to determine whether Māori interests had been genuinely extinguished, yet this had not been the case: there were serious defects in the procedures of the first Land Claims Commission, and in the case of scrip, sometimes there had been no inquiry at all.[1104] For Bell, the issue was not whether Māori owned or had any enduring rights in such lands (he flatly rejected Māori requests for the land to be returned) but rather, whether settlers' claims were valid against those of the Crown.

In contrast, he expressed sympathy for the northern settler claimants, whom 'personally' he would be glad to see 'get the whole of their land as residents and old settlers'. Their claims were small in scale and posed little danger to future settlement even if awarded in their entirety. Yet Bell

Sub-district	First commission FitzRoy award (acres)	Bell commission award (acres)	Crown surplus (acres)
Bay of Islands	44,208	57,596.25	35,541
Hokianga	6,620	837	773.25
Mahurangi	0	4,008	80
Whāngārei/Mangakāhia	414	2,585	3,890
Whangaroa	7,727.5	15,010	11,696
Total	58,969.5	80,036.25	51,980.25

Table 6.5: 'Surplus' lands taken by the Crown as a result of old land claims in Te Raki.

thought that settlers who had applied for Crown grants under the scales set out in the 1841 and 1842 ordinances were prevented from pursuing a claim to the surplus and could not, as he phrased it, 'eat their cake and have it'. He feared also that if the principle was conceded for smaller claimants, others would expect the same consideration.[1105]

The Crown's surplus was thus maximised, both by the various incentives that had been created in the legislation (some at Bell's instigation) and by the commissioner's own insistence that the outer boundaries of the land subject to the validated deed, however vaguely defined, be surveyed, rather than the more restricted acreage of the recommended grant. Bell did allow some exceptions to this (under rule 17) if the original claim was much larger than the subsequent grant, but even in those cases, claimants were induced to take the boundary as far as Māori would tolerate.

The first commission had protected unextinguished Māori rights only if they were explicitly provided for in the deed. Yet Godfrey had acknowledged that there remained such rights in the grants issued by the first Land Claims Commission, so there must also have been unextinguished rights in lands that were covered by the deed but excluded from the grant. Yet Bell's inquiry would override even these arrangements. Not only did Bell substantially increase the area held by settlers, but as the Tribunal noted in its *Muriwhenua Land Report* he also 'gave unconditional grants, severing such ancillary obligations as may still have been apparent'. All Māori received were a few small reserves, designed not for their benefit but to 'remove their claims to a continuing right of occupation of the surplus lands'.[1106] While the Crown had wavered over whether to pursue its claim to the surplus, and on a number of occasions had assured Māori that it would not,

> Bell made it his concern to get as much land as possible for European occupation and use, and to secure the remaining surplus for the Government, irrespective of its existing use by Maori or their likely needs in future.[1107]

Bell presided over a sequence of hearings in 1857 to deal with the northern claims, beginning in Coromandel and reaching Russell in 21 to 26 September. In the following month, the commission sat in a number of locations: Mangonui for a week; Whangaroa and Waimate for a day each; and two further days (12 and 14 October) at Russell. On 21 December, the commission heard Auckland cases.

But it would be several years before Bell would release his final report, in 1862.[1108]

The notification requirements of the Act concerned settlers only,[1109] but before opening his first hearing in the Bay of Islands, Bell published a notice in *Te Karere*, discouraging Ngāpuhi from seeing this as an opportunity to make further demands or to repudiate transactions that the commissioner considered already 'properly settled' by their 'fathers':

> When the Europeans first arrived at this island, the Maories were an upright people and for those lands which were purchased by Europeans no second payment was ever demanded. When the claims of the old settlers, who were living among the Ngapuhi, were investigated, they manifested no desire to conceal the boundaries of the land they had sold, but on the contrary, the particulars of any transaction were fairly and truthfully stated, both as regarded the boundaries and the payment; nor did they desire to withhold anything that had been justly sold by them at a former period. And now, O Ngapuhi, Mr Bell, the Land Claims Commissioner, is about to proceed to your district, for the purpose of investigating the claims of some of the old settlers: – and do you now follow the example set you by your fathers during the former investigations: – let the right be upheld, but let there be no demanding a second payment for what has already been properly settled: – let not that be practised by you. You are the people who first received the Europeans, and now do you still continue to adhere to that which is right, and hold fast the last words of your fathers who are dead. – So ends.[1110]

This set the tone for the hearings that followed. As we explore in the following section, Bell would almost invariably dismiss Māori objections that they continued to have rights in the land; he saw these as importunate demands from younger men, and told them that the surplus belonged to the Crown and no portion could be 'returned' to them.

Bell's commission resulted in the old land claims being defined and finalised. Surveys were completed, in most cases covering the entire area of the original deeds; and the Crown then issued grants to the settlers from within those surveys, the acreage based on a series of calculations, and claimed any 'surplus' for itself. Māori interests were thereby extinguished. In all, we calculate that the Crown took some 51,980 acres of Te Raki land in this manner – about one-quarter of the total area lost to Māori as a result of the old land claims. The extent of loss to Māori was greatest in the region of the Bay of Islands – we calculate over 35,000 acres – but was substantial at Whangaroa as well. Bell's re-examination of pre-emption waiver claims resulted in another 20,877 acres of surplus for the Crown, almost all of it in Mahurangi and the Gulf Islands. In the Hokianga taiwhenua, the area taken was 6,620 acres, much of that a result of the Crown's scrip policy (which we discuss in section 6.7.2(5)). All districts were affected to some extent, and some hapū more than others, as we will see later.

We have already referred to several of the cases in which the Crown obtained large areas of surplus land. In the Bay of Islands, the Crown took 11,819 acres from James Kemp's Puketōtara claim (OLC 595); 1,914 acres from George Clarke's claim (OLC 634) at Waimate; 4,926 acres from Orsmond's claim (OLC 809); 1,043 acres from Henry Williams' claim (OLC 524) at Pākaraka; 1,817 acres from James Shepherd's claims (OLC 804–806), and 1,038 acres from the Church Missionary Society's claims (OLC 660–669) at Paihia and elsewhere. The Crown also took 8,746 acres from John King's claim (OLC 604) which straddled the Whangaroa and Bay of Islands taiwhenua. Additionally, at Whangaroa, the Crown took 5,860 acres from James Shepherd's OLC 802–803 claims; 2,889 acres from William Baker's OLC 549 claim; and another 1,742 acres from James Kemp's OLC 599–602 claims. In Whāngārei, the Crown acquired 3,890 acres from Gilbert Mair's OLC 1047 claim. We will return to a number of these cases in more detail later.

(a) The Bay of Islands missionary claims

In the Bay of Islands area, Bell endorsed or, in some cases, substantially increased the grants to settlers, while also awarding the Crown more than 35,000 acres of surplus

lands (excluding pre-emption waivers). As table 6.6 indicates, much of this boon to the Crown estate came from the missionary claims.

After returning to Kororāreka from his sittings at Mangonui and Whangaroa (discussed later), Bell began to deal with these claims. Given the extensive areas encompassed by the missionaries' deeds, and the promises made about their continued occupation, it is unsurprising that Māori often opposed the survey of these lands.

Bell dealt first with Davis's Waimate claims (OLC 773 and OLC 161). FitzRoy had expanded his initial 1,963-acre grant to 3,000 acres, leaving no provision for Māori who continued to live on these lands (and, indeed, exert authority over them). We discussed in section 6.5.2(2), for example, how Davis had paid compensation in 1848 to avoid a muru after his son violated a wāhi tapu. Davis now told Bell that he had been forced to leave some 300 acres out of his new claim because of 'some difficulty' over the survey that involved younger Māori men who 'were hardly born at the time of the purchase'.[1111] Bell reluctantly accepted that this land (described as 'between the road to the Bay and the Waitangi River') would have to remain in Māori hands, although Davis later expressed the hope that he would be able to acquire it at 'some future time'.[1112] There were other objections, too. Te Morenga Kēmara wrote to Bell complaining that Davis was wrongly claiming land between Owiritangitangi and Tikitiki, having obtained his 'tuku' from the wrong people.[1113] Bell recorded:

> In the Evening the Natives assembled and brought before the Commissioner several disputes and claims – relative to Mr Clark's, Wm Williams, and the Rev Mr Davis' Lands. At a little before midnight the Commissioner gave his decision, overruling all their objections upon the proofs afforded by repeated references to the old papers in the several claims. They were asked whether it had ever happened that Government had taken from them and given to a European, any land stated to be their property by the former Commissioners; and in what light would they regard the present Court, if at the request of a European made 13 years after the former adjudications reserved by them were taken away? Equally they could not expect that after such a lapse of time I should listen to the claims of Natives to get back portions of the land awarded to Europeans by the former Commissioners.[1114]

According to Bell, it was his 'invariable practice' to hear 'all they had to say', but clearly his mind was already made up, as he announced:

> I should certainly not give back an acre which had been validly sold by those who in those days were really empowered to sell, nor allow the claim of anyone who had failed to bring his objection forward at the original inquiry.[1115]

Bell was unhappy that Davis had left out a portion of his claim 'to please certain of them', but reluctantly accepted the excision. At the same time, he warned the assembly that had he been present at the survey, he would have insisted that the boundaries stated in the deed be followed and that the Crown hold on to 'every acre'. Bell maintained that Māori were 'perfectly satisfied' with his proceedings and had apologised for the objections they had raised.[1116] Ultimately, he ruled that Davis was entitled to 4,308 acres (1,308 acres more than under FitzRoy's expanded grant), leaving the Crown with a 363-acre surplus and Te Morenga Kēmara's people with the 300 acres that had been excised.[1117]

The commissioner was reluctant to repeat this small concession, insisting that Kemp's surveys follow the boundaries as described in the first commission's reports in order to maximise the surplus, even if this should contravene the prior understandings between CMS missionaries and Māori. As we discuss later, Māori challenged Kemp's survey of the 185-acre block, Kioreroa (OLC 596), at Waimate. They were told to attend Bell's next hearing, which would be the 'last occasion' on which they could raise their concerns. At that hearing, Bell read out the original deed and the first Land Claims Commission's report. A long discussion followed, which Bell did not record. Once he had confirmed that the survey had followed the boundaries described in the deed, 'all objections were overruled'. Besides, Bell noted, 'the objections were

OLC	Claimant	First commission award	Bell commission award	Crown surplus (acres)
14–22	James Busby	2,923 acres	Judged void but subsequently awarded under arbitration	1,010
59	Thomas Bateman	1,200 acres	1,157 acres for claim with 542 acres already taken by the Crown	128
100	George Thomas Clayton	4 acres	0.75 acres	3.25
116	James Reddy Clendon	1,418 acres increased to 1,800 acres by FitzRoy	2,685 acres	657
227	William George Cornelius Hingston	1,600 acres	1,276 acres	84
231	Thomas Hopkins and William Tully Pearse	305 acres	Hopkins was informed a survey was required	350
353	Benjamin Nesbit	106 acres	227 acres but rounded up to 230 acres	125
521–526	Henry Williams	7,010 acres for all his claims; FitzRoy expands grant to 9,000 acres	9,203 acres*	1,043
554	William Derby Brind	440 acres	390 acres, 1a 2r 11p, and one acre (392.5a)	50
595–598	James Kemp	1,354 acres, increased by FitzRoy to 5,276 acres	6,954 acres in 10 grants	11,819 †
603–606	John King	672 acres increased to 5,150 acres by FitzRoy	Bell awarded 12,637 acres for all of King's claims, which totalled 21,000 acres	8,746 ‡
633–634	George Clarke	increased to 5,500 acres by FitzRoy	Bell awarded 5,539 acres at Waimate and three other grants for a total of 7,010 acres	1,914

638	Joel Samuel Polack	0.5 acres	—	4.5
660–669	Church Missionary Society	733 acres	—	1,038
734–735	Church Missionary Society families (James Kemp)	3,100 acres	4,450 acres and 947 acres, total 5,397	333
736	Church Missionary Society families (James Kemp)	500 acres	947 acres	1,050
769	Ambroise Bagile Victoun de Sentis	No award by commissioners but FitzRoy allowed £30 scrip	Nil	5.25
773, 161	Richard Davis	1,963 acres increased to 3,000 acres by FitzRoy	4,308 acres in 7 grants	362
804–806	James Shepherd	Nil, 343, and 367.5 acres	Nil, 22, and 259 acres	1,817 ¶
809	John Muggridge Orsmond	No award by commissioners but 2,560 acres granted by FitzRoy	Bell awarded 4,681 acres in 9 grants	4,926
863	Edward Bolger	300 acres	437 acres	76
Total		44,208 acres	57,596.25 acres	35,541

* Bell's ultimate award included OLC 526, which had gone through the Quieting Title procedure but which was added to the Pākaraka estate.

† There was considerable confusion as Kemp's entitlement based on the boundaries described in the original deeds. We have used the Rigby's figures: Dr Barry Rigby, old land claims spreadsheet (doc A48(d)).

‡ Part of this claim lay within the Whangaroa district.

¶ A return prepared for the 1948 Surplus Lands Commission gave the respective acreages as 378 acres and 1,580 acres, but we have used the figures from Rigby's spreadsheet, which were also based on the Surplus Lands Commission papers, in the absence of definitive evidence either way: Rigby, old land claims spreadsheet (doc A48(d)); Bruce Stirling and Richard Towers, supporting papers (doc A9(a)), vol 5, p 588.

Table 6.6: Crown taking of surplus lands in the Bay of Islands.

. . . raised by young men chiefly, and were on the whole without foundation.'[1118] Protests in the case of Kemp's Puketōtara claim (OLC 595) had a similar result. Rewa and others had challenged the survey, which took in land they claimed. This prompted Bell to examine the original deeds, which purported to alienate a much larger area. It was recorded:

> Mr Kemp had left out of his survey a considerable portion of those boundaries, viz 1st at Tarata Rotorua and Tiheru, and 2ndly a large block between the Waipapa and Rangitane Rivers. The Commissioner after explaining the law to the natives overruled all their objections. And with regard to the land left out, he announced that it 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.[1119]

Although Kemp declined undertaking the survey of the 18,000-plus acres he had originally claimed under his deed, his new survey took in a further 1,849 acres over that awarded by FitzRoy. Māori, having lost their rights in that area, now asked the Crown to 'give them back a small portion'. The commissioner's response was his standard one – these calls were advanced 'chiefly by young men complaining of land having been sold while they were children', although this clearly was not true of Rewa – and he advised them to approach the Governor, who would decide the matter.[1120]

When he dealt with Clarke's Waimate claims (OLC 634), Bell resorted to the same reasoning: 'the law' said the land belonged to the Crown, and that Māori would have to make a special appeal to the Governor to have any of it reserved to them. At Waiohanga, Waka Nene sought a 'small piece', likely a wāhi tapu (described by him as a 'piece which will grow nothing'). Pirika also raised objections, the substance of which Bell did not record, reporting only that:

> After a full hearing and reading over the evidence and deeds produced before the investigating commissioners it appeared clear that there was no encroachment whatever on the original boundaries sold. Waka Nene's objection to Potaetupuhi and to the piece adjoining Mr Shepherd's claim were overruled as well as all the other objections. The natives were then informed that under the law, as they had been repeatedly told, the surplus land reverted to the Crown and that if they desired the government to make any reserve out of the same for their use, they must at once address the Governor, with whom the decision on such a request rested.[1121]

The exclusion of only a small portion (411 acres) for Māori out of Clarke's extensive grants was endorsed, leaving the Government with over 1,900 acres.[1122]

In the case of the vast Pākaraka estate formed out of the claims of Henry Williams (and children) and William Williams (OLC 521–526 and OLC 529–534 respectively), Te Tao objected that his land (at Taiāmai) had been 'given over secretly in the past by another person' and had been 'stolen'.[1123] Again the objections were noted as 'heard at Waimate' and 'overruled'.[1124] Bell's reasoning was not recorded; indeed, his minutes for the sitting that day do not refer to any Māori claim at all.[1125] The Crown gained 1,043 acres as surplus as a result of its extended ratification process, while the Williams family were granted 10,700 acres.[1126] Māori had been given explicit assurances that these 'populous' lands would be protected for later occupation as part of their shared future with the missionaries;[1127] instead, they retained only a token acreage from within their transactions.

Also noteworthy is John King's claim that straddled the Bay of Islands and Whangaroa taiwhenua. When Samuel Marsden arrived in New Zealand in 1814, he was accompanied by three lay settlers, King among them. A shoemaker by trade, he had been dispatched to learn rope-making before setting sail with Marsden and William Hall in 1809 for New South Wales, where he remained until settling in Northland.[1128] Over time, he was to amass a 'stupendous area' as a result of his pre-treaty dealings, in a huge estate known as 'Otaha'. Bound by Te Puna Inlet, Tākou Bay, southern Whangaroa, and the road between Kerikeri and Whangaroa, it sat in a contested region, with claims also hotly disputed in neighbouring Whangaroa and Puketōtara lands.[1129]

King's original claim was based on four pre-1840 deeds, which he had secured by making a series of additional payments to rangatira as part of his ongoing obligations to his Māori hosts.[1130] The claims were:

- OLC 603, August 1835: transaction between King and Manuwiri, Tahu, and others for approximately 3,000 acres; 911 acres awarded by the first Land Claims Commission;
- OLC 604, September 1836: transaction between King and Witirua, Hokai, and others for approximately 1,500 acres; 672 acres awarded by the first Land Claims Commission;
- OLC 605, September 1836: transaction between King and Manuwiri, Pari, and Tauha for approximately 500 acres; 271 acres awarded by the first Land Claims Commission; and
- OLC 606, October 1834, November 1835, and February 1836: a series of transactions between King and Waremokiaka, Ngaware, Taotahi, Tatari, and others for approximately 150 acres; 150 acres awarded by the first Land Claims Commission.[1131]

In each case, the disallowance of the New Zealand Land Claims Ordinance 1842 meant the awards had to be recalculated; in all instances, it appears that the same acreages were awarded, with the proviso that the total of all grants not exceed 2,560 acres. FitzRoy, however, overrode these decisions, increasing King's awards for OLC 603, 604, and 605 to 3,000, 1,500, and 500 acres respectively, while leaving OLC 606 at 150 acres. King was thus granted 5,150 acres, his original estimate for his four claims.[1132] An Executive Council minute reveals the thinking on the matter: King had overpaid for the land, was 'one of the earliest' missionaries, and had lived on the land 'for upwards of 25 years'; and for these reasons he deserved an expanded grant.[1133]

Stirling and Towers characterised King's relationship with his host Māori communities (particularly Ngāti Rēhia) as 'close and mutually beneficial', and indeed, he received gifts of land on behalf of his nine children, who were born on the whenua and raised among them. King told the first commission: 'all my deeds state that the land is given to myself and children and the natives have always considered them as virtually belonging to the tribe they were born amon[g]st'.[1134] He had also invested in 'building, fencing, cultivation & etc'.[1135] Be that as it may, King was another beneficiary of the CMS's relationship with leading Government officials, which resulted in the enormous increases to their awards and compounded the matter of unextinguished Māori rights.

By the time of Bell's hearings, King had passed away and his son, John Wheeler King, brought the claim, with assistance from George Clarke senior. In October 1857, Clarke submitted plans of the surveyed land to Bell:

> The total contents within the Blocks surveyed amount to 21,226 acres. One block (at Otaha Bay) being 20,516 acres, and the other 710 acres. I desire to represent to the Court that the land included in the larger Survey is extremely sterile.[1136]

Clarke explained that, in attempting its cultivation, members of the King family had been 'obliged to relinquish it, being unable to obtain a remunerative return for their labour'. He requested that, before making any final award, Bell should inspect the land for himself. Clarke also drew Bell's attention to a 'peculiarly applicable' clause in the 1856 Act which allowed 'an additional acre for each acre of compensation land'. As for the second, smaller block, it was 'of somewhat better quality', and the family wished to retain it 'under any circumstances'.[1137]

Mindful that this was the first time the provision (section 46) had been invoked, Bell examined the matter carefully and deemed a personal inspection of the Otaha Bay claim essential. He 'crossed the land in several places', concluding with 'no hesitation' that,

> taking it altogether, I had never seen such a poor and sterile tract . . . it really was hardly worth having, much less subdividing into separate properties for the numerous family of the late John King.[1138]

Accordingly, in April 1859, Bell ruled that a double award for survey could be allowed for Otaha Bay, resulting in claims that, when totalled, amounted to an estate of close to 21,000 acres. After a final computation, Bell

recommended a grant of 12,637 acres, with the provisos that this cover the cost of subdivision of the land amongst the King family (16 grants in total) and that the surplus land at Otaha Bay, which 'reverted' to the Crown, be in one block.[1139] Meanwhile, Māori occupation and use of the land continued, as did persistent protest aimed against King's claim. While opposition could seemingly take the form of skirmishes over specific issues, Māori grievance was ultimately rooted in the failings of the old land claims processes, which had benefited the missionary families while overlooking their interests.[1140]

One such skirmish emerged in December 1861, when rangatira opposed the construction of a new road from Paringaroa to Taraire. In the Crown's view, the lands were part of the surplus it had obtained from the King transaction, but Whangaroa and Tākou Māori clearly still regarded them as their own. Two of the rangatira involved – named as Tana Toro (of Upokorau) and Ngāpuhi Te Kōwhai (of Tākou) – told Kidd, who was in charge of the road gang, that they would not allow any work to go ahead because the land was 'in their possession by *right*, and by *wrong* claimed by the Crown or by Mr John King' (emphasis in original).[1141] Kidd referred the matter to Clarke, who had supported King's son before the Bell commission but had since been appointed civil commissioner, the Crown's senior official in the district. In turn, Clarke asked Resident Magistrate Edward Williams (son of Henry) to investigate. Williams duly reported that Tana had no quarrel with King's family; rather, he was upset with Hirini Rāwiri Taiwhanga (Ngāti Tautahi, Te Uri o Hua) over the initial transaction: Taiwhanga, in Tana's view, had 'no right to sell'.[1142] Williams believed he had calmed matters, and that Tana and Te Kōwhai would allow the road to proceed so long as their people were employed in its construction. Yet, there was further opposition very soon afterwards, with rangatira from Kāeo to Te Tii getting involved. The magistrate viewed this as a dispute about employment, but Stirling and Towers observed that the real issue was underlying rights. As they explained, the road bordered King's claim and another highly contested missionary claim, that of Shepherd at Upokorau (discussed later). It was 'hardly surprising' that the project was challenged.[1143]

Meantime, also in December 1861, another dispute was emerging at Tapuauetahi. This again concerned a local rangatira, Te Wirihana Poki, who had been left out of the original transaction and was now asserting his rights. Te Wirihana reportedly threatened to shoot a horse that Taiwhanga had received as part of the bargaining process; and he had another rangatira in his sights as well, Wawatai. When John King learned of these threats, he accused Te Wirihana of 'tugging at our land', and claimed that the rangatira had been aware all along of the original dispute.[1144] In response, Wiremu Hau, who attempted to mediate, explained that Te Wirihana had indeed known that King and his family were occupying the land but had only recently learned of 'the map'; that is, the survey of King's claims that had laid bare their vastness, and indeed the scale of the lands the Crown was now claiming and the paltry amount left for Māori. Hau tried to set up a meeting, but King failed to attend, and the matter remained unresolved. Clarke took no action except to record that Māori were making a claim to 'King's block'.[1145]

Te Wirihana continued to protest, writing to Clarke in November 1864 about 'contested lands' between Tapuaetahi and Tahoranui.[1146] He called on Clarke to investigate, saying, 'If you will not look at it, well, listen, trouble will look to it.'[1147] Clarke's reply is not in the record, but Te Wirihana's response leaves no doubt as to the gist of what he was told: that his claim had no basis and that King had already been issued with a Crown grant. Te Wirihana's outrage resonates through his words. Clarke, he said, was like a 'tangata tahae' (thief), and the missionaries had caused great harm through their greed for land. 'Ko taku tino kupu tenei ki a koe, e he ana a Hone Kingi, ka nui te he.' ('My main message to you is that [John King] is wrong, very wrong – he is simply wrong over his lands.')[1148]

Te Wirihana received no redress either from King's family or from Government officials, and he considered the land stolen by both. The distinction between CMS and Government personnel was in any case blurred, with

men like Clarke filling roles in both camps over time. Ultimately, by 1865, the land was lost,[1149] the only area still retained by Māori comprising Te Tii Mangonui on the eastern bank of the Tapuaetahi River, and a reserve of six acres excluded from King's Te Puna claim. There is a later addendum to the story: in 1894, part of King's Otaha estate was bought by Māori.[1150] The land had been home to a large settlement in the 1820s and 1830s, and as Tony Walzl noted, it retained 'such significance' that Hōne Puru and others raised a mortgage against Otaha Lot 4 to purchase it back from a descendant of King. We note that a portion of the block remains in Māori ownership today.[1151]

(b) The Whangaroa claims

As shown in table 6.7, for most Whangaroa settler claimants, Bell either increased the area granted or made grants where previous commissions had not. In addition, by our calculations, Bell's recommendations led to the Crown taking 11,696 acres of surplus land in the Whangaroa taiwhenua. We note that this figure differs from both those stated by the claimants in closing submissions (19,613 acres of surplus land, including 4,905 acres acquired by means of scrip; subsequently revised to 20,884 acres of surplus and 4,813 acres of scrip) and those of the Crown (3,890 acres of surplus and 3,605 acres of scrip), in part because of the different criteria we have applied.[1152] We have included the large-scale King grant (discussed earlier) in the Bay of Islands figures, when in fact it involved lands in both the Bay of Islands and Whangaroa. There is also confusion about whether the figures for the Powditch claims, which involve a particularly complex alienation history, should be assessed as scrip or surplus, as we discuss at section 6.7.2(5). In the absence of a detailed breakdown, we have no insight into the Crown's much lower finalised figures.

As in the Bay of Islands, the most significant of these takings of surplus land involved the missionary claims: those of Shepherd (OLC 802–803 and 807–808) and Kemp (OLC 599–602). Māori also lost extensive areas in the case of William Baker (OLC 549) and Hayes (OLC 881).

Shepherd's Whangaroa claims are particularly notable. In the first instance, much of the land he claimed had been acquired from his pupils at the Waitangi Mission Station. Tahua Murray of Ngāti Ruamahue explained to us that Shepherd had a 'huge influence' on the students 'as they were only young men when they came to Whangaroa'; in her view, Shepherd 'used his influence to advance his own agenda of acquiring land'.[1153] Counsel for Ngāti Ruamahue, Ngāti Kawau, and the wider Whangaroa taiwhenua submitted that these tūpuna did not understand the ramifications that their arrangements would have:

> that they would never be able to have free access to their fishing spots, wāhi tapu, and places of significance, and also in regard to their ability to exercise their kaitiaki and rangatiratanga over, and for them.[1154]

Counsel also quoted the view expressed by Presbyterian minister, Dr Lang, in 1839:

> instead of endeavouring to protect the New Zealanders . . . from the aggressions of unprincipled European adventurers, the missionaries of CMS have themselves been the foremost and the most successful in despoiling them of their land.[1155]

Although Shepherd brought seven separate claims, four of which were for lands in the Whangaroa taiwhenua, we will focus here on Upokorau (OLC 803), located between Whangaroa and Waimate. His claim there was based on a transaction made in 1836 and 1837 with Awa, Kowiti, and others in which they had received £40 in cash, goods that were calculated to have a value of £520 10s, and four cows valued at £60.[1156] Bell's subsequent handling of this case was conducted in the face of sustained protest from Heremaia Te Ara (Ngāti Uru, Te Whānaupani) that his hapū had not been involved in the original transactions with either Shepherd or Kemp (discussed at section 6.7.2(4)). He argued consistently that their rights to the lands north of the Upokorau River were unextinguished. Ultimately, the hapū managed to retain only four small reserves totalling 22 acres, plus two modest blocks that had been excluded at the time of the first hearings.[1157]

During the first commission, Shepherd himself had

OLC	Claimant	First commission award	Bell commission (acres)	Crown surplus (acres)
270	Thomas Joyce	291 acres	508	992
283	William Lillico	35 acres	Nil (26-acre award lapses)	26
383–384	William Powditch	No grant	165 742 (total 907 acres)	Nil 95
385	William Powditch	No award but FitzRoy offered £1,500 in scrip. Claim was for 3,000 acres.	Nil	Nil
549	William Baker	557.5 acres	1,289	2,889
599–602	James Kemp	2,284 acres FitzRoy awarded 4,000 acres but no order was issued.	2,722	1,742
802–803*	James Shepherd	2,000 acres and 2,560 acres	3,553 and 5,723	1,697 4,163 †
882–883	Edward Boyce	No award	308	92
Totals		7,727.5	15,010	11,696

* These figures do not include a further two awards at Whangaroa (OLC 807, 808) of 132 acres since these did not result in a surplus for the Crown.

† A return prepared for the 1948 Surplus Lands Commission gave the respective acreages as 4,440 acres and 1,697 acres, but we have used the figures from Rigby's spreadsheet, which was also based on the Surplus Lands Commission papers, in the absence of definitive evidence either way. However, neither source identifies all three pieces of land that comprised Shepherd's award for OLC 803 at Upukorau: Dr Barry Rigby, old land claims spreadsheet (doc A48(d)), Stirling and Towers, supporting papers (doc A9(a)), vol 5, p 588.

Table 6.7: Crown surplus lands in Whangaroa.

acknowledged this reservation. In 1836 and 1837, he had reached agreements for an area totalling 6,000 acres, he explained, of which 2,000 acres were reserved 'for the sole use and benefit of the natives'. He also maintained that he had acquired this acreage additionally, solely to 'prevent its sale to Europeans.'[1158] Copies of the 1836 and 1837 deeds were presented, the latter of which specified that cultivations and kāinga were to be left out, though it failed to identify their location.[1159] The reservation, sited on the north bank of the Upokorau River, was covered by a third deed, which he had given to Protector Clarke.[1160]

At the first commission, objections to Shepherd's claim from Toro and Taka had been withdrawn when they found that land at Tawapuka on the north side of the Upokorau River was 'reserved for and given up to the Natives'.[1161] It is likely that this area included the Tawapuka and Raukaurere blocks (103 acres and 268 acres respectively), which were later put through the Native Land Court

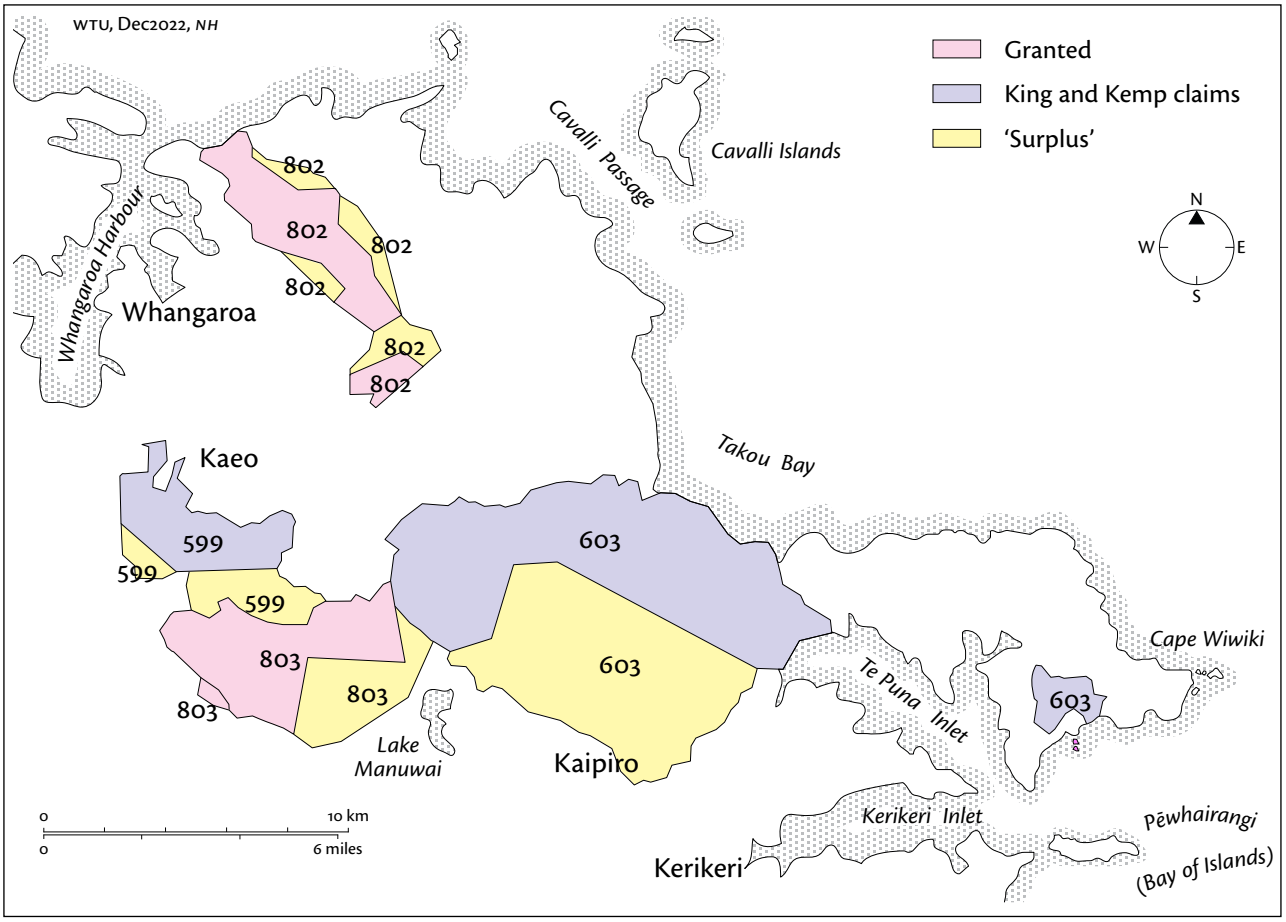
for title determination;[1162] the rest of the reserve would become a contentious issue when Shepherd undertook his survey in 1857. In the meantime, the first commission had recommended an award of 2,482 acres to Shepherd, excepting the reserve, its boundaries understood to trace the northern bank of the Upokorau Stream to the Kāeo River (the 'great water of Whangaroa'), extending to Kemp's claim, taking in the cultivations at Tawapuka, and stretching up to the road between Whangaroa and the Bay of Islands.[1163] 'Great care must be taken in the survey of this claim', the commissioners directed, in order 'to prevent an encroachment upon the land belong[ing] to, or reserved for, the natives'.[1164] Shepherd's recommended grant was recalculated when the 1842 ordinance was disallowed. Found to exceed 5,000 acres, the award was revised to the maximum of 2,560 acres.[1165] However, the commission recommended five other awards as well (2,000 acres at Tauranga, Whangaroa; two small grants of 30 acres each on the Whangaroa Harbour; and two Bay of Islands awards of 343 and 367 acres on the Kerikeri River).[1166] These were authorised by FitzRoy, bringing Shepherd's total entitlement to 5,330 acres, well in excess of the statutory limit. The grant for Upokorau was issued in November 1844 and included the reserve stipulation.[1167]

Shepherd was one of the targets of Grey's general attack on the missionaries, and in 1848 the Governor took action in the Supreme Court seeking to force him to give up his grants, but the case did not proceed.[1168] Shepherd had written to the Government to defend the size of his claims – the land was intended for his children and acquired in their names – and as discussed earlier, the Supreme Court upheld the validity of FitzRoy's grants in similar cases. Afterwards, Shepherd divided his grants up among his children, but the Whangaroa properties remained unsurveyed.[1169] Stirling and Towers noted that there was little incentive to survey while Crown purchase activity remained low in the district and if colonists respected each other's boundaries and recognised the understanding of Māori that they could continue to utilise their land traditionally. Nor was there any reason at this point for Māori to protest the Crown's validation of Shepherd's claims.[1170]

All that changed with the Bell commission. The requirement for settler claimants to survey the entire boundaries of their original claims resulted in Māori also trying to ensure their lands were properly defined and protected. After 'various conversations' between Shepherd and Bell about the survey of adjoining claims, Shepherd produced surveys of his six grants, totalling 18,880 acres. The survey of the boundaries at Upokorau (OLC 803) encompassed 10,413 acres, as compared to the 5,330 acres he had been awarded by FitzRoy.[1171]

Shepherd's claim at Upokorau was challenged by Ngāti Uru and Te Whānaupani. According to Stirling and Towers, this area had been transacted by Hira Mura, Hone Tino, Toro, and Pueka Pita in the second deed for Upokorau, signed in November 1837.[1172] During Bell's hearing at Whangaroa in October 1857, Heremaia Te Ara gave evidence that his people had not sold Maungakaramuramu and Waihuka: 'I do not know who sold it, or that he had a right to sell as I never knew he had a right with us in the land.' Unaware as he was of Shepherd's intention to survey the land, Heremaia described it as done 'in secret'.[1173] On the same day as Heremaia gave evidence, Shepherd wrote to Bell to 'protest against all opposing statements to [his] claims to land by the natives'. He had always given Māori 'sufficient time . . . to hear of it and come forward to receive their share of the payment,' he continued, and no objections had been raised before the first commission.[1174] It seems that Heremaia (a young man at the time) had been living elsewhere in 1842; more significantly, he would not have been aware of the extent of land being claimed by Shepherd until the survey was undertaken.[1175]

A subsequent letter, signed by Heremaia and Naihi Te Pakaru and dated 11 November 1858, asked that the land between Te Taita and Waihuka be returned.[1176] Two sketch maps were enclosed, showing the excluded north-eastern portion, the boundaries of Kemp's claim, and an area of land (Matawherohia) that had been sold to the Crown between 1858 and 1859. Heremaia had approached Shepherd three times, 'but he would not agree to give my land back'.[1177] The appeal to Bell was equally fruitless. The commissioner issued his standard response to complaints from Māori who said they held unextinguished rights:



Map 6.7: Shepherd's Whangaroa claims.

that the land identified had been included in the original deeds and he could not therefore 'interfere to take it back.'[1178]

Heremaia Te Ara also protested the inclusion of the eastern portion of Shepherd's claim at Upokorau. Extending from Whakaniwha to Katiaka, it was described in the 1837 deed from which cultivations and kāinga were excepted. His letter stated: 'kia rongo mai koe e kore hoki e tika kia tango hia noa tia e te ha pa tana wahi pihi i ka pea nea e te kai whakarite whenua i mua kotinga tenei otaua whenua'. This was translated by John White (in 1859) as 'it will not be right for Mr Shepherd to take that piece of land which was excluded by the Commissioner.'[1179] Bell made no immediate response, noting that he would reply 'finally' once Shepherd had deposited his grants.[1180]

Further evidence was deferred until 1860 at Auckland. Here, on 16 February, Shepherd produced his 1844 grant (for 2,560 acres) and three survey plans for the land he wanted at Upokorau: Tiheru (3,863 acres); Mokau (250 acres); and Irumia, Upokorau, and Waiare (6,300 acres) – a total of 10,413 acres. He insisted that the land excluded within the original deed was 'on the other side of the river,

OLC	Name of land	FitzRoy award (acres)	Area surveyed (acres)	Selection and award under Bell commission (acres)	Crown surplus (acres)
802	Tauranga	2,000	5,250	3,553	1,697
803	Upokorau	2,560	10,413	1,372 *	4,163
				3,737 †	
				614 ‡	
807	Whangaroa Harbour	30	57	132	0
808		30	33		
Totals		4,620	15,753	9,408	5,860

* Upokorau † Waiare ‡ Tirehu

Table 6.8: Shepherd's claims in Whangaroa.

where I gave them back a large piece of land . . . amounting to about 3,000 acres.'[1181]

Bell considered the land Heremaia had claimed between the Taita and Waiare Rivers 'fairly sold' but was undecided as to whether he 'had a rightful claim' at Katiaka.[1182] He wrote to Heremaia (who had been unable to attend) to explain his reasoning; in his view, 'these words "keep the Maori villages out" relates to the land on the side to the north of Upokorau', and 'the part occupied by Shepherd's sons is for them themselves to cultivate undisturbed.'[1183] Referring to the deeds set out by the first commission, Stirling and Towers concluded that this assessment was incorrect. Two distinct areas had been reserved for Māori: the first was the area covered by the reserve deed, Tawapuka; the second was any kāinga and cultivations in the area covered by the 1837 deed.[1184]

Letters were sent to Bell from both sides of the dispute. According to James Shepherd, Heremaia and Naihi were 'natives originally living on this land and now returning and trying to effect a breach of the peace'. Their claim, he reminded Bell, also jeopardised the Crown's surplus, for:

> in the event of the natives gaining their point they would not only deprive her Majesty's subjects of their legal rights but also rob the *Government* of a portion of valuable land. [Emphasis in original.][1185]

Heremaia protested that it was his home that was being stolen.[1186] In the meantime, negotiations were also taking place between Bell and Shepherd regarding an exchange of land for water frontage lost as a result of new legislation, the Bay of Islands Settlement Act 1858 (discussed in chapter 7). Resolution of the issue entailed the addition of survey allowances and fees, after which Bell calculated that Shepherd was now entitled to 11,484 acres for his claims, irrespective of the 683 acres already granted to him as part of the CMS families' claim. Shepherd's final selections totalled 9,689 acres (9,408 acres for his awards in the Whangaroa region) and were brought before the commission and endorsed in September 1860. Plus, he was entitled to a further 1,761 acres at Puketī (for his survey of the Orsmond claim).

The order for his selection of 1,372 acres at Upokorau was held back because, in Bell's words, there was a 'dispute with Heremaia and certain natives as to one or two small pieces included in the survey.'[1187] In January 1862, in Auckland, he finally heard evidence regarding the disputed land at Katiaka. Heremaia told the commission:

> I supposed at the time the claim was investigated by the former Commission that the piece of land now in dispute was all right (takoto pai); and did not know till it was surveyed by Mr Shepherd that it was included in his boundary. When I saw that it was included, I said: 'How is this?'
>
> . . . It is not well that a man should overrule the decision of the Commissioner in 1842 [*sic*, 1843]. I wished Mr Shepherd to yield the land peaceably and not to have a dispute about it. I desired and still desire that this piece of land should be returned to me, as it was never sold by me or my father, and was awarded to me by the Commissioner in 1842 [*sic*, 1843].[1188]

He recounted detailed boundaries of the area his hapū claimed (these had already been provided on the sketch maps sent to Bell in 1858). Under questioning by Shepherd, Heremaia explained that he had been only a boy at the time the deed had been signed, absent in Hokianga. The land had belonged to his father, Te Puhi, and had come to him upon his death.[1189] Shepherd maintained that he had purchased the land outright but had permitted Māori to live on it, and had later decided to return it to them while reserving the right to its timber for himself. The kāinga excluded from his 1837 deed was a 'small piece' called Pākaraka, located on the south side of the Upokorau, for which he had given a horse in 1845.[1190] Bell accepted Shepherd's evidence, regarding the dispute as pertaining only to modest blocks, and Pākaraka to have been sold, as the missionary had a receipt for the horse. He ignored the much larger area at stake.

Despite the findings of the first commission regarding the need to prevent encroachment on land in Māori ownership, the sustained protests of Heremaia, the evidence he produced as to their understanding of the matter, and Shepherd's earlier promises and subsequent admission that Māori had been occupying the land in dispute, they ended up with a tiny area on which to stand. Shepherd received three separate grants from the Bell commission for his OLC 803 claim: 1,372 acres at Upokorau, 3,737 acres at Waiare, and 614 acres at Tiheru. In addition, he was awarded 3,553 acres at 'Tauranga' (OLC 802) and 132 acres at Whangaroa Harbour (OLC 807 and 808). He selected only 259 acres for his two awards at Kerikeri after negotiations for lands taken under the Bay of Islands Settlement Act.[1191]

Stirling and Towers noted that Shepherd's selection of 5,723 acres for his OLC 803 claim left 4,690 acres to cover the excluded kāinga and the 'returned' land at Katiaka, with the rest to be claimed by the Crown.[1192] Out of all this, Māori ended up with only four small reserves totalling 22 acres 1 rood.[1193] Even this was soon gone. Heremaia continued to protest the limited extent of the land reserved on survey, and Bell referred the matter to land purchase commissioner Kemp for 'final settlement' in 1864. Shepherd proposed paying £20 to 'extinguish all claims to the small pieces in question', a 'very reasonable' proposal, Bell thought, and he directed Kemp 'to see the natives at once and obtain if possible an immediate adjustment . . . [to] complete all his claims'.[1194] Kemp succeeded in doing so the following month. In sum, the Crown surplus out of all Shepherd's Te Raki claims was 7,677 acres, 5,860 acres of which were located in the Whangaroa district.

(c) The Whāngārei and Mangakāhia claims

The first Whāngārei claims were heard by Bell at Auckland in December 1857. It quickly became apparent that questions of title in the district were complicated by on-sales and Crown purchase activity which, in some instances, had revealed unextinguished Māori rights. In the case of Pataua, the property had been sold on the death of the original grantee James Stuart (OLC 449), and the new purchaser was required to pay an additional £120 to complete the acquisition after District Land Purchase Commissioner William Searancke found Māori who had been left out of the original transaction were residing on the block.[1195]

The Bell commission's investigation into the next claim on its schedule, Taurikura, centred on whether the boundary described in Gilbert Mair's OLC 1047 deed, or that reportedly derived from his verbal transaction with Te Tao, should be recognised as valid. In their evidence to Bell, Wiremu Pohe and Hirini Tipene both argued that Te Tao should not have been able to make arrangements about the land; but Brown and Campbell, who had taken over Mair's claim, had relied on his agreement with Te Tao

to dispose of land beyond what Wiremu Pohe and Hirini Tipene regarded as the OLC 1047 boundary.[1196] Ultimately, Bell opted for Te Tao's boundary, even absent a deed, concluding that the two transactions of Mair, together with the Crown's purchase for £200 of the 5,365-acre Manaia block from Wiremu Pohe and others in 1855, had extinguished the interests of all customary Māori owners to some 10,942 acres of land.[1197] At the same time, Bell upheld the original finding of the first Land Claims Commission that Mair was entitled to 414 acres. After adding in the one-sixth increment and other survey allowances, this figure rose to 575 acres. John Logan Campbell had increased his holding at Taurikura still further by purchasing 1,675 acres, at a rate of 10 shillings per acre, which earned him another 335 acres in survey allowance, thereby increasing his total award from the Bell commission to 2,585 acres (which he took in one parcel of 1,762 acres and another of 823 acres).[1198] Meanwhile, the Crown also benefited significantly from Bell's finding, ending up with 8,357 acres of 'surplus' land, although part of this was encompassed by the Crown's subsequent purchase of the 'Manaia' block.[1199] It should also be noted that the Taurikura sale was opposed by Paratene Te Manu in 1860, but Government officials declined to reopen the case.[1200] The Lands and Survey Department, taking into account the 'Manaia' block overlap, later reported the OLC 1047 surplus as 3,890 acres, while according to the Myers commission in 1948, this was the entire area of surplus lands for the Whāngārei district.[1201] Stirling and Towers summarised the outcome for Māori: they had received '£50 in goods from Mair and £200 from the Crown for all of the peninsula (just over five pence per acre), no reserves, and nothing at all from the surplus land'.[1202]

Local tensions in the Mangakāhia district between Te Parawhau and Te Uri o Hau resulted in Bell having to revisit Charles Baker's OLC 547 award. A tribal meeting was held in 1858 to get agreement on the boundaries of his claim, but the survey, under the guidance of Matiu of Te Uri o Hau, was blocked soon after it started, reportedly at the insistence of Te Tirarau. Baker proposed in mid-1859 that his award at Mangakāhia be increased from the 1,316 acres recommended by the first commission to 2,560 acres, to which Bell agreed.[1203] The prospect of Crown purchasing heightened tensions further; indeed, during early May 1862, this escalated into localised armed conflict (see chapter 8).[1204] Baker subsequently accepted that he would not be able to take up his award at Mangakāhia and so, in 1865, he was paid out £1,920 in scrip (which equated to a rate of 15 shillings per acre).[1205] Papers prepared for the Myers commission indicate that these Crown interests were absorbed into the purchase of the Oue block in 1876 (discussed later) and Tarakiekie block in 1896.[1206] While Bell also investigated Busby's previously disallowed Whāngārei claims (OLC 23 and OLC 24) under section 12 of the Extension Act 1858, final settlement was by means of arbitration under special legislation in 1867 (discussed at section 6.7.2(10)).

(d) Mahurangi, Gulf Islands, and pre-emption waiver claims

Most pre-emption waiver claims in our inquiry district concerned lands in the Mahurangi area and gulf islands. The Land Claims Settlement Act 1856 had adopted the maximum settler entitlement of 500 acres established under Grey's Land Claims Ordinance 1846 and again ignored the obligation to set aside tenths, ensuring a sizeable surplus for the Crown. In effect, the Crown already considered itself to own land under disallowed waiver claims, although in some cases further payments were made, especially in the southern Mahurangi where the Crown made a number of overlapping purchases (see chapter 8).

We did not receive the sort of detailed evidence relating to the disposal of the waiver claims as we did for old land claims. Still, Bell clearly assumed that native title had been already extinguished in almost all cases. In his final report, he stated:

> in the great majority of these [pre-emption waiver] cases the native title had been fairly extinguished, and that the Government took possession of and sold the land on the strength of the purchases made by the claimants, there can now be no doubt. The fact has been established by the records in my office and in the Land Purchase Department

	Bay of Islands (acres)	Hokianga (acres)	Mahurangi and Gulf Islands (acres)	Whangaroa (acres)	Whāngārei (acres)	Total (acres)
Land granted to settlers	0.5	0	14,119	0	281	14,400.5
Scrip	320	0	3,925	0	0	4,245
'Surplus' taken by Crown	0	0	20,877	0	291	21,168
Total	320.5	0	38,921	0	572	39,813.5

Table 6.9: Total alienation of Te Raki Māori land through the pre-emption waivers.

> and Survey Department, and by the returns which have from time to time been laid before the Assembly and printed in the Sessional papers.[1207]

His reliance on prior investigations – on findings of the Matson inquiry, with its dependence on Clarke's perfunctory advice – furthered the flaws of a system unable to examine Māori rights in lands assumed already to be alienated. Bell also relied on the fact that pre-emption waiver claims had yielded land for the Crown, which it had then sold to settlers without Māori interruption. Stirling and Towers noted that distinguishing what Crown land was the result of pre-emption waiver claims from the land it had acquired from overlapping Crown purchases was not clear. In their view, 'overlapping Crown transactions effectively "mopped up" remaining Maori interests, at least in intensively transacted areas such as southern Mahurangi.'[1208] We return to this assessment of Crown purchasing policy in chapter 8.

A similar exercise of extinguishing the last vestiges of Māori title occurred at Aotea. After Whitaker and du Moulin's claims were disallowed for want of survey by Matson, the land had 'reverted' to the Crown, the deed being testament enough to the extinguishment of Māori rights. However, a letter from Whitaker in December 1851 – requesting the services of Government interpreter C O Davis to go to Aotea and Hauraki 'with a view of adjusting the native claims' to Aotea – suggests that there were interests outstanding.[1209]

In December 1853, Aotea settler Barstow asked the Government to 'purchase the whole of the remaining waste land of the Barrier of which the native title has not yet been extinguished'. In his attempts to secure land he was leasing at Tryphena, he had found himself 'entirely at the mercy of the natives' (Māori of 'Matewaru'). His request set in train a process where the complexities of lands to the south of Whitaker and du Moulin's purchase – of ownership, boundaries, owed payment, and wāhi tapu – were all cleared away, along with 15,000 acres of land, for which the Crown paid the equivalent of threepence per acre in August 1854.[1210]

In 1856, Māori lost their interests to the Crown in lands to the north of Whitaker and du Moulin's claims as well. No survey was made, an omission addressed by Bell when he received the claims of the two settlers for the grant of lands purchased under their pre-emption waiver certificates. Not only did he have those claims surveyed but also much of the rest of Aotea, determining the size of the Crown purchase in doing so. A survey allowance provided to Whitaker and du Moulin to cover both their own claims and the Crown purchase meant the exercise required no outlay from the Government.[1211]

Of the total of 28,608 acres surveyed, the Crown purchase, in two pieces, was found to be 2,163 and 4,600 acres

respectively. By this means, from an initial transaction of 3,500 acres, the extent of Whitaker and du Moulin's land was finally calculated as involving 21,845 acres. Of this, Whitaker received a grant of 5,463 acres and du Moulin a grant of 1,000, leaving a surplus of 15,382 acres for the Crown.[1212] Like Matson's inquiry, it appears the Bell commission heard no evidence from Māori, whose rights were not investigated and who received no additional payment for the land, bought originally for £172 of goods – making a final return to Māori of just shy of twopence an acre. Great gains were made for colonists and the Crown from transactions that by rights should never have been approved, involving multiple discrepancies that included the issuance of pre-emption waivers for amounts of land far beyond that allowed by FitzRoy's proclamations.[1213]

According to our calculations, overall, the Matson and Bell inquiries resulted in the award of Crown grants for 14,400 acres under the October penny-per-acre regulations, with an additional 4,245 acres of scrip land. The Crown took some 20,877 acres as 'surplus' lands in the Mahurangi district (including Aotea and other gulf islands). The exact figure remains uncertain, however, because of subsequent Crown purchases of portions of the lands covered by waiver certificates.

(4) *Case study: Crown handling of Māori occupation in the Kemp claims*

We have already mentioned Kemp's claims, in the sections above. We now explore them in more detail because they were the subject of particular debate between claimants and the Crown in our inquiry as to whether all Māori rights had been extinguished in the lands granted to him. The Crown's handling of Kemp's claims provides considerable insight into its approach to evidence of unextinguished rights at the time and the extent to which such rights were protected within the ratification process. As we discuss later in this chapter, the Crown's alleged failures in that regard would remain a matter of protest for Te Raki Māori for many years.

The Crown submitted to us that it was unaware of evidence that Māori continued to occupy any blocks that had been awarded to settlers.[1214] Questioned on this point by the Tribunal, with Kemp's claims as an example, the Crown later provided its analysis of his grants at Whangaroa and Kerikeri (OLC 599–602 and 594–598 respectively). The Crown argued that it was 'unclear' whether Māori remained in occupation. A block awarded to Kemp's son in 1859 did contain a three-acre 'Maori Cultivation' which had been identified in the original deed. One of Kemp's Kerikeri grants also contained Kororipo pā, though in that case the Crown submitted that it was 'not aware of evidence that [the] pa was occupied at this time'.[1215]

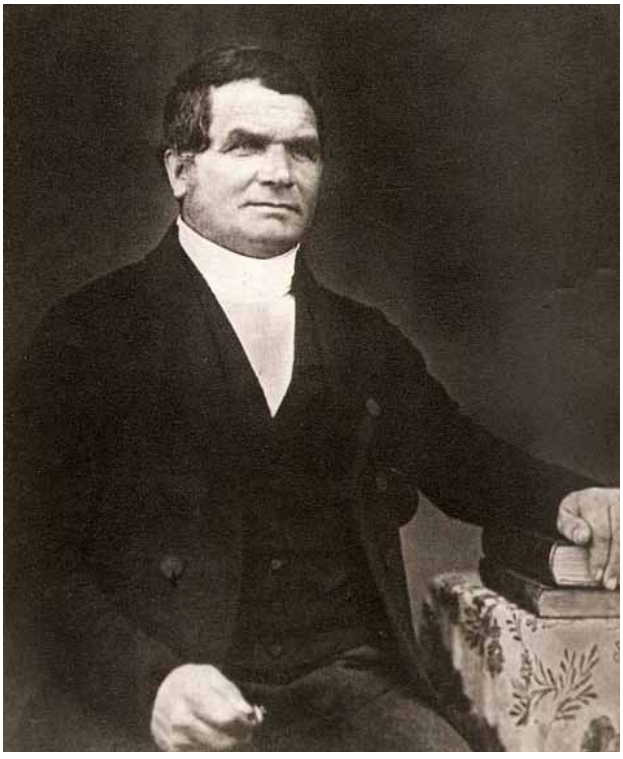
(a) How much land was granted to Kemp and his family?

Kemp's claims in the Bay of Islands (OLC 594–598) were based on five deeds signed with Rewa and other Ngāi Tāwake rangatira between 1834 and 1839, for which the first Land Claims Commission recommended grants totalling 1,354 acres.[1216] He also brought claims for land at Whangaroa (OLC 599–602) based on agreements reached with Tītore, Tāreha, and others, for which the commission recommended grants totalling 2,284 acres. The aggregated grant to Kemp could not, however, exceed the maximum 2,560 acres.[1217] The award for Kioreroa (OLC 596), comprising 150 acres at Waimate, specifically noted a reservation – a three-acre cultivation.[1218] Governor FitzRoy increased the total acreage of Kemp's entitlement to 9,276 acres, split between the two regions: 5,276 acres for the Bay of Islands claims and 4,000 acres for those in Whangaroa. Kemp had also subsequently acquired two properties granted to James Hamlin in the Bay of Islands, totalling 87 acres.[1219]

Kemp's survey at the Bay of Islands for the second Land Claims Commission encompassed 7,125 acres, including 109 acres for the two Hamlin properties. Two portions totalling 95 acres (including 13 acres at Kororipo pā) were located within the area proclaimed under the Bay of Islands Settlement Act 1858; ultimately the land was not required, and a grant was therefore issued.[1220] The final entitlement for his Bay of Islands claims, based on the original awards by FitzRoy and various allocations and adjustments calculated on the area of survey and the fees paid, totalled 7,437 acres. But pending finalisation of

the Bay of Islands settlement reserves and his claims at Whangaroa, Kemp had subdivided and surveyed the land at the Bay of Islands into 10 allotments for himself and his children. Bell endorsed the surveys on which the final grants were based. The total area was for 6,954 acres, of which 580 aces went to James Kemp senior.[1221]

The initial grants at Whangaroa had never been issued for reasons discussed later, but on eventual survey took in 4,464 acres. On Bell's calculations, taking into account what had already been surveyed and granted at the Bay of Islands, Kemp was entitled to 2,735 acres. This included an 'additional fourth' (301 acres) under section 26 of the Land Claims Settlement Act 1856 because Bell considered the missionary to have been unfairly penalised by the delay in settling his title 'by the default of Government'. On the ground, Kemp's eventual grant encompassed 2,722 acres.[1222] The remaining 1,742 acres were taken by the Crown.[1223] By our calculation, Kemp personally received 3,302 acres and the other family members another 6,347 acres. We have been unable to account for the six-acre difference between our figure for Kemp's personal grants and that of 3,308 acres provided by the Crown.

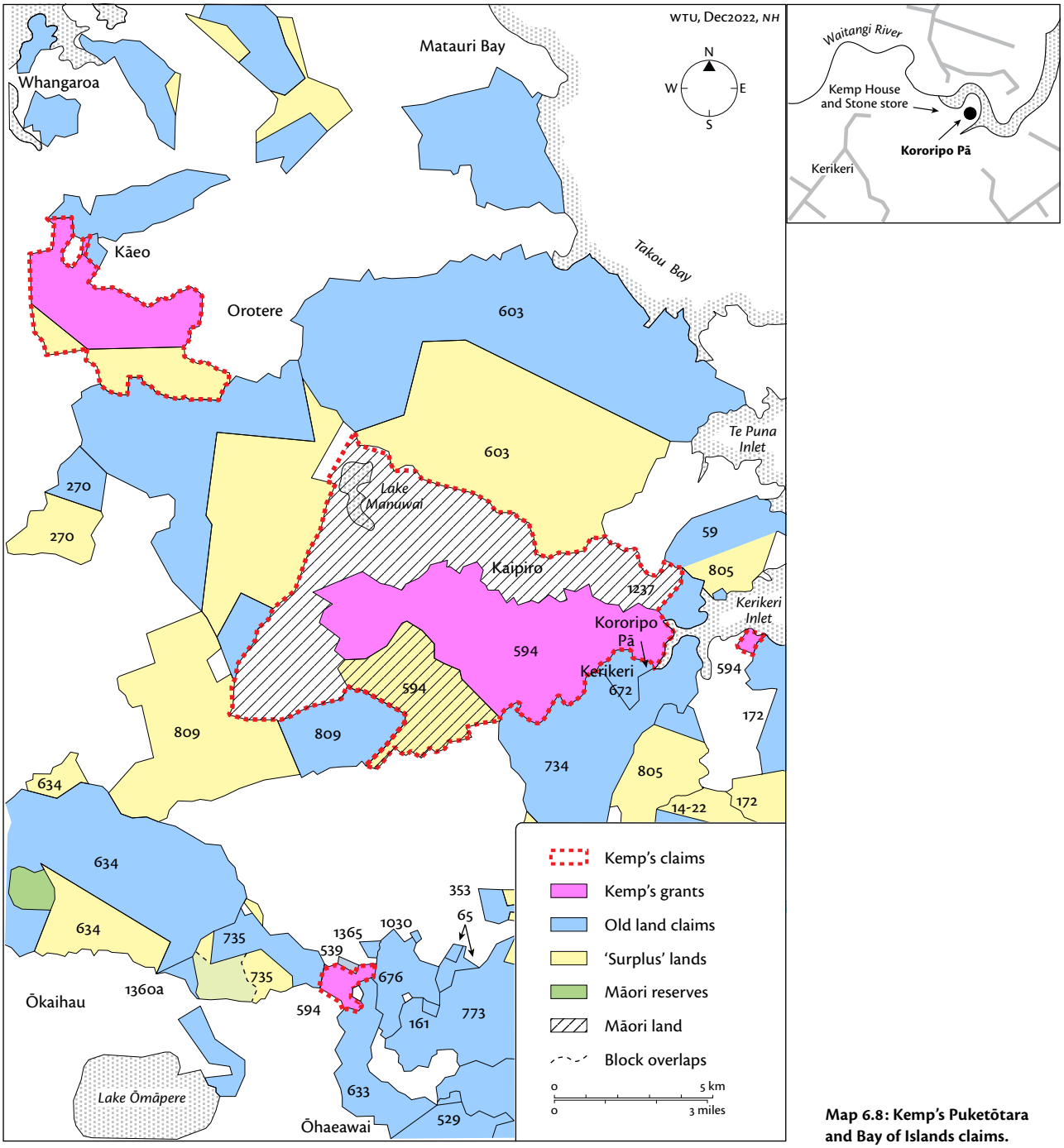


James Kemp, a missionary and old land claimant in the Bay of Islands, Whangaroa, Puketōtara, and elsewhere in our inquiry district. Kemp and his family were granted a total of 9,649 acres for their claims.

(b) Māori occupation

There were various indications and acknowledgements throughout the validation process in both regions that Māori continued to live on and assert rights in the lands being claimed by Kemp, although the exact locations generally were unrecorded. The Crown did very little to ensure that Māori on these lands were protected. Even the small reserve specifically excluded from the Kioreroa deed was not recorded in the survey plan and ended up being included within the boundaries of the grant that was eventually issued to Kemp's son, William Papillon Kemp, in 1859. This is acknowledged by the Crown in our inquiry, although – as with Kororipo pā – counsel also pointed out that it is 'unclear . . . whether the Maori cultivation was still in use' by this date.[1224] The pā had been subject of a deed signed by Hongi and Puru in October 1838.[1225] We observe that in the land court in the 1930s, Hone Rameka and others challenged the view that the pā was unoccupied and had been sold.[1226]

As discussed in section 6.3, it was common in pre-treaty times for missionaries to claim that they had purchased land while nonetheless allowing Māori to remain in occupation. Māori saw these arrangements differently: it was the missionaries who were allowed to occupy and use the lands; notably, Māori saw such allocations as providing for the missionaries' children, who were regarded as part of the hapū. While giving evidence to the first Land Claims Commission, Rewa spoke of allocating land at Puketōtara 'to Mr Kemp for his Son, who is named after me'. He added, 'The Land belonged to us & we have never sold it to any other person.'[1227] Kemp, in his evidence, also referred to that underlying intention, although he continued to regard the transactions as sales:



Map 6.8: Kemp's Puketōtara and Bay of Islands claims.

> I made all the purchases of Land in New Zealand for the benefit and use of my Eight Children; intending to put each of them in possession of a portion, upon their coming of age. The Chiefs, from whom I purchased the various tracts, perfectly understood that I did so, altho' the Children being infants, the deeds were made out in my name. I have lived Twenty Three Years in New Zealand, and all my Children have been born in the Island, and are considered by the Natives as belonging to their tribes.[1228]

Kemp later informed the Colonial Secretary that Māori had remained on the land, and had continued to cultivate it and cut timber whenever they chose, 'a system universally adopted in all purchases of the missionaries'.[1229]

(c) Grey's handling of Kemp's grants

When FitzRoy brought Kemp's claims before the Executive Council in 1844, he made no attempt to provide for ongoing Māori occupation. Commissioner FitzGerald subsequently recommended awards of 5,276 in the Bay of Islands and 4,000 acres in Whangaroa. FitzRoy duly issued grants for the Bay of Islands claims but (apparently due to some administrative oversight) not for Whangaroa.[1230] Kemp's Whangaroa claim then became caught up in Governor Grey's campaign against the missionary purchases (discussed earlier in section 6.5). During three years of heated correspondence, Kemp sought recognition of his Whangaroa grants, and Grey repeatedly refused.

In 1847, Grey wrote to the Colonial Office insisting that the legality of these and other extended grants should be challenged. He eventually received the support he desired from the Secretary of State, informing Kemp in September 1847 that his awards were 'entirely null and void' and that Her Majesty's government had refused the grants being prepared for his Whangaroa claims. Grey proposed that Kemp surrender his Bay of Islands grants as well and obtain new ones to the maximum of 2,560 acres allowed by the law, to be selected in four blocks and surveyed by the Crown.[1231] The only restriction was that Kemp would 'not be allowed to include in the blocks . . . any Lands to which the Natives may establish a just claim, or which may be required for the use of the Natives'.[1232] Crown counsel pointed to this statement as indicating that Grey would only 'permit grants that *excluded* Maori cultivations and habitations' (emphasis in original).[1233] Grey had however given little thought about how to ensure that occupied sites within settler grants were to be protected, or how to establish what would be required by Māori for their sustenance.

Kemp refused. He did not see the justice, he said, of reopening his claim to hear 'any objection that the Natives might be induced to make', as (in his view) they had already acknowledged that they had fairly sold the land. He therefore thought that further reserves were 'not required'.[1234] Expressing surprise that any grants issued by the Crown should not be legal, he rejected the Governor's proposal, except on condition that the surplus land be set aside for the 'moral and religious welfare of the Native race, and to be held in trust with the Church Missionary's property in New Zealand for that purpose'. He argued that it should not revert to Māori for it was likely to cause jealousy between those who had received payments as part of the original transactions and those who had not. Echoing Grey's earlier rhetoric, he warned of 'awful Calamity' and 'War & Bloodshed', and moralised that he would rather all the land be lost to his children than 'one drop of Human Blood . . . be shed on that account'.[1235]

Grey's response was equally moralising and uncompromising:

> the British Government should not permit any person illegally and unjustly to deprive the natives of land to which they may be entitled, more especially in the case of persons who were sent to this country with the most holy objects and purposes, and not just to acquire an influence over the natives and then to deprive them for a merely nominal consideration of large tracts of land, which might now afford them the means of raising themselves and their children to comfort and to the luxuries of life.[1236]

As to any surplus, this could not go to the missionaries even if held in trust for Māori, because it contravened

what was allowed under the 1841 ordinance. Grey professed himself as

> happy to avail [himself] of the experience of those who [were] best acquainted with the country to do anything which the law may permit & which may be judged best for the interests of the natives with surplus land situated as that . . . claimed by Mr Kemp.

However, the Government had 'no power' to accede to his proposal because this would be a 'payment for the surrender of . . . illegal grants' to individuals who could not be admitted to have any claim. If Kemp did not accept the Government's conditions, Grey warned, the only course would be to 'place the affair in the hands of the attorney'. In essence, Grey thought that the land granted in excess of the statutory maximum should be returned to Māori; there was no mention of it being taken by the Crown at this stage.[1237]

Kemp continued to insist that his purchases were fair, had been acknowledged as such by both Māori and the commissioners, and that there could be no reason for grants to such long-term and established residents as the missionaries to be withdrawn or withheld. Having informed the Colonial Secretary that missionaries never forced Māori off the land they had purchased, he went on to claim that there had 'never been any disputes upon land' between Māori and missionary families, and that:

> for the last thirty years every encouragement has been given by the Missionaries to the Aborigines to rear stock, for which purpose stock has been given them, they also have been taught to use them to till the ground, and encouraged to build regular houses, with the comforts of a Christian people.[1238]

Kemp was nonetheless more concerned with the interests of his family than those of Māori who had welcomed them onto the land and into their community. With his descendants' inheritance under threat, he failed to support Māori, who would find they had no legal rights even over the cultivations that had been excluded from the missionary grants, let alone those areas that were ultimately deemed to belong to the Crown as surplus. In the meantime, Kemp argued that the Governor could not deny

> a right to the families of the Missionaries freely admitted by the Aborigines to persons of New Zealand birth long before the Govt appeared in this Country, or ever contemplated such a movement.[1239]

Stirling and Towers summed up the impasse and the consequences for Māori:

> Neither Kemp nor Grey appeared to have a way to formally acknowledge the ongoing Maori interests in the land. On the one hand, Kemp wished to maintain exclusive rights to his granted area and have the CMS manage the surplus land for whichever Maori they decided should benefit by it. On the other hand, Grey sought to confine Kemp's exclusive rights to a smaller area and maintain the Crown's exclusive rights to the surplus land, some or all of which might be returned to Maori if he so decided. Meanwhile, there was no process to determine what rights Maori had maintained over the land or where they had maintained those rights.[1240]

(d) Māori opinion turns against Kemp

Up to this point, Māori had seemed to support Kemp, although, as we discussed earlier, the record of the Land Claims Commission hearings must be read with caution. In the 1850s, Māori began to realise that Kemp and his fellows in the CMS were claiming 'far more than was ever sold to them' and protested that the missionaries would 'not allow them to retain possession.'[1241] In 1854, Tāmati Waka Nene asked the Governor to send a surveyor without delay because 'great' was the 'mistake'.[1242] It is apparent, too, that Māori had been felling timber on some of the land being claimed at Whangaroa. Kemp complained of having sustained a 'very great' loss from the Government's failure to issue his grants, which had resulted in 'unprincipled Europeans' instigating Māori 'encroachments' on his property to cut timber for sale. In addition, a bad

precedent was being set. According to Kemp, 'The natives [were] doing the same to other settlers seeing that I had no person to prevent their cutting of my land.' This, he informed the Government, was the 'source of much evil amongst natives and Europeans in the north.'[1243]

The substance of this allegation was repeated in a petition to the House of Representatives. Kemp drew their attention to a letter purportedly written by Te Ururoa (of Ngāi Tāwake) in 1848 asking permission to cut timber (something Kemp earlier claimed he always allowed) and which, he now argued, 'clearly show[ed]' that he had 'fairly purchased the Land.'[1244] This stated:

> Tenei ano taku korero atu kia koe, e mea ana ahau kia wakaae mai koe ki te tahi Rakau maku i nga rakau o te Paru, e pai ana tenei he mea inoi atu kia koe mehemea ka tahae ahau ka he, tena ko tenei mau te wakaaro kia tukua mai tetahi maku i o rakau kei te Para pu ano nga Rakau e hiahia nei ahau, e rua tekau rakau etahi mai I koe maku.

This was translated by Kemp as

> I have something here to say to you. I wish to obtain your consent to let me have some Timber, some of the Timber of the Paru, this is good because permission is asked of you, if I take your Timber unknown to you it will be wrong but as it is you must consider the matter and let me have some of your Timber. I wish for it from the Paru, let me have twenty Trees.[1245]

We interpret this statement differently. Te Ururoa can be seen as informing Kemp of his intention to take timber off the land that the hapū had allocated for the missionary and his family to use, while Kemp's disgruntlement at the loss he had incurred suggests that the timber was cut without his sanction – whether by Te Ururoa or Heremaia's people (Ngāti Uru and Ngāi Te Whiu) is unknown.[1246]

Other claims were being made. A 'young native' named Karuhorongia had objected to Shepherd's survey at Tiheru (part of an area disputed between Kemp and Shepherd) in nearby southern Whangaroa.[1247] According to Dr Rigby, this is what had alerted Rewa to a potential problem. Kemp's survey of his Puketōtara award, taking in 6,674 acres,[1248] had been presented to Bell in September 1857, but Rewa now accompanied the commissioner to Kerikeri to inspect the boundaries, to which he raised objections.[1249] On review of the deeds, Bell had discovered the omission of Tarata Rotorua and Tiheru, and a large block between the Waipapa and Rangitāne Rivers from the original claim area.[1250] He nonetheless had dismissed Māori objections as coming from 'young men' – who could petition the Governor for a 'small portion' to be returned – and announced the Government's intention to take any surplus land.[1251]

Objections were also raised to Kemp's survey of a number of his other claims. Pirika Pinamahue wrote to Bell about the 185-acre Kioreroa claim (OLC 596) at Waimate, complaining that 'Te Koki sold a small part to Kemp, but another part [she did] not because she, Te Koki, did not own it.'[1252] Hira Tauahika stated in another letter that 'we continue to quarrel with him' (Kemp) about 'our place, Te Ahikanae.'[1253] They were both advised to attend the commission's next hearing, which would be their last opportunity to raise any objections. Then, on finding that the survey was in accordance with the boundaries of the original deeds, Bell dismissed them, again observing that the complaints had come from 'young men chiefly' and were 'on the whole without any foundation'. Bell made no mention of the reserves that had been explicitly excluded from the original award for Kioreroa.[1254]

(e) Bell's awards to Kemp at Whangaroa

The matter of Kemp's grants at Whangaroa remained unresolved. At first overlooked, they were then not issued because of Grey's opposition; Kemp had been unable to survey them; and Māori continued to utilise portions of the land described in the original deeds. When Bell sought to finalise Kemp's grants and take the rest as 'surplus' for the Crown, further evidence of unextinguished interests and ongoing occupation surfaced. Heremaia, whose objections to Shepherd's Whangaroa claims are discussed in section 6.7.2(3)(b), made similar allegations in the case of Kemp. When the inquiry into Kemp's Whangaroa case (OLC 599–602) commenced at Mangonui in October

Kemp House at Kerikeri (also known as Kerikeri Mission House), the oldest surviving European building in New Zealand. It was built between 1821 and 1822 on land acquired through an 1819 land agreement between the Church Missionary Society and Hongi and Rewa. James Kemp and his wife, Charlotte, occupied the house after the Reverend John Butler's departure in 1823, living there until the mission closed in 1848.

1857, Bell addressed Te Ururoa and Te Morenga, along with 'other chiefs' who were in attendance from the Bay of Islands, informing them that 'the claim was about to be heard and that they would have ample opportunity of making any statement'. They replied:

> they had nothing to do with the [Whangaroa] land, and referred the Court to Heremaia and others who were then called upon . . . the Commissioner first directing the whole of the Evidence taken in the case before Commissioner Godfrey to be read over to them.[1255]

As Stirling and Towers pointed out, this evidence was exclusively that of Bay of Islands rangatira and did not include any testimony from Heremaia's people, who had not been involved in the original transactions.[1256] It implied that Bell had little idea about occupation patterns and rights in the region.

Heremaia told Commissioner Bell, 'The reason of my now appearing is that I now object to the sale of this land. The land is mine and no other man has any claim to it.' He then proceeded to detail his boundaries, which encompassed lands from Puketī north to Torohanga and Mangaiti. He did not dispute the rights of Te Ururoa or Te Morenga to make agreements about their pieces, but his land had been 'wrongfully sold' at Kororāreka and Kerikeri by those 'having a wish to procure European goods', and the transaction had not been witnessed by 'all the people'.[1257] Heremaia went on to request that 'a portion of this land . . . be given back on which my Children can live'.[1258] Hare Hongi, Rihari Te Kuri, and others indicated their endorsement of his evidence. It was also revealed that Heremaia's hapū had been taking timber from the Whangaroa land as well as cultivating a portion of it. As Henry Clarke, who had been engaged to survey Kemp's claims, and James Kemp junior reported in the next sitting held at Kororāreka on 24 March 1858:

> the Ngati Uru tribe had taken possession of about 120 acres within the original boundary of the claim, and were cultivating it. Considering the circumstances connected with the settlement of the Ngatiuru on that piece of land,

> we considered it better to leave it out of the survey, and it is accordingly not included in the Block.[1259]

It may be that this concession was prompted in part by a wish to gain Heremaia's consent to a road through Florance's scrip claim which was being negotiated at the same time. The agreement reached over these matters was put in writing: 'It is land for us to work and will continue thus forever', and the road 'must be open, and right down to the Kaeo River'.[1260] Clarke also told the commission that, as they were walking over the block, Heremaia had

> admitted to us, entirely voluntarily, that a considerable quantity [of timber] had actually been removed by them in the last six or seven years; and referred to one place in particular from which 200 spars had been removed at one time.[1261]

While Commissioner Bell accepted the exclusion of the 120 acres from the 4,238 acres encompassing Kemp's Whangaroa survey, he noted in his report of the following year that it was 'probable that more will be got'.[1262]

The final survey figure at Whangaroa took in an additional 226 acres, bringing the total to 4,464 acres.[1263] Although the location of this extra area was not identified, Stirling and Towers concluded that 'it can only have been taken from Ngati Uru and the lands they had never transacted and which they sought to set aside from Kemp's survey'.[1264] Counsel for the Whangaroa claimants also conceded that, in the absence of the original survey plan, it cannot be 'definitely determined' that the areas occupied by Heremaia's people were granted to Kemp rather than taken as surplus by the Crown. Counsel argued, however, that Kemp selected his grant in order to leave the more rugged southern portion of his claim to the Crown; on that basis, it was 'almost certain that the areas of [Māori] occupation lay within Kemp's grant'.[1265] This inference seems reasonable, but we have found no evidence regarding the exact location of the land in question.

The more important point, as Bryan Gilling also noted, is that 'lands occupied by Maori needed to be protected not only from being granted to settlers but from being taken by the Crown as surplus lands'. The Crown has focused on the distinction between those two possible outcomes, but we agree with claimant counsel that *who* took it matters

> much less than the fact that it was taken, especially when, as the [first] Old Land Claims Commissioners said, such occupation land . . . was supposed to have been reserved to them [Māori] 'in every case'.[1266]

Although the land may not have ended up in the hands of the Kemp family, it did transfer out of those of Ngāti Uru.

Bell's attitude towards Māori stands in contrast to his sympathetic treatment of Kemp. As a result of delays caused by Grey's opposition, Crown indecision on core policy questions, and failures of process, the task of defending ancestral land rights now fell to a younger generation. The original Māori participants were often no longer alive to testify to their understandings of the matter; but Bell's summary approach to the claims of their descendants as coming from 'young men' who could have no first-hand knowledge was a refrain in his reasoning alongside his repetition that the Crown owned the surplus under the law. In the case of Kemp, Bell acknowledged that referral of the grants to Commissioner FitzGerald had been 'illegal' – as the Privy Council had found in 1851 – but he nonetheless awarded him extra land to make up for the delay in their issue. He reasoned that only one had been 'in violation of Commissioners Richmond and Godfrey's Reports, the others were in conformity with them'. In his view,

> whatever illegality attached to that grant, was cured by the Quieting Titles Ordinance in 1849; and this being done [he could] not see the Government was justified in refusing any grant at all in the Wangaroa claim. For the issue of an illegal grant in one claim cannot deprive the claimant of his right to the fulfillment of the award in another.[1267]

(f) The Crown's claims on the surplus

The Crown took 1,742 acres of surplus from Kemp's claims at Whangaroa. The assertion of its claim in the Bay of

Islands was more complex. Bell had informed Māori that 'a large extent of land in addition to what the claimant had surveyed at Kerikeri . . . included in the Boundaries originally sold to him . . . would still be retained by the Crown.'[1268] But it made no attempt to survey the surplus land to the north of Kemp's grant, and there was no mention at all of the area to the south which also came within the boundaries of the original claim. Stirling and Towers noted,

> As far as Kemp and Ngai Tawake and Te Whiu were concerned, the area [outside the grants to Kemp and his family] was now Maori land; indeed, as far as local Maori were concerned it appeared to have always been Maori land, as they had continued to occupy it and had objected to Kemp's attempt to claim it. They had also objected to the Crown's claim – communicated through Bell – to land that they had excluded from Kemp's claim.[1269]

The Crown abandoned its claim to the northern surplus, and this would be put through the Native Land Court as the Pungaere block (7,184 acres) in 1868, when it was awarded to two owners who sold it to a private purchaser the following year.[1270] The failure to assert its claim of ownership seems to have been an oversight; the Lands and Survey Department later commented it could not 'discover how the Maori got this'.[1271] The story was different elsewhere. When, in 1875, Ngāi Te Whiu attempted to gain title to Te Mata block, located in the south and west of Kemp's original claim, the Government's district officer, William Webster, informed Judge Henry Monro that it was Crown land – even though it had not been surveyed as such at the time of the Bell commission or successfully in the interim.[1272] Webster's statement appears to have been accepted by the Court, without question, the record simply noting: 'Te Mata surplus land – dismissed.'[1273]

Ngāi Te Whiu, dismayed at this turn of events and puzzled as to why the Government should have laid claim to one portion of their land and not the other, continued to live on the Te Mata block, utilising its resources, leasing timber cutting rights, and charging royalties for gum digging.[1274] This practice continued until 1889 when a Crown lands ranger investigated 'natives levying blackmail at Kerikeri', reporting the following year that 'Waihou HauHaus' were digging gum on Crown land at Puketī. During his inspection, the ranger also found that 'the Waimate Maoris [had] been leasing a large block at Puketotara marked as Crown lands'. He had made inquiries of one of Kemp's sons, who had informed him:

> the Maoris always believed they had the best right to Puketotara . . . Old Mr Kemp told the Maoris they could have the land that was cut off [his survey]. Peeti . . . one of the principal men who claims the land . . . said there was some dispute about the surveying which was never settled . . . [it was] sold by people who had no right whatever to do it . . . let the Government bring it before the Court and prove their title.[1275]

Since the Native Land Court could only hear claims to customary land, this was not an available option. Instead, Hōne Peeti and Ngāi Te Whiu, along with other leaders concerned about the Crown taking of surplus lands elsewhere in the region, would lobby, petition, and testify before multiple commissions over many decades, seeking the return of the land. We return to these efforts and the Crown's response in section 6.8.

(5) *Why did the Crown implement the scrip policy?*

'Scrip' was a land order that enabled the holder to purchase a given value of Crown land, where it was available for sale, via a Treasury credit.[1276] The policy was developed as a solution to two related problems faced by the new colonial administration. The first was the Crown's concern about providing for the needs of dispersed settlement across the country. With that in mind, in December 1841 Governor Hobson had proposed some form of transferability of land grants, by which means settlers would be concentrated around Hokianga, the Bay of Islands, and Auckland.[1277] Hobson dropped this proposal from the 1842 Land Claims Ordinance in light of settler protests, but his immediate successor, Shortland, saw scrip as a means of avoiding delay and saving expenditure on Government surveyors, who were in short supply, as well as ultimately

broadening the land base owned by the Crown.[1278] Consequently, a 'Notice to Land Claimants' was issued in September 1842, in which scrip was offered to those 'who may prefer land in the immediate vicinity of the settled districts'.[1279] Proclamations followed in 1843 and 1844 to set out the opportunities for scrip holders to acquire land on the outskirts of Auckland.[1280]

The second problem facing the Crown was how to provide some form of title resolution for land claimants when circumstances precluded the immediate investigation of pre-treaty transactions. Initially, only settlers found to have valid claims to land were intended to be eligible to receive scrip,[1281] but when Godfrey found himself unable to investigate around 40 Mangonui claims because of conflict between the rangatira Pororua and Panakareao, he wrote to the Colonial Secretary in February 1844 advocating that scrip be paid in such circumstances.[1282] In part, this was put forward as a punitive measure by the commission to convey the message that uncooperative Māori communities would be deprived of their Pākehā settlers.[1283] The delay in resolving old land claims was an issue of growing official concern too, and the award of scrip at Mangonui became a precedent for the speedy resolution of other settler claims that remained unproven.[1284] The Crown would be able to claim its interests in the lands at a future date, even though the transactions for which scrip had been issued had not been investigated by the first commission. The full impact of the Crown's scrip policy was, however, not revealed to Māori until many years later when surveys were undertaken for the Bell commission.

Another important aspect of the new scrip policy was the payment of orders of £1 for every acre claimed – the amount recommended by Lord Stanley when he wrote to Governor FitzRoy in August 1843 – and related to the minimum price set for Crown lands at £1 per acre. Stanley reasoned, too, that payment of scrip should be set at a rate according to acres claimed rather than the sum expended, because the same money would obtain far less land in the vicinity of Auckland; in his view, 'much the reverse of an encouragement.'[1285] It was nonetheless extremely generous when compared to the threepence per acre that Chief Protector Clarke was instructed to pay for good agricultural land in 1841.[1286]

(6) *What were the effects of the scrip policy?*

As Hobson initially conceived of it, scrip would be issued only to settlers who had properly investigated, valid claims.[1287] But in practice, scrip was awarded to numerous settlers whose claims had not been investigated, or whose claims had been investigated and rejected. FitzRoy intervened on several occasions to this effect, and the number of scrip awards grew once the Bell commission was established and claims were surveyed. The Crown has acknowledged that 'failing to investigate transactions for which "scrip" was given' was a breach of the treaty.[1288] Its position on the issue of scrip when claims had in fact been investigated is less clear.

In Hokianga, FitzRoy awarded scrip for five claims for which the first Land Claims Commission had declined to recommend a grant. Three were claims of John Marmon – OLC 312, OLC 313, and OLC 315 – which the first commission had declined after Marmon failed to appear.[1289] In another case, Gundry's OLC 209 claim, the problem was uncertainty about when the transaction had been made.[1290] It remains unclear why no grant was offered for White and Russell's OLC 517 claim.

In the Bay of Islands, De Sentis was awarded scrip for one of his Kororāreka claims (probably OLC 769), which was initially disallowed due to his failure to appear at the hearing.[1291] And at Whangaroa, Powditch was permitted to take scrip for a disallowed claim, which we will discuss shortly.[1292]

Scrip was also used for some Whāngārei claims where Māori interests had not been fully extinguished. The first commission had accepted Charles Baker's Mangakāhia claim (OLC 547), recommending an award of 1,316 acres. FitzGerald, to whom Baker's claims had been referred later, increased it to the 'entire quantity' of 5,000 acres he had claimed, with the caveat that he 'remove' the protest of Te Tirarau (who had not been party to the original transaction), or leave the disputed land out of his grant 'as he may choose'.[1293] On subsequently attempting to survey

the grant, significant on-the-ground opposition from Te Tirarau meant that Baker was unable to take up the award. Ultimately, in 1865 he accepted £1,920 scrip in exchange for his 2,560-acre award.[1294] Similarly, the Crown awarded Salmon land in exchange for his 7,000-acre Whananaki claim (OLC 408),[1295] and scrip for Black and Green's 3,000-acre Tutukaka claim, both of which had been disputed by the Māori occupants.[1296]

When Hokianga scrip surveys were undertaken for Bell's investigation, he allowed six claims that had been rejected by the first Land Claims Commission, and a further 10 latent claims that had never been filed were resurrected by John White (who assisted Commissioner Bell in the district). No scrip was paid in regard to these 16 claims, so the subsequent increase in the Crown award was the result of what Bell and White deemed to be the extinguishment of customary title. Although the lands acquired in this manner could more properly be considered as 'surplus land', they were almost always merged on the ground with land acquired using scrip, so for practical purposes they have been included in our tally for this class of land.

The long delay in settling titles permitted by the exchange for scrip caused trouble for customary owners and has been acknowledged by the Crown as compounding the grievance caused by its taking of surplus land.[1297] For example, survey of the scrip land derived from Powditch's Whangaroa claims (mentioned earlier) did not occur until the 1870s, leading to confusion as to whether the areas in question had even been subject to a 'sale' arrangement. This had never been investigated by the first commission, while Bell only investigated the derivative claims.

Powditch had filed three Whangaroa land claims for investigation by the first Land Claims Commission: for the 140-acre Kaimanga block (OLC 383), the 1,080-acre Waitapu and Waireka block (OLC 384), and the 3,000-acre Paripari block (OLC 385). None was reported on by the commission as Powditch had been unable to pay the hearing fees. However, FitzRoy later agreed to the exchange of £1,500 for the entire Paripari claim.[1298]

Bell's investigation resulted in award of Kaimanga and part of Waitapu and Waireka to settlers who had purchased them off Powditch in the meantime, netting the Crown 95 acres of surplus land.[1299] How the commission disposed of the 3,000-acre Paripari claim is less clear but by the mid-1870s, the Crown considered itself to be the owner. When Wiremu Naihi, Wi Warena Tuoro of Ngāti Mokokohi,[1300] and others either accepted down payments or sent in title applications to the Native Land Court for portions of the Paripari claim (surveyed as Te Huia and Waitapu blocks), the Crown Lands Department lodged objections that they were 'Government land' on account of 'Powditch's claim', which had been investigated by the Bell commission. Judge Monro duly dismissed both cases before any testimony had been heard.[1301] In a subsequent application for Te Huia, solicitor Frederick Earl wrote to Chief Judge John Edwin Macdonald that he could find 'no evidence whatever of the title of the Government to the blocks in question.'[1302] Wi Warena Tuoro testified, acknowledging that the block had been 'sold to Europeans, but [he said] not by the proper owners'. However, when the Crown produced Powditch's deeds, Macdonald again accepted that the block was outside the Court's jurisdiction.[1303]

Similarly, the Crown was still surveying its Kohukohu and particularly dubious Motukaraka awards in the mid-1880s. At Kapowai, the Crown did not survey land (an exchange for the £2,560 it had paid in scrip) until 1892. The Crown's claim derived from an award to Whytlaw recommended by Commissioner Godfrey to total 733 acres but which FitzRoy had increased to the maximum allowed by the ordinance.[1304] The whole peninsula only contained around 2,700 acres and was already subject to multiple grants of varying sizes to settlers and four successful Native Land Court claims, so it was little wonder that the Crown's attempt to take 2,170 acres was strongly resisted by Wiremu Te Teeti and others in 1894 (see section 6.8).[1305]

Under its policy, the Crown generally paid settlers £1 scrip for every acre awarded – an extravagant provision which it later sought to recover in land from Māori. On occasion, the Crown granted settlers far more in scrip

	Bay of Islands	Hokianga	Mahurangi	Whangaroa	Whāngārei and Mangakāhia	Total
Crown (OLC and pre-emption waiver)	2,672	14,008	3,925	3,605	0	24,210
Rigby (OLC and pre-emption waiver)	2,672	14,029	3,925	0	3,605	24,231
Rigby (OLC only)	2,352	14,029	0	0	3,605	19,986
Waitangi Tribunal (OLC only)	2,419	13,829	0	5,272	1,818	23,338

Table 6.10: Scrip awards in the Te Raki inquiry district.

than their Land Claims Commission awards justified. At Papakawau in Hokianga, for example, the settler Poynton claimed 2,550 acres (OLC 387–390); the commission recommended grants totalling 819 acres; yet the Crown subsequently awarded him £2,560 in scrip, covering the entirety of his original claim. Later, the Crown surveyed 2,572 acres (some 1,753 acres more than the commission's awards) and claimed it from Māori.[1306] A less extreme example, from Whāngārei, was that of the Awaru block. The claimant Peter Greenhill sought 2,500 acres (OLC 199); the commission recommended an award of 620 acres; yet the Crown paid Greenhill £2,500 and following that, surveyed and took 1,053 acres of scrip land.[1307]

When it came to awards of land, Bell's insistence on the boundaries as stated in the original deeds was designed to maximise the Crown's surplus to Māori prejudice, but given the wild exaggeration of the estimated sizes of some claim areas in many instances of scrip, the deed boundaries were their only safeguard. We particularly note the survey of Henry Pearson's OLC 379 scrip claim in Hokianga. Its purported area was 2,000 acres, for which Pearson received £1,594 in scrip, but on survey it was found to contain fewer than 78 acres.[1308] On the face of it, the Crown was the loser in such situations, but ultimately Māori paid a price as well, because the Crown consistently sought to take as much land as possible, either by making the best (for itself) of vagueness about boundaries or by limiting the number and size of reserves. Commissioner Bell was almost apologetic in tone when he reported to Parliament in 1862 that he had secured only 15,446 acres from the scrip surveys as the return from the £32,000 plus paid out in scrip to settlers making claims in Hokianga.[1309] As will be seen later, this attitude was to be evident in an even more extreme fashion at Motukaraka two decades later and was used to justify extending the Crown award there, via the re-imagining of the boundary.

(7) *Application of scrip policy*

Figures for the areas that the Crown obtained as scrip land in the course of settling old land claims have been provided to the Waitangi Tribunal by Dr Rigby and by the Crown, both of which are set out in the following table.[1310] These were subsequently adjusted following careful scrutiny, and with the aid of Stirling and Towers' more detailed research on some of the problematic old land claims, particularly those in Hokianga. Although the Crown or Rigby's figures (or both) revealed the odd instance of accidental inclusion (such as 340 acres for OLC 284, located in the Kaipara inquiry district) or omission (such as 2,560 acres for OLC 738), for the most part the adjustments represent the reinterpretation of surplus land as scrip land – in which case a corresponding alteration has been made to the surplus acreages. In other instances, later surveys showed that the actual area taken did not match the area nominally acquired; for example, the Crown acquired 1,053 acres instead of the 2,500 acres of scrip land provided for by its OLC 199 payment.

These figures represent land acquired by the Crown as

a result of scrip exchanges but incorporate a number of areas included in the survey for which scrip had not been issued. It is to be noted also that not all lands for which scrip exchanges were made ended up being taken by the Crown.

Scrip was given in 48 instances, or about one-third of all old land claims in the Hokianga district. Areas from a further 10 claims never previously filed, plus six claims which had been disallowed, were also integrated into scrip surveys.

In 1857, Kemp estimated the Crown's entitlement to land in Hokianga, based on areas that had been claimed by the recipients of 46 scrip exchanges, to be more than 75,000 acres.[1311] In the end, the Crown acquired just 13,829 acres from the Hokianga scrip surveys undertaken in the late 1850s, which encompassed 48 of the 50 scrip claims listed in the table preceding. Subsequently, the Crown award was boosted by the around 570 acres secured in satisfaction of OLC 971,[1312] and the vast expansion in the Crown's OLC 1034 taking at Motukaraka (from 67 acres to more than 3,000 acres) after the resurvey of the boundary in the 1880s (as detailed later).

Elsewhere in our inquiry district, many of the scrip payments on land were invisible because of later Crown purchase activity. In the Whāngārei and Mangakāhia taiwhenua, £4,625 scrip was given in exchange for three land claims (OLC 96, 543, and 547), which according to the estimates provided by settler claimants, collectively encompassed 26,000 acres;[1313] however, in all three cases the issue of scrip effectively became down payments for subsequent Crown purchasing.[1314] Many of the Bay of Islands and Whangaroa scrip claims overlapped each other and also required further Crown payments to the Māori owners. Sometimes, the ultimate disposal is unknown. In other cases, as in Thomas Spicer's claim (OLC 435), the sketch map was so vague that the Crown may have been unable to convert its interests into land.[1315] Ultimately, the Crown was able to claim lands for only five Bay of Islands scrip claims: OLC 114–115, OLC 172, OLC 174, and OLC 520.[1316] Notably, the Crown acquired 509 acres for the capital at Russell after James Clendon was given £10,000 scrip for land at Papakura (a small fortune) in exchange for his claim (OLC 114–115).[1317] This was for land for which Pōmare, Kiwikiwi, and the other owners had received goods in payments estimated at £178 9s.[1318]

Considerable uncertainty also surrounds the Crown's acquisition of scrip land at Whangaroa, reflecting the complexity of the situation on the ground. Crown counsel put forward a figure of 3,605 acres, based on Rigby's assessment of scrip, surplus, and pre-emption waiver land within the inquiry district.[1319] Whangaroa counsel submitted a figure of 4,813 acres reached by adding together the claims of McLiver, Powditch, and Florance in the surveys of the Waitapu and Te Huia blocks.[1320] We consider this to be accurate, with the exception of the area obtained in exchange for McLiver's scrip. The Whangaroa claimants assessed this at 785 acres, but the survey was for 459 acres.[1321]

(8) *Bell's investigations into scrip claims*

At Hokianga, where the Bell commission sat for a period during March 1858, much of the evidence provided by local rangatira concerned the boundaries of private claims.[1322] Two years earlier, Makoare Taonui and others had written to the Governor asking for the Hokianga land claims to be resolved through surveying, so that they might attract Pākehā settlers to the district.[1323] From the Crown's perspective, the prospect of surveying its own Hokianga scrip lands also promised to make available a large area of land for its disposal. William Clarke, son of the former Protector of Aborigines George Clarke, was duly appointed as the surveyor for the Hokianga scrip lands, while John White was employed nominally as the interpreter for Māori who were pointing out boundaries. His role in practice was far greater. We might expect him to have been disqualified for this appointment by his vested interest in holding up settler claims, since £7,000, or about one-fifth of the scrip the Crown had exchanged in relation to the Hokianga district, had been shared between his uncle, William White, and his father, Francis White. Beyond the general supervision that Bell provided, there does not seem to have been any effort by the Crown to address this issue.[1324]

Bell sent detailed instructions to White on 4 October

OLC	Claimant	Scrip awarded by first commission and FitzRoy	Acres surveyed and retained by Crown after Bell commission
12	Henry Richard Oakes	£300	69 acres 3 roods
40	John Anderson	£1,000	3,895 acres
315	John Marmon	£250	
461	Alexander Thompson	£1,825	
519	William White and George Frederick Russell	£6,099	
41	Robert Angus	158 acres (changed to £50 by Grey)	2,572 acres
479	Patrick Walsh	£280, plus 70 acres elsewhere	
387	Thomas Poynton	Poynton was given £2,560 for his claims in OLCs 386–391 and Thomas Hunt was given £400 for OLC 391	
388	Thomas Poynton		
389	Thomas Poynton		
390	Thomas Poynton		
391	Thomas Poynton		Not included in scrip survey
386	Thomas Poynton		328 acres
123	Denis Browne Cochrane	£500	
517	William White and George Frederick Russell	£250	
50	John Baker	£722 between this and another claim	944 acres (out of 1,957 acres surveyed)
811	Robert Anwyl	No scrip (abandoned)	
82	Thomas Cassidy	£1,053	105 acres
83	Thomas Cassidy	£1,000	380 acres (reduced to 317 acres after Crown cuts out 63 acres for later grant)
87	William Nicholas and Edward Chadwick	£467	393 acres
208	William Richardson Gundry	£463	
94	Alexander Chapman	£54	340 acres (out of 350 acres surveyed, remainder being 10 acres for OLC 836 grant)
176	Samuel Egert	£214 10s	
209	William Richardson Gundry	£500	
95	Alexander Chapman	£136 10s	173 acres 2 roods

447	Henry Ashford Strout and Henry Harrison	£340	
190	Edward Fishwick	£1,200	959 acres
191	Edward Fishwick	£80	
467	William Trusted	£42	
1044	Baron de Thierry	£110	
242	Robert Hunt	£2,560	533 acres
272	James Kelly, James Philip Lloyd, John Baker, and Thomas Hollingsworth	£1,958	475 acres
468	Pierre Piene Tuite	£174	
275	John B La Court and James H La Court	No scrip paid	No grant made, 37 acres reverted to Crown
312	John Marmon	£200	324 acres
313	John Marmon	£200	
318	Richard Mariner and Francis Bowyer	£1,500	
352	George Nimmo	£200	181 acres
378	Henry Pearson	£80	10 acres 3 roods 20 perches
379	Henry Pearson	£1,594	77 acres 1 rood
402	George Frederick Russell	£251	335 acres
514		No scrip paid	Nil (87 acres later reverted to Māori ownership)
515	William White	£1,000	814 acres
540	William Young	£640	
1043	Baron de Thierry	£1,500	
*	William White	No scrip paid	176 acres
624	Joseph William Wright	£1,500	389 acres
625	Joseph William Wright	£100	18 acres
706	James Honey and Edward Parker	£200	24 acres 3 roods
966	Thomas Mitchell	No scrip paid	No grant made, 271 acres reverted to Crown
971	Matthew Marriner	£950	Not included in scrip survey
1034	Thomas McDonnell	£2,560	67 acres (later increased on resurvey to more than 3,000 acres)

* Unnumbered Wairere claim

Table 6.11: Scrip awarded in the Hokianga taiwhenua.

1858. After giving the reasons for White's selection – '[Y]our own acquaintance with the position and extent of the several claims at Hokianga' – the instructions explained that his 'principal duty' was:

> to see that the boundaries surveyed agree with those stated in the evidence by the chiefs, and that, while on the one hand the government obtains all that was duly sold to the old claimants, no encroachment whatever takes place on native land.[1325]

In order to prevent disagreements, White was to call upon an assembly of rangatira who would nominate one or more individuals to vouch for the survey line as it was being cut. The resulting survey would be final and not able to be questioned.[1326] With respect to reserves, Bell observed:

> While I was at Hokianga the chiefs in several instances requested that reserves might be made for them within the boundaries of the government lands, where such a reserve includes any pa or actual cultivation you are authorised to get the same laid off at the time the survey of the claim is being made, but when the land wanted for a reserve is not actually occupied, you will explain to the natives that they must make a specific request to it in writing to the Governor, which you will transmit to me for His Excellency's orders.[1327]

Another instruction revealed that Bell was also expecting the scrip survey to take in exceptional cases, including those for which payments were incomplete and had not been investigated by the first commission:

> In the case of a few old claims never brought before the former commissioners but which the Natives agreed to give up to me, it was stated that small portions of the payments originally agreed upon still remained due. As there are no papers to refer to in such cases, it will be necessary you should take down in writing full particulars of any demand that may be made.[1328]

Bell additionally authorised various measures for reducing the cost and duration of the survey, such as not cutting boundaries between scrip claims and allowing Māori owners to exchange areas located within them.[1329]

Bell's instructions gave the impression that he had made arrangements with Māori for all of the scrip lands, and that the surveys would be completed without difficulty, but it turned out that was not the case at all. Once the surveys began, Māori responded in a variety of ways. Apart from physically obstructing the survey – this was met by Bell and White with a mixture of economic pressure and appeals to authority (discussed later) – Māori had two main options: to ask for reserves to be set aside or to propose a land swap. Despite his instructions to White, Bell seems to have been opposed to land exchanges when Māori sought them in their own interests, though he was willing to approve them when they benefited the Crown by reducing survey costs. Māori offered only one exchange during the Hokianga scrip surveys: an attempt to retain Tangatapu, scrip land on the Mangamuka River which Māori still occupied.

As we discussed earlier, the first Land Claims Commission had rarely stipulated that reserves should be made when recommending awards. This reflected the shortcomings of the legislation under which it operated, the lack of timely surveys, and the limited testimony elicited from Māori witnesses at hearings.[1330] Instead, the commission had relied on a general recommendation that all pā, kāinga, cultivations, and wāhi tapu should be excluded from grants, and a pragmatic resolution between claimants and Māori 'vendors' when boundaries were pointed out to private surveyors.[1331]

In the case of scrip claims, reserves had to be negotiated between the Māori 'vendors' and the Crown. Bell and White had been given an almost blank canvas in the matter and, as we have observed, were anxious to maximise the return for the Crown. The example of Pearson and other settlers, who had been awarded scrip for thousands of acres when in fact their claims totalled only tens, increased the determination of Bell and White to keep reserves for Māori to a minimum. Stirling and Towers' analysis has shown that at least 23 requests for reserves were made to White during the Hokianga scrip survey. Of these, 14 were for reserves within awards recommended

by the first commission, while the other nine were in respect of lands that White had brought into the scrip surveys from claims that had previously been found wanting, or via unheard claims that he had revived.[1332] In only one of the previously investigated claims, OLC 191, had the first commission recommended the establishment of a reserve; White rejected that recommendation.[1333]

White was prepared to recommend that a reserve be made in only 10 of the 23 cases. Of these, two were considerably smaller than requested (in one case, seven acres was granted when 40 acres had been sought; and in the other, nine acres was granted versus 24 acres requested). The combined area of the 10 surveyed reserves was 221 acres, or less than 1.5 per cent of the area encompassed by the Hokianga scrip surveys.[1334] The two largest reserves White accepted, each of 40 acres, were for Rai (the son of Pāngari) and Te Kaingamata; both had been active in opposing parts of the Ōrira scrip survey where they had demanded the return of all the land encompassed in the disallowed claims. White's stated rationale was that Rai and Te Kaingamata had both been left landless by sales undertaken by their relatives, but Stirling and Towers surmised that his real motive was to dampen opposition when the Government's right to the land was particularly questionable, based as it was on claims that had been initially rejected.[1335] (We return to the Ōrira survey in the following section.)

Elsewhere in Hokianga, White declined or reduced reserves even where cultivations, kāinga, and urupā were found, notwithstanding Bell's instructions that these areas be surveyed off.[1336] At Te Pukahau on the Mangamuka River (Cassidy's OLC 82 claim), Māori requested a 40-acre reserve; White recommended reservation of the seven-acre portion containing an urupā but not the remaining lands which included cultivations. At Pākanae, he turned down the request of the kaiwhakawā (native assessor) that his courthouse be set aside.[1337] White's attitude was even more reprehensible in the conduct of the Matakaraka scrip survey on the Waimā River, where he not only turned down Mohi Tāwhai, Arama Karaka, and Tapu's request for a reserve as compensation for an incomplete payment,[1338] but he also steadfastly rejected the granting of a one-acre reserve for two urupā on the grounds that it would deprive the surrounding property of a landing spot. Rangatira continued to raise this matter in later years, with White going so far as to claim that the urupā were not genuine.[1339] Nor did obtaining White's endorsement, difficult as that was, guarantee ultimate success. At Rāwene, White had agreed to three reserves of three acres each (as opposed to the total of 24 acres that had been sought), but the eventual Crown award, a decade on, reduced their size to around one acre each (we discuss this further later). According to Stirling and Towers, most of the 'miserly allowance' recommended by White 'was not actually granted to Maori'.[1340]

Māori continued to experience similar difficulties long after the completion of the 1859 scrip survey. When a 20-acre urupā reserve and a five-acre reserve for a kāinga were requested from the Crown's survey of Marriner's claim at Kohukohu (OLC 971) during the mid-1880s, officials restricted their area to just seven acres;[1341] meanwhile, at Motukaraka, officials required that adjacent Māori land be provided in exchange for equally small reserves. Similarly, it took the Native Land Court to set aside the 10-acre Ota block from the Waitapu block for a customary owner still in residence.[1342] Although it is not clear what became of the wāhi tapu that William Powditch had requested to be reserved from his Paripari claim, it appears that this land became part of the Te Huia block.[1343] While the history is complicated by a later Crown purchase, it is also worth noting that the Crown failed to make any reserves at Whananaki, where it exchanged scrip for Salmon's OLC 408 claim, despite knowing that it contained cultivations, urupā, and a pā.[1344]

(a) Ōrira scrip survey, Hokianga

The largest of the Hokianga scrip surveys directed by John White was Ōrira – an area of 3,895 acres made up of nine claims, five of which were invalid or had been disallowed.[1345] It occupied most of the coastal hinterland east of the Ōrira River between Umawera and the Waihou River, as well as taking in a lesser area on the western side of the river.[1346] The land encompassed by the survey was also a valuable source of kauri timber, a factor of which

the Crown took advantage to secure as much acreage as possible.[1347]

The largest Ōrira claim by far was the 10,000 acres applied for by William White and George Frederick Russell (OLC 519). In spite of the range of Māori interests held in the block, which was reflected in the overlapping transactions entered into by Pāngari and Taonui respectively, the first Land Claims Commission had found White and Russell's claim to be based on a valid purchase, with a total payment up until January 1840 of just over £845. In May 1843, it had recommended the maximum award of 2,560 acres; had this limit not been in place, the award based on the payment would have been 3,901 acres.[1348] William White pleaded for an increased award, emphasising that the collective debts owed to him by Māori at Ōrira – these had accrued through advances on cut timber – stood at more than £2,000. Governor FitzRoy responded by offering £2,000 scrip to William White and £1,901 to Francis White in exchange for the claim interests. This exchange was not taken up, and following consideration by FitzGerald, FitzRoy increased the scrip offer to William White to £4,099, an option he accepted. Francis White's share in the claim (which was assigned to one F Burdekin) was taken in land instead; because Governor Grey rejected Governor FitzRoy's increase of the claim beyond the 2,560-acre limit applied in 1843, Burdekin received 1,280 acres (or half of this maximum) while £160 scrip was given in compensation to Francis White.[1349]

Three other Ōrira claims had also been acquired by the Crown in exchange for scrip, namely those of John Anderson (OLC 40), John Marmon (OLC 315), and Alexander Thompson (OLC 461). Thompson's 'Puparahaka' claim had the largest estimated area, of 1,800 acres, which earned the derivative scrip claimants (John Taylor, Thomas Nesbitt, and A E Dudley) a combined payout of £1,825, while John Anderson had received £1,000 scrip in exchange for his 1,000-acre claim. Like the OLC 519 claim, both OLC 40 and OLC 461 were based on transactions that were found valid by the first Land Claims Commission.[1350] In contrast, no land grant had been recommended by the first commission for Marmon's 250-acre claim; he had failed to appear at the first hearing, and then when the case was reheard by Commissioner FitzGerald, he only had one Māori witness (Raumati) to the deed. FitzGerald was nevertheless amenable to the Crown taking over Marmon's claim in return for £250 scrip.[1351]

The remaining claims used to build up the Crown award at Ōrira were much flimsier and although incorporated into a scrip survey, were essentially 'surplus land', as no scrip had been paid by the Crown to acquire them. Only Egert's claim (OLC 177) had been heard by the first commission where it was found invalid after Taonui gave evidence that the transaction was finalised in April 1840, three months after Governor Hobson's arrival. No evidence had been put before the commission regarding Thurlow and MacDonald's claim (OLC 464), while Eleanor Baker's (OLC 1031) for 60 acres had been withdrawn before it was heard. The other two claims, those of Monk and Makin, had never been filed, although the transactions entered into by Monk also seem to have just post-dated Hobson's arrival, which again should have invalidated them for the purposes of extinguishing customary title.[1352] However, the combination of Bell's determination of claim boundaries,[1353] together with White's assertions of personal knowledge of the transactions, was regarded as sufficient for the Crown to claim ownership. (White disclosed, for example, that Pāngari had told him of a payment from Egert.[1354]) Notwithstanding Māori protest, White also arbitrarily included a large unclaimed area of river-bend mudflats adjacent to the Monk claim in the Crown's survey.[1355]

To ensure acquiescence among Māori owners at Ōrira, White and Bell relied on a combination of coercion and demands for them to defer to Crown authority. Commissioner Bell's hui at Ōrira in March 1859 set the tone; he promised to allow Māori to retain timber-cutting rights, but only if they would accept his interpretation of claim boundaries.[1356] This threat had been employed in the preceding month when Te Kaingamata and others disputed the line between Whakaoma and Ahukawaka

which cut through the middle of a large tract of kauri forest. In response, Bell let it be known that he would threaten Pākehā timber merchants with prosecution for trading in stolen timber if Te Kaingamata did not give up on the proposed boundary, which would have seen the Crown's boundary skirt around the edge of the forest.[1357] It is possible that Bell's threat was even more coercive and extortionate; it may have affected the cutting of timber on the Māori side of the survey line as well, since the Crown's land provided the obvious point of access.[1358]

White and Bell also promoted the notion that they were carrying out the expressed wishes of the Governor; any questioning of their decisions by those whom White dismissed as 'slaves and children' was an affront to the Governor's mana and contrary to the findings of the first Land Claims Commission.[1359] This tactic was exemplified by White's invitation to Arama Karaka Pī to attend a hui about Ōrira in March 1859. Pī had no rights in that land, but White called on him nonetheless to quell any complaints against the Crown's takings on the west side of the river. During the hui, White represented Bell's message as coming directly from the Governor. Informing the hui that he would not allow it to be 'dealt with as though it meant nothing', he rudely interrupted a number of speakers and refused to listen to 'disorderly' kōrero or 'twaddle' about unextinguished rights.[1360]

At least three reserves were sought from the Ōrira scrip lands, two by Te Kaingamata and one by Rai, both of whom had been opponents of White's survey.[1361] One of Te Kaingamata's requests, for a reserve of unknown size from Baker's claim area, was rejected by White, but he supported the other for 40 acres from the area of Monk's claim (unfiled and therefore unnumbered) which, like Baker's, was on the west side of the Ōrira River. The other known request, from Rai, resulted in White recommending the reservation of the entire 40-acre contribution to the Ōrira survey that the Egert claim represented.[1362] Stirling and Towers considered this a strategic move; by offering these reserves, White was able to soften Māori opposition to the survey and avoid scrutiny of the Crown's right to take them in the first place.[1363] The claims of both Egert and Monk should have been invalidated.

(b) Pukahau scrip survey, Hokianga

The crescent-shaped Pukahau scrip block of 328 acres encompassed land derived from five scrip claims, as well as an adjacent area that had been Māori land, offered to the Crown as part of a proposed exchange for land elsewhere on the Mangamuka River.[1364] Of the five scrip claims, only three had been investigated by the first Land Claims Commission. It had deemed the adjoining OLC 123 and OLC 386 claims to be valid purchases and had initially recommended grants of 240 acres and 100 acres respectively. The OLC 123 recommendation was amended to 500 acres after the disallowance of the Land Claims Ordinance 1842, while that for OLC 386 remained unchanged.[1365] The claimants (Cochrane and Poynton) had gone on to accept scrip worth £500 and £100.[1366] The other claim heard by the first commission, OLC 517, was unusual in that William White had been unable to produce the deed – it had reportedly been lost in the 1840 wreck of the barque *Aurora* at Kaipara. Nevertheless, the commission, persuaded by witness evidence that the purchase had been valid, had recommended an award of 250 acres.[1367] George Frederick Russell, who had purchased the claim from William White in 1843, had later accepted FitzRoy's offer of £250 scrip.[1368]

The remaining two latent claims, which were never lodged with the first commission, accounted for more than half of the surveyed area shown on John White's sketch plan. The Puriritahi claim of John's father, Francis White, was the larger of the two and appears to have accounted for around two-fifths of the block.[1369] As Stirling and Towers noted, Bell's examination of this claim for the second commission did not extend beyond having Hōhepa Te Ōtene, Kaio Te Ōtene, and Wi Pātene describe the boundaries.[1370] The other latent claim was William White's.[1371] It is not clear from the available evidence what investigation, if any, Commissioner Bell might have made independently to establish either its extent or the

circumstances of the alleged purchase. The final component of the scrip survey was the six acres of land given up by Te Ōtene, Wiremu Patene, and others in the vain hope of retaining the 11-acre Tangatapu block which the Crown had claimed through the scrip exchange for OLC 378; as noted earlier, the Crown ultimately took both areas.[1372]

(c) Rāwene scrip survey, Hokianga

The survey of the Rāwene claims represented the Crown at its most acquisitive in the Hokianga scrip survey. Here, the Crown award was expanded by use of abandoned and latent claims, and negotiation with John Montefiore. The combined Rāwene awards of the first Land Claims Commission had only totalled 988 acres; the scrip survey added another 969 acres.[1373] Notable among the latent claims at Rāwene was that of Captain Herd which dated back to the New Zealand Company's visit in 1826. The first commission had commenced its own investigation into the transaction 'on behalf of the government', though the company had not filed a claim.[1374] The Government, we observe, could have no standing as a claimant for a pre-1840 transaction. When Chief Constable Tuite had first drawn the commission's attention to the site, Richmond had responded that 'he could not legally enter into the investigation of any land claim' unless he received orders from the Governor, which he thought unlikely as no claim had been made.[1375] Nonetheless, in December 1842, he took evidence on the claim since, as he subsequently informed the Colonial Secretary, it appeared to him that it was 'admirably adapted for the site of the Government Town'.[1376] The commission concluded that between 50 and 60 acres had been sold, even though the claim had been abandoned by the New Zealand Company,[1377] and Taonui had received no part of the payment, despite endorsing the transaction, while Mohi Tāwhai had opposed it altogether. Richmond had dismissed Tāwhai's resistance, describing him as 'a very inferior chief', whose claims were 'groundless'.[1378] Chief Protector George Clarke reported several months later that he had no doubt Tāwhai had a claim but thought that his interests at Ōkura could be disposed of by a payment.[1379] As Stirling and Towers commented, it is difficult to see the commission as a 'neutral and impartial body' in light of these actions.[1380] There was no redress to be had from the second Land Claims Commission; Bell insisted that the land should be given up, despite Tāwhai's objections and unextinguished interests.[1381] It is apparent that Tāwhai was induced to accept the Crown's claim in return for the promise of a Crown grant for a small reserve, the size of which was then whittled down – an experience shared by other rangatira.

Separate claims from William and Francis White contributed about one-third of the surveyed area, yet neither claim had ever been filed for hearing – and what was more, William White's claim should have been regarded by John White as invalid, as he knew that his uncle had never completed the payment.[1382] John White pointed to the undisturbed occupancy by Butler of part of Rāwene as evidence of a property transaction having occurred, and reported that this had been confirmed by an unnamed rangatira.[1383] Mohi Tāwhai sought the return of the entire invalid claim, as his rights had never been extinguished nor the land transacted by him.[1384] This was just the sort of 'exceptional case' that Bell had sought authority to rule on in his 1858 memorandum to Parliament and subsequently enabled in 1858 by section 15 of the Land Claims Settlement Extension Act.[1385] In addition to taking land for the Crown, White also sought to take more than 1,000 acres of harbour foreshore on the basis that it lay in the mouths of rivers, and the adjacent land claims could be extended to the river centre-line.[1386]

Given the evidence of unextinguished Māori interests at Rāwene, it is unsurprising that there were numerous requests made for reserves to be cut out of the area surveyed for the Crown. The ultimate award to Māori was even more miserly than what John White had been willing to allow. White's report of proceedings shows that Mohi Tāwhai had requested a reserve of 18 acres at Herd's Point, and Arama Karaka Pī and Papahurihia (Te Atua Wera) had also requested land. Having recognised that Kataraina Kohu (daughter of Te Whareumu and the wife of John Bryers) was cultivating part of the area Mohi Tāwhai had requested, White should have returned this land to Māori

in accordance with his instructions. Instead, he was prepared only to give Mohi Tāwhai, Arama Karaka Pī, and Papahurihia three acres each.[1387] Kataraina Kohu's rights as Mrs Bryers are discussed further at section 6.7.2(12).

Mohi Tāwhai had also called on White to abandon the Crown's claim to the foreshore and mudflats, as well as to Rangiwhakataka (for which Butler had made no payment to him), but to no avail.[1388] Wi Hopihona Tahua, meanwhile, applied directly to the Governor for land at the point, but White rejected this appeal outright, arguing that he could have no claim on the land when his father, Muriwai, had sold it; added to which it was the only location where wharf access could be provided to the rest of Rāwene.[1389] Ultimately, the only reserves provided by the Crown were two one-acre grants to Mohi Tāwhai and the son of Arama Karaki Pī, in 1870.[1390]

(d) Motukaraka, Hokianga

The Motukaraka claim (OLC 1034) was the largest of all the old land claims in this inquiry district. It was also one of the last Hokianga scrip claims to be resolved from the Crown's perspective (the others from the post-1859 surveys were OLC 50, 391, and 971). In January 1843, the first Land Claims Commission had heard Thomas McDonnell's claim for some 50,000 acres on the north side of the Hokianga River, which was based on his payment of goods, worth £404 5s in 1831, to Whatia, Taonui, and others.[1391] When it came to the boundary, McDonnell asserted that it ran from Waihoehoe Creek across to Toromiro. Taonui endorsed McDonnell's evidence but Whatia disputed it, maintaining that the area covered by the agreement only extended from Tokatorea (which was just to the east of the Motukaraka Peninsula) rather than Waihoehoe.[1392] These competing views were recorded on a sketch plan which, although undated, was drawn in the same hand as the minutes taken at Richmond's Motukaraka hearing.[1393] Evidence was heard from five rangatira who argued that they had not consented to the alienation of their interests at Motukaraka.[1394] Commissioner Richmond eventually reported that there were more than 30 Māori residents at Motukaraka who 'strongly opposed' the sale.[1395] He validated it nonetheless – even though McDonnell was unable to produce the original deed.[1396] Two factors may have weighed in McDonnell's favour: he had spent a further £400 on buildings and other improvements; and Taonui's evidence that McDonnell had allowed Māori to continue cultivating the land if they did not cause him trouble.[1397] Ultimately, Richmond recommended that McDonnell be granted the standard maximum award of 2,560 acres, provided there was 'that quantity included in the boundaries stated in the report'. These were the more restricted boundaries accepted by Whatia.[1398]

Just over a decade later, in April 1856, McDonnell petitioned Parliament, complaining that local Māori had only accepted his occupation of about 200 acres of the area awarded. After reviewing the situation, the select committee appointed to report on his petition determined that he should be issued a grant for this lesser area, while the remainder should be valued, and the Governor authorised to give him scrip as compensation.[1399] McDonnell's Motukaraka claim subsequently formed part of Bell's discussions about scrip claim boundaries in March 1858. Hokianga rangatira, who had continued to occupy the land, acknowledged Whatia's boundary (from Tokatorea, across the ridge that formed the peninsula spur, to Toromiro).[1400] This area proved to contain only 67 acres when surveyed by White.[1401]

This was not a satisfactory result for the Crown, and its surveyors returned to Motukaraka in 1885, intent on recovering the 2,560 acres to which they thought it was entitled. Given that the first Land Claims Commission had put the eastern boundary at Tokatorea, officials chose to re-interpret Whatia's line. By placing a new 'Tokatorea' adjacent to Okuao, it accorded almost with McDonnell's original claim.[1402] This imaginative reconstruction of the boundary proved a tremendous boon to the Crown, taking in more than 3,000 acres including the rich Wairupe and Huahua valleys.[1403] There was fierce opposition from the customary owners (identified as Ngāi Tūpoto, led by Pairama; and Ngāti Here, led by Nui Hare) when first canvassed in 1878, and again in 1885, but officials once more threatened to confiscate timber proceeds to quell

any resistance.[1404] Stirling and Towers noted that, in the 1920s, these owners (or at least their descendants) would seek redress from Parliament, but the Sim commission of inquiry of 1927 merely relied on the Crown opinion proffered in 1885 of its rights to the land.[1405]

The Crown's taking of much more Motukaraka land than the first commission had been willing to grant was exacerbated by its ruthless policy towards granting reserves. The continuing occupation of Motukaraka was reflected in the number of cultivations (nine) and wāhi tapu (five) identified in the 1885 survey.[1406] As had been the case in the Hokianga scrip survey a quarter of a century earlier, officials again tried to minimise the size of the reserves that would be needed. For example, when reserves for two wāhi tapu encompassing 65 acres were sought, officials offered only seven acres adjacent to an existing three-acre cultivation.[1407] What made the approach even harsher at Motukaraka was the stipulation of officials that three acres of surrounding Māori land should be given up for every acre that the Crown set aside for cultivations.[1408] The outcome of this apparently arbitrary policy was that the Crown added 156 acres of Māori land to its holdings in compensation, on top of a survey error that provided it with another 46 acres. In return, the Crown granted five wāhi tapu (four of 10 acres, and one of two acres) and nine cultivations, with a combined area of 65.5 acres. This insistence on a land exchange weighted so heavily in the Crown's favour was far removed from Taonui's testimony 40 years earlier about the original understanding of the Motukaraka community: that they had been assured that they would not have to give up their cultivations when their land was 'sold'.

(9) *Bell's 'final' report*

In 1862, as his work as commissioner drew to a close, Bell tabled a 'Final Report of the Settlement of the Land Claims', acknowledging that it was premature to describe it as such since there were still matters that had to be considered by the Legislature. His report was, he said, a 'summary of sufficiently complete information [to allow the House to decide] on all the points which ought to be considered in any proposed measure this session.'[1409] Māori were not included in this assessment, nor in the concerns of the colonial Legislature. They were barely mentioned by Bell at all.

He proceeded to summarise the 'state of settlement' of land claims, including overall numbers and location, payments made, areas surveyed, the way the claims were disposed of, and quantity of land awarded, and scrip and debentures issued. The report also discussed the Crown surplus: how much land the Crown had acquired, and Bell's views on its right to claim that land as opposed to the settlers who had undertaken the original transactions. He was in no doubt as to the Crown's prerogative. His view was that the British government had consistently denied the right of its subjects to buy land in New Zealand and keep all they had acquired; its policy on the matter had been clearly stated by Normanby and Gipps, and had been expressed within the ordinances of 1840 and 1841, which had been accepted by 'the great body of claimants' willing to abide by the limitation of 2,560 acres 'in consideration of the exchange . . . of an English title for a precarious occupation under the law of the strong arm.'[1410] He also thought that when FitzRoy had raised the question in 1843, Lord Stanley had expressly declared that land in excess of the grant would 'revert' to the Crown. He considered this to be 'conclusive against Governor FitzRoy's contrary opinion'[1411]

Bell also argued against any further general provision for old land and pre-emption waiver claimants since they had not suffered any injustice that had not already been repaired. The 1856 and 1858 statutes had 'operated as a great relief' and had 'substantially fulfilled the liberal wishes and expectations' of Parliament in passing them. Claims to properties that had been 'utterly void for any purpose whatever' had been exchanged for defined grants. Claims that had been disallowed under Governor Grey's 'exterminating process' had been admitted and compensation paid for the delay in their settlement. Claims that had lapsed had been heard in instances of real default and awards made. Boundaries had been settled, family arrangements validated, and grants issued to the children

or heirs of the original claimants. Land that had been abandoned by the original purchasers had been secured for public use. Bell himself had offered settler claimants every advantage within his power:

> Taking as a rule for my guidance the desire constantly expressed in both Houses during the discussions of 1856 that a liberal interpretation should be given to the Act, I have in every case awarded as much as I felt empowered to do, and have sincerely endeavoured to satisfy the claimants while I guarded the public interest.[1412]

In sum, the colonial endeavour had been greatly advanced:

> A country which six years ago was almost unknown except to the few people residing there, has been mapped and made available for settlement. Compensation has been granted where land was taken possession of for the Crown upon the strength of the extinction of native title.[1413]

He praised the settlers for their 'fairness and moderation'.[1414] Again, he said nothing about Māori.

There remained, however, a number of 'unsettled' claims – by Bell's accounting 12 in all – that he considered 'special' cases requiring further legislative provision.[1415] Included amongst these were Busby's claims at Ngunguru and Whāngārei.[1416] Unacknowledged were Busby's claims at Waitangi and numerous other less notable cases, including those of the children of inter-racial marriages.

Busby's claims went to arbitration and in other instances (outside our inquiry district), special Acts were passed to resolve the issues that remained outstanding for the settlers concerned. Otherwise, it fell to Bell's successor, Alfred Domett (who had chaired the 1856 select committee on land claims) to deal with any other matters that were still unresolved and, in Te Raki, preventing the 'safe' transfer of the Crown's surplus and scrip to the Auckland Province. Despite his experience in land administration, Domett soon confessed himself to be overwhelmed by the voluminous files and unable to make out what had been promised to Māori in the way of Crown grants.[1417] Increasingly, the solution was to refer these matters to the Native Department and the Native Land Court for their advice. Ultimately, clean-up legislation was passed in 1878 to deal with any claims that settlers had failed to prosecute before the Bell commission (see section 6.7.2(13)).

(10) *Settlement of Busby's claims*

Although Commissioner Bell focused on Ngunguru and Whāngārei in his report to the House, none of Busby's extensive claims had been fully settled. He had refused to accept the statutory limit of 2,560 acres, arguing that his transactions, which he considered legitimate purchases, had been made while Māori sovereignty was undisturbed, and that he (and others like him) should be able to retain the whole of what had been acquired. He objected likewise to the Crown's claim to the surplus and rejected the authority of Bell.

Busby's nine contiguous claims at Waitangi comprised more than 10,000 acres. Busby had moved onto the land at Waitangi in 1833, initially on the strength of a deed he had acquired from William Hall. Hall had taken up residence there in 1815, with his wife and Thomas Kendall, and by permission of Waraki and Ngāti Pou, but had been driven out the following year by a series of muru.[1418] Busby soon found himself the subject of a muru too, purportedly committed by Reti, whose ongoing conflict with Busby we discussed in our first report.[1419]

Clearly, Hall's deed was insufficient to provide a secure occupation, and Busby entered into a series of nine deeds between 1834 and 1839 with a total of 31 individual rangatira. Hōne Heke (Ngāi Tāwake, Ngāti Tautahi, and Te Māhurehure) and Reti (Ngāti Rāhiri) had been among the signatories of the first deed, while Te Kēmara (Ngāti Rāhiri and Ngāti Kawa) signed six of them. Te Tao, Parangi, and Te Arapiro were also prominent participants in these arrangements.[1420] Busby had been obliged to make multiple payments and in the later instances of OLC 18, 20 and 21, based on deeds signed in 1839, promises of reserves were made.[1421] The areas concerned were set aside from the land to go to Busby and could not be 'sold' to

other Pākehā. According to Te Tao, who was recalled by the commission after Busby mentioned the matter, the 'deed . . . makes the land mentioned in it sacred to him, but he cannot sell the land'.[1422] Busby referred to these reservations at the treaty debates as 'reconvey[ing] . . . both habitations and cultivations' to Māori.[1423]

We reproduce here a tabulated summary compiled by Bruce Stirling, showing the date and signatories of Busby's deeds, the area he claimed, what he was awarded under the first commission, and what was later surveyed.[1424]

Busby now considered himself to own all the land along the left bank of the Waitangi River for some 13 kilometres from its mouth and inland north along the ridgeline separating the Waitangi and Kerikeri areas.[1425] OLC 22, based on a deed signed with Te Kēmara and others, covered a small area on the right bank of the Waitangi River.[1426]

Busby had also signed deeds for extensive tracts of land in the Whāngārei district. The resulting claims were:

- OLC 23 for 25,000 acres at Bream Bay based on a deed signed in December 1839 with Tirarau, Motutara, Amo-o-te-riri, Tirikiriri, Te Karekare, Tutahi, Iwitahi, Wakaariki, Pou, Kawanui, Tauwitu, Toro, Kahanui, Hamiora, Maru, Porihoro, Umangauku, Te Haungarei, Te Rore, Hori Tipoki, Tipene Hari, Paora Kaitangata;[1427]
- OLC 24 for 15,000 acres at Waipū based on a deed signed in January 1840 with Tutahi, Toru, Tauwhitu, Haro, Parihoro, Ngahuru, Pona, Wakataha, Pukarahi, Te Mahia, Ponahia, Tiakiri, Kaikou;[1428]
- OLC 1324 (with co-claimants, Gilbert Mair and John Lewington) for 40,000 to 50,000 acres at Ngunguru based on a deed signed in January 1840 with Mohi Repa, Noa Taiatikitiki, Taiumau, Wiremu Patene Repa, Te Inu, Poka, Tuwaia, Kawanui, Hiku, Pukohu, Te Kuwa, Hawenua, Ingaro, Rongo, Kiharoa, Nga Te Hau, Tora, Pakitai, Watarau, Titari, Puhatai, Uawa, Ruakiri, Maurioho, Anaana, Piihi, Hipi, Te Puki, Papahewa, Haki, Hone, Tamati Muri, Hekaraka, Karere, Tapiora, Hori Wiremu, Tiro, and Matangi.[1429]

These deeds also contained provisions for reserves along similar lines as those at Waitangi.

We discussed the nature of Te Kēmara's evidence before the first Land Claims Commission regarding the transactions with the CMS missionaries in section 6.3. The record of the examination of Māori witnesses for Busby's claims was similarly brief and formulaic, confirming little more than the deeds had been read out and signed, that the signatories had a right to 'sell', and that payments had been received; even so, the meaning of that testimony is doubtful. All the Waitangi claims except OLC 22 were heard in a single day, and the latter on the next. Stirling pointed out that it is not clear whether Māori were even present when Busby gave his evidence.[1430]

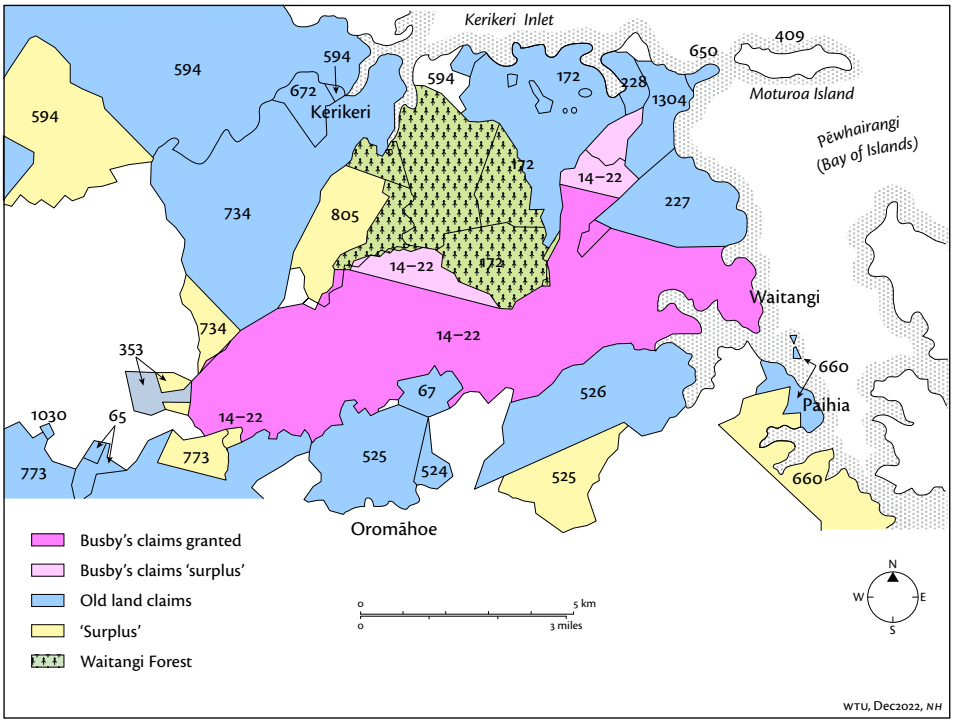
The commission awarded Busby a total of 3,264 acres at Waitangi with the proviso that his total grants not exceed the statutory maximum of 2,560 acres. In 1844, FitzRoy waived the limit and increased the grants to the 3,264 acres that the commission had recommended.[1431]

The Whāngārei claims – OLC 23 and OLC 24 – were disallowed because Busby had, as the commissioners reported, 'peremptorily declined making any further attempt to prove the integrity of his purchase' and had refused to produce any Māori witnesses.[1432] Busby argued:

> he would not, by producing them, give even an indirect sanction to the principle advanced by the Governor & Legislative Council that lands sold by the Natives to private persons were vested in the Queen.[1433]

The Governor withdrew the claims from the commission, informing Busby that they could not be resubmitted for investigation – a step approved by Stanley. The Ngunguru claim (OLC 1324) was not entertained at all because the transaction had taken place after the January 1840 proclamation.[1434]

Over the next three decades, Busby attempted to secure the full extent of the land he claimed. In the meantime, as we discussed at section 6.3 with reference to wāhi tapu at Te Karaka (within OLC 14), Māori continued to assert rights in the land supposedly sold, maintaining kāinga at Te Puke as well.[1435] Mahi Te Uaua and other local Māori challenged Busby's rights during Bell's hearings, but their



Map 6.9: Busby's Waitangi claims. The Waitangi Forest comprises parts surplus retained from the Crown out of Busby's Waitangi claims, as well as scrip and surplus lands associated with Shepherd's and Edmond's claims.

objections were dismissed out of hand.[1436] At Whāngārei, the Crown set about purchasing land within Busby's disallowed claims.[1437] Busby, for his part, appealed to a variety of Crown officials and took more direct measures as well. In 1854, he prosecuted a settler for trespass who had purchased land at One Tree Point from the Government. He lost the case but inserted a notice in the newspapers warning settlers from acquiring the lands he claimed at Waipū and Ruakākā.[1438] He also attempted to sell a portion of the land to a friend, issued further warnings through the newspapers, and threatened Whāngārei Māori with prosecution for 'conspiracy'.[1439]

He appeared before the Bell commission in September 1857 but refused to recognise the validity of the Land Claims Settlement Act 1856, surrender the Crown grants for his Waitangi claims, or produce his survey plan, despite the generous allowances to which he would be entitled under that legislation.[1440] His grants were repealed as a result.[1441]

The 1856 Act did not provide for disallowed claims to be reinvestigated. However, section 12 of the Extension Act 1858 allowed for a grant to be made (or scrip paid) in cases where the Crown had subsequently acquired land to which the native title was proved to have been extinguished prior to 1840. According to Stirling and Towers, it was Bell rather than Busby who instituted proceedings under this provision, asking the Government (in 1861) to consider whether its purchases at Waipū and Ruakākā had been facilitated by Busby's earlier payments.[1442] The question was referred to the former Native Land Purchase Commissioner J G Johnson, who reported that there had been both a pecuniary advantage of £400 and a political one, in that Busby's dealings had been 'instrumental in extinguishing the Ngapuhi land league – which then

OLC	Date	Māori involved	Claim (acres)	Award (acres)	Survey (acres)
14	June 1834	Heke, Tuhirangi, Rete, Inake, Te Arapiro, Hau, Toua, Reha, Peia (Peha?), Tahitua, 'other tribes'	270	270	228
15	November 1834	Hepetahi, Tao, Pokai, Kemara, Marupo, Aka, Hau	25	25	25.5
16	November 1835	Toua, Peha, Taitua	500	500	482.5
17	November 1835	Te Kemara, Te Tao, Parangi, Te Wakarua, Taro, Puhiahia, Te Hauhau, Te Puri, Repa, Ngoua, Tuhirangi, Peia, Te Arapiro, Ihirau (or Wierau), Haimona Pita	2,000	217	858.25
18	July 1838	Te Kemara, Ngoua, Parangi, Te Arapiro, Puhiahia, Inake	80–100	100	267.5
19	February 1839	Te Kemara, Ngoua, Wierau, Te Arapiro, Puhiahia, Parangi, Hakopa	60	60	161.25
20	February 1839	Toua, Peha, Taitua, Te Tao, Tiutiu	1,500	868	1,576.5
21	March 1839	Te Kemara, Te Tao, Parangi. Te Arapiro, Wierau, Wakarua, Te Kaka, Haratua, Hauhau	5,000	1,074	6,741
22	November 1839	Te Kemara, Te Tao, Haratua, Pepene Paparangi, Te Oki, Parangi, Panapa	150	150	247.5
Total			9,605	3,264	10,588

Table 6.12: Summary of Busby's Waitangi claims.

prohibited the sale of land in this district'.[1443] Although Busby's claims had lapsed, Bell recommended that he be compensated for his expenditure in partially extinguishing native title. The Legislative Council, however, rejected the Land Claims Bills 1862 and 1863 in which Bell had proposed a clause be inserted to allow Busby the benefit of section 12 of the 1858 Act.[1444]

In the meantime, Busby had also purchased the interests of Mair and part of Lewington's holdings at Ngunguru. In 1859, he sought compensation for the claim on the basis that he had lost out from the delayed investigation and from being denied access to the timber that had been removed over the ensuing years. Although successive Governors had rejected Busby's efforts to have the Crown recognise his claim, Bell thought that he had a right to have it investigated.[1445]

Bell was clearly swayed by the prospect of the Crown obtaining a substantial acreage of surplus land should Busby's claim at Ngunguru be validated. His investigation, held at Auckland in June 1859, confirmed that the deed agreement had been entered into after the proclamation of January 1840 – and the payment not completed until

1841. The testimony of Noa Taratikitiki, Tuwhaia, and Moihi Te Peke also revealed that the initial arrangement had been made with rangatira at Waimate and had been only reluctantly accepted by the people at Ngunguru the following year. Nor did the witnesses accept the extensive boundaries claimed by Busby.[1446] When he and Mair finally went to Ngunguru, Busby maintained that Māori had tried to confine the transaction to a small area at Waiotoi for a timber mill, because they had 'heard that the government intended only to give to the claimants a part of what they had bought from the natives'. In response, they had 'marked out the portion which we were to have, determining that they and not the government should have the surplus'.[1447] Whether Bell believed Busby's explanation is unrecorded, but he certainly didn't believe the Māori witnesses. He considered their evidence as 'not very satisfactory' and it 'most likely' that Busby would be able to survey a much larger area than they would admit, should he make the attempt.[1448]

Busby disputed the commissioner's interpretation of the 1858 legislation, arguing he should be awarded compensation assessed on the price he had paid (a figure he had inflated) rather than on 'the quantity of land the natives may now be willing to give up'.[1449] At an impasse, Bell agreed to Busby's proposal that the matter be submitted to the Supreme Court for a decision, not on matters of fact, but as to how compensation should be calculated under the 1856 and 1858 Acts. The chief justice agreed with Busby that it should be based on expenditure rather than the area found to have been purchased, but also that Bell could refuse to accept the figures claimed by Busby and could exercise his powers at his discretion. Busby next appealed to Governor Thomas Gore Browne and then to the Secretary of State for the Colonies, arguing that Bell was acting in an unjust and arbitrary manner, but he met with no success.[1450]

Busby was unwilling to undertake the requisite survey because he wanted any compensation to be located at Waitangi rather than at Ngunguru, while Bell proposed that the Government undertake the survey itself while having others done in the same locality. Land Purchase Commissioner Searancke undertook the task in 1862. According to him, the 'whole of the natives' gathered to discuss the matter. Moihi Te Peke recalled that Busby and Mair had wanted to secure exclusive access to the area's timber rather than take possession of the land itself. Under these circumstances, he 'absolutely refused to allow Mr Busby's claim to a single acre'.[1451] Searancke believed that Busby had probably intended that the land be given up to Māori for cultivation and not absolutely, but he also accepted that they had not intended to sell such an extensive area since they had 'sold' portions of the same land to other settlers a short time previously.[1452]

Ultimately, after what he described as nearly a 'month's obstinate perseverance', Searancke persuaded Mohi and his hapū to cut out 1,032 acres 'in consideration for the goods received by them'.[1453] However, another £50 would be required to seal the matter; money supposedly to compensate them for a cask of bad tobacco they had returned at the time of the original transaction. Although approved by Bell, it is not clear whether this sum was ever paid.[1454] Searancke was also able to acquire the surrender of another 125 acres nearby – possibly the site of the old sawmill – for £15, which he represented as a 'present for pointing out the boundaries . . . [rather] than as a payment for the land'.[1455] Bell reported that Searancke, acting under his instructions, had made 'every effort' to 'get as much land' as he could for Busby.[1456] But by this stage, the commissioner had come to the conclusion that Busby was not entitled to compensation in scrip since Searancke's investigation had shown that the supposed justification for it – that the land had been stripped of its timber during the delay in validation – was untrue; he proposed that Busby (Lewington was now deceased) be awarded the land instead.[1457]

Still not satisfied, Busby continued to contest the disposal of his claims. In 1867, the Government, wishing to settle the troublesome and long-standing dispute, passed the Land Claims Arbitration Act in order to determine whether Busby was 'entitled to any and if any to what quantity of land' in respect of his claims, and whether he had 'suffered special damage' relating to them.[1458] If a majority of the three arbitrators found in his favour, they could recommend Crown grants for land within the

original claims that remained unsold, and scrip for any other lands, as well as for any damages.

The arbitrators (Busby's lawyer, Samuel Jackson; Daniel Pollen; and James Mackelvie) reviewed the papers and heard evidence from a variety of officials over the course of three months, but not from Māori.[1459] They found in the applicant's favour by a majority of two, with Pollen dissenting. They deemed Busby to be entitled to 9,374 acres within the boundaries of his various Waitangi claims as delineated on the plans drawn on the Crown grants issued in 1844. Why that figure was awarded as opposed to the 10,420 acres he had surveyed is not entirely clear but likely related to the portion already granted to another settler (Hingston) and (as discussed later) the three reserves that Busby had supposedly 'reconveyed' to Māori. He was also awarded a staggering £14,200 in special damages in connection with his Ngunguru claim, and a further £22,600 for those at Whāngārei and Waitangi.[1460] The final deal, struck between Busby, the New Zealand Government, and the Auckland provincial government in 1870, saw Busby receive £23,000 in cash in exchange for surrendering his claim to the £36,800 he had been awarded in scrip and for renouncing his claim to any grant of land at Whāngārei (so that the two Ngunguru parcels of 1,032 and 125 acres were retained by the Crown).[1461]

The award at Waitangi stood. Nothing in the arbitration findings had referred to the reserves, but in a subsequent letter to Busby, Jackson and Mackelvie stated that they had awarded him 'the Bay of Islands [Waitangi] land only, from which we withheld small portions you re-conveyed to the Natives'.[1462] Moore, Rigby, and Russell pointed out that we do not know what the arbitrators thought they had withheld: 'According to the available survey information, they "withheld" nothing.'[1463] They suggested that, since the survey plans did not record any reserves, the arbitrators may have thought that the reserves were located outside the surveyed and granted area.[1464]

In fact, Busby considered there to be no reserves at all, even though (as we discussed earlier) his correspondence had clearly indicated that Māori had continued to occupy 'his' land seasonally for fishing and despite building whare there. In 1870, Busby informed Alfred Domett, who had taken over as commissioner in 1864, of the nature of his purchases and requested that his grant be issued in one block. He maintained,

> In every case the land purchased by me from the natives was purchased absolutely and without any reservation whatever. This will appear from the certified copies of the original deeds which, as well as copies of the original leases granted by me at Wangarei and the Bay of Islands were delivered to [Land Claim] Commissioners . . . I have always therefore considered that I was entitled to grants without any reservation whatever on the Government being satisfied that the natives entitled to the leases were in possession of them, and enjoyed the right of occupation which continued only so long as they continued to occupy.
>
> With regard to the reservation at a place called Otuwhere or Wharengarara in the grant of 5,000 acres, this right ceased within two years of the date of the purchase, having been abandoned by the natives and never afterwards occupied. But their only representation lately preferred a claim for it before the Native Land Court which was dismissed by the Court, and afterwards relinquished by the claimant as will appear by the original documents enclosed Nos 2 & 3.
>
> The other reservation in the grant called Te Puke has been occupied by the descendant of the parties to whom it was leased, and their right of occupation therefore still exists: but it is a right of occupation only, held from me, and ought not to interfere with the integrity of the grant.[1465]

There was no investigation in 1870 of what the Māori understanding was, and any intention of the arbitrators that the reserves should be protected was immediately forgotten by the Crown which took the 1,046 acres excepted from Busby's grant for itself.[1466] Busby's son, who was a surveyor, submitted a rudimentary plan, later requesting its return so that he could fill out the details. Enclosed with Busby's letter to Domett were several supporting documents:

- A statement from Hare Wirikake, dated 1 December 1868, relinquishing his claim to the Otuwhere

reserve, that: 'E hoa e Te Pukipi [*sic*]. Kia rongo mai koe kua mutu taku totohe ki a koe mo Otuwhere – ara mo Wharengarara – Hera matu, kua rite a mana korero, ko mita Wiremu Puhipi – ko te mutunga tenei ake ake.'[1467]

- A statement from Judge Maning confirming that the Otuwhero reserve was identical to land brought to the Native Land Court in 1866 (no 93).
- A register entry recording the dismissal of the Otuwhero claim on two successive non-appearances by the claimant.
- A copy of a deed reconveying a piece of land to Tona (or 'Toua') and party.[1468]

Rather than cutting out the lands as originally reserved, Busby's survey set aside two areas (one of 460 acres in three parcels and the other of 586 acres) adjoining Crown lands.[1469] In November 1870, Busby submitted his plan of his Waitangi grant showing the excepted blocks of 'surplus' that the Crown endorsed. Moore, Rigby, and Russell summarise the final disposal: 'Busby got 9,374 acres, the Crown got 1,010 acres, and Maori got nothing.'[1470]

(11) *Polack's island claims*

When Polack's claim to the island groups, discussed at section 6.6.2(6), came before the second Land Claims Commission, he again asked for the survey requirement to be waived; Bell refused and declared he would publicise an intention to survey in the *Maori Messenger* so that any Māori objectors could come forward. Meanwhile, the Native Secretary and Land Purchase Commissioner Rogan advised the commissioner of claims to Taranga and Marotiri (Hen and Chicken Islands) preferred by Kaipara and East Coast Bays Māori. Bay of Islands Land Purchase Commissioner Kemp, when asked to look into the situation at Tawhiti Rahi (Poor Knights Islands), reported to Bell of claims preferred by Māori from his district but stated that he doubted them, as he believed Polack's purchase had extinguished their rights.[1471] In his opinion, any claim to the islands by Māori was 'scarcely desirable'.[1472]

The report of the commission showed no settlement was reached on Polack's claims. Stirling and Towers commented that the Crown had long since assumed ownership of Tawhiti Rahi, Taranga, and Marotiri on the basis of Polack's 'severely deficient claim, so it was not about to return the islands to those Maori who had never sold them'.[1473] Bell had instead directed Māori objectors to C O Davis to arrange compensation. As a former interpreter in Polack's transaction and agent in many pre-emption waiver claims, he was hardly a disinterested choice. But by the time the final report of the commission was completed, the financial settlement asked of him by Bell had not been reached, and a decision on the evidence of Māori claimants like Tawatawa and Kairangatira was deferred until Domett took charge.[1474]

Identified as Hoterene (also known as Tawatawa), Paratene Te Manu, Te Matenga (Tamaki), and Reupena (Puni), the claimants to the island groups involved in Polack's pre-emption waiver transaction gave their evidence to the commissioner on 20 July 1864. Also present were Māori claimants to Aotea, believed by Davis to be satisfied with a proposed settlement of £10, likely supplied by Thompson, to whom Polack had by this time sold his claim. Davis was confident there would be no difficulty in granting the other islands to Thompson. Tawatawa told the Court that, while he had received payment for the three groups, he had not been party to Polack's transaction, to which he had long objected, but he challenged the Crown's appropriation of Taranga (Hen Island) in particular, as it had never been part of any dealings. Kairangatira's representative, Reupena, consented to granting Thompson the remaining islands.[1475]

The following day, Domett made his recommendations. Taranga, having been included in error in the claim, was ratified as Māori land, while the other island groups were to be granted to Thompson. After adjustment for the cost of survey, Thompson's grant came to 1,739 acres –the total extent of the islands plus 400 acres in scrip. The many breaches by Polack of the pre-emption waiver proclamation – not the least being the issuance of three certificates for a single transaction, as described earlier – remained unconsidered by Domett. In sum, after a flawed transaction, a failure of protections, a defective ratification

process, and an unjustified assumption of Crown ownership, the islands, with the exception of Taranga, were lost to Māori.[1476]

(12) *Settling the 'half-caste' claims*

Of the claims heard by the first Land Claims Commission, only a few cases revealed that the 'sale' of land to settlers had involved the 'purchaser' marrying into the hapū, and settlers very rarely sought title for gifts. Instead, they typically continued to live on the land by 'sufferance' of the hapū, with children inheriting their rights through their mother.[1477] This does not mean that officials, missionaries, and other contemporaries were unaware of the practice; Henry Williams, Charles Terry, Ernest Dieffenbach, Willoughby Shortland, and Bishop Selwyn were amongst those who commented on it and on the question of how the rights of the children of interracial marriages should be provided for in law. As evidence of the 'inevitable progress of amalgamation'[1478] and considered 'highly worthy of every just encouragement',[1479] the consensus was that some form of provision should be made for the children of Māori–Pākehā unions, both in terms of education and recognition of land claims.[1480]

In other colonies – Canada and Australia – specific provision was made within the land reservation system for the wives and children of interracial marriages. In New Zealand, title had to be sought by the settler father and would be issued solely in his name; that changed only when women were widowed, or else as the children of such marriages came of an age to pursue their own claims deriving from the earlier land arrangements reached between their father, their mother, and her whānau.

A rather half-hearted provision was made for their possible claims under the Land Claims Settlement Act 1856. Section 54 stated:

> And whereas there are cases in which aboriginal native women have men not being aborigines, and there are children of such marriages, and there are also other children where the maternal parent only is of the Native race: And whereas various transactions in land have taken place in reference to such persons, and it is expedient that inquiry should be made into such cases with a view to make a just provision for the same: Be it therefore further enacted that the Commissioners appointed under this Act shall make full inquiry into all such cases, and report the evidence taken and their opinion thereon to the Governor.

The following section defined 'Governor' as 'the Officer for the time being lawfully Administering the Government of the Colony of New Zealand'. In practice, this seems to have meant the Native Land Court.

By the late 1850s, Māori were becoming aware of the effects of the Crown's ratification process and its claim to surplus and scrip lands, and sought to use the mechanism of the second Land Claims Commission to ensure that their intentions when marrying settlers were given effect: that land would be retained within the hapū bloodlines, and that provision would be made for any future children. Māori had not thought that specific reserves for the mothers and their children were needed in the deeds they signed. Women and children now found that the Crown's claim to scrip, survey, and its parsimonious approach to reserves had disrupted the occupation rights previously provided by their Ngāpuhi relatives. Given the opportunity, Māori grandparents and hapū leadership attempted to create the documents so valued by Pākehā by sending in statements to the commission specifically 'gifting' lands and attempting to use its procedures to protect the rights of their kin, a tactic that met with limited success.

Although customary marriages had underpinned many of the transactions that had taken place between Māori and settlers, the claims of the children were at the end of the queue in the Crown's validation process. Such claims would subtract rather than add to the Crown estate and were not a priority for Bell. He was, in any case, tasked only with reporting the evidence and his opinion to the Government. As noted earlier, Bell's 'final report' had listed the issuance of grants to the heirs of the original claimants as one of commission's achievements, but he

failed to mention the many outstanding claims for or from the children of interracial marriages.

Despite the combined efforts of Bell and White (in Hokianga), this was another matter left to Domett and, in light of the many complications, for the Native Land Court to resolve. In March 1873, George Fannin, the clerk of the Land Claims Commission, suggested that a Native Land Court judge be appointed (under section 5 of the 1856 Act) as an assistant land claims commissioner for the Province of Auckland, to examine and report on any outstanding claims so that they could be 'proceeded with judicially'. Any claims not prosecuted after they had been advertised for hearing could then be disallowed. Since most of the unsettled claims – 'many of which [were] half-caste' – concerned lands in Hokianga and the Bay of Islands, Fannin suggested that Judge Frederick Maning be appointed and 'finally determine those of the half-caste claims to which the Native Land Acts apply'.[1481]

Numerous claims concerning the children of Hokianga whānau were dealt with in this way, including those of Bridget Cassidy, Annabelle Webster, Hori Karaka (George Clarke) at Kohukohu, Hardiman at Ohopa, and Mary Marmon; also the children of Kataraina Kohu and Bryers; of Taonui's daughter and Anderson; and of Makareta Kauari and W R Gundry. We now discuss a number of these cases.

The marriage of Makoare Taonui's daughter to the sawyer John Anderson at Ōrira was revealed only during the examination of the transaction at 'Warewarekauri' (OLC 40) by the second Land Claims Commission in 1858. When Taonui raised the question of the rights of his two grandsons,[1482] Commissioner Bell said that he would 'recommend the Governor to reserve a piece of the land for them', but there is no record of this occurring.[1483] The attempt by Ururoa to make provision for his grandchildren, the progeny of the union of his daughter, Raupane, to Henry Davis Snowden, with whom he had signed several land deeds, also failed, despite wide hapū support for an allocation of land for the children at the time of Bell's investigation. In 1858, Ururoa and other leaders sent in a written deed of gift that made specific provision for them – a piece of land called 'Totara' at Lake Mawhe. While there was some discussion about other rights in a portion of that area, Hare Hongi gave evidence that he, Ururoa, Hira Te Puna, and others had intended that the land be set aside in this way, and that the matter had been resolved.[1484] Once Bell's final report was tabled, the claim lay dormant. One of the sons later pursued the matter, and the claim was referred to the Native Land Court in 1870, but although he could produce the 1858 deed gifting 'Totara', by this stage the former consensus had broken down. The claim was contested and disallowed. Maning reported to Domett that the deed was not, 'taken with the other circumstances of the case, now for the first time, fully understood, sufficient to give him title'.[1485]

In another case, the existence of a Māori wife, Makareta Kauari, was revealed in 1859 only when the Crown attempted to survey the land it claimed as a result of its scrip arrangements with W R Gundry. Ngāi Tūpoto attempted to ensure that Makareta, now widowed, was provided for, sending a signed document to the Land Claims Commission that confirmed an allocation of land at Paraoanui. This stated:

> We together . . . agree to the word of our chief Tereti Whatiia, who is now dead, with respect to the land for Makareta Kauari (the widow of Gundry) for her son Wiremu and his younger brothers.[1486]

Located on the Motukaraka Peninsula and outside Gundry's original claim at Kohi, the land had been chosen 'on account of Mrs Gundry having a claim there'.[1487] The claim, if validated, would eat into the Crown's scrip at Motukaraka, and Bell did nothing to advance it further. Like several others of a similar character, it lay dormant. When the claim was called in January 1880, no one appeared, and it was declared to be abandoned.[1488]

However, Mohi Tāwhai's efforts to have land set aside for the family of Kohu (Mrs Bryers) by a deed of gift had better success. During the complex negotiations to sort

out the Crown's claim to scrip lands at Hokianga (discussed at section 6.7.2(7)) and of local rangatira to have reserves set aside, Mohi Tāwhai and other rangatira (Tiro, Pororua, Hohepa Kiwa, Hoera Tuhiparu, Ihaka, Pehi, and Neho) sent in a statement to the commission:

> This is the document of our consent giving the land for our grandchildren and for our children, the children of Kataraina Kohu and Joe Bryers . . . This is our true consent, giving this land is a free gift of love to these children, to be a permanent possession for them and their children for ever.
>
> Ko te pukapuka tenei o to matou whaka ae tanga ki te whenua mo a matou, mokopuna, moa matou tamariki, mo nga tamariki a Kataraina Kohu, raua ko Ho Paraea . . . Ko tamatou whaka ae tanga pono tenei, he mea tuku aroha atu anei whenua e matou, mo enei tamariki, hei kainga pono ratou, mo ratouriri hoki a muri ake nei.[1489]

The land to be gifted was Otautu, as Kohu was of a senior line and had a claim 'in all the land at Waima, the portion to be given to them was to be in full [recognition] of all her claims'. Bryers paid for the survey in 1859, but Tāwhai's statement 'sat in Bell's office until February 1861, when he filed it with other "half-caste" claims'.[1490]

No further steps were taken until, in 1865, White advocated that something be done, stating:

> unless it is, the Maori people will not be so wishful to do justice to half-cast[e]s in respect to land claims on account of their mothers, if they see the government neglect to take action when it is given.[1491]

Domett acknowledged that the survey and issue of grants for this and similar claims were sadly lagging, and in some danger, it would seem, of being neglected altogether. He minuted White's memorandum:

> I do not know *why* such promises or engagements . . . *are not always* (or have not been *always of late years*) been *immediately fulfilled*. There can be no doubt of the extremely ill effect neglect to fulfil them must have on the natives concerned. The records of the Old Land Claims office are so voluminous, and *every one* in my office is so entirely new to the work concerned, that it's impossible for this officer to make out any such engagements. [Emphasis in original.][1492]

In this instance, Domett directed that the promised Crown grants be issued to Bryers' sons, but still nothing was done by the Government. 'Instead,' Stirling and Towers commented:

> it was left to Maori to claim the land through the Native Land Court and it was not until November 1871 that 316 acres at Otautu was granted to Charles Bryers alone by the Native Land Court.[1493]

Judge Maning confirmed that the title for Charles was 'in full satisfaction of all his claims and those of his family to the lands at Otautu,' adding that 'both Charles Bryers and his family being Ngapuhi chiefs of the highest standing amongst the natives, have many other claims in the Bay of Islands district.'[1494]

This tardy treatment of the claims generated by Māori, as they sought to ensure that the underlying intent of marriages they had arranged be carried out, contrasts with the concern to settle the claims of Pākehā, for whom detailed legislation and many concessions had been made. Bell had boasted in 1862 that he had done everything in his power to award as much land as he could to settlers while securing the 'public interest' and that it was an 'unquestionable truth' that the Acts of 1856 and 1858 had 'operated as a great relief' to them.[1495] The claims made by Māori for the children did not meet with anything approaching this consideration by Parliament or the commission, even though 'amalgamation' was encouraged. Ten years after Bell reported, officials were still debating what to do about them and in the end, did very little. The returns indicating the 'final' disposal of claims show that in addition to awards authorised by Domett to the children of Thomas Maxwell at Motutapu and those of Berghan at Mongonui, subsequent Native Land Court investigation had resulted in grants in only five instances: for the Cassidy children, Charles Bryers, Annabella Webster in Hokianga, Anna

Cook, and the 'half-caste' children of Robert Kent (held in trust by George Clarke) at Waimate.[1496]

(13) *Old land claims 'definitely settled'*

In 1878, the Land Claims Final Settlement Act was passed to close off any old land claims that remained unsettled by Bell and Domett. If the claimants had not prosecuted them to a final issue by 31 December 1879, they would be judged by a land claims commissioner to have lapsed. The original Bill had a schedule attached that was criticised by Bell in the Legislative Council as reviving claims to 'hundreds of thousands of acres' barred by the 1856 Act, even though the architect of the measure, Robert Stout (then Attorney-General), had inserted a clause in committee explicitly stating that inclusion in the schedule would not be deemed to have this effect.[1497]

The schedule was omitted from the final measure, as was a clause stating that any land the claim to which had lapsed would be 'deemed to be waste lands of the Crown, freed from the right, title, or interest of any person whomsoever'.[1498] Two returns – one titled 'Return of Land Claims Finally Settled since 8th July 1862' and the other, 'Final Return of Land Claims Definitely Settled since 20th August 1878' – were tabled before the House of Representatives. Te Raki claims predominated in both. The former listed 40 claims in Te Raki that had remained unsettled at the time of Bell's departure, including Busby's.[1499] The latter return, which was tabled in 1881, listed a further 58 claims which were either granted; deemed to have lapsed and thus regarded as 'surplus'; or if uninvestigated in the earlier stages of the validation process, as was the case for most of the children's claims, sent to the Native Land Court for determination.[1500] Most of these were also deemed to have lapsed, thus, we presume, finally reverting to the status of 'native land' in the eyes of the Crown.

6.7.3 Conclusions and treaty findings: legislation, the validation process, scrip, and surplus lands

We find that the Crown policies and practices that resulted in the appropriation of some 51,980 acres of 'surplus land' from old land claims and a further 21,168 acres from pre-emption waivers were in breach of the treaty and its principles. This much has been conceded by the Crown, but on specific and limited grounds. It conceded that the surplus lands policy had 'failed to ensure any assessment of whether Te Raki Māori retained adequate lands for their needs'; that in some cases it had taken decades to assert title or its claim to the surplus lands; and that it had awarded scrip without properly investigating the pre-treaty transactions.[1501] As a result of these flaws in its old land claims investigations, the Crown conceded that some hapū lost vital kāinga and cultivation areas (but did not specify which).[1502] It made similar concessions with regard to the retention of the 'surplus' from pre-emption waiver claims. While we welcome these acknowledgements of treaty breach, our findings are grounded differently. We also note the Crown's general insistence that grievances be proven on a case-by-case basis. For that reason, we have discussed how those losses occurred in some detail.

In our view, the underlying basis on which the Crown's claim to surplus lands was founded was in breach of the treaty and its principles. The policy was grounded in the Crown's assertion of sovereignty and its accompanying assertion of the underlying or radical title to all New Zealand lands, subject to the 'burden' of customary rights as it was expressed in colonial law. We found in chapter 4 that the assertion of sovereignty was in breach of the treaty and its principles. It followed that the assertion of radical title was also in breach and so, too, must be the Crown's expropriatory processes (for if the root is planted in breach, so will the fruit be tainted).

The surplus lands policy was moreover inappropriate to the circumstances of New Zealand and it was implemented in breach of promises made to Māori during the Tiriti debates and on subsequent occasions. The personal and mutable character of the pre-1840 transactions meant that there was no basis for the Crown to claim an unencumbered right to any part of that land. No agreement had been reached with Māori about its retention by the Government. The Crown's claim to own the surplus as a right of kāwanatanga had not been raised by Hobson when it ought to have been, if such was the intention. In fact, Hobson had seemed to promise the opposite: he said the

Crown would return Māori lands that had been unjustly acquired, a pledge that Māori understood as meaning that their understanding of pre-treaty transactions would be enforced. Later, as Māori became aware of the Crown's intentions, Governor FitzRoy promised to return the surplus lands. As we set out in chapter 5, through this and other commitments, FitzRoy gained himself allies among Ngāpuhi, whose support was to prove critical during the war that followed. Although the Crown has argued that FitzRoy's undertaking to return the surplus land was ambiguous and made without official sanction, we do not agree. The promise was recorded and although not directly communicated to the Colonial Office, the information was available to it in the reports enclosed with FitzRoy's dispatches. Additionally, Stanley's 1843 responses to FitzRoy left the Governor with discretion to return lands, at least when Māori were in occupation or had some other just claim. In any event, in our view Māori were entitled to rely on the commitment FitzRoy had made to them. For many years afterwards, they continued to occupy the 'surplus' as they wished, unaware that, in the eyes of the Government, it did not belong to them.

That the Crown still considered itself to own the surplus lands was not communicated to Māori until the late 1850s, when the deed boundaries and settler grants were surveyed, and the Crown claimed its portion. In our opinion, it is extremely doubtful that such a claim could have been made in the first years of the colony without causing outrage; certainly, FitzRoy and the missionaries thought that it could not, and later expressed the view that their assurances on this and other matters had prevented a more general Ngāpuhi uprising. Nor had any such claim been explicitly communicated to Māori in the years between the Northern War and the establishment of the Bell commission. Professor Boast described the Crown's revival of its claim to surplus lands as 'devious' in the context of Muriwhenua; we endorse this opinion in the case of the Te Raki region also.[1503] The incentivising of the Pākehā claimants to survey the outer boundaries of their pre-treaty claims was clearly intended to identify the surplus and secure it for the Crown, which exploited the personal relationships so essential to the original transactions to its own advantage. It was thought that survey by settlers known to Māori would be more acceptable to them and less expensive to itself.

We consider the Land Claims Settlement Act 1856 and Extension Act 1858 to be in breach of both the Tiriti guarantee of tino rangatiratanga and the article 2 guarantees of the English text, as well as the principle of equity. These Acts were intended to maximise benefits to the Crown and settlers at cost to Māori, while denying Māori rights that were extended to Pākehā. In particular, settlers were given an opportunity to have uninvestigated and disallowed claims endorsed, with very little scrutiny, while Māori were unable to have the findings of the first Land Claims Commission re-examined and their unextinguished interests recognised if a grant or scrip had been issued. There were other flaws as well. There was no requirement to provide Māori with adequate reserves, a critical omission given the earlier reliance of the first commission on their allocation within the lands left out of the settler grants. The legislation also omitted any requirement for conditions on which the original transactions had been affirmed (such as joint-use and trust arrangements) to be respected and upheld. These measures were enacted without any opportunity for Māori to express their views on the settler grants or the Crown's right to the surplus.

Bell and White then applied the legislation in a manner that exacerbated its flaws. As noted earlier, the legislation encouraged claimants to survey the entire area covered by the original deeds, even if they knew that Māori continued to occupy and use the land, but Bell turned the screw further. He almost invariably insisted that claimants complete the full survey, even when they were prepared themselves to compromise with Māori and respect the old, underlying understandings, at least to some degree. Bell also did his best to make awards to settlers even for claims that were 'irregularly acquired', previously disallowed, or not even investigated by the first commission. That he did so cannot be attributed solely to the strictures of the law; Bell himself had promoted the 1858 amendment to facilitate the progress of claims that were otherwise invalid. As

a result, Pākehā could revive their claims under certain circumstances, whereas Māori were stuck with earlier adverse decisions.

The relentless prosecution of the Crown's interests by the second Land Claims Commission in a situation in which Māori had been completely disempowered was in breach of all the Crown's undertakings to actively protect them in ownership of their lands as long as they wished to keep them. It was far removed from Māori understandings that they would enjoy equal partnership with the Crown and would engage with the Crown to ensure that their rights were respected.

The consequences were deeply felt in the cases of scrip claims in Hokianga, where many such exchanges for lands elsewhere had occurred, and Māori had received none of the expected future benefits that had underpinned the original transactions. In some instances, the Crown claimed scrip lands without any investigation of the original claim or when it had been disallowed. When the Crown came to define the lands it believed it had acquired in exchange for scrip, officials were anxious to maximise the returns for its early expenditure for settler benefit. Scrip issued at £1 per acre so that settlers could acquire Crown lands in Auckland was considered a debt on Hokianga lands that the Crown regarded as sold, but which it had failed to survey or utilise in any way that would indicate to Māori that they were no longer owners of the land under new laws that ignored tikanga. In some instances, scrip had been issued by FitzRoy without proper inquiry, but this failure remained unaddressed by the Land Claims Settlement Acts.

White took a leading role in negotiating boundaries, even though he was hardly a disinterested party, given the close involvement of his family in the original land arrangements. There were clear instances in which Māori owners were bullied into accepting the Government's survey, which was arranged to its advantage despite plainly expressed Māori opposition that dated back to the original hearings and had been revived with the Crown's subsequent claim to ownership. As the Crown has acknowledged, it failed to assess the adequacy of land remaining to Māori, and requests for reserves were almost always rejected or at best, reduced in size, even when kāinga, wāhi tapu, and cultivations were at issue. Even when recommended, actual grants of reserves often failed to materialise. The basis of the policy was inequitable, and its flaws exacerbated by the way it was applied.

The Crown also took the 'surplus' derived from its pre-emption waiver policy in Mahurangi and the gulf islands, notably Aotea. For all of Governor Grey's criticisms of FitzRoy's waivers and the purchases conducted under them, the measures he introduced to sort out questions of title were addressed to settling Pākehā claims. These transactions were validated in much the same way as the old land claims had been, with no more effective protection of Māori interests than could be provided by the Protector of Aborigines. The original intention to restrict the acreage that could be acquired by settlers under waiver exception certificates and to reserve occupied sites and tenths was largely ignored both at the time of the transaction and during the validation process that followed. Once settlers' claims had been resolved through the mechanisms provided under the Land Claims Ordinance 1846 and the Land Claims Settlement Act 1856, which specifically enabled waiver claims disallowed for non-compliance with regulations to be re-opened (unless the Crown had already onsold the land concerned, on the mistaken assumption that the native title had been fully extinguished), it took the rest of what had been surveyed. This included land supposed to be set aside as tenths for Māori benefit.

By taking the 'surplus' lands from old land claims, the Crown clearly acted inconsistently with the plain meaning of article 2. It claimed ownership of that land by reason of a sovereignty and a title that we consider to have been asserted in breach of the treaty and its principles. We have also already found that the initial validation of transactions as conveying freehold title was in breach of the principles of partnership and recognition and respect and its guarantee of te tino rangatiratanga. We have explained earlier (at section 6.4.3) why we think the granting of land to settlers, overriding Māori law, was effectively a

raupatu, in breach of the property and control guarantees of the treaty. Those validations were never re-examined or overturned, enabling the Crown to take the land that was deemed to have been transacted but had not been granted to settlers, and contrary to what Māori had been specifically promised by the Queen's representative. In our view, the taking of that surplus can only be seen as an effective confiscation of some 51,980 acres from pre-treaty land arrangements undertaken under tikanga.

We find, therefore, that the Crown was in breach of te mātāpono o te tino rangatiratanga, as well as te mātāpono o te houruatanga me te mātāpono o whakaaronui tētahi ki tētahi/the principles of partnership and of mutual recognition and respect; and that, by failing to honour promises that such land would return to Māori, the Crown disregarded its duty to act in the utmost good faith and breached te mātāpono o te houruatanga/the principle of partnership.

An additional 21,168 acres were taken by the Crown from the waiver transactions entered into in 1844 when it could at least argue that the British law applied. As Grey acknowledged, it was doubtful still that Māori fully understood the effect of the arrangements into which they were entering, yet validation proceeded while, at the same time, intended protections were disregarded. Rather than the limited purchases contemplated by FitzRoy, in some cases very extensive acreages were alienated, much of it kept by the Crown once settlers' claims had been dealt with. The Crown also kept the land when settler waiver claims were disallowed for failing to meet survey and other technical requirements. By failing to ensure that the title of all Māori customary owners had been fully extinguished and to ensure that Māori retained sufficient reserves, or to fulfil its obligations to set aside tenths, the Crown further expanded the area it claimed as surplus. None of this was rectified by the Bell commission or the legislation under which he operated.

We consider the Crown's pre-emption waiver policy and its retention of surplus resulting from transactions arranged under its direct supervision to be in breach of te mātāpono o te tino rangatiratanga and te mātāpono o te matapopore moroki/the principle of active protection.

The Tiriti agreement and partnership required the Crown to recognise and respect Māori customs and tino rangatiratanga, actively protect their rights to land and resources, and ensure they maintained an economic base so that they had the opportunity to develop on an equitable footing into the future. The surplus land policy applied in respect of both old land claims and pre-emption waiver purchases contravened all those guarantees.

We find, therefore, that the Crown breached te mātāpono o te tino rangatiratanga; te mātāpono o te houruatanga/the principle of partnership; te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect; te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development; and te mātāpono o te matapopore moroki/the principle of active protection.

The Land Claims Settlement Act 1856 and Extension Act 1858 did not require the commissioner to examine the workings of the first Land Claims Commission. Section 15(2) of the 1856 Act prohibited the rehearing of claims for which awards had been made – these could be adjusted only – and scrip lands specifically could not be investigated, even if they remained unexamined by the first commission. In contrast, the legislation extended many advantages to settlers and to the Crown itself. Pākehā claimants could have cases revisited in certain circumstances and were offered survey incentives designed to maximise their awards and the 'surplus' available to the Crown.

We thus find the Land Claims Settlement Act 1856 and Extension Act 1858 to be in breach of te mātāpono o te tino rangatiratanga, as well as te mātāpono o te mana taurite me te mātāpono o te matapopore moroki/the principles of equity and of active protection.

There was no requirement in that legislation that adequate reserves be set aside out of the areas deemed sold and awarded to settlers or taken by the Crown as surplus. In fact, the only mention of reserves was in section 8 of the 1858 Extension Act, which dealt with what the Crown would do should Māori be willing to give up a reserve originally made for their occupation within the exterior boundary of a claim or grant. In our view, it would have been better to have returned the surplus to

Māori, but reserves might have been easily set aside out of the extensive areas of surplus lands the Crown claimed as its own.

We find the Crown's failure to do so was in breach of te mātāpono o te matapopore moroki/the principle of active protection.

The Acts were passed without any opportunity for Māori to express their views on either how settler grants were to be resolved or the Crown's right to take the surplus. The legislation enabled commitments that the surplus would 'return' to Māori to be ignored. In this respect, we consider the legislation also to be in breach of te mātāpono o te whakaaronui tētahi ki tētahi me te mātāpono o te mana taurite/the principle of mutual recognition and respect and the principle of equity.

The Crown failed to institute an impartial and fair process whereby Māori who had been adversely affected by the defects in the first ratification procedures could gain redress. Instead, the second Land Claims Commission, under a single Pākehā commissioner, Francis Dillon Bell, exceeded its function of defining European grants and Māori reserves. Bell acted to obtain as much land from Māori as he could for the Crown and suggested legislative amendments and gazetted rules for that purpose. He refused to hear Māori properly on the question of unextinguished rights and reserves. The result was that, over the objections of Māori, shared occupancy arrangements were brought to an end, while the reserves that were recognised by Bell were minimal and made without regard to comparable equities.

We find, therefore, that Māori hapū were prejudiced by these actions and omissions which deprived them of lands in which they had legitimate rights, and that this was in breach of te mātāpono o te tino rangatiratanga, te mātāpono o te mana taurite/the principle of equity; te mātāpono o te matapopore moroki/the principle of active protection; and te mātāpono o te whakatika/the principle of redress.

In the case of scrip, the Crown has acknowledged that its investigation of the validity of the claims fell short of what was required of a good treaty partner. Some claims for which scrip had been awarded remained uninvestigated or had been disallowed, but the Crown asserted a right to those lands nonetheless. Commissioner Bell and his delegate, White, also pressured and on occasion, threatened Māori owners into accepting their interpretations of what lands had been transacted. The scrip surveys followed the pattern set by Bell generally, with officials taking deliberate and sometimes questionable steps to gain as much for the Crown as possible, securing land well in excess of the original award. In the case of Motukaraka and Waitapu, the Crown claimed land (by falsification of boundaries) to which it clearly was not entitled.

We consider the Crown, by these actions, to be in breach of article 2 guarantees of tino rangatiratanga over lands and resources, and in breach of te mātāpono o te tino rangatiratanga.

Reserves of wāhi tapu and cultivations were only reluctantly recommended, and the provision for Māori was derisory as the Crown sought to maximise the return on its earlier issue of scrip on extremely generous terms to the settlers concerned.

We thus find the Crown's scrip policy to be in breach of te mātāpono o te matapopore moroki me te mātāpono o te mana taurite/the principles of active protection and equity, resulting in prejudice to Māori throughout the inquiry region but, in particular, to hapū based in Hokianga, who lost 14,029 acres by this means.

The disparity between how Pākehā and Māori were treated within the later stages of the Crown's validation procedures was highlighted by the awards ultimately received by missionaries such as Shepherd and Kemp and settlers such as Mair and Busby. Bell undertook a protracted examination of the missionary awards but dismissed Māori protests as coming too late, even though survey had been long delayed, and there had been no way of knowing what land was being claimed. In contrast, the earlier missionary promises of sharing the land, the 1851 Privy Council decision that grants awarded beyond the statutory limit must fail, and FitzRoy's earlier commitment that surplus lands would return to Maori were all discounted. In the end, both missionaries and Crown gained thousands of acres of land, while Māori retained only a handful of acres as reserves. Settlers such as Mair

and Busby were also treated with a great deal of sympathy within the later stages of the Crown's validation process, despite the questionable nature of their claims and disregard of rules that might have offered at least some protection to Māori. In contrast to his usual practice, Bell was willing to rely on a verbal agreement over documentation when it favoured Crown and settler interests (in Mair's case), and at Waitangi his investigation of Māori occupation was cursory. Their understanding of what had been reserved to them was sought neither by Bell nor by any official, the commissioner, or the arbitrators. Despite Busby's refusal to acknowledge his authority under the Land Claims Settlement Act 1856, Bell actively promoted his interests with the Government (under the Extension Act of 1858). In the end, Busby was awarded an enormous sum for damages that had not actually been inflicted and in the case of Ngunguru, for a transaction that was illegal. We therefore find the Crown to be in breach of te mātāpono o te matapopore moroki me te mātāpono o te mana taurite/the principles of active protection and equity.

The disposal of the claims of children of marriages between Māori women and settlers (the 'half-caste claims') also contrasted with the treatment of settler claims. The potential to have provision made for the mothers and their children under the Land Claims Settlement Act 1856 proved illusory, they were among the last claims to be examined, and few grants were issued despite promises to the contrary.

We find the Crown again to be in breach of te mātāpono o te matapopore moroki me te mātāpono o te mana taurite/the principles of active protection and equity.

By all these actions, the Crown deliberately minimised the lands retained by Māori while maximising those to be awarded to Europeans or to be taken as scrip and surplus. We think the Crown in doing so acted neither in good faith nor with fairness.

In summary, we find the Crown – because of its legislation privileging settler and its own interests over those of Māori; its failure to ensure that problems arising from the first commission were dealt with and rectified in a fair and timely manner; its failure to ensure that hapū were left with sufficient lands; and by reason of its scrip and surplus land policies – to be in breach of te mātāpono o te tino rangatiratanga, te mātāpono o te mana taurite/the principle of equity, and te mātāpono o te whakatika/the principle of redress.

Te Raki Māori were prejudiced by these policies and practices which resulted in extensive loss of land and hapū autonomy, and an insufficient economic base for their future sustenance and development. The long-term legacy was the embitterment of hapū and the undermining of their relationship with the Crown that te Tiriti had embodied.

6.8 Did the Crown's Response to Māori Petitions and Protest Meet its Treaty Obligations?

6.8.1 Introduction

In section 6.7, we noted Bell's assertion, after a hearing at Kororāreka, that Māori had been 'perfectly satisfied' with his rejection of all of their concerns, including those about lands 'sold' by the wrong owners, and the Crown's failure to protect reserves or shared-use arrangements and to return the surplus.[1504] Bell's assertion is doubtful to say the least; it was not corroborated by any other evidence and it was contradicted by subsequent Māori actions, including applications to the Native Land Court, and ongoing petition and protest. Māori discontent over the 'surplus' began as soon as the Crown attempted to seize control of those lands, was unappeased by a number of inquiries in the twentieth century, and has been strongly expressed in this forum.

Several claimant groups, including Ngāti Hine, Te Kapotai, Ngāti Rāhiri ki Waitangi, Ngāti Manu, Ngāti Rehia, descendants of Pumuka, and hapū of Whangaruru, raised concerns about this issue, in particular focusing on Ōpua,[1505] Kapowai,[1506] Kororipo Pā,[1507] Te Manawaroa,[1508] Motukaraka,[1509] and Motumaire and Motuorangi (islands off-shore from Paihia).[1510] These were far from the only areas retained by the Crown as a result of its old land

claims and 'surplus' land policy but were the particular subject of claims, petitions, and protests.

Claimants told us that despite Māori protest the Crown continued to assert ownership of the surplus land and sold much of it to settlers, in so doing putting it beyond recovery. These failures compounded the Crown's earlier breaches in declaring the pre-treaty lands to be permanent sales. After years of delay, the Crown enforced its claim to the 'surplus', often despite ongoing Māori occupation.[1511] In the claimants' submission, the responses of the Crown, including the various parliamentary commissions that investigated their petitions about these lands, did not adequately address the central issue: that they had not been sold at all. The Crown did not recognise and enforce Māori rights; instead, it forced Māori into compromises and (in the case of the Myers commission) paid inadequate compensation through the inappropriate mechanism of the Taitokerau Trust Board.[1512]

The Crown did not make specific submissions on these particular cases but did defend the performance of the various parliamentary commissions, specifically:

- the Houston commission (1907) which investigated petitions concerning Puketōtara, Kapowai, Ōpua, and Waimamaku 2;
- the Native Land Claims Commission (1920) which investigated two petitions relating to surplus lands at Kapowai and Puketōtara;
- the Sim commission (1927) which inquired into petitions relating to Puketī (part of Crown purchase of Mokau block), Wheronui, and Motukaraka; and
- the Myers commission (1946) which inquired into petitions and claims to the Crown's title to surplus lands and which reconsidered the blocks scrutinised by the earlier inquiries.[1513]

In the Crown's submission, the Myers commission was 'in substance, . . . adequate, detailed . . . and principled'.[1514] As a result of its inquiry, compensation of £47,150 4s was duly paid to the Taitokerau Maori Trust Board for all Northland claims, and another £735 10s for Aotea (Great Barrier Island). Counsel made no comment on the adequacy and the appropriateness of this action.[1515]

6.8.2 The Tribunal's analysis

(1) *Decades of protest: 1860–1907*

In the wake of the second Land Claims Commission, Te Raki Māori continued to protest the expropriation of 'surplus' lands and sought their retrieval through many avenues, to no effect. Tacit resistance, like the peaceable occupation of land and obstruction of surveys, could no more help them than the Native Land Court process or the lobbying of Government officials, when all responses to Māori claims to Ōpua, Kapowai, Motukaraka, and elsewhere were predicated on the assumption that their interests were long since extinguished and that the Crown's ownership of the 'surplus' was unassailable in law. Māori also approached the Crown directly by means of petitions to the House of Representatives, but most were dismissed with little consideration, the refrain the same: that the lands in question belonged to the Crown.

We turn first to the case of Ōpua. Before the first Land Claims Commission, the Church Missionary Society claimed all the land between Ōpua and Te Tii, an area totalling some 1,700 acres. Māori witnesses pointed out that they occupied much of this land and that their arrangement with Henry Williams provided for their ongoing use. In 1851, the CMS had accepted a grant for a total of 733 acres, including unspecified Māori reserves which the CMS did not subsequently survey. In all, the area between Te Tii and Ōpua contained 'a lot of unextinguished and undefined Maori interests'; indeed, the bulk of this land remained under Māori customary occupation and use.[1516] According to Stirling and Towers, the Bell commission did not look into this question; the commissioner simply assumed that the CMS claim had been settled in 1851, and that the balance belonged to the Crown. Māori continued to live on the land for many years, but the Crown ultimately claimed its 'surplus', ignoring the Māori occupation and protest.[1517]

During the 1860s and 1870s, Land Purchase Commissioner Henry Tacy Kemp acknowledged that Māori continued to live on the lands between Te Haumi and Ōpua; and this was also recognised by the Native Land Court in 1868 and 1872.[1518] However, in 1880, the

Crown sought to assert its claim on the ground by attempting to extend the Kawakawa–Taumārere railway through to Ōpua. It also planned to build a town and a deep-water port – these infrastructure plans were aimed at enabling coal shipments from a privately operated Kawakawa mine.[1519] But Māori still claimed rights in these lands, and so began a series of protests. In 1880, the Ngāti Hine leader Maihi Parāone Kawiti attempted to stop the construction but was threatened with a fine.[1520]

In May 1881, Hirini Taiwhanga of Ngāti Tautahi wrote to the Native Minister protesting over the railway and the Crown taking lands between Ōpua and Te Haumi. Taiwhanga, a qualified surveyor, had been sacked by the Crown after he surveyed Ōpua and a number of other contested blocks for Māori. He wrote that Ōpua had never been sold to the CMS, so the Crown had no claim to it; in fact, Māori had entered an agreement with Henry Williams that they would not transfer their rights in the Paihia lands to other settlers. This was a completely different understanding to an outright sale of the land. Taiwhanga therefore asked the Crown to pay for any land taken for the railhead, while also expressing concern about land extending to the low-water mark to be taken for a railway station and wharf.[1521] He later warned that direct action could be taken through occupation of the site if 'you and your government do not devise some means in accordance with the law whereby this long-standing trouble of many years past can be satisfactorily settled'.[1522] The Government rejected his claim for redress and refused to enter into further correspondence.[1523]

Subsequently, Ngāti Hine and Ngāti Manu sent two petitions seeking to have their rights recognised. The first, in September 1881, was signed by Maihi Parāone Kawiti and 40 others and sought a commission of inquiry to examine their grievances about the taking of 'surplus' lands at Ōpua, including foreshore land for the Taumārere–Ōpua railway extension. This, the petitioners said, was land they had always occupied and used, and that the Crown had unlawfully taken twice over, by treating the CMS claim as a sale, and by taking the surplus.[1524] On inquiring into the petition, the Native Affairs Committee denied Māori any further consideration, concluding that 'the Opua land had been purchased by the CMS as part of a larger trust for Maori', and lying as it did beyond the allotted 773 acres, the surplus land was vested in the Crown. The terms of the trust were not considered.[1525] Stirling and Towers argued that, by examining only the evidence heard by the two Land Claims Commissions, 'it was a foregone conclusion that this petition would fail'.[1526]

In the year that followed, Kawiti again sought a forum for their claim, writing a series of letters to Government ministers. He argued that the land should be placed before the Native Land Court so its true ownership could be determined,[1527] and challenged the Crown to produce his father's signature on a deed for Ōpua.[1528] The question, according to Hare Puataata, was whether 'we are in the wrong, and the pakehas who purchased from our parents are in the right, so that the acquirement of that land by the Government may be free from difficulty'.[1529] James Stephenson Clendon, who was sent by the Government to investigate, was told by one of the Williams family that Māori had sold the land and then occupied it as tenants. This led Clendon to conclude that Kawiti and other senior rangatira had recognised the sale in their lifetime, and that this was 'sufficient to show that the alienation had been complete and that he [Maihi Parāone Kawiti] could not have any real claim to it'.[1530] Phillipson commented, 'Clendon failed to see that the chiefs' recognition of the transaction might have meant something else altogether.'[1531] Explanations and protests were all to no effect. The Crown continued to insist that it owned the land and auctioned much of it off in 1883, so putting it 'completely beyond any claim'.[1532]

The Ōpua example is one of many in which Māori protested against the Crown for taking surplus lands. Rebuffed at every turn, Te Raki Māori nonetheless raised their concerns whenever they could. Although the Rees–Carroll commission of 1891 was in no way focused on this issue, when it sat at Kawakawa on 4 April, Māori seized the chance to voice their grievances regarding Ōpua and other nearby lands. When asked by Commissioner William Rees why he believed the lands should be returned, Te Atimana Wharerau told of their history. Hone Peeti of Te Whiu also spoke of the loss of Puketōtara

The Kotahitanga Paremata, held at Waitangi in March 1899. Standing in the centre are Hōne Heke Ngāpua, James Carroll, Lord Ranfurly, and Premier Richard Seddon. During the meeting, Te Raki Māori raised grievances with representatives of the Crown, which included the Crown's taking of 'surplus' lands and its Native Land legislation.

(OLC 595) through Crown processes.[1533] Even though the question of surplus lands did not fall under the remit of the commissioners, Rees assured Māori that he would ask for an appropriate inquiry to be made into the claims.[1534]

When the report of the Rees–Carroll commission was published, it contained a section, 'Complaints Against the Government', in which the issue of surplus lands was clearly identified:

> it was stated by many influential chiefs that the government had in the North – especially in the Ngapuhi country, and both on the East and West Coasts – taken land to which it had no right by purchase, cession, or conquest, and dealt with it as Crown lands. The evidence shows that this accusation was made not generally, but with utmost particularity.[1535]

Not only did rangatira identify such blocks in every district but they offered also to 'name very many other cases if the Commissioners desired it'.[1536] Although the Rees–Carroll commission did not ask for an investigation of the matter, their report clearly indicated its need. No such commission of inquiry transpired for many years.

The issue of unextinguished interests in surplus lands was not to fade away but became a familiar topic of protest throughout the 1890s and into the new century. In 1891, Hone Peeti travelled to Wellington to raise the matter with the Government. He met the Minister of Lands, John McKenzie, along with three members of the House of Representatives: James Carroll (Eastern Maori), Robert Houston (Bay of Islands), and Epairama Te Mutu Kapa (Northern Maori). The *New Zealand Herald* reported:

> For many years the native tribes of Whangaroa and the Bay of Islands have had a grievance regarding what are known as surplus lands taken by the Government . . . which they claim belong to them.

They had been 'petitioning the House for a considerable time' on these matters. They 'did not wish to disturb Europeans who were settled on surplus lands by right of purchase from the Government' but wanted an inquiry into their claims, and compensation should they be shown to be valid.[1537] Houston told the meeting that the grievance caused ill feeling, which was regrettable since

Māori–settler relations in the north were otherwise amicable. McKenzie responded by promising to visit the north and inquire into the matter more fully, but there is no record of that occurring.[1538]

Māori frustration continued, and in 1894 several further petitions were sent to Parliament. Four dealt with the issue of surplus lands, including one from Reihana Moheketanga and 47 others seeking return of the Ōpua land. The other petitions were from Wiremu Te Teti and 43 others, Rewiri Hongi and 11 others, and Hone Peeti and four others.[1539] While information about their content is scant, they differed from previous letters and petitions in that they asked for 'either the return of the lands, or the payment of compensation for them', not an inquiry.[1540] They were treated as a package by the Government. Reihana Moheketanga's petition, relating to Ōpua and tracts of CMS land nearby, called for 'these lands of ours be returned to us'.[1541] The petition was rejected by Auckland Commissioner of Crown Lands Gerhard Mueller: 'I cannot see that natives can now set up or establish a claim to land so long held by the Crown.'[1542] Not only did the land belong to the Crown but it had already been subdivided. Mueller dismissed another of the petitions the same day because it concerned land at Kapowai that had been acquired by the Crown from the old land claimant, Whytlaw, in 1844, in return for £2,560 in scrip.[1543] Of the 3,000 acres claimed, Mueller noted that 2,170 had been surveyed, though actually no such survey had been completed by the time of the second Land Claims Commission, a circumstance he failed to consider. Rather, he recited Bell's mantra, first circulated in the late 1850s: 'I may add that the younger natives are now persistently setting up claims to Crown land which were sold by the former generation.'[1544]

The 1894 petitions had a better reception once they reached the Native Affairs Committee, which acknowledged that 'these grievances have been of a very long standing' and required settling 'once and for all'. When it recommended that 'a Royal Commission should be appointed to inquire into the allegations set forth in the above petition[s]', it seemed, finally, that Te Raki Māori would get what they had wanted for so long.[1545] Yet another 13 years would pass before the Government acted on this recommendation.

In the meantime, Māori continued in their quest for fair treatment. Taniora Arapata wrote a letter of protest for Whangaroa Māori, listing both Crown purchases and surplus lands in which they had unextinguished rights and interests, among them Waitapu, long considered surplus from one of Powditch's claims. Though presented with 'ample evidence' about the lands by a William Matthews, who assisted in the protest, the official response was dismissive: 'it's no use carrying on the correspondence.'[1546] This did not stop Matthews and others again writing to the Department of Lands, this time about unextinguished rights within Brind's old land claim in the Bay of Islands.[1547]

Puhipi Pene and others likewise attempted to defend their interests at Waiaua (Tākou Bay), mounting a claim in 1897 in the Native Land Court. This land was part of the original Philip King claim (OLC 610–611), subsequently transferred to Eleanor Stephenson. The boundaries had been in dispute since the first Land Claims Commission. Land originally contested by Māori had initially not been surveyed but had later been included by Bell, increasing the total acreage to far more than had ever been claimed or granted.[1548] Also of importance to Māori were the Opiako wāhi tapu and Haimama pā, which had been excluded from the initial grant to King but taken in by the new survey for Bell. Deemed beyond the scope of the Court, given that this no longer concerned customary land, it was again described by officials as 'a very old grievance'.[1549]

Complaints expressed at a local level by Māori about old land claims and surplus lands were met with equally scant attention from officialdom. The press alluded to one such instance in 1893, when Māori wrote to the Crown Lands Office regarding long-standing grievances over land at the mouth of the Whananaki Inlet (OLC 408) which had been claimed by Salmon from the 1830s onwards, and later taken by the Crown as scrip land. In 1893, settlers selected some of the area for a cemetery reserve, even though Māori were still in occupation and assumed themselves to be the owners.[1550] The *New Zealand Herald* remarked: 'It is not considered that their protest will be allowed to

'We then Found that the Government Claimed the Surplus Land': Hōne Peeti to Rees Commission, 1891

'THERE was a dispute long ago with regard to some land that was handed over by our people to certain Europeans. At that time no surveyors had arrived in New Zealand. At length the Europeans arranged with our old people as to the portion of land they should have and as to the portion that should be returned to our old people. . . . The surveys were made, and a portion went to the Europeans and a portion came to us. But the Government made no such claim to the portion that came to us as they did in subsequent cases, by calling it 'surplus land' . . . nothing was done until 1889 when we again brought the case before the Court and we then found that the Government claimed the surplus land, and we also saw that it was marked as Crown land . . . We have been thinking about and seeking to understand why . . . the Government should take our land from us in this way . . . we have sought and sought hard but are quite unable to discover any reason to justify the Government in what it has done. Therefore we think it is but right that the land that was wrongly included in this purchase should be returned to us. In all the times past we have worked this land, used it, dwelt upon it and leased portions of it and yet now we find there is this trouble about it.'[1]

stand in the way of the progress of Whananaki.'[1551] The Crown would indeed establish a 10-acre cemetery reserve and an adjacent recreation reserve. As Stirling and Towers observed, 'The two reserves took in most of the peninsula on the south side of the entrance to the inlet. There was nowhere left for Maori.'[1552]

In 1895, Māori were able to address Premier Richard Seddon directly when he visited the north as part of a nationwide tour. There was limited time at the Waimā meeting, and when the complex question of surplus lands was raised, the Premier proposed making a written record of grievances for consideration by Wellington officials, a pen-and-paper approach rejected by Hone Peeti because 'a mere exchange of words' would not do.[1553] Peeti described the numerous attempts by Māori to have long-held grievances addressed regarding surplus land taken from the Puketotara block, of especial importance to his hapū, as his correspondence with the Rees–Carroll commission and petition of 1894 attested.[1554] Objections stretched back to the initial transaction; the case had twice been taken to the Native Land Court; petitions to Parliament had produced unkept promises of action; finally, the claim had been aired at the Rees–Carroll commission. All attempts had failed. Peeti addressed Seddon:

> I think it is only right in the case of this surplus land that the Natives and their descendants should be allowed to participate in them. I want you, as the head of this Government, to give full consideration to the claims of the Natives.[1555]

Seddon replied that he was unaware of the particulars of the Puketotara block, but promised to investigate the papers further. On the issue of surplus lands in general, he believed the source of the problem to be the 'constant holding over of titles';[1556] in other words, 'the failure to define the extent of unextinguished Maori interests at the time of the first Land Claims Commission.'[1557] Seddon concluded:

> Hence what I urge upon the Natives and Europeans, and all concerned, is that the sooner we ascertain the titles to all the land, the sooner we shall be able to do justice to all parties. You may rest assured I will go into the matter most carefully, because I desire to do what is just.[1558]

This was a significant admission, after decades of official denial, that there might be a grievance to be investigated and addressed.

Hone Peeti again asked for the appointment of a tribunal or inquiry 'to go into the question on both sides'; that is, one empowered to assess the claims of Māori to surplus lands and also to examine the validity of those of

the Crown. Peeti asked for an inquiry because the colonial politicians had done nothing: 'It is futile to approach Parliament by way of petition. Nothing comes of it.'[1559] Nothing came of this approach, either.[1560]

Four years on, Te Raki Māori approached Seddon again. The occasion was a meeting in March 1899 at Waitangi, one of several held around the country between representatives of Crown and Māori, primarily to discuss the Government's proposals for land law reform as Māori demands for a separate Parliament grew (see chapter 11). The Governor, Lord Ranfurly, led the Crown party, with Premier Seddon and Native Minister Carroll in attendance. After the welcome and preliminary speeches from both sides were concluded, Ranfurly and then Seddon spoke, unanimous in their message. Māori were advised that Parliament was the forum for settling their claims as '[it] is useless for you to hold meetings year after year regarding grievances that are things of the past, and which cannot now be remedied'. While Seddon assured Māori 'that their appeal to Parliament [would] not be in vain', the outcome would rest on their 'conduct' and abiding by the laws of the country.[1561]

The next day, discussions with Seddon, led first by Hōne Heke Ngāpua, turned to surplus lands again. Heke reminded the Premier that Parliament's Native Affairs Committee had on several occasions recommended inquiries, but none had been held. He therefore repeated the request. Some of the land had since been sold to settlers, and Māori did not want an inquiry into those lands; however, 'there are still large areas in the hands of the Crown'. Māori believed this land was theirs, since they had never sold it; yet the Crown insisted the land belonged to it; 'therefore it is a claim between two, which should be investigated and settled'.[1562] Hone Peeti also addressed Seddon, reminding the Premier of his 1895 advice to detail any claims in a petition to Parliament, and asking what had come of their earlier efforts to gain redress.[1563]

In reply, Seddon gave the Crown's much-repeated stance on surplus lands, stating that 'the Government would not admit that there had been any error on its part'.[1564] But while Māori had no equitable claim to these lands, Seddon explained that, as a response to increasing landlessness among the population, an argument might be possible for their expedient return. In other regions this sort of provision was already being made:

> I think it would be an act of grace on the part of the State if it were to give to the tribes and hapus of those who claim to have given these surplus lands – if they were to give the landless Natives of the different tribes and hapus those surplus lands, if it were possible to allocate them. I will therefore submit your representations to my colleagues.[1565]

Stirling and Towers commented that, at best, this 'act of grace' was 'the strongest basis the Crown was prepared to admit for any Maori claim to surplus land'. In effect, Seddon was denying all Māori claims to the land while

> holding out the prospect that land could be offered as some sort of welfare programme, designed not so much with justice in mind but to relieve the government of the potential burden of landless and impoverished Maori.[1566]

Seddon either misunderstood or rejected the expressions of hapū rangatiratanga on which Māori petitions for the return of land were grounded. Carroll echoed Seddon's view in 1904. Asked by Heke if, as part of a Crown 'stock-take' of Māori landholdings, it would examine whether any Māori had been made landless through the Crown taking surplus lands in Northland, Carroll was dismissive of any Māori claims: 'the appropriation by the Crown does not seem unreasonable'.[1567] In spite of this, Carroll concluded the 'stock-take' would indeed consider 'landless natives', and that 'sufficient areas to cultivate and occupy will be provided for them'.[1568]

By directly approaching the Premier and his Native Minister, Te Raki Māori had elicited undertakings that the Government might be prepared to return a portion of the surplus lands to those in need. In this, their persistent requests for a commission to examine their legal rights to the land had been sidestepped, but after decades of trying to retrieve what was theirs, it must have seemed like a very small step in the right direction.

While Seddon and Carroll were making this minimal

promise, civil servants and the courts continued to enforce the Crown's view that it legitimately owned the lands. Several incidents from around the turn of the century support this conclusion. One concerned a large area of surplus land north of Kerikeri Inlet, which the Crown had acquired from the Bateman and Shepherd claims (OLC 59 and 805 respectively). Māori continued to live there after the award was made, but ultimately the land seems to have been transferred into private hands. In 1903, one Kīngi Te Ngahuru was arrested and charged with trespass for occupying the land he had lived on for decades. Hōne Heke Ngāpua raised the issue in Parliament, explaining that the land was 'never sold by his elders'. Carroll promised to enquire into the matter, but there is no record of his doing so.[1569]

The other two incidents concerned intransigence on the part of Crown officials, who were unwilling even to provide Māori with information about the surplus lands.[1570] In 1901, in response to a request by Hōne Heke Ngāpua, the House of Representatives asked the Department of Lands to supply a return showing the specifics of each block of surplus land. The department refused, Under-Secretary William Kensington calling it 'impossible' and citing several dubious reasons. The undoubted logic for refusing is found obscured in the fine print: 'any attempt to comply with the return would only lead to false premises and also lead to a feeling of insecurity of tenure by the northern settlers.'[1571]

Another instance surfaced in 1905, when Native Land Court Judge Herbert Edger wanted to consult a copy of Turton's *Maori Deeds of Old Private Land Purchases in New Zealand* for a hearing into the Rawhiti block, which had ties to Clendon's 1830 Manawaora transactions. He had previously borrowed a copy several times from the office of the Auckland chief surveyor, but on this occasion was denied. It had been 'withdrawn from circulation', because 'it is misleading to persons who do not understand the circumstances under which it was completed. Every time natives are allowed to peruse it shoals of petitions follow'.[1572]

Instead, Judge Edger was directed to get the information he wanted from Wellington or to sight the original deeds. He persisted in his attempt to access a copy locally, noting its lack was a costly inconvenience to the Court and all participants in the hearing. The Justice Department responded – inaccurately – that the book contained no information on Clendon's claims.[1573] With the page reference to Clendon's deed to hand, Edger was quick to refute this, prompting an apology from the department for its obstructiveness. Nonetheless, Justice Secretary Frank Waldegrave informed the judge that the book would not be made available to anyone: 'we have had and are having so much trouble over these ancient transactions that I have fully made up my mind not to let these mischievous books out of my own possession.'[1574]

(2) *Three attempts at remedy: Houston commission 1907, Native Land Claims Commission 1920, and Sim commission 1927*

It was not until 1907 that the official inquiry recommended by the Native Affairs Committee in 1894 was finally convened. Robert Houston was appointed as commissioner to investigate surplus lands north of Auckland that had been the subject of seven petitions. Six blocks were involved: Puketotara, Kapowai, and Opua (in the Bay of Islands); Waimamaku 2 (a Crown purchase in Hokianga); and Tangonge and Motuopao Island (in Muriwhenua). Houston was tasked with ascertaining whether these were surplus lands; how they had been acquired by the Crown; and which parts, if any, might realistically be returned to Māori. Long a Mangonui local-body politician before becoming a Liberal Party member of the House, and a former chair (from 1891 to 1906) of the Native Affairs Committee, he was no stranger to Māori grievances about surplus lands, among other matters.[1575]

A public notice to announce the commission is revealing of the Government's mindset leading into the inquiry. It stated that petitioners were not contesting the Crown's legal right to surplus lands but merely asked for any remaining surplus to be returned. As Stirling and Towers noted, the shift in focus was interpreted – incorrectly – as 'tacit acceptance by Maori to the government's right to the lands'. Any decision made by the commission in favour of Māori therefore would be 'due to the benevolence of the

government',[1576] or as Seddon had put it, an 'act of grace'.[1577] That Houston was instructed to consider not only the claims to surplus lands but also the circumstances of Māori inhabiting them likewise speaks to the prevailing attitude of Parliament.

Nonetheless, the Houston commission represented a milestone: the first opportunity in more than a generation for Māori claims regarding surplus lands to be heard – which they were at Russell, on 17 May 1907. It is worth noting that the evidence of all the petitions was presented in a single packed day, which suggests an inquiry of limited remit and resources.

Hone Rameka was spokesperson for the Puketotara block. Like the petitioners for the other blocks, he outlined its history to Houston. He described the initial transaction with Kemp (see section 6.7.2(4)), the ensuing boundary dispute, the following Native Land Court hearings, and then the additional boundary problems, this time with Shepherd's claim. He advised that, although it was deemed to be Crown land, the Te Mata block had been continuously occupied by Māori until they had been finally forced off when the Government had subdivided it.[1578]

Kereama Hori and Henare Keepa presented the evidence about the Kapowai block and its ongoing occupation by Māori. Kereama Hori explained that the land had never been sold, and that the Crown's claim to it only became evident on the death of his father. Keepa, too, believed the land, with its wāhi tapu and cultivations, still belonged to Māori, stating that the hapū did not 'understand how the land was taken'.[1579] He estimated the area to be 3,000 acres, although there had been no survey, and while there had been transactions with his tūpuna prior to 1840, Māori could identify these, such as that with Cook for the land named Pahiko, and that with Greenway for Ōhua. He further enumerated Stephenson's 800 acres, and the sales of Opa to the Crown and Taikapukapu to Cook.[1580]

Riri Maihi Kawiti, Horotene Kawiti, and Te Atimana Wharerau submitted evidence regarding the Opua block. According to Riri Maihi Kawiti, the land had been occupied by Māori until some 30 years before, when the Government had taken possession of it for the construction of a railway extension, wharf, and township. Kawiti identified sites of customary use in the block and named people associated with them: Tuakainga, a seasonal fishing kāinga, occupied by Wiki te Ohu and Toheriri; Maraeaute, a papakāinga; Waipuna, near Ōpua wharf, by the railway; and Ongarumai, a papakāinga, also near the railway line.[1581] He explained how the land from Ōpua to Te Haumi had never been alienated by their tūpuna, and that the boundary of the original transaction with the CMS (disputed and then redefined by his grandfather, Te Ruki Kawiti) stood; therefore, Māori had retained possession of the land outside the CMS grant.[1582]

Horotene Kawiti agreed that the land had always been theirs, though he understood the CMS rather than the Crown had taken it, and the boundary line he quoted was marginally different. He mentioned that Maihi Parāone Kawiti, in the late 1870s, had asked the Native Minister, John Sheehan, to return the land, but this request had fallen on deaf ears. He wanted to know how the Crown came to own the land when it was never gifted to the CMS to begin with.[1583] Te Atimana Wharerau, too, described his knowledge of the boundaries of the land over which his forebear, Maihi Parāone Kawiti, had protested. He asked whether the Crown had told Māori lies to get the land, or had confiscated it.[1584]

Irrespective of minor inconsistencies, all the witnesses gave clear evidence to Houston that their tūpuna had never willingly parted with the whenua. This was at complete odds with the very scope of the commission, set up, as it was, to investigate which of the surplus lands might be returned to them benevolently. Indeed, Houston's decision echoed Seddon's words:

1. That in some of the lands mentioned . . . there are portions of 'surplus lands' undisposed of by the Crown;
2. That there are landless Natives residing in the locality of such 'surplus lands';
3. That, without prejudice to the Crown's legal right to such 'surplus lands', it would be an act of grace on the part of the Crown to confer portions of such lands on—

a. The landless Natives; or
b. On those who but for the alleged sales would have been the owners, according to Maori custom, of such lands; or
c. On both.[1585]

Houston's use of the term 'alleged sales' is noteworthy, and paradoxical. As Stirling and Towers remarked, 'for any surplus to exist such transactions would have to be valid, not merely alleged'.[1586] Houston's slimline commission had delivered what his party leader, Seddon, had wanted: a decision that did not undermine the Crown's claim to legal ownership of the surplus land but nonetheless addressed Māori grievances by recommending that some of it be returned as an 'act of grace'. Houston suggested that legislation be introduced to implement his decision to return lands to the landless and to customary owners, with the Chief Judge of the Native Land Court acting as the final adjudicator – but no legislation was introduced, nor any land returned. In the end, the commissioner singled out just one tract of land from the other claims, in the Tangonge block in Muriwhenua, because it had been given back to Māori by the settler concerned.[1587]

Why the Government did not follow through with Houston's recommendations is not readily apparent. The intransigence of officials, who were indifferent to Māori land issues generally, may have contributed. Problems in awarding grants to landless Māori in the South Island had perhaps coloured Crown thinking. Or maybe the Stout-Ngata commission that followed soon after, and was charged with identifying Māori lands that could be opened for sale and lease, was a distraction. In any event, the idea of setting aside parts of surplus lands for Te Raki Māori in Northland as an act of benevolence missed the main point of grievance and the strong desire of hapū to have the lands lost by reason of the old land claims process returned to them. The issue of unsold and surplus lands remained alive for Te Raki Māori, who continued to agitate for their claims to be addressed by an inquiry.

Their next opportunity was at the Native Land Claims Commission in 1920. Appointed on 8 June of that year to inquire into 11 matters arising from petitions and claims received by the Government, including the question of surplus lands, it was headed by Native Land Court Chief Judge Robert Noble Jones, assisted by the former Surveyor-General John Strauchon and the Ngāti Maniapoto leader John Ormsby. This was the first occasion, since 1840, when a Māori was given any sort of power of determination on this issue. Two of the petitions under consideration, relating to the Kapowai and Puketotara blocks, were of relevance to our inquiry district.

The petition in respect of the Kapowai block had been presented by Kereama Hori and 20 others in 1917.[1588] The commission acknowledged the discord to be longstanding, dating from pre-treaty transactions which, according to the Crown, had resulted in the land becoming surplus, while Māori claimed it should never have been classified as such. Edward Bloomfield represented the claimants, first providing an account of its history. Situated on the south side of the Waikare Inlet in the Bay of Islands, the 2,075-acre area had been subject to the four historic land claims of Cook and Day, Greenway, Whytlaw, and Wood.[1589] In the case of all, early Māori interests relating to the claims were a matter of record, thanks to evidence heard at the first and second Land Claims Commissions.[1590] A few years on, the Native Land Court had awarded land from the block to Māori: Taikapukapu in 1866, Opa in 1867, Manukau in 1868, and Kohekohe in 1870.[1591] It was not until the 1890s that the Crown asserted its claim to the Kapowai surplus lands when it leased out an area from Whytlaw's claim, which it had exchanged for scrip, triggering protest from local Māori. After Wiremu Te Teeti and others had petitioned Parliament in 1894, an inquiry to address their claims was recommended but when one was finally appointed, it was the unsatisfactory Houston commission of 1907 which had provided no redress for the loss of Kapowai. All of this had led to the petition of 1917, under consideration by the 1920 commission. From this complexity, Bloomfield specified the Crown's dealings over the Whytlaw claim to be the root of the grievance, arguing that the Crown had not established its boundaries. Supporting evidence was given by Pou Werekake,

Pene Rameka, and Wiremu Hori, a repeat of that given by Kereama Hori and Henare Keepa before the Houston commission in 1907.[1592]

Although the commission initially favoured the return of most of the land claimed by Māori, it was not to be. The commission reported that, in the three years between the petition being sent and the commission sitting, the Crown and Māori had reached a compromise. Under this deal, each would keep a part of the land – the Māori portion comprising 1,099 acres. It emerged that Māori also sought a 50-acre area known as Ohinereria within the Crown's portion, as this contained an old kāinga, and instead of an exchange, the commission recommended that it be returned as well, as an 'act of grace'. Section 81 of the Reserves and other Land Disposal and Public Bodies Empowering Act 1920 fulfilled the recommendations, designating 850 acres as Crown land, of which no more than 50 acres at Ohinereria would be considered Māori land.[1593]

The commission also considered a 1918 petition from Hone Peeti and others on behalf of Ngāi Te Whiu over the Puketotara block.[1594] This was part of a much larger transaction between Ngāi Tāwake and Kemp in 1835. The 4,644 acres at issue had been surveyed as the Te Mata block by its Māori owners in 1872 and represented approximately a quarter of the area covered by the Puketōtara old land claims (see section 6.7).[1595] As with Kapowai, the commission heard evidence about the history of the land and its treatment by the two Land Claims Commissions. The details were no different to those Hone Peeti had presented to Seddon in 1895, and then reprised by Hone Rameka at the Houston commission in 1907. The Puketotara (Te Mata) block had been excluded from Kemp's 1857 survey of his claim because of a deal struck with Ngāi Te Whiu, but Bell, basing his decisions solely on evidence brought before the original commission, had dismissed all objections, declaring: 'it 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.'[1596]

Bell, however, had taken no steps to formalise the status of the land by survey, and it had continued to be occupied by Ngāi Te Whiu. Some 60 years after the second Land Claims Commission, when Ngāi Te Whiu presented the same evidence to the 1920 Native Land Claims Commission, it was to quite different effect. The latter concluded that the Crown itself had some doubt about its claim to the land, whereas the claims of Māori had remained consistent.[1597] Despite questioning the Crown's title, and despite its positive reception of the Ngāi Te Whiu claim, the result was another compromise deal. Puketōtara would be divided using a road as a boundary – land to the west would return to Māori, while land to the east would remain with the Crown. As with Kapowai, the Reserves and other Land Disposal Act enacted the arrangement. Māori ownership of the land was settled by the Native Land Court, which awarded it to Ngāi Te Whiu in 1921, in the face of a claim by Ngāi Tāwake.[1598]

It is evident that the Native Land Claims Commission of 1920 saw a shift in the Crown's thinking about surplus lands. Seddon had insisted that the Crown was their rightful owner while proposing that some lands be returned by 'act of grace', and the Houston commission had endorsed this approach. But the 1920 commission questioned the Crown's legal ownership, and its recommendations acknowledged that Māori title to some of the surplus lands may not have been extinguished. All the same, the Crown retained substantial areas at Kapowai and Puketōtara. As Stirling and Towers argued:

> In this light, the compromise deals look more like the acts of grace proposed by Seddon and Houston, than the result of the Commission (let alone the Crown) accepting the validity of the Maori claims to their lands.[1599]

The Royal Commision on Confiscated Lands (Sim commission) of 1927 was the next opportunity for Ngāpuhi and other northern Māori to have their claims heard. Primarily appointed to investigate grievances arising from confiscations that occurred during the New Zealand Wars, it was also mandated to inquire into a schedule of petitions, three relating to surplus lands, while a fourth concerned a pre-emption waiver claim from John Maxwell pertaining to the Okahukura block. The Supreme Court judge, Sir William Alexander Sim, was appointed

to chair the inquiry, assisted by Legislative Councillor and former Bay of Islands member Vernon Reed, and the Ngāti Kahungunu leader William Turakiuta Cooper.[1600]

The commissioners were instructed to:

> inquire into the claims and allegations made by the respective petitioners . . . so far as such claims and allegations are not covered by the preceding terms of this Commission and to make such recommendation thereon as appear to accord with the good conscience and equity in each case.[1601]

Petitions were considered from Patu Hohaia and others in respect of the Puketi block (part of Orsmond's OLC 809) in the Whangaroa Forest survey district;[1602] Hemi Riwhi and another unnamed petitioner in respect of the Wheronui block (part Crown purchase; part Kemp's OLC 599–602) in the Kāeo survey district;[1603] and Hone Hare and others of Ngāi Tūpoto in respect of the Motukaraka block in Hokianga.

A limited inquiry, the Sim commission produced predictable results. In the case of the Puketī petition, it considered only evidence from Bell's report and dismissed the claim; it declared Māori title to the Wheronui block as long gone; and as for Motukaraka, in the absence of better information, it adopted the report of the first Land Claims Commission. The thinking harked back to earlier investigations, where the claims to 'surplus' lands by Te Raki and other Northland Māori were denied because of the Crown's fixed stance that Māori interests were extinguished by the original transactions.

(3) *Disputed ownership at Kororipo*

In the early 1930s, Māori at Kerikeri began to express concern about Kororipo as a result of increasing commercial activity there. The pā site was part of a property originally awarded to the missionary James Kemp but had passed through several hands subsequently – Williams, Bull, and Riddell; and then the North Auckland Development Company (NADC), from whom it was purchased by Edward Little of Kingston Orchards Ltd.[1604] What had finally led local Māori to question the Crown about the title in 1932 was Little's installation of a tenant, Nordstrand, on the land in a new building under the auspices of the Unemployment Settlement Scheme.

In December 1932, in a letter written on his behalf by a Mr Clinton, Henare Kingi Te Rangaihi, the son and successor of the late Kingi Te Rangaihi of Ngāti Tautahi, alerted the Native Department of the situation:

> Kingi and his people are anxious to place the position of the Kororipo Pa before you and pray that you will take such steps as will have this historic property preserved for all time as a monument to its founder Hongi Hika whose principal stronghold it was.[1605]

Henare Kingi understood where the boundaries of the 13-acre property lay from his father and had previously protested its inclusion in the sale of land by Riddell to the NADC, to no avail. The letter further noted that the 'Misses Kemp of Kerikeri', descendants of James Kemp, held letters 'which will no doubt prove the right and title of the Ngapuhi to this land'.[1606] While there was no desire that the land be put to 'tribal use', offense had been caused by the 'present mercenary fashion' in which it was being handled. Specific mention was made of the erection of the 'standard cottage'. The letter concluded:

> I feel sure I state the feelings of the Ngapuhi correctly in saying that they are much incensed and are most anxious to have this desecration of their ancient places stopped and the property taken over and cared for by the Government.[1607]

Charlotte Kemp, the granddaughter of Kemp and 'an old and respected resident of Kerikeri', had already taken her views about the new cottage ('a most exceptionally unsightly shack') to the top, writing a letter of complaint to the Governor-General after getting no action from several Government agencies.[1608]

In February 1933, Henare Kingi Te Rangaihi presented the history of Kororipo pā as handed down to him by his father and kaumātua. The long life of Kingi Te Rangaihi – an estimated 98 years – had encompassed much knowledge, starting with memories of occupying the land as a boy. He had said that the pā and church site were excluded

Petition of Patu Hohaia and Others, 14 July 1925

To the Honourable Speaker
of the House of Parliament

Greetings to you all.

1. This is a Petition from us in regard to Puketi Block situated in . . . Whangaroa Forest District containing 1919 acres which was surveyed in 1857. This land belongs to the Maoris exclusively. We do not know how the Government acquired this land,
2. The timber has been sold to the Kauri Timber Company, Auckland.

Wherefore your Petitioners humbly pray that the Native Land Court be empowered to hold an enquiry whereby relief may be obtained for the injustice which has been inflicted upon us.[1]

from the Kerikeri lands sold to the CMS and that along with other chiefs, he had arranged for the land 'to be set aside'.[1609] But when the NADC began planting trees on the site, his father had begun to 'suspect that something had happened to the land'. The NADC had also broken down the boundary fence he had erected.[1610]

W M Cooper, a consolidation officer from Whāngārei, was deputised by the Native Department to investigate. In February 1933, having seen the site and its building, now leased to Nordstrand, and having interviewed Miss Kemp, Mr Clinton, and Henare Kingi Te Rangaihi, he reported on the various accounts of ownership of the land. While citing the pre-treaty purchase of land by the CMS, OLC 34, Cooper related that for Māori, Kororipo pā had been specifically excluded from sales 'owing to the fact that it was Hongi Hika's Pa and at the time subject to Tapu'. Miss Kemp's view, however, was that her grandfather had at some point held it, as why else would he have once negotiated with the Crown to exchange it for another parcel of land? That said, Miss Kemp had told him that 'the older Natives have always stated to her that the area in question was never sold'. Cooper also reported that both Miss Kemp and Mr Clinton, fearing defacement of the pā, advocated its preservation by purchasing the land from Little, its present owner. He was certain of its historical value, 'located as it is in close proximity to the old Kerikeri station, the present home of the Misses Kemp.'[1611]

Just as the accounts reported on by Cooper reflected some common ground between Māori and settler versions of the history of the land, so did a letter from Tamati Arena Nepia to the Native Minister in March 1933. The land had been 'handed down by our ancestors for a landing place when they sold Keri Keri to the Missionaries,' he wrote; and additionally: 'I am very clear about this land and so are the daughters of Hunia Keepa and so too some of the old settlers.'[1612] In reply, the Native Minister explained that the land was vested in Little, but that 'The matter has been referred to the Scenery Preservation Board to see if they can get it back again.'[1613]

It seems that Hone Rameka (Ngāti Rēhia) of Waimate had made a similar approach in April to the registrar, who likewise explained that the land was legally Little's and as such 'impossible for the Court to set it aside as a Reservation.'[1614] Eru Pou, on behalf of Rameka and others, responded, asking to have the Kororipo case presented at the Native Land Court, with a view to reserving the pā site 'for all Ngapuhi people'.[1615] The registrar conveyed this to Judge Acheson, who agreed that there was a grievance to address, yet nothing transpired, possibly because Little was overseas. An inter-departmental letter, in January 1935, noted Little as 'sympathetic towards the proposal, but is of opinion [*sic*] that the Pa has been too much knocked about by cattle to be of any value for reservation'. Department of Lands and Survey inspections supported the view. Reconstruction of the pā would be too expensive. The Scenery Preservation Board agreed and therefore, no further action was proposed.[1616]

A hearing to inquire into the title of Kororipo pā finally began in Kaikohe on 22 August 1935, having been adjourned there from Russell for the convenience of

Kerikeri Basin, with a view of Kororipo Pā.

affected Māori. They believed that Kororipo continued to belong to them, but that understanding was now shaken, especially with the erection of the building. Witnesses recited the history and significance of the site, the 'biggest and most important Pa of the Ngapuhi tribe', according to Hone Rameka; the place from which Hongi Hika's war parties departed, and Hongi Hika and Waikato's departure point for England; a burial place that had 'never been sold to Europeans.'[1617] Rameka disputed Kemp's purchase of the land from Hongi Hika; it was not possible, as the great Ngāpuhi leader had died in 1828 – a notion to be perpetuated by Acheson – though it was Hare Hongi, Hongi Hika's son, who was the likely signatory at the 1838 transaction.[1618] Two other witnesses gave evidence attesting to the pā's significance, supporting that of Rameka.

Next T P Mahony was heard – a representative of either Little or the Crown; his precise status is unclear – who argued that, as the pā was European-owned land, it was not a matter for the Court. Furthermore, a reservation had not been discussed when the land was purchased, nor issues of 'Tapu', and neither had Māori interrupted the survey.[1619]

Consolidation Officer Cooper, however, restated his findings of three years earlier, that 'Miss Kemp, granddaughter of Rev Kemp, told me she understood this land had never been sold by Hongi.'[1620] Despite a prevailing settler narrative where the land was properly purchased from the outset, prominent and respected Kerikeri residents lent credence to the view of Māori.

As for Judge Acheson, he found it 'amazing' that Māori 'ever allowed (if they did so in fact allow??) so historical a Pa to be sold or to remain unclaimed by them for so long'. Agreeing with Rameka's argument, he found that Hongi Hika could not have sold the site to Kemp and noted 'other peculiar circumstances' that also warranted a court inquiry. Of Little, the current owner of the land, he declared him a person who 'might respond to an appeal by the Natives.'[1621]

Accordingly, the registrar wrote a detailed memorandum to the Under-Secretary of the Native Department on 7 October 1935 laying out the evidence brought before the Kaikohe sitting, notably the importance of the site to Ngāpuhi; their continued use of the pā 'at various times' until its occupation by Little; the continuing assertion of Ngāpuhi leaders that the pā had never been sold; and the discrepancy between Hongi Hika's death and the date of the deed. When the claim had come before the Land Claims Commission, the registrar noted, 'There was no mention of any Reservation for the Kororipo Pa.' The memorandum continued:

> They also want to know how it was that OLC 273F became merged in OLC 34 and so practically submerged and merged the identity of the 13 acres [in fact six acres] reserved for the Pa. They want the matter investigated.[1622]

The registrar related Judge Acheson's suggestion to deal with the issue in the next parliamentary session by inserting a clause in the Native Purposes Bill 'authorising the Native Land Court to hold an Inquiry and to require the production of old records for inspection by the Court'. He concluded:

> The Court stresses the fact that the loss of this particular Pa has been a matter of much concern to the Ngapuhi for many years past, and that if anything is to be done on behalf of the Natives it should be done this year before Mr Little effects costly improvements.[1623]

On 26 November 1935, Little, on behalf of Kingston Orchards Ltd, wrote an amenable letter to Judge Acheson outlining a nine-point proposal regarding the future of Kororipo '[in] order to show our willingness to meet Maori opinion and to promote good feeling between ourselves and the Maori community'. While the land would remain in its present ownership, the company would set aside the site of the pā and its approaches 'as a memorial'. In return, Māori would find the funds to reconstruct its palisades and whare and to plant the site, and so create a 'place of scenic beauty' under the aegis of a representative committee. Compensation for Nordstrand would be the Government's responsibility. The deal was conditional:

> The arrangement shall continue so long as the Maori community is sufficiently interested to find funds necessary for the upkeep of the area. When this ceases the Company will resume its own direction of the area and whatever of the Pah may remain.[1624]

After dialogue with the Native Department, Judge Acheson was entrusted to put the proposal to Māori. In June 1936, at a sitting of the Māori Land Court in Kaikohe, the offer was heard. Hone Rameka responded with a restatement of the reasons the site was so significant and he again challenged the 1838 sale. With regard to Little's offer, he said it had been received favourably; that Māori would indeed undertake to clear and rebuild the pā.[1625] In a memo to his registrar, Acheson confirmed approval of the draft as 'a suitable basis for negotiations for a friendly solution of the problem', but he considered a site inspection with Little necessary to work through some details. Little was then in China.[1626]

Though progress was made with the removal of the lessee Nordstrand from the land, it was stymied by the absence of Little, who remained abroad till at least March 1937,[1627] only to return briefly and then depart again by the following month. By June, it seemed his son would act in his stead.[1628]

It was not till early 1938 that the reservation of Kororipo was brought before the Native Land Court. By then, the idea of developing 'a replica of Hongi Hika's famous pa' had become associated with the upcoming centenary of the treaty; it was suggested as a contribution Ngāpuhi could make to the celebrations,[1629] along with building a waka. On 31 January, Hemi Whautere informed the Court that after consideration by 'a large and representative gathering', Little's plan had been accepted. Member of Parliament Tau Henare was then nominated as the Māori representative on the 'Pa Committee'.[1630]

Judge Acheson provided the Native Department with a

copy of the draft clause on 24 August for its incorporation into the Native Purposes Bill, describing it 'as a means of putting the arrangements for the Pa upon a footing worthy of its importance to the Maori people and to New Zealand'. He explained that there had been no objections to the proposal from the Europeans, who asked for no compensation, and that the process of obtaining formal consents for the land and its access was underway. He was keen to see work commence on clearing gorse and preparing the earthworks and palisades, given the imminent centenary.[1631] Acheson noted that he would also send the clause to Tau Henare: 'It is on the lines already agreed to by him and by the assembled leaders of Ngapuhi.'[1632] Reflecting Little's proposal, the draft legislative clause additionally contained administrative details about the operation of a 'Koropiro Pa Fund' through the Tokerau District Maori Land Board and identified that for access to the site, some land would need to be given up by neighbouring property owners.

On 24 August 1938, Judge Acheson sent the clause to Wellington, as well as a request for funding to clear up the site, only to learn from the Native Minister that Parliament was tied up with other business. It was not until 21 May 1939 that the departmental Under-Secretary responded to the letter with the news that the draft clause had been received too late to be included in the Native Purposes Act 1938 but would be heard in the next parliamentary session; and that, regrettably, the relief fund could offer no financial aid for the pā.[1633]

In spite of this pessimistic timetable, headway was clearly made, and the draft clause was enacted. On 6 December 1939, a Native Land Court hearing in Rāwene made an order pursuant to section 8 of the Native Purposes Act 1939 to declare that the six acres of Kororipo be reserved as a place of historical interest and that the land be vested for an estate in fee-simple in the Kororipo Pa Board.[1634] On 22 January the following year, Acheson informed the Kerikeri Settlers Association of the Court's proceedings, including details of marking off the access road and the election of the three-person pā board, namely the judge himself, Minister of Parliament Paraire Paikea, and Mrs Little.[1635] The same day, he alerted the Native Department of developments, noting that the Pa Board 'will also seek always the co-operation and advice of Mr Hone Heke Rankin and the chiefs of Ngapuhi'.[1636]

All good intentions for the redevelopment and maintenance of Kororipo Pā under the management of a representative board were thwarted, however. The first two annual reports (for the years ending 31 March 1940 and 1941) recorded no progress in clearing the gorse, the necessary first step. Māori lacked the funds to do so, while Acheson's plan to get unemployment assistance was met unsympathetically by the Native Minister, who served the judge a lesson in how accountability around 'free Government moneys' worked in the department: 'There is little use clearing gorse if it is to be left to grow again.'[1637] The relationship between Acheson and the Native Department became increasingly acrimonious and personal, with the former claiming that 'the Native Dept throttled the whole project out of hostility to myself as the medium through whom the Ngapuhis and Mrs Little saw fit to move'.[1638]

The situation stagnated until early 1947, when a call was made for the land to be returned to its Pākehā donors. Representatives of all interested parties met to consult on 13 May. Among the minutes were recorded remarks of some condescension from Judge Prichard, Acheson's successor, about the pā: 'Judge pointed out pros & cons, the difficulties – never c[oul]d be used as Maori village – Hongi left many more famous places, This was not scene of triumph etc.'[1639]

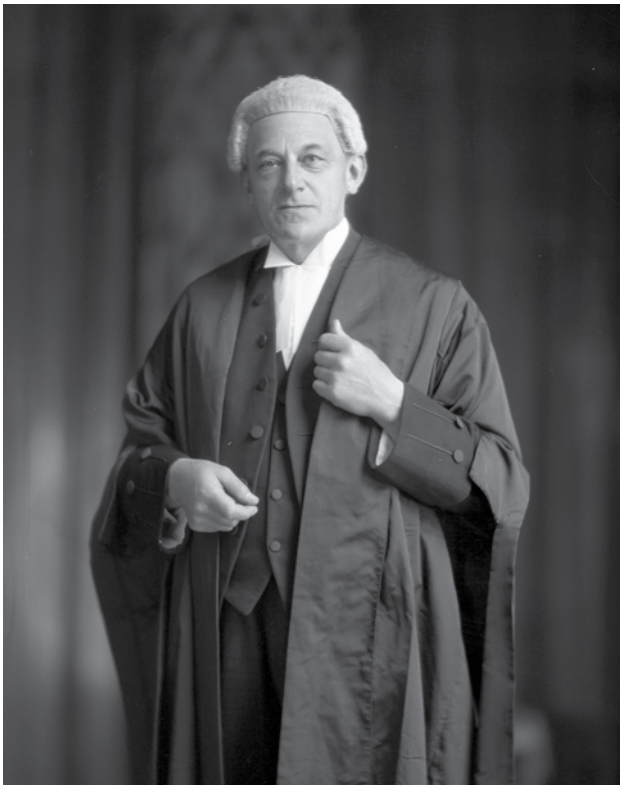
The stalemate dragged on, with lack of Māori financial capacity at its heart, until a proposal was made in 1948 to vest the property in the council as a domain board. Kingston Orchards finally agreed to this course in September 1952, but the plan was never executed. In 1965, Edward Little's daughter sold the land to the Veale family who began developing it, resulting in protest and the formation of a local society which went on to purchase the site, assisted slightly by the Government. The reserved land finally was transferred to the Crown and to the administration by the Bay of Islands Maritime and

Historic Park in 1970.[1640] Issues relating to the subsequent management of the pā and calls led by Ngāti Rēhia[1641] for its return will be discussed further in a subsequent chapter in relation to wāhi tapu and the Department of Conservation.

(4) *The 1946 Royal Commission into Surplus Lands (Myers commission)*

With neither the Houston commission of 1907 nor the Sim commission of 1927 yielding outcomes wanted by Te Raki Māori, they continued to agitate for another inquiry into their claims to the 'surplus' lands. On 6 February 1940 at Waitangi, at the celebration to mark the centenary of the treaty, Āpirana Ngata addressed the gathering about the longstanding sense of 'unremedied grievance' around the issue. Representing the Prime Minister, Michael Savage, at the event, acting Prime Minister Peter Fraser promised a full inquiry.[1642]

Māori would have to wait until the post-war years before this promise was kept. To use its full title, the 'Royal Commission to inquire into and report on claims preferred by members of the Maori race touching certain lands known as surplus lands of the Crown' was appointed in October 1946, but it was commonly known as the Myers commission, after its chairman, Sir Michael Myers, a retired chief justice. An acclaimed career lawyer with a wealth of experience, he could be perceived as impatient and arrogant. Early in his career, his great mentor was his law partner, Francis Bell, son of the influential second land claims commissioner.[1643] Also appointed was Albert Moeller Samuel of Auckland, a retired ex-member of Parliament; and Hanara Tangiawha Reedy, a Ruatoria farmer and Ngāti Porou leader.[1644]



Sir Michael Myers, chairman of the 1946 Royal Commission to inquire into and report on claims preferred by members of the Māori race touching certain lands known as 'surplus lands of the Crown' (commonly referred to as the 'Myers commission'). The commission discounted Māori oral evidence and relied on official sources and documents from previously flawed investigations undertaken by the first and second Land Claims Commissions.

The terms of reference acknowledged the history of Māori grievances regarding 'surplus' lands:

> And whereas in and by petitions to Parliament and otherwise members of the Maori race have from time to time claimed and contended that the surplus lands should have reverted to the members of that race who would but for the purchases, gifts, conveyances, or other agreements aforesaid have been the owners thereof according to their customs and usages or to their successors by Native title.[1645]

Though 'the Government has not admitted such claims and contentions as aforesaid', it wanted Māori to be afforded

> an opportunity of pleading and proving the justice and merit of their claims and contentions to the end that if those

> claims and contentions are well founded in equity and good conscience the General Assembly may be enabled to consider what relief (if any) should be accorded or granted to them.[1646]

The commissioners were instructed to:

- inquire (both 'in a general way' and with respect to specific claims) into how lands came to be claimed by the Crown as surplus;
- report on whether, as a matter of 'equity and good conscience', the lands should have remained in or been returned to Māori ownership;
- make recommendations for compensation 'in money or money's worth' to the descendants of the original owners of any lands that should have remained in Māori ownership; and
- inquire into any other claims or allegations made in the various petitions placed before it (as listed in a schedule to the terms of reference) and recommend 'what relief (if any)' should be awarded to the petitioners.[1647]

As Stirling and Towers noted, for the bulk of surplus lands, the return of the land itself, even if still in Crown ownership, was 'apparently . . . ruled out from the beginning'.[1648] For the specific petitions, however, 'relief' would appear to include the possibility that land would be returned.[1649]

What transpired was a general inquiry into the question of 'surplus' lands rather than an investigation into the petitions regarding specific hapū and whānau lands that Māori argued had never been sold. Once again, the core grievance of Te Raki Māori was sidelined.[1650] Of the six petitions, three were relevant to this inquiry district, listed as numbers 4, 5, and 6 in the schedule:

- petition 143 of 1925, of Riri N Kawiti and others, concerning the Opua block;
- petition 24 of 1938, of Kipa Roera, concerning the Manawaora block; and
- petition 97 of 1938, of George Marriner and others, concerning the Tapuae and Motukaraka blocks.[1651]

Other key roles in the commission were filled by R J Blane, the commission's secretary, and Crown counsel Vincent Meredith, who had also represented the Crown before the Sim commission.[1652] Most Māori were represented by a Crown-appointed lawyer, Hugh Cooney of Tauranga, with C A Herman appearing for some claimants, and Louis Parore, a celebrated Ngāpuhi and Te Roroa land rights campaigner, for others. Some of the Māori petitioners objected when Cooney was appointed, saying they had not been properly consulted, but his appointment nonetheless stood.[1653] While Cooney's capabilities as a lawyer were undeniable and he had experience representing Māori before other inquiries, he lacked knowledge of the people, lands, and history of the district. The complexities around surplus lands required a huge amount of research into numerous iwi and hapū, and several hundred old land claims. Compared with Meredith, who had assistance from the Department of Lands and Survey and the Native Department, Cooney was under-resourced and had to rely largely on his rival counsel to provide him with the required historical evidence.[1654]

The first hearing of the Myers commission convened on 21 November 1946 in Auckland. Present were the commissioners and the two counsel only. It was a preliminary meeting to discuss procedure and operational questions. Immediately apparent was the vast scale of the workload ahead. Familiar with surplus lands matters, Meredith identified two aspects to the inquiry: the 'historical side' and the petitions. A decision was therefore reached to split the commission's business along these lines. Of the former, Meredith advised:

> there is not only the question of surplus land, but there is a question of rights in equity and good conscience, so the historical side has to be properly placed before the Commission because that will have a considerable effect, possibly, on that question.[1655]

Having considered the wider question of whether Māori had any rights whatsoever to surplus lands, the commission would then investigate the individual or tribal claims of the petitioners. Meredith further recommended setting a time limit on the addition of fresh petitions to the

schedule and dismissed the need for oral evidence: 'Well, as far as the Crown is concerned, all the evidence could only be documentary, and I cannot see that there can be any oral evidence.'[1656] Both recommendations would disadvantage Māori.

Myers agreed with Meredith but saw the presence of Māori, if not their right to speak, as important:

> we must be careful to see that the natives, or any Natives who wish to be present, have the opportunity of being present and hearing what goes on, because it must be made plain to them they are receiving justice.[1657]

He also had doubts about the viability of dividing the commission into two parts. Were they indeed to conclude from the submissions put before the historical hearing that there were no rights 'in equity and good conscience', would the second part of the inquiry be necessary? Commissioner Samuel championed the right of the Māori petitioners: 'I think the matter is so important that every Native who is interested at all should have the right of being heard.' Because of difficulties in transporting the mass of documents involved elsewhere, Auckland had already been settled on as the location for the historical part of the inquiry, but Samuel strongly advocated that the commission hold hearings in Northland as well, otherwise:

> at a later stage, some natives may say that they did not have the opportunity of putting their side of the question before the Commission, because the Commission sat in Auckland and they lived in Hokianga or somewhere else.[1658]

No decision was reached about locations at this meeting. The two-part format was agreed to and a three-month adjournment to allow for the collection of evidence.[1659]

This preliminary hearing revealed some fundamental issues. Cooney's inexperience with surplus lands meant he was unable to put forward any of his own proposals as to how matters should proceed. Asked by Myers how much time the historical aspect of the case would take, he frankly replied:

> I cannot talk to you, Sir, confidently about this matter at the present time. I am insufficiently instructed really to give a considered opinion to the Commission, even on that phase of it.[1660]

Myers' query as to whether findings from the historical aspect of the case might invalidate the next stage highlights the gulf between what the Crown and the petitioners wanted, as exemplified by the two-part structure. As Stirling and Towers pointed out, the general inquiry into surplus lands claims would necessarily rely on 'general principles associated with the investigation of pre-Treaty dealings and the creation of surplus land (not to mention FitzRoy's promise to return the same to Māori)'.[1661] The Māori petitioners, however, believed the land was not surplus – it had never been surplus because it had never been sold, and it had therefore been wrongly claimed by the Crown. The commission failed to note the distinction.

During the interval between hearings one and two, Blane received additional requests for claims to be heard, some in the form of petitions. He also fielded queries about the commission's itinerary and timetable. Hepeta Renata twice explained that the Māori claimants needed these details. Other questions from Renata about the commission's approach to the historical claims again illustrated the divide between Māori and Crown officials as to the basis of the inquiry. While it would be touted as definitive, 'the fullest inquiry', in Myers' words,[1662] it presupposed the validity of the old land claims.[1663]

The commission held its second hearing in Auckland from 25 to 28 February 1947. Meredith and McCarthy appeared for the Crown; Cooney and Herman for the petitioners, assisted by Parore, who at the start of proceedings asked that the meeting be adjourned to Kaikohe, 'the centre of the North'.[1664] He explained that most of the 100 or so Māori present had travelled especially, but elders could not, and that relocating the hearing was 'the wish

not only of the people here but also the wish of the thousands of Maori people living in the North':

> the people would like to hear the history of it from the Crown because they have the records and we do not have access to all the records. But the address from the counsel, also the address from your counsel, they would like that delivered at Kaikohe. That would help us a great deal in helping the Commission to solve this very knotty problem.[1665]

After some discussion around the impracticality of the move, especially with the last-minute timing of the application, the commission decided to carry on as planned but then to hold another hearing later in Kaikohe where the historical matters covered in Auckland would be presented as an address. That settled, the general submissions were heard, and counsel presented their respective positions as to whether Māori had a right 'in equity and good conscience' in surplus lands. The answer to that, in the commission's view, depended on who owned the land taken by the Crown. As Myers expressed it:

> if the property that was taken was the property of the purchaser and not the property of the Maori, the Maori could not have any legal or equitable right. If, on the other hand, the property was the property of the Maoris then they [had] a moral right.[1666]

On behalf of the Crown, Meredith provided a detailed historical survey of the surplus lands issue, from which he drew key arguments. Essentially, the theme of his opening submissions was that Māori had been dealt with fairly. As they had received payments for the pre-treaty transactions, the old land claims were valid and absolute; Māori title was extinguished. The findings of the two Land Claims Commissions had clarified that Māori had no further claim to the 'demesne lands of the Crown'.[1667] If Māori could have no equity, then the taking of surplus land was a matter between purchaser and Crown in transactions where the entire area was validated, not just a portion. As such, the surplus lands were a 'creation' or 'accident' of law.[1668] This, in essence, had been the Crown's position since 1840. Reflecting British racial ideology that persisted well into the twentieth century, Meredith also referred to pre-treaty Māori as living in a state of anarchy, with a rapidly declining population; he claimed that Māori neither occupied nor used vast tracts of land, which in any case had no value; and he said they had sought the protection of the British King, and that the civilising force of the Crown was a godsend.[1669]

When it came to the value of the lands concerned, the question as to whether fair consideration had been paid was not one Meredith wished the commission to address. Myers agreed that 'it would be impossible at this stage to say what was a fair consideration for this land prior to 1840 or even shortly afterwards'.[1670] Meredith further stated that 'schedule "B" of the ordinance of 1841', the sliding scale used to work out the equities between old land claimants who had made their 'purchases' in different time periods, had no relation to the price paid to Māori and its fairness.[1671] Schedule B would figure significantly in Cooney's submissions on behalf of Māori. But he was handicapped from the outset by his acceptance that the surplus lands were unquestionably the legal property of the Crown, having failed to challenge Myers' view that if anyone had rights to the surplus lands, it was the settler who had originally purchased them. The infallibility and rectitude of the original commissions was also assumed, especially Bell's work, meaning that no proper investigation into their operation or deficiencies was thinkable. Cooney's reliance on evidence from land claim files assembled by the Government for Meredith likewise weakened his position.[1672]

He based his case on the Land Claims Ordinance 1841 and what 'fell' from it, focusing on schedule B and the situation of Māori at the time.[1673] In his reply to Meredith's submissions, Cooney argued that, although the Crown undoubtedly owned the lands in question, the process by which the lands had been obtained in the first instance was unfair and inequitable, and thus did not meet the

benchmark of 'equity and good conscience'. If the schedule represented a 'yardstick' that set a fair price for the pre-treaty transactions, then any land not so granted by reason of the schedule had been purchased unfairly. If, however, the schedule was not that yardstick, then the work of the first commission was contrary to the Crown's treaty obligation to protect Māori interests, as there had been no enquiry into the adequacy of the consideration and no other measure of the equity of a transaction. Nonetheless, schedule B was the only measure to hand that could be applied retrospectively to pre-treaty purchases and on that basis, all surplus lands created by reason of the schedule should as a matter of equity and good conscience have been returned to Māori.[1674]

Though espousing views of early contact between Māori and the British that were (in the words of Stirling and Towers) 'scarcely more enlightened' than Meredith's and as much a product of the times,[1675] Cooney raised significant points:

> Whatever factors and motives induced the British to take steps to establish British sovereignty in New Zealand, the protection of the rights and property of the Maoris and to secure to them the enjoyment of peace and good order was a dominant consideration.[1676]

He argued that the Crown had failed in its responsibilities enshrined in the treaty. Once it had assumed sovereignty, it was obliged to protect the rights of Māori to their land and therefore should have compensated them for unfair pre-1840 transactions.[1677]

The submissions from both sides completed, the second hearing of the Myers commission drew to a close. A starting date was slated for the third hearing, 10 June 1947, at Kaikohe. More time was needed for research, so it was adjourned, finally taking place from 10 to 22 October. The venue was the Kaikohe Magistrate's Court, supplemented by a marquee and amplifiers in the grounds, so that those who could not fit inside could follow proceedings. Myers affirmed that the adjournment north was to allow parties whose interests were involved to appear. But, as had been the case with using Auckland as a location for hearings, some Te Raki Māori were experiencing problems with Kaikohe. They wrote saying that they wanted the commission to adjourn the hearings of the petitions to localities appropriate to the affected lands, to Mangonui, Russell (in the case of Ōpua and Manawaora), and Kaitaia:

> We who are staying here are not people of this district, therefore we are experiencing many inconveniences.
>
> The people and tribes concerned in these matters are not here.[1678]

Though Cooney presented the letter – 'it is my duty to bring it before the Commission' – he subverted its purpose, invoking Myers' previously stated position that Kaikohe would be the only venue used in Northland. Myers was however ready to look at the request if it would do justice to the cases. Cooney advised him otherwise but acknowledged, 'I will probably render myself a little unpopular with some of the petitioners.' He personally believed that 'At this stage viva voce evidence in regard to the petitions 100 years after the original transactions is practically impossible.'[1679] Meredith had previously expressed the same view. Whereas previous inquiries, like the Houston commission, had sat in various localities and heard traditional oral evidence, the Myers commission denied Māori this opportunity. Its decisions would be based on submissions of counsel and the vast documentary record. In Stirling and Towers' view, Cooney had 'undermined his clients by denying there was any purpose to meeting his clients' instructions'.[1680] As a result, the commission heard no evidence of tikanga and its continuing operation.

The business of the third hearing began. As had been decided, the lawyers first presented précis of the submissions from the second hearing. Consideration of the various petitions followed, and though some reference was made to specific blocks, the focus was again on surplus lands in general. Both sides relied largely on Crown-supplied research and evidence prepared by officers of the Lands and Survey Department that was, according to Stirling and Towers, 'voluminous in nature but narrow in range'.[1681] Indeed, so voluminous was the material that not all could be covered at the Kaikohe hearing, and

additional time was required for counsel to prepare their closing submissions; they were ready some seven months later.

The fourth hearing of the Myers commission was held in Auckland from 11 to 14 May 1948. There is no record of the presence of any Māori. Meredith presented his evidence first, involving a convenient interpretation of schedule B. Although he had already advised the commissioners at the second hearing that the 'yardstick' used by the two Land Claims Commissions had no relation to the price paid at the initial purchase, Meredith now found merit in its use in his own evidential schedules. For each transaction, he presented a calculation that compared the area of land that could have been awarded, based on schedule B, with the actual amount of surveyed land that was eventually granted. By this calculation, he sought to demonstrate that Māori had indeed been treated fairly and had no equitable claim to the surplus lands; in fact, he argued that Northland Māori were up on the deal to the tune of 50,344 acres. His argument relied on the 'in globo' approach, also his recommendation at the second hearing, by which all surplus lands should be dealt with together – and therefore all claimants as one group.[1682]

Cooney rebutted Meredith's arguments, pointing out the failure of logic before presenting his own closing submissions. He said that, with a few exceptions, Māori had occupied and owned the land secured by the Government as surplus after the Bell commission. He further argued that its commissioners had not considered the adequacy of consideration to Māori. Of the first Land Claims Commission, he highlighted the lack of counsel to represent Māori in a situation requiring knowledge of the law. The protection promised by the treaty had not come to pass, nor Hobson's declaration of an inquiry into pre-1840 claims; and then the Bell commission had failed Māori again, Cooney concluded.[1683] Cooney said:

> there was no enquiry from the point of view of the Maori . . .
>
> I say that the Maori was led to believe that some enquiry would be instituted and having been promised that, his representatives signed the Treaty of Waitangi and the Act and the Ordinance seemed to be a fulfilment of it. In actuality there was no enquiry from the point of view of the Maori and the enquiry was from the point of view of the white and that is why we are before this Commission. . . . And what did the average Maori with the mat around his shoulder, attending that Commission, what did he know about [the] pre-emptive right of the Crown, or what did he know about the Crown's right of demesne?'[1684]

The hearings completed, the three commissioners began five months of painstaking deliberations, involving hundreds of claims. A précis of every file was considered, with additional reference to the fuller record when needed, the total volume of work being 'in the estimation of the Chairman . . . the equivalent of the hearing and determination of over three hundred actions in the Supreme Court'.[1685] On 18 October 1948, their report was ready. It comprised three parts. A joint report recapped the work undertaken by the commission and gave its decisions in respect of the claims made in the petitions and the 'general controversy whether the Maoris have a claim in equity and good conscience'.[1686] Though in agreement that compensation should be paid, the commissioners were unable to reach consensus about its calculation; as a consequence, parts two and three consisted of a majority report from Reedy and Samuel and a minority report by Myers.

As an introduction to their findings regarding each petition, the commissioners advised:

> We shall directly explain these petitions more particularly (though it will not be necessary to do so at very great length), but they may all really be disposed of in a few words. Not one of them raises the question of surplus lands as such, nor do the petitioners base their claims on considerations of equity and good conscience to 'surplus land.' What they do is to claim on other and altogether different grounds.[1687]

In our view, it is a moot point why the petitions ever came under the consideration of the Myers commission. As already noted, the terms of reference for the commission stated that by means of petition, 'members of the Maori race have from time to time claimed and contended

that the surplus lands should have reverted to the members of that race'.[1688] None of the three Te Raki petitions met the criteria. None asked for the return of 'surplus' lands; this was an irrelevance when Māori claimed that the land was never sold or alienated in the first place.

Of the petition of Riri Maihi Kawiti and others concerning the Opua block, the report explained: 'This petition claimed that the land had been wrongly taken by the Government, and had never been sold by the elders or any member of the tribe to whom the land belonged.' The claim was a reiteration of the petition brought before Houston by Hoterene Kawiti, Riri Maihi Kawiti, and Te Atimana Wharerau – itself a restatement of the same claim that had been made repeatedly since the 1880s: the land had never been sold to the CMS. The commissioners concluded that the petition had nothing to do with the Crown's claim to surplus lands and, as a result, '[it] may be disposed of shortly'.[1689]

The petition regarding the Manawaora block, by Kipa Roera on behalf of his wife, likewise described a long-held grievance that had been repeatedly expressed. It asked for an inquiry to investigate a claim for compensation for 600 acres taken by the Government 'without a legal title to the land from the Native owners whatsoever'. It advised that Manu, the chief who had made the original agreement with Clendon in 1832, had done so without the required consent of the people, and the Native Land Court had ruled as much.[1690] As with the Ōpua petition, the commissioners rejected the Manawaora claim – this time in just three summary sentences. In short, 'This is also a straight-out case of surplus lands, and the petition can be considered on no other basis.'[1691]

The petition filed by George Marriner and others concerning the Motukaraka and Tapuae blocks in northern Hokianga fared the same way. The petitioners argued that the land in question had never been alienated. Again, it was a longstanding claim aired previously, notably in a petition from Hone Hare and others before the Sim commission. Myers, Reedy, and Samuel saw no need to interrogate the matter further, repeating verbatim the decision that had been reached in 1927, which itself had adopted the report of the first Land Claims Commission – and so were fallacies dating back to McDonnell's initial transaction in 1831 perpetuated. The commissioners advised, however, that the same decision would have been reached

> from a consideration of the question of surplus lands on the principles we have applied in dealing with the whole topic. From no point of view can it be said that there is any surplus in this case to which the Maoris have a claim in equity and good conscience.[1692]

As to the matter of surplus lands in general, the commissioners made special mention of 'one specific point'. They agreed with the request from Māori that any wāhi tapu in areas still in Crown possession be preserved and they noted that there was already 'ample statutory power' in the Native Land Act to do so 'administratively as a matter of course'.[1693] According to Michael Nepia, who researched the Myers and other commissions for the Muriwhenua inquiry, the Māori petitioners had sought protection of wāhi tapu as a 'fall back' position should the commission reject their claim to rights over all surplus lands.[1694]

On that more general question of Māori rights to surplus lands, the commissioners found that a claim existed in some cases but not others:

> We are agreed that in the case of many transactions there was an area of surplus land to which the Maori vendors would have had no right in equity and good conscience but that in a number of other transactions where there was an area of surplus land they would have had a claim in equity and good conscience to the whole or part of such area.[1695]

This distinction between cases where Māori had a claim to the surplus and cases where they did not was predicated on the accuracy of the original estimated acreage in relation to the consideration that was paid, and on whether the final survey exceeded that initial estimation.

The commissioners were unanimous that Māori had rights to 87,582 acres of 'surplus' land. This was far less than the 205,000 acres that Bell had calculated as surplus once he had made grants to settlers. It was also significantly less

than the 104,000 that Meredith had acknowledged as surplus.[1696] The commissioners gave conflicting explanations as to how this acreage had been arrived at. On the one hand, Myers explained it was the difference between the area stated in the original sale deed and the area ultimately surveyed.[1697] Elsewhere in his report, he said the commission arrived at their figure by considering each block case by case, discounting any area that Bell considered 'waste' land (that is, land already purchased by the Crown) that was available for settlement; and by taking into account other local circumstances which Myers regarded as too complicated to explain. He viewed this as the 'true surplus' – the area that Māori had a claim to in equity and good conscience in accordance with English law.[1698] Reedy and Samuel appear to have adopted the latter explanation, saying in their report that the figure had been arrived at by starting with Bell's estimate, discounting any areas of Crown purchase, and further discounting 'other areas [to] which in the opinion of the Commission the Maoris did not have a claim.'[1699] The commission therefore significantly discounted the area for which compensation might be awarded. Having reached this point, they were unable to agree on the basis for awarding compensation or the amount to be awarded; accordingly, they issued separate reports on this matter.

Myers' thinking, as detailed in his minority report, was coloured by a number of beliefs. He doubted that FitzRoy had ever promised to return the surplus, and was of the view that it was contrary to Crown policy in any case and could have no bearing on the issue at hand.[1700] Key to his approach was the assumption that Māori title had been extinguished by the original transactions, and that those transactions and matters such as price had been thoroughly investigated by the first Land Claims Commission. In his view, Bell's sole duty had been to judge the case between purchaser and Crown, and not the equity of the initial transaction. Myers was also of the view that Māori had accepted Bell's findings. Furthermore, in his view, guarantees under article 2 of the treaty applied only to lands in the actual possession of Māori. The Government had been 'actuated by the purest motives' in its dealings with them. All in all, the Crown's claim to the surplus was unimpeachable. It was both legal and made in good conscience.[1701]

This left very limited grounds on which to recognise a Māori claim. The principle that Myers thought would

> seem to accord with good sense and reason, which would have done justice to both the original purchaser and the Maori vendor, and which therefore may be applied to-day as between the Maori and the Crown . . .

was based on the difference between the estimated area covered by a deed and the actual amount that was demonstrated on survey.[1702] If – as often was the case – the survey encompassed a larger area than was originally estimated, did it rightfully belong to the purchaser (and thus the Crown) or to Māori? Myers argued that two different approaches could be taken. The first was that Māori could have no legal right since the commission had found that they had sold all the land within the boundaries stated in the deed; but Myers' preferred reasoning was that the purchaser's payment was based on the estimated acreage, in which case it could not be in accordance with equity and good conscience for the extra land to go to the Crown.[1703]

In their separate report, Reedy and Samuel argued that Māori were entitled to the surplus because of the promises made implicitly at the Waitangi negotiations and explicitly by Governor FitzRoy.[1704] Yet, in essence, they saw the promises as applying only to the 'true surplus'; that is, lands wrongly or unfairly taken according to English ideas of equity. Their reasoning was ambiguous, but nonetheless it seems to have led them to a point where they agreed with Myers over the area to which Māori had claims (the lands created by schedule B) while disagreeing about the basis for compensation.

(5) *Divergent recommendations for compensation*

While the commission had been unable to reach consensus about what sum of compensation to recommend, it appears to have at least briefly considered the return of undisposed surplus lands to the descendants of the original customary owners, although its terms of reference with regard to the general question of surplus spoke

only of monetary compensation (as distinct from the lands subject to specific petition, where 'relief' could be recommended).[1705]

The framework in which the commission operated was one of English law and assumptions derived from it: that sovereignty had been ceded when the treaty was signed; that radical title resided in the Crown; and that Māori – although ignorant of such precepts – had been brought to a more civilised state within a superior and benevolent legal and social order. Māori oral evidence had been ruled out, and no consideration was given to the tikanga and customary law that underpinned Māori grievances. As a result, the commission rejected the grounds of wrongful taking alleged within the petitions, concluding that the

> real and only valid ground upon which relief could be claimed [was] that there was an area of surplus land involved in the case of each petition, and that in each case the real and only question [was] whether the original Maori vendors of the land had a claim in equity and good conscience to the surplus.[1706]

A return of such land to the descendants was deemed 'quite impracticable' however, because there was none sufficient, it being scattered and unsuitable 'for profitable or successful occupation by Maoris'.[1707] Myers considered the needs of Māori to be greater in Northland but much of the surplus lands remaining in Crown hands was located in the vicinity of Auckland.[1708] Samuel and Reedy said in their report that they would have recommended a return of all 87,582 acres of surplus but had found no lands that were suitable.[1709]

It was also deemed impossible to allocate monetary compensation to specific hapū or whānau. The commission therefore advised that compensation should be 'dealt with *in globo* for the benefit of the Maoris or of Maori institutions in the district or districts in which the surplus lands [were] located' (italics in original). To do otherwise and 'individualize the parties or persons to whom the compensation should be paid' they considered 'impracticable' because of the century that had lapsed since the early transactions, changed circumstances, and 'intermarriage that [has] taken place between members of the various tribes and hapus and families'. Cooney had agreed with this and with the commission's decision that the petitioners could not succeed on the specific grounds they had alleged.[1710]

In Myers' minority view, he recommended that compensation be calculated based on the value of surplus lands at the time of their initial purchase, using prices paid in pre-treaty and pre-emption waiver transactions. In Nepia's view, this was 'what a cynic might call a "minimalist" approach'.[1711] Nor did Myers suggest any interest payment should be applied or any adjustment made to late-1940s valuations. Having calculated that Māori had a claim in equity and good conscience to a much-reduced area of the surplus lands only – 45,747 acres (including pre-emption waivers) in our inquiry district; 87,582 acres nationwide (71,155 acres from pre-treaty transactions and 16,427 from pre-emption waivers)[1712] – his calculation for compensation payable was £9,476 6s 9d, increased to a 'complete and final settlement' of £15,000 'by way of solatium' (a payment given as solace or consolation for injured feelings). Payment should go to a Maori Land Board for disbursement in the districts with surplus lands. There was no explanation given as to how Myers had calculated the solatium.[1713]

Myers advised:

> I have endeavoured in this memorandum to dispel the confusion that has given rise to erroneous and exaggerated notions of the Maori grievances, and to explain what I regard as the real equities and broad justice of the case; and on the whole case as I see it I consider that a payment of £15,000 would give the fullest measure of justice to the Maori claims.[1714]

Underlying the Chairman's thinking about compensation – as about surplus lands in general – were familiar problematic assumptions: that it was largely waste land; that big tracts of land had 'reverted' to Māori ownership, creating a 'profit' for them; that pre-treaty transactions were for a fair price and constituted 'sales' of the land; and, most particularly, that the matter of adequacy of consideration had been settled before the issuance of grants.[1715]

Memorandum by Samuel and Reedy, Report of the Surplus Lands Commission, 1948

'If words mean anything, then promises to return the surplus lands were made to the Maoris by many persons in "high places", amongst whom were Governor Hobson, James Busby, Henry Williams, and Governor FitzRoy.

'Without a doubt these promises were made in all sincerity and it could not have been contemplated by those responsible for making them that they could have any other meaning.

'No other construction could be put upon their utterances by the simple and trusting people of those times.

'That the Natives regarded the word of the representatives of the "Great White Queen" and the missionaries as tapu or sacrosanct will not be doubted by anyone having the slightest knowledge of Maori character or custom.

'The Maoris have been waiting for more than a century for the redemption of these pledges.

'In our opinion, their right and title to this heritage is unquestionable.

'We feel sure that the people of New Zealand would not hesitate in agreeing that as a matter of good conscience the surplus lands should have been returned to the Maoris according to promises.'[1]

Commissioners Reedy and Samuel concluded likewise that a claim existed on equitable grounds, but had formed their opinion on different grounds, citing FitzRoy's promise of 1843, and summarised, 'In our opinion, their right and title to this heritage is unquestionable.' As to the compensation payment, they argued that 'the length of time during which the Maoris have been deprived of their land and the increase in value during that period' should be acknowledged. Finally – and crucially, judging by their use of italics – their calculations were guided by the value put upon these lands in Lord Stanley's dispatch of 21 August 1843 and the Land Claims Settlement Act 1856, whereby scrip or cash could be issued to settlers at a rate of £1 per acre:

> *By this action the Government placed a value upon surplus lands, and if it was equitable to compensate the European at this rate, would it not be equally fair to adopt a similar system now? In our opinion, it would be unfair not to do so.* [Emphasis in original.][1716]

Reedy and Samuel then recommended compensation of 14 shillings per acre, amounting to a full and final settlement of £61,307 for all the surplus lands. Their calculation was based on the same national figure of 87,582 acres of surplus lands as in Myers' report. They further recommended that the compensation be payable over 10 instalments and administered by a trust board, with special attention paid to housing to mitigate urban drift.[1717] As Stirling and Towers noted, it is not clear how they arrived at their 14 shillings-per-acre recommendation, having previously determined that Māori deserved £1 per acre, the same rate settler scrip claimants had received.[1718]

The Government decided to implement the larger payment, as recommended by Reedy and Samuel. Section 28 of the Maori Purposes Act 1953 authorised payment of the compensation moneys to the Māori Trustee, who would distribute the £61,307 amongst relevant Māori trust boards. The lion's share, £47,150 4s, plus a further £4,735 10s in respect of the surplus in Aotea (Great Barrier Island) would go to Northland by way of a new regional body, also authorised by the Act, the Taitokerau Trust Board, intended to administer compensation moneys on behalf of Ngāti Whātua, Ngāpuhi, Te Rarawa, Ngāti Kahu, and Te Aupōuri, with Cabinet to decide most of the particulars around the appointment of its members and its administration.[1719]

Preliminary meetings were held with iwi representatives to discuss the makeup of the board. After feedback from kaumātua, the initial plan of a five-member structure – one member per iwi – was rejected in favour of dividing the Taitotokerau Trust Board district into seven tribal districts, considered more appropriate because of the

distribution of the surplus lands.[1720] The division occurred 'along very broad lines' and reflected local body administrative districts rather than customary rohe or takiwā.[1721] The board held its first meeting on 30 November 1955, some seven years after the commission's report was tabled.

Continuing and widespread dissatisfaction with the settlement for the surplus lands was evident. A pan-iwi compensatory payment made to a regional trust board was not what Te Raki Māori had ever wanted, though very much a product of the Myers commission. As Stirling and Towers observed:

> the entire [Myers] commission had operated along non-tribal lines, with the separate and very specific claims of individual hapu being set aside in favour of a general claim to surplus lands on behalf of Maori in general.[1722]

Indeed, by 1962, three of the five tribal groups identified in the Act as beneficiaries (Ngāti Whātua, Ngāti Kahu, and Te Aupōuri) had sought separation from the Taitokerau Trust Board. Ngāti Taimanawaiti did not have representation and therefore did not participate even indirectly in the compensation made for surplus lands, including that for Aotea.[1723]

6.8.3 Conclusions and treaty findings: the Crown response to Māori protest and petition

The Bell commission had given certainty to settler grants and enabled the Crown to define its scrip lands. Bell had discounted earlier promises to Māori regarding the return of surplus lands; instead, his recommendations enabled the Crown to take extensive areas for itself. But, contrary to Bell's confidence that Māori had accepted his repeated explanations as to the 'law' – that their transactions and the boundaries stated in the deeds had been ratified by the first Land Claims Commission and could not be revisited; and that any surplus lands belonged to the Crown and any requests for reserves entailing the 'return' of a portion of these areas were at the discretion of the Governor – Ngāpuhi had continued to protest the loss of a number of blocks for many years following. Those protests took the form of direct discussions with leading politicians of the day, attempts to gain recognition of title through the Native Land Court, petitions to Parliament, and (after many years of delay) evidence before a series of commissions of inquiry. These efforts had limited effect.

In particular, the contention of Te Raki Māori that their lands – at Ōpua, Puketōtara, Kapowai, Motukaraka, and elsewhere – had never been sold was never properly investigated and dealt with. Instead, successive administrations and inquiries focused on issues of landlessness and on the question of whether Māori had any rights to surplus lands. Their core grievance was discounted on the assumption that the question of sale had been properly investigated and decided by the first Land Claims Commission. Such redress as was made available fell well short of what Māori wished, and was eventually contemplated by the Crown largely in order to solve what it came to see as the increasing problem of landlessness. In the case of Kapowai and Puketōtara, a substantial proportion of the land was still retained by the Crown; elsewhere, redress was in the form of monetary compensation only. Such redress was made as an 'act of grace' rather than as an act of justice; its receipt was seen as contingent upon good conduct and acceptance of the law, disregarding the loss of hapū rangatiratanga that was at the heart of their complaint. We note also a degree of obstruction on the part of Government officials when faced with requests for information about old land claims, likely because they might lead to further queries and a 'feeling of insecurity' among the current Pākehā owners.

The Myers commission, presented as a definitive inquiry into the protracted surplus lands issue, for all its apparent exhaustiveness, dipped no more deeply into the source of Māori grievances than did earlier twentieth-century commissions, and it discounted the importance of Māori oral evidence, instead relying on official sources and the documents generated by the earlier flawed investigations undertaken by the first and second Land Claims Commissions. Again, the transactions questioned by Māori were presumed to have been valid sales since they had been ratified as such, and legal title to the surplus lands was presumed to have been vested in the Crown since this was the law. The commissioners were

undoubtedly conscientious, but their considerations were limited by the framing of the inquiry and the assumptions they brought to it. Nonetheless, members Reedy and Samuel acknowledged the weight of outstanding Māori grievances in general 'in equity and good conscience'.

The remedy proposed by the commission for Te Raki and other Northern Māori was flawed. The compensation was inadequate, its means of distribution via the Crown-established Taitokerau Trust Board unsatisfactory. As historian Professor Alan Ward has remarked with reference to the Myers commission and the Crown's actions – or omissions – in the years after the signing of te Tiriti:

> The most serious underpayment to Maori in districts such as the Far North was the failure to provide the settlements and the services that Maori expected to follow swiftly from the transactions and to involve them in real partnership in development, which is obviously what they wanted.[1724]

We agree with this assessment.

Accordingly, we find that the Crown's responses to decades of Māori petition and protest over the question of old land claims and surplus lands was entirely inadequate; that, through the various inquiries that took place between 1907 and 1947, the Crown failed to properly inquire into the essence of Māori grievances; that the Myers commission's formula for calculating compensation was flawed and based on an unreasonable discounting of the area of surplus lands and the nature of Māori interests in those lands; and that, through these failings, the Crown breached te mātāpono o te tino rangatiratanga, and te mātāpono o te whakatika/the principle of redress.

6.9 Kōrero Whakatepe / Conclusions and Findings

How the Crown dealt with settler claims to land ownership arising out of their transactions with Māori prior to 1840 is an important take for the claimants of our inquiry district, as evidenced by the long struggle to achieve recognition of their grievances. Numerous claims alleging breaches of the treaty in this context and with reference to many blocks of land that were subject to old land claims were filed before us. Our view is that these claims are well founded. When the Crown began its investigation into the old land claims, it imposed an alien legal system upon Te Raki Māori that supplanted the customary law that had been in operation when those land arrangements had been made, transforming them into permanent and exclusive sales. Legislation was passed that favoured settler interests, and processes were introduced that were defective and that completely disempowered Te Raki Māori. The Crown then took surplus lands contrary to promises that it would be 'returned' to Māori. Māori capacity to engage with the opportunities presented by colonisation was severely impeded by the loss of land and resources that resulted, and the Crown's efforts at redress have fallen well short of what the treaty requires.

6.9.1 The nature of pre-treaty transactions

Whether Māori envisaged a permanent and exclusive alienation of land and resources when entering into deeds with settlers before 1840 was a key point of disagreement between Crown and claimants. The claimants argued that underlying customary principles of tuku whenua still operated in all cases despite some modification of practice. In their view, transactions are more properly described as social arrangements rather than as commercial in nature. The Crown suggested that Māori had gained an appreciation of sale by 1840; that there were clear instances when a sale was intended; and that whether any particular transaction had been customary and intended only to convey a right of occupation, rather than a more permanent alienation, has to be established case by case. Further, the Crown questioned whether the claimants had established that tuku was traditionally practised at all.

It is indisputable that Māori law was the only cognisable law in New Zealand when these engagements were made. We do not accept the Crown's implication that evidence is lacking that tuku whenua was practised under customary law. Such a conclusion disregards the oral testimony of the claimants and the overwhelming weight of scholarship and treaty jurisprudence; nor did the Crown present any evidence to the contrary. The more persuasive argument

is that these early land arrangements took place on what scholars have termed the 'middle ground', in which people from different cultures adjusted their behaviour and expectations so as to engage with each other and obtain what they wanted. For settlers, this was women, land, resources, and protection; for Māori, goods, money, literacy, and knowledge of new technologies; and for both sides, the opportunity for further trade. There was academic support for this proposition in our inquiry, and it is undeniable that adaptation was occurring. Māori adapted by signing deeds, accepting money, and in many cases, allowing landholdings to transfer from one European to another, often without apparent opposition. Some of the transactions for very small areas at Kororāreka appeared to be commercial in character, although, even there, Māori often knew the 'purchaser' and did not intend to sever all connection with the land. Settlers adapted too, and in very significant ways. They married into their host communities and had little or no choice but to make additional payments when demanded, accept Māori repossession of land that they had failed to occupy, and most importantly, acquiesced in continuing Māori occupation and use of lands they believed they had purchased.

Although both sides adapted, Māori and settlers continued to view these arrangements through their own cultural lens: as Dr Phillipson explained, Māori saw them as conditional, personal, and limited grants of a right to use hapū lands, in return for the benefits associated with settler presence; settlers saw them as purchases that granted them exclusive rights. Crucially, throughout the pre-treaty period and for many years beyond, Māori were able to enforce their view; it was not until after te Tiriti (indeed, not until the late 1850s, in Phillipson's view) that the middle ground gave way, and the settler view prevailed.

The Crown, in its submissions, discounted the significance of ongoing Māori occupation, arguing that it occurred only by permission of the European owner. We do not see that position as tenable. In our view, when settlers asserted that Māori remained in occupation only because they allowed it, this was a sort of fiction: it enabled settlers to occupy the land, use it, and to trade with Māori while sustaining the self-deception that they had purchased the land outright. The reality was that settlers were permitted to occupy properties on the sufferance of Māori, conditional on the acceptance of the authority of the rangatira and the community he or she represented, not the other way around. The ground remained firmly Māori.

We have accepted that the missionary drafters of land deeds attempted to convey the concept of permanent alienation but we cannot accept that they succeeded. Where the deeds were translated, the author intended one thing based on their worldview, but Māori can only have understood the document through theirs. Also, many deeds were still in English and in most cases, we do not know what was said between the parties. Where we do know what was discussed, as in the instance of the missionaries and settlers who were being married into hapū, the clear evidence is that Māori were assured that they and their children would remain on the land.[1725]

The Crown has failed to demonstrate that the fundamental principles and value system underpinning Māori law had changed to any great degree at the time of actual engagement with Pākehā over land. This was so despite the use of deeds, money, and other innovations in protocols such as the substitution of one European for another, which was increasingly (but not invariably) tolerated for the long-term benefit of settlement and trade.

The Crown submitted that we could not make general findings about the nature of pre-treaty land arrangements but rather should consider them case by case. We do not regard this as a reasonable request either of us or of the claimants. Due in no small part to the very limited and pro forma nature of the Crown's old land claims inquiries, it is no longer possible to discern the exact details of the relationship that was established between Māori and settlers for each of the many hundreds of claims for which grants were awarded. Nor is it necessary to do so. As we have set out, the operative law was customary law when these arrangements were made. None of the expert witnesses in this inquiry saw the transactions as sales, and nor (despite some hesitation in the Hauraki inquiry) has the Tribunal elsewhere. Māori who entered pre-treaty land arrangements were not consenting to sales but were

making allocations of land to settlers as part of a broader and mutually beneficial relationship. Yet Crown policies proceeded on the basis that the transactions were sales, in the knowledge that there was no such thing in custom and that there remained outstanding issues about what Māori had intended when entering into these arrangements.

Given that under tikanga, as understood and enforced by Māori, the pre-1840 transactions were not absolute alienations but rather customary arrangements, conditional, ongoing, and with an unextinguished underlying Māori title, it is our view that the Crown's grant of absolute freehold title and its own subsequent taking of the 'surplus' was effectively a raupatu of both thousands of acres of land and authority over it, in breach of the te mātāpono o te tino rangatiratanga, te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect and te mātāpono o te matapopore moroki/the principle of active protection.

Prior to the Crown's assertion of its sovereignty, Māori law and custom had been accorded considerable 'recognition and respect'. That was evident in the observations of several British residents and visitors and in their testimony before the 1838 House of Lords select committee – but this was largely overridden as the imperial project of bringing order to land ownership in New Zealand on British terms got under way. At this point, respect for tikanga was largely written out of the script, and Māori were never able to recover from the position in which they were placed before the early land commissions, which were conducted on the basis of settler understandings and favouring their interests.

6.9.2 The New Zealand Land Claims Ordinance 1841

The legislation establishing procedures and rules by which pre-treaty land arrangements were investigated was seriously flawed and in breach of the treaty and its principles. The Land Claims Ordinance 1841 under which the first Land Claims Commission operated was based on Australian precedents and concerned the purchase of lands by settlers from each other, under a law system common to, and accepted by, both parties – rather than indigenous Australians, who were not seen as having any land rights and with whom no treaty had been recognised. It was utterly inappropriate to New Zealand circumstances and to establishing whether valid transactions had been undertaken with Māori, who were governed by their own laws and who had been given to understand, at the time of entering negotiations for te Tiriti, that their tino rangatiratanga would be respected, the land arrangements they had made with Pākehā investigated, and any lands unfairly acquired returned to them.

The ordinance spoke of inquiry into the 'mode' and 'circumstances' of the case in question and of commissioners being guided by 'real justice and good conscience' rather than legal 'solemnities', but it failed to direct the commissioners to consider land arrangements in light of the customs and standards of Māori society. Although Governor Gipps later issued instructions to this effect, the context was quite specific: if the settler could not produce a deed, the commissioners could accept verbal assurances from Māori that they had consented to the transaction according to their own custom; there was no requirement to consider to what exactly they had assented. It is apparent, too, that the requirement to be guided by real justice derived from and reflected the Australian situation and the frequently unsatisfactory nature of the documentation that could be produced by settlers there, not the equity of the arrangements entered into with Māori. Legislators failed to acknowledge and incorporate customary law into the ordinance in a meaningful way.

Nor did the ordinance require the commissioners to consider the adequacy of the price; again, the legislation (and the scale it established of acreages to be awarded for money spent at various dates) was intended to protect the interests of the Crown and ensure equity between competing Pākehā claimants rather than between the Pākehā 'purchaser' and Māori 'vendor'. Although the ordinance required that claims had to be conducted on 'equitable terms', and later instructions directed that compensation could be paid if the consideration was insufficient, no guidance was given as to what this meant. Inquiry into the fairness of price was attempted only early on for Busby's claims. In general, Crown officials resisted the notion that, as Māori acquired a greater knowledge of the monetary

value Europeans placed upon the land, they could repudiate their bargains for insufficient price.

If, as the Crown has argued, at least some of these transactions were straightforward sales, the obligation to ensure that Māori were fairly paid was all the greater. For Māori however, the ongoing benefit was the important consideration, and it was dependent in large part on adequate land being reserved into the future. But there was no requirement stated in the ordinance for the commission to consider whether Māori 'vendors' had sufficient other land, or for reserves to be set aside for their future welfare.

We find, therefore, that the Land Claims Ordinance 1841 was inconsistent with the guarantees in article 2 of te Tiriti in breach of te mātāpono o te tino rangatiratanga and te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect.

6.9.3 Conduct of Godfrey and Richmond's inquiry under the Land Claims Ordinance 1841

The deficiencies in the legislation were reflected in the commission's composition, its procedures, its failure to ascertain how these land arrangements and deeds had been understood at the time, and its failure to adequately protect sites of occupation.

The first Land Claims Commission assumed that the arrangements it was investigating were sales and failed to consider Māori usages, even though that information was available to the Crown and its officials. While we accept that clause 3 of the 1841 ordinance provided for claims by virtue of different sorts of conveyances, the ordinance as a whole and the instructions to Godfrey and Richmond made clear that they were investigating conveyances under English law. The notices issued, forms used, and questions asked during hearings all assumed that the transactions under consideration were sales. Even though officials were aware that under their own usages, Māori could not alienate land permanently, there was no attempt to uncover the true nature of these arrangements. Nor were the commissioners, though conscientious, at all equipped to undertake such an inquiry. They had no legal expertise, they had only recently arrived in New Zealand, and they had no cultural knowledge.

That Māori giving evidence before the commission generally were recorded as acknowledging their 'sale' cannot be read as simple proof that this was their intention. The evidence was recorded in English, so we cannot know the Māori terms used. We do know that in many cases the rangatira had long-established relationships with the settler claimants, whom they wished to support; indeed, in a significant number of cases they had married them into the community. Such acceptance reflected their desire to honour and affirm the original transaction as they saw it, and to ensure that 'their' Pākehā remained in the district and would continue to meet their responsibilities to the community. They did not regard their own interests in the land as having been extinguished. Māori could acknowledge that an arrangement existed with the settler yet continue to occupy the lands supposedly sold. How then to interpret those occasions when sales were specifically denied? Do they suggest, as the Crown argued, understanding and acceptance of the settler view on all other occasions? In our opinion, the evidence does not support that conclusion. Rather, testimony before the commission denying a sale reflected specific dissatisfaction with the price paid or the extent of the land claimed, and again was not directed to the question of whether their earlier agreements were tuku whenua or sales.

Even leaving aside the failure to investigate this crucial issue, the commission's inquiry was inadequate. There were frequent instances of the commission recommending awards even though it knew that not all customary owners had been included, that Māori were still cultivating and living upon portions of the land, and that boundaries had not been fully agreed upon and defined. At best, disputed areas were excised from the recommended award, and generally reserves were recorded in the award only if they were specifically mentioned in the deed. Where Māori continued to occupy these sites but admitted a transaction, or where agreements were oral, the commission awarded the land to settlers as if an absolute and unconditional alienation had taken place without any reserves being set

aside; nor were trusts and joint-use arrangements given legal recognition.

These defects and uncertainties were acknowledged by the commissioners themselves. Their solutions were to make a general recommendation that all kāinga, cultivations, and wāhi tapu be reserved and to fashion awards that left room for future recognition of remaining unextinguished rights. The officials followed through on neither strategy. FitzRoy's 'perfectible' expanded grants entrenched purchases that were not yet complete, which encouraged grantees to buy up wāhi tapu and reserves and undermined the Crown's capacity to recognise any unextinguished rights out of the lands in excess of what went to the claimant (which ended up in the pocket of the Crown instead). No general reservation was made of occupied sites, and these, too, were lost to Māori and also went to settlers or the Government.

The presence of Protectors clearly did not solve these problems. We have not formed the view that the Protectors – and the missionary interpreters – were deliberately defrauding or deceiving Māori, although there was a clear conflict when their own family-aligned interests were involved or when interpreters were working for both claimants and the commission. But the crux of the problem was that they brought their own cultural assumptions to their duties of protection and ignored the mutual understanding they knew to have existed when settlers and Māori entered into land deeds. Justice for Māori came second to securing titles for settlers and the progress of the colony. In any case, the presence of a handful of missionaries could not compensate for the total absence of any Māori input into the decisions about what Māori had actually intended and how this might be carried into future arrangements.

We find that the Crown was in breach of te mātāpono o te matapopore moroki/the principle of active protection and te mātāpono o mana taurite/the principle of equity.

Māori of our inquiry district were prejudicially affected by the lack of adequate inquiry and by a skewed validation process. Had the Crown ensured that the process it instituted was consistent with the treaty and respected tribal rangatiratanga and laws, outcomes would have been more equitable, and Māori rights in these lands would not have been extinguished in such a sweeping manner and replaced by awards of exclusive and absolute title to Pākehā. There had not been a sufficient meeting of minds regarding the meaning of the arrangements made within the supposed middle ground to permit this. As a result, many thousands of acres of land were ratified as 'sold' and lost to Māori (by Crown grant, scrip exchange, or appropriation of the 'surplus') within the Te Raki region.

6.9.4 The actions and omissions of Governors

The damage to rangatiratanga already caused by the commissioners' practice of validating transactions they knew to be incomplete was exacerbated by FitzRoy's decision to increase awards and issue unsurveyed grants, a policy he instituted even though he knew that Māori had not intended permanent alienations when they had entered into land deeds with settlers; this he justified on the grounds that settlers would be able to 'perfect' their titles once Māori came to realise the superiority of English laws and practices – or they had died out. Further, he introduced the policy against the clear advice of the land commissioners that it would undermine their intention to cater for unextinguished Māori interests out of the area excluded from the more restricted awards they had recommended. The procedure followed by FitzRoy to increase awards beyond what the first Land Claims Commission had recommended was at first endorsed and then overturned by the courts. Most recently, it has been condemned in the 2017 Supreme Court *Wakatu* decision as 'expansive' and beyond the 'scope' of the Governor's 'power to make grants under the prerogative.'[1726]

The policy also increased the vulnerability of the few reserves that had been awarded since it was open to settlers to perfect their title 'by degrees'. It was clear that the Crown would not intervene to protect remaining Māori interests, and that settlers could remove any such impediments to the full enjoyment of their freehold title. FitzRoy ignored the Crown's 1839 instructions concerning the importance of reserving areas of occupation, and the

warnings of Godfrey and Richmond that Māori had not alienated their kāinga, wāhi tapu, and other valued sites, and would be dispossessed by degrees unless the Crown acted to protect them.

Grey was critical of his predecessor's policy, repeatedly advising the Colonial Office of Commissioner Godfrey's denunciation of it. He recognised that Māori did not accept that they had lost all rights in the lands they had allocated to settlers and, in his opinion, had intended only to convey a 'life interest'. Acknowledging the existence of unextinguished Māori interests in lands judged to have been validly sold, he condemned FitzRoy's premature issue of grants as an act of injustice to them and predicted the outbreak of conflict once Māori realised they had been displaced. In particular, he condemned the transfer of any urupā into European hands as 'repugnant' to Crown policy.[1727] Grey informed Earl Grey that he considered it 'a duty upon behalf of the Crown' towards Māori 'to do its utmost to support their rights' in the matter.[1728]

Yet his governorship resulted in few fundamental changes. The protectorate was abolished, but for all its shortcomings, nothing replaced it; and Grey's Quieting Titles Ordinance achieved little. Largely focused on the difficulties being experienced by settlers, not Māori, it was intended to affirm 'the validity of the Crown grants which had been issued to Europeans' while 'inflict[ing] the least possible amount of injustice on the natives'.[1729] This was an imbalance that did not bode well for Māori. While they could challenge the commission's decisions and FitzRoy's subsequent extension of grants, they would have to do so through the Supreme Court. As Grey admitted, this would not be easy, and it never happened. Māori gained no additional protection for lands that they continued to occupy. Nor did Grey have any intention of preserving Māori custom in this matter; they had to understand that 'land once sold "was gone forever"'.[1730]

Accordingly, we find that the Crown, through Governor FitzRoy's actions in expanding grants beyond the commissioners' initial recommendations, issuing grants where the commissioners had recommended none, and issuing unsurveyed grants breached te mātāpono o te tino rangatiratanga and te mātāpono o mana taurite me te mātāpono o te matapopore moroki/the principles of equity and of active protection.

The Crown Quieting Titles Ordinance 1849 aimed to remove uncertainty about settlers' title in Crown-granted lands but provided inadequate protections for enduring Māori customary interests and was in breach of te mātāpono o mana taurite me te mātāpono o te matapopore moroki/the principles of equity and of active protection.

The failure to ensure occupied sites and wāhi tapu were reserved in grants to settlers was in breach of te mātāpono o te matapopore moroki/the principle of active protection.

Especially prejudiced by the Crown's failings were hapū who held rights in lands granted to missionaries (Kemp, Williams, Shepherd, Baker, and others) or established settlers (such as Mair, Powditch, and Clendon), whom FitzRoy deemed especially 'deserving' on criteria that were far from consistent or clear. In most instances, Māori were still occupying portions of those lands, accessing their resources, taking mahinga kai, cultivating, and erecting whare, unaware yet that their rights no longer existed under the new laws.

6.9.5 Pre-emption waivers: policy and practice

The good intentions of FitzRoy in waiving pre-emption in favour of individuals (as discussed in chapter 4) were undermined by serious flaws in the design and application of policy.

The regulations introduced under FitzRoy's proclamations, though deficient in several respects, reflected the Governor's awareness and acceptance of the obligation to protect Māori even though the Crown's pre-emptive right was waived in favour of individual settlers. However, the protections proved inadequate – evaded by purchasers or abandoned as settler interests increasingly came to dominate in Crown policy. Notably, several waiver certificates might be issued for what was essentially a single purchase, enabling evasion of the restriction to a few hundred acres described in FitzRoy's notice of 6 December 1844.

Purchases exceeding that limit were later approved by both FitzRoy and Grey. Protection of pā and other sites in Māori occupation, guarantees that waivers would not be issued for lands that Māori required for their 'present use', and promises of tenths contained in FitzRoy's proclamations were abandoned or compromised by subsequent legislation passed to confirm settler title. The prohibition on the issue of waiver certificates for purchases already negotiated was also regularly ignored by officials, meaning that Māori did not receive the intended benefit of increased prices through competition.

The Governors and the Secretaries of State for War and the Colonies acknowledged the danger posed to Māori by the waiving of pre-emption, and both recognised the Crown's responsibility to ensure that they were not harmed by excessive and inappropriate land purchase. Earl Grey had issued clear instructions regarding the settlement of pre-emption waiver purchases that Māori vendors must be 'according to native laws and customs, the real and sole owners of the land'.[1731] But this was not established by the validation procedures that were introduced. For all Governor Grey's rhetoric about the failure of the pre-emption waiver proclamations – and of FitzRoy and the protectorate, in general – to safeguard Māori interests, again, nothing effective was done to remedy the injustice he had repeatedly identified. By his own admission, the measures he introduced were concerned with the interests of the settlers, not Māori

His 1846 ordinance undermined the tenths provisions – a crucial ptotective element in the waiver scheme – and the investigations under his three options perpetuated failures to identify all rightful owners properly, establish that a fair price was paid, and ensure that Māori retained their valued sites and sufficient lands for their use. In general, the issue of a waiver certificate in the first place was taken as proof that a transaction had been valid. Although settler claims were often disallowed, this was for failure to submit the necessary documentation or to comply with survey requirements, not because rightful owners had been omitted or those involved retained insufficient lands. As a result, the Crown was able to take those disallowed claims for its own as 'surplus'. While clause 10 of the 1846 ordinance acknowledged that the Crown's title to that land was 'burdened' by 'the rights which may hereafter be substantiated thereto by any person of the Native race', the onus was on Māori to establish whether any customary rights remained; in the meantime, often the Crown had onsold tracts or issued mining rights to settlers.

We find therefore that:

- the administration of the waiver policy was flawed from the outset, and Crown scrutiny of transactions was deficient to the point of negligence with the result that settlers were able to evade the intended protections in breach of te mātāpono o te matapopore moroki/the principle of active protection.
- Governor Grey's Land Claims Ordinance 1846 and options of August 1847 for the settlement of waiver claims favoured settler and Crown interests over those of Māori in breach of te mātāpono o mana taurite/the principle of equity and te mātāpono o te matapopore moroki/the principle of active protection.

6.9.6 The Land Claims Settlement Act 1856 and Extension Act 1858

The Land Claims Settlement Act 1856 and Extension Act 1858 entrenched the injustice that Governor Grey had acknowledged but failed to redress. This legislation also embedded and further deepened the inequitable treatment of Pākehā and Māori. The Land Claims Settlement Act 1856 was intended to facilitate the final settlement of old land claims that had not been already surveyed and confirmed by a valid Crown grant. This would give certainty of title to claimant settlers and clarify what land the Crown claimed as 'surplus' following the reassertion of its claim to this land, despite earlier promises to Ngāpuhi and other Māori that the land would 'return' to them. The Act would also provide Māori with greater certainty and, potentially, protection of what land was reserved. However, this was not a priority, and redressing the inequitable outcomes of the first Land Claims Commission and FitzRoy's intervention was not a consideration at all.

Section 15(2) of the Act specifically prohibited the commission from reopening investigations into claims that had resulted in a Crown grant being made or the payment of scrip. Earlier awards could be adjusted but not overturned. The commission could not reopen claims that had lapsed or been disallowed, except in pre-emption waiver cases. In the view of the 1856 select committee appointed to consider the nature and best means of disposing of outstanding land claims, Grey's 1846 ordinance to deal with waiver purchases had been unfair to settler claimants and the regulations too strictly applied. Special provisions were passed to deal with those cases (sections 29 to 31 of the Act); notably, however, restrictions were placed on the acreage that could be granted, resulting in a sizeable 'surplus' for the Crown which, as noted earlier, had already disposed of much of this land before the Act was passed.

In addition, the Act was designed to encourage settler claimants to survey the fullest extent of boundaries as described in the original deeds, even when they had been awarded a much lesser area, and the boundaries had never been examined by the first Land Claims Commission. The clear intention was to maximise the 'surplus' lands going to the Crown, and this outcome was further strengthened by the Land Claims Settlement Extension Act 1858, which increased the already generous incentives being offered to settlers. Other assistance was offered. Under section 8, claimants could buy back from the Crown land that had been reserved to Māori in the original transaction if Māori were willing to surrender it to the Governor, further undermining protections. Section 15 also permitted claimants in 'exceptional cases' to reopen cases to which the provisions of the 1856 legislation could not 'in justice be strictly applied', or had been disallowed by the first commission for want of evidence that they could now supply, or if they had been in actual possession of the land for many years.

On the other hand, despite the many defects of the first commission's findings that had been identified by this time, neither Act required a review of these or of cases where scrip had been awarded without prior investigation. The provision of reserves was not required and remained utterly inadequate. Conditions, notably joint-use arrangements on which transactions had been predicated, were ignored. Māori were not heard on what was required for grants to be tika, what they had consented to, or the area of 'surplus' that the Crown intended to take.

We thus find the Land Claims Settlement Act 1856 and Extension Act 1858 to be in breach of te mātāpono o te tino rangatiratanga, te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect, as well as te mātāpono o te mana taurite me te mātāpono o te matapopore moroki/the principles of equity and of active protection.

6.9.7 Conduct of the Bell commission

Although inhibited by the defects in legislation identified earlier, Commissioner Bell cannot be seen as an impartial and blameless arbiter. There is no doubt that Bell himself assumed that legitimate sales had taken place and was personally eager to maximise the land held by Europeans and the Crown irrespective of existing use by Māori or their likely future needs. He quickly acted to thwart any effort by Māori to revisit the findings of the first commission and devised rules and amendments to the original legislation that favoured the interests of settlers and Government over those of Māori. We note, in particular, Bell's dismissal of the claims of a new generation of hapū leadership to whom the task of defending land rights fell, since the long delay in the Crown establishing exactly what land it deemed 'surplus' also meant that the original Māori participants were often no longer alive to testify to their understandings of the matter.

The result was that shared occupancy arrangements were brought to an end in spite of the objections of Māori, while the reserves that were recognised by Bell were minimal and made without regard to comparable equities.

We find that Māori hapū were prejudiced by these actions and omissions of the Crown which deprived them of lands in which they had legitimate rights. This was in breach of te mātāpono o te tino rangatiratanga, te mātāpono o te mana taurite/the principle of equity; te mātāpono o te matapopore moroki/the principle of active

protection; and te mātāpono o te whakatika/the principle of redress.

6.9.8 Scrip lands

The Crown has acknowledged that its taking of Te Raki land that had been exchanged for scrip without any investigation of the validity of the claims concerned was in breach of the treaty. This occurred in a significant number of instances, more especially after the passage of the Land Claims Settlement Extension Act 1858. Anxious to obtain the maximum amount of land for the Government in return for its early expenditure, Commissioner Bell and his delegate, John White, pressured Māori owners into accepting their boundaries for the scrip lands, notably by threatening to prevent access to timber resources in order to force them into acquiescence.

Scrip surveys followed the pattern set by Bell generally, with officials taking deliberate and, on occasion, questionable steps to gain as much land for the Crown as possible. Often it was found that the full acreage exchanged for scrip could not be realised because claims had been much exaggerated and from the Māori perspective, seemingly abandoned, but in a number of instances, such as Rāwene and Papakawau, White was able to secure land well in excess of the original award. In the case of Motukaraka and Waitapu, the Crown claimed land (by falsification of boundaries) to which it clearly was not entitled. In line with the effort to maximise the Crown's return, reserves were only reluctantly recommended even when wāhi tapu and cultivations were involved, and the provision for Māori was derisory. Although Māori were promised reserves, in most cases the Crown ultimately made smaller awards than recommended or did not award them at all.

We consider the Crown, by these actions, to be:

- in breach of article 2 guarantees of tino rangatiratanga over lands and resources, and in breach of te mātāpono o te tino rangatiratanga.
- in breach of te mātāpono o te matapopore moroki me te mātāpono o te mana taurite/the principles of active protection and equity, resulting in prejudice to Māori throughout the inquiry region but, in particular, to hapū based in Hokianga, who lost 14,029 acres by this means.

6.9.9 'Surplus' lands policy and practice

The Crown has conceded that its 'policy of taking surplus land from pre-Treaty purchases breached the Treaty of Waitangi and its principles' when it 'failed to require proper surveys and to require an assessment of the adequacy of lands that Māori held'; and that this was compounded by flaws in the way the policy was implemented, including by 'failing to investigate transactions for which "scrip" was given, and in some cases taking decades to settle title or assert its own claim to these lands'. This resulted in 'some hapū losing vital kainga and cultivation areas.'[1732]

This is an important general concession but in our view, it does not go far enough. First, the Crown does not acknowledge that the doctrine of radical title on which its claim to the 'surplus' was based was itself in breach of the treaty, whereas from our standpoint and for the reasons set out in chapter 4, this was the root problem. The Crown was asserting a power by reason of its claim to sovereignty, which it did not in fact possess, and a legal principle with which Māori were unfamiliar and which they had not had the opportunity to understand or consent to, despite its enormous ramifications for their rights over their lands and resources.

Additionally, the policy was applied contrary to what we think Māori could have inferred from their discussions with Governor Hobson prior to the signing of te Tiriti; certainly, the Crown's intention to take such lands should have been clearly explained to them, and it was not. If there was any doubt as to what the Crown gave Māori to understand, this was removed by Hobson's successor. FitzRoy clearly signalled to his colonial masters, early on, that he intended that the 'surplus' lands would revert to Māori both as an act of justice and as a practical necessity for maintaining the peace of the colony. He made a commitment to that effect on his arrival in New Zealand and at his subsequent discussions at Waimate in 1844. We question whether the Colonial Office was ignorant of those commitments, as the Crown has argued, but in

any event, in our view Māori were entitled to rely on the assurances of Crown representatives who spoke on behalf of the monarch of the day. We consider the reneging on that pledge to be a failure of the Crown's duty to act in good faith and a serious aggravation of the treaty breach that had been already committed.

The Crown appropriated 'surplus lands' in numerous blocks (as discussed at section 6.7) amounting to some 72,857 acres (including pre-emption waivers) to the prejudice of Māori in our inquiry region, and most particularly in the Bay of Islands and Whangaroa, where the Crown acquired 35,541 acres and 11,696 acres respectively by this means. In the Mahurangi and gulf islands, the Crown obtained 20,877 acres as 'surplus' from pre-emption waivers, many of which had been approved although in excess of the limited areas FitzRoy had intended. We consider the Crown's 'surplus' lands policy and practice, which resulted in the effective confiscation of extensive lands without the consent of Māori at the time of transactions or when they were ratified by Crown-created processes, to be in breach of the treaty, giving rise to sustained protest.

In sum, the Crown was:

- in breach of te mātāpono o te tino rangatiratanga, as well as te mātāpono o te houruatanga me te mātāpono o whakaaronui tētahi ki tētahi/the principles of partnership, mutual recognition and respect; and te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development;
- in breach of te mātāpono o te matapopore moroki/the principle of active protection; and
- in breach of te mātāpono o te houruatanga/the principle of partnership by failing to honour promises that such land would return to Māori, and it acted poorly, disregarding its duty to act in the utmost good faith.

6.9.10 Government efforts to redress injustice

The Crown failed over many years to fully put right its past wrongs. The second Land Claims Commission was not concerned with the injustices resulting from the first commission. Subsequent inquiries, instituted after decades of protest and petition – the Houston commission 1907, the Native Land Claims Commission 1920, and the Sim commission 1927 – were limited, cursory, and narrowly focused. Māori were denied proper redress because of the Crown's fixed stance as to the nature of the original transactions and the integrity of its earlier validation process: Māori interests were simply considered extinguished. Redress was extremely limited and offered only as an 'act of grace', not as an acknowledgement of wrong inflicted. Even the more thorough Myers commission fell well short of meeting treaty standards. As its official title – the 'Royal Commission to Inquire into and Report on Claims Preferred by Members of the Maori Race Touching Certain Lands Known as Surplus Lands of the Crown' – indicates that, it, too, was focused on the question of surplus rather than the underlying grievances of Māori relating to the true nature of their land arrangements with pre-1840 settlers, the appropriation of their lands, and the displacement of their laws. Although the commission acknowledged the outstanding Māori grievances 'in equity and good conscience', it still presumed that legal title to the surplus lands was vested in the Crown. The remedy was also flawed as the compensation was inadequate and its distribution via the Crown-established Taitokerau Trust Board inappropriate and unsatisfactory. What Māori in our inquiry district received as a result of the Myers commission failed to redress the imbalance, involve them in real partnership in development, and remove the grievance.

We find, therefore, that the Crown breached te mātāpono o te tino rangatiratanga and te mātāpono o te whakatika/the principle of redress.

6.10 Ngā Whakahāweatanga / Prejudice

Māori tikanga respecting land arrangements was supplanted by British law before there was any question as to which applied in Te Raki. This was done without Māori consent and in contravention of the understanding reached at the time of the signing of te Tiriti that the question of authority would be negotiated where interests of Pākehā and Māori intersected. The transfer of authority

exclusively into the hands of Crown officials that followed was not voluntary, and the refusal of the Crown to fully recognise and give effect to customary usages resulted in the undermining of tribal autonomy and law.

As a consequence of the Crown's flawed process for assessing pre-1840 land transactions, Māori in the district were deprived of 159,461 acres by the granting of permanent and exclusive titles to settler claimants. Added to this loss were the 23,338 acres the Crown acquired as a result of scrip exchange, and also its appropriation of 51,980 acres of 'surplus' land (contrary to Māori understandings and the promises made to them). In total, the land loss suffered by Māori in the pre-treaty period amounted to 234,779 acres.

The pre-emption waiver system briefly introduced in 1844 also had long-term consequences for hapū involved. The purchases ratified under the system resulted in the transfer of a further 14,400 acres of land (including geothermal and mineral resources) out of hapū hands into those of settlers, while the Crown acquired an additional 4,245 acres of scrip and took some 21,168 acres as 'surplus', almost all that loss occurring in the Mahurangi and gulf islands.

Many claimant groups made submissions on the issue of the Crown's validation of old land claims and pre-emption waiver purchases and its taking of 'surplus' lands. As indicated in the following list, claimants included the following:

- Ngāti Kawa, Ngāti Rāhiri, Ngāti Hine, Ngāi Tāwake, Patukeha, Ngāti Kuta, Ngāti Rēhia, Ngāti Manu, Te Kapotai, Ngāti Pare, Ngāti Hineira, Ngāti Torehina in the Bay of Islands;[1733]
- Ngāti Kawau, Ngāti Rua, Te Whānaupani, Ngāti Ruamahue, Te Tahawai, Kaitangata, Ngāi Te Whiu, Te Uri o Te Aho in Whangaroa;[1734]
- Ngāti Hau, Ngāti Korokoro, Te Māhurehure, Te Ihutai, Ngāti Tupango, Ngāti Pou, and Te Roroa in Hokianga;[1735]
- Te Parawhau, Te Uriroroi, Ngāti Kahu o Torongare, and Ngāti Hau in Whāngārei;[1736] and
- Ngātiwai, Ngāti Taimanawaiti, Ngāti Tahuhu, Ngāti Rehua, Ngāti Manu in Mahurangi.[1737]

The list is not comprehensive since some claimants relied on generic closing submissions; however, all hapū who can show that their lands were affected by the Crown's flawed validation of pre-treaty and waiver transactions are covered by our findings.

The Crown has conceded that its 'investigation of pre-Treaty transactions was flawed and caused particular prejudice to Māori'.[1738] It acknowledged that the 'decision to proceed with unsurveyed grants of land was wrong and caused prejudice to Maori'.[1739] The taking of surplus land from 'pre-Treaty purchases' and pre-emption waivers 'breached the Treaty of Waitangi and its principles when it failed to require proper surveys and to require an assessment of the adequacy of lands that Māori held'.[1740] Counsel for the Crown also made a general acknowledgement that certain groups – namely, those associated with the Mahurangi, Whāngārei, and Whangaroa taiwhenua – are now virtually landless, but did not specify the role that its validation process had played in that loss.

While welcome, these acknowledgements do not encompass the full breadth and depth of the prejudice that the Crown's validation process inflicted upon Māori in our inquiry district. The prejudice here was far greater than elsewhere in the colony. The national average of the land loss through this ratification process was an estimated five per cent reduction of the territory held by Māori; in the Bay of Islands the figure was near 30 per cent, much of it their best land. In other taiwhenua, the loss was less extensive but still significant. In Mahurangi and the gulf islands, 38,509 acres transferred out of hapū hands as a result of the validation process, with all but 80 acres granted to settlers; and as noted earlier, further extensive acreages were lost as a result of the ratification of pre-emption waiver purchases. In Whangaroa, almost 35,000 acres was removed from the Māori sphere of authority as a result of some 40 validated old land claims, 11,696 acres of which was taken by the Crown as 'surplus' and 5,272 acres by means scrip. In Hokianga, the figure was 24,378 acres, with the majority (13,829 acres) acquired by scrip. At Whāngārei and Mangakāhia, the total loss to hapū as a result of the validation of their early transactions was 14,631 acres. For Māori of the region, this was a poor

reward for their early manaakitanga, their enthusiasm for missionaries and settlers, and their acceptance of the Crown's presence.

6.10.1 Displacement of tikanga

The most profound prejudicial effect of the Crown's validation process was the displacement of tikanga by an alien system of property law that struck at the very heart of Māori social organisation, as well as their hopes for the future when they had welcomed manuhiri (guests) onto the land and into their communities. Through its validation or ratification process, the Crown sought to convert what had been essentially social and personal arrangements – whereby land had been allocated to Pākehā in the expectation that both sides would benefit – into straightforward 'sales' in which all Māori rights as 'vendors' were extinguished. Understandings as to ongoing Māori occupation of transacted lands were additionally undermined by later stages of the validation process: they were inadequately expressed in the awards first recommended, severely jeopardised by Governor FitzRoy's expansion of awards, and then finally quashed by the insistence of the second Land Claims Commission that the full boundaries of the original deeds be surveyed, which took in lands that Māori still considered themselves to 'own'.

As a result of the Crown's ratification process, 'large tracts of land passed from tenuous and uncertain Pakeha occupation, subject to tikanga Māori, into clear and absolute title according to British law'.[1741] Ngāti Manu claimants expressed the impact in this way: 'the Old Land Claims and Land Commissions processes were instrumental in the decimation and denial of authority with respect to their tribal territories that followed the welcoming' of Pākehā;[1742] Ngāti Pakihi said that '[t]heir Tino Rangatiratanga and their laws and customs with regard to their turangawaewae were undermined and displaced'.[1743]

We note one further prejudicial effect. From the very outset, the Crown failed to consider sharing authority with Māori in investigating the validity of pre-treaty land transactions. That would have to wait until the twentieth century, when at last a tentative step was taken in that direction and a Māori kaumātua (albeit not from Te Raki) was appointed to an official body of investigation into the validity of a pre-treaty land transaction. In our view, the prejudicial effects of that failure to give effect to te Tiriti guarantees of tino rangatiratanga encompassed loss of knowledge, loss of mana, and loss of mana wāhine.

6.10.2 Prejudicial conduct of the validation process

Māori of our inquiry district were prejudicially affected by the lack of adequate inquiry into pre-treaty land transactions, a skewed validation process, and the inequitable nature of the legislation authorising it. The inquiries of the Land Claims Commissions were limited and their processes full of inconsistencies and omissions. The commissions were thus ineffective in determining the real character of the transactions undertaken under tikanga at the time and allowed conditional occupation rights to be converted into absolute conveyances under British law. The legislation did not require any consideration of Māori customary law and impeded any inquiry that would ascertain what Māori intended when they entered these transactions or whether there had been any meeting of minds. Those shortcomings were exacerbated by the inquiry process itself and the instruction that only two Māori witnesses were required to demonstrate that a transaction was valid. Customary owners were not all identified (as later protests demonstrated) nor their consent to transactions and the fair and full extinguishment of all rights established.

Meanwhile, in 'innumerable instances', as the first commissioners and Governor Grey themselves acknowledged, pā, kāinga, cultivations, and wāhi tapu were left unprotected and transferred into settler or Crown hands. We make special note, here, of Kororipo pā. That Ngāpuhi disputed the pā's ownership was brought to the attention of the Crown by the protests led by Ngāti Rēhia from the 1930s when they became aware of its loss – an issue that remains yet to be resolved. At Waitangi, none of Busby's promises of reserves or wāhi tapu identified in the decade after the commission's initial findings were respected in the final awards. Neither Pouērua nor the kāinga at Ōwhareiti were set aside out of Williams' award at Pākaraka, while the wāhi tapu identified at Tomotomokia

and Warehuinga were given no protection. These are but a few examples of an injury widely experienced, known to have been inflicted, and yet unrectified by the Crown.

Claimants told us that they were prejudiced by a 'sliding scale' of justice that advantaged Crown and settler interests over their own. We agree. Claimant Erimana Taniora (Ngātiuru and Te Whānaupani) provided an example of the unfair process relating to Upokorau, noting that the Land Claims Commission gave James Shepherd a grant to land over and above the maximum limit:

> The maximum total award for an individual was supposed to be 2,560 acres according to the Old Land Claims Commission Ordinance 1842. Shepherd should not have been entitled to any land in Whangaroa because he had claims in the Bay of Islands as well. The fact that the Commission awarded lands over and above the maximum awards has had a lasting detrimental impact on Ngātiuru.[1744]

The expansion of grants by FitzRoy and endorsement by the Bell commission caused particular prejudice to the many hapū who had entered into transactions with missionaries such as Kemp, King, Davis, and Shepherd for lands at Bay of Islands, Kerikeri, and Whangaroa; and Charles Baker at Waikare and Mangakāhia. These hapū had been encouraged to think they could remain on the land and that their children would share in the benefits of that arrangement. Also prejudicially affected were the customary owners of lands subject to transactions with settlers and entrepreneurs such as Busby (at Waitangi), Clendon (at Manawaora), Gilbert Mair (at Whāngārei), and Sparke (at Mahurangi) whom FitzRoy decided (on very doubtful grounds) to be 'really deserving', or who ultimately benefited (in the case of Busby) from an 'arbitration' process that completely excluded Māori.

6.10.3 Prejudice resulting from Crown's 'surplus' land and scrip policies

The Crown's retention of 'surplus' land has long been a source of grievance for Te Raki hapū and iwi – the result of a broken promise, one made by Governors and then overturned by a colonial Legislature. Crown counsel questioned whether such a promise had been made but acknowledged the distress that the policy had caused in the region and conceded that it had breached the treaty. Survey had not been timely and there had been no assessment of whether hapū retained adequate lands.[1745]

Many hapū were adversely affected. For example, Ngāti Hine, Te Kapotai, Ngāti Manu, Ngāti Uru, Te Whānaupani, and Ngāi Te Whiu have long pursued redress for takings at Ōpua, Kapowai, and Puketōtara.

We heard compelling evidence from Stirling and Towers about the overall loss in respect of the original CMS claims. The missionary claims lay across a swathe of land from southern Whangaroa down to Kerikeri, Paihia, Taiāmai, and across to Waimate and Ōpua. These included a total of over 107,000 acres of surveyed land. This is more than half of the land surveyed for all old land claims across Te Raki, even though the CMS and the missionaries made just 70 of the more than 500 claims pursued in our inquiry district. The missionaries had initially claimed just over 69,000 acres (a figure reached by estimation) and were in fact awarded essentially exactly this area in addition to almost £2,000 in scrip. This left the Crown with more than 38,000 acres of 'surplus' land from the missionary and CMS claims – over half of all the 'surplus' land derived from old land claims. The missionaries and the Crown did very well out of the claims, but Māori certainly did not.[1746] Included in that transfer of authority over the land were many wāhi tapu, pā, and kāinga.

In the Bay of Islands, 28.8 per cent of the loss suffered was in this form (the Crown gained a total of 35,541 acres). We make note, too, of the prejudice suffered by the Whangaroa people as a result of the Crown's assertion of its right to the 'surplus': 36 per cent of the land that went from their hands as a result of the ratification of their early transactions, especially those undertaken with the missionaries, ended up in those of the Crown (that is, 11,696 acres).

Particularly affected by the Crown's scrip policy were Ngāti Hau and other hapū based in Hokianga, though there were also cases in Whangaroa, the Bay of Islands, Whāngārei, and Mangakāhia. The Crown has acknowledged that the scrip claims were not properly investigated

at the time. Yet it succeeded in claiming those lands for itself – a total of 23,338 acres, of which 13,829 acres was from Hokianga hapū. As described in section 6.7, the Crown considered itself to be the loser in the system it had created, faced with Māori opposition unable to survey for itself the full extent of the land for which it had given generous scrip. However, Crown agents Bell and White – operating under the legislation that had been enacted by a colonial Parliament to settle claims for once and for all in its favour – in fact manipulated and bullied Māori into giving up their rights at Motukaraka, Rāwene, and elsewhere. The result was a serious loss of land and mana.

Claimants described it in this way in generic closing submissions:

> In a number of cases, there was not the acreage the Crown had relied on to issue scrip. Rather than simply take a loss, however, the Crown did what it always did – it leaned on Māori, literally taking land not included in anybody's version of an Old Land Claim to make up the deficit.[1747]

The economy of Hokianga languished because of the scrip policy and also as a result of the Northern War and the shift of Crown focus to Auckland. Claimant counsel noted that, in Hokianga, it was the areas designated as scrip land that were severely impacted:

> The actual implementation of the scrip exchanges left much to be desired. Settlers were given scrip for their land and moved off. This left land vacant, in Crown ownership. This land lay dormant for decades, producing no economic benefit to anyone. As a result, those areas with the greatest concentration of scrip lands endured suffering economies.[1748]

6.10.4 Te Raki hapū were prejudiced by delay

The Crown took upon itself the power to determine whether transactions were valid, but then delayed the validation process for years while waiting for Māori to accept that all their rights had been extinguished and embrace the putatively 'superior' English tenurial system and property laws. The generation of Māori who had originally entered into these arrangements began to die, and the task of negotiating with the Crown about the tikanga of land transactions fell to a new generation. Officials dismissed their views as those of young men who had not been present at the time. Claimant counsel put it this way:

> The typical basis for time as prejudice involves death, loss of memory, loss of records, and other similar changes. These features operated against Māori when they objected to a transaction and were unable to produce people who originally participated in a transaction. The [settler] claimants and Crown raised lack of original participation as a shield to objections – even when the defense wasn't warranted.[1749]

Thus, Māori were further deprived of any chance of ensuring that their view of these transactions and the obligations they entailed was embedded in law.

We have already noted the impact on the Hokianga economy of the long delay in settling the scrip claims. More generally, the intentions of Te Raki rangatira and hapū in entering these transactions were also frustrated by the passing of time. Tikanga had been supplanted by English property law, but the long delay in defining what properties had been created impeded the ability of Māori to establish communities of Pākehā under their authority and protection in order to enhance the prosperity of both peoples.

6.10.5 Loss of land and resources

The impact on Te Raki Māori of such an extensive land loss as a result of Crown-imposed laws and processes, so early in the development of the colony, was profound and lasting. As claimant counsel described in generic submissions,

> Under the broad rubric of culture sits all that arises for the Māori relationship to land. What came from enjoyment of the bounty of resources, including everything relied on to sustain life and culture was transformed into loss and struggle for survival as a person, as a people, and as a culture – all due to the central feature land. The land loss that arose from the

> [Old] Land Claims process was to set Māori on a course they did not anticipate and have still not recovered from.[1750]

Claimants told us that land lost through the old land claims processes was some of the best land in the inquiry district. In the case of Ngāti Hine, for example, we were informed (and accept) that:

> The Crown's Land Claims Commissions wrongfully granted Old Land Claims which had the effect of permanently alienating our land and the Crown itself wrongfully acquired land in our rohe when it took lands declared 'surplus' or 'scrip' for its own benefit.
>
> . . . . .
>
> As a result thousands of acres of land in the Bay of Islands were alienated from hapu ownership. This has had a profound impact on Ngati Hine, on our traditional connections with our whenua, our tikanga, wairua, whakapapa and way of life in general. Much of the land that was taken through the old land claims process was prime land in terms of location and quality, located close to the rivers, sea and main anchorage points. It was also very culturally significant land in that it included pa, kainga, wahi tapu, tauranga waka, walking tracks, hunting grounds and more. Prior to 1840 through to today there is evidence of frustration, grievance and prejudice from these Old Land Claims.[1751]

Ngāti Rēhia claimants also commented:

> over a third of the land [subject to old land claims] went to the Crown. The land kept by the Crown was some of the most fertile and productive lands in the Ngāti Rēhia rohe. An obvious example is what is now the Kapiro Land Corp Farm which was originally part of the three large John King Old Land Claims. As Arena Munro has pointed out, this land was rich in resources as well as sites of significance for Ngāti Rēhia.[1752]

At Whāngārei, Te Parawhau and other local hapū were denied the ability to participate in the management and economic development of the town by a process of loss of key ancestral lands initiated by the Crown's endorsement of their pre-1840 arrangements as complete alienations, quickly followed by its own purchases. The same point – the transfer of valued lands into the hands of settlers and Crown – can also be made in the case of Paihia, Waimate, Kerikeri, Puketōtara, and elsewhere as detailed in this chapter.

We note the hurt that was caused. In many cases, hapū of the region were betrayed by those whom they trusted most: missionaries and settlers who had been allocated lands and offered high-ranking women and protection. And it was their claims that the Crown ultimately favoured at the expense of Māori. As Charles Bristow (Te Roroa) told us:

> What the investigation of these Old Land Claims show is that the Crown granted a substantial amount of our lands to Pakeha claimants and this meant that our hapu suffered land alienation very early on and have therefore been landless for a very long time. In the Old Land Claims . . . are examples of Pakeha claimants exchanging the lands they claimed, for lands elsewhere in the Country and the Crown gaining ownership of our land. In terms of these Old Land Claims, only the Crown and Pakeha benefited. We on the other hand, were left landless. What is saddening for us about how our lands were alienated through the Old Land Claims process, is that the very missionaries and settlers who Pumuka befriended in the early 1830s including Williams, later claimed, and were awarded, his lands. . . . We have no marae.[1753]

Whangaroa claimants expressed similar views. Missionaries such as James Shepherd had been able to exert a tremendous influence over their tūpuna, but the ratification process enabled the missionaries to forget their original undertakings. Isabella Kathleen Urlich of Ngāti Kawau described how

> Land was central in the relationship between Maori and missionaries. The relationship between Maori and missionary made occupation of land possible. . . . Occupation of land in 1819 was by permission of Maori only. Later, permission to

> occupy was by missionaries only. The initial understanding between Maori and missionary, that is, missionary occupation of land by permission of Maori only, was conveniently forgotten.[1754]

Instead of the economic benefits, protection, and return of lands 'unjustly acquired' that Te Raki Māori had been promised, hapū in areas of early contact – in particular, the Bay of Islands, Whangaroa Harbour, and Hokianga, where lands were subject to scrip – bore the brunt of new and alien legal processes. As a result, they suffered a loss of land and authority from which they never fully recovered. Popi Tahere (Ngā Uri o Te Aho) told us that 'The old land claims have been a terrible affliction and injury on our people.'[1755] Claimant counsel Annette Sykes, speaking for Ngāti Manu, described the loss of Pōmare's coastal lands as his hapū became 'virtually landless by 1864', noting that they 'effectively became irrelevant' as a result of the procedures followed.[1756] For Te Kapotai, Te Patukeha (Ngāi Tāwake), Ngāti Rāhiri, Ngāti Kawa, Ngāti Hine, Ngāti Rēhia, and other hapū whose rights were located in that wide swathe of territory already described (from southern Whangaroa down to Kerikeri, Paihia, Taiāmai, and across to Waimate and Ōpua), the impact came early and resulted in extensive loss of land and hapū autonomy, and an insufficient economic base for their future sustenance and development.

It is clear to us that the Crown sought to undermine and abandoned respect for Māori law and custom in favour of its agenda to 'rationalise' land ownership in New Zealand on British terms. At this point, tikanga was overridden, and many hapū of the inquiry district were never able to recover from the position in which they had been placed; they had welcomed the manuhiri and been deprived of land and authority in return. The prejudice has been ongoing. The legal framework for all future land dealings was set. The Crown had established its exclusive authority and processes in which Māori should have shared when coming to decisions concerning their own lands and the arrangements they had made with Pākehā.

To summarise, the prejudice Te Raki Māori suffered as a result of the Crown validating pre-treaty transactions as permanent alienations that conferred absolute and permanent title; issuing scrip; and taking surplus lands encompassed the following:

- the displacement of tino rangatiratanga and tikanga with regard to their lands and resources;
- the loss of some of their most valuable lands very soon after first contact, meaning hapū were left with insufficient land and resources for their present and future needs;
- the denial of their ability to care for, manage, and control their lands and resources in accordance with their law, cultural preferences, and customs;
- economic and social deprivation; and
- a consequent diminution of mana.

We finish with the words of Ngāti Hine:

> [We] have been prevented from freely exercising our tino rangatiratanga, including possession, management and control of all of our lands in accordance with our tikanga and we have been prevented from enjoying proper economic utilisation and development of our land and resources.[1757]

Notes

1. This quote is attributed to Heke in Richard Davis to Church Missionary Society, 23 August 1847 (cited in Bruce Stirling and Richard Towers, '"Not with the Sword but with the Pen": The Taking of the Northland Old Land Claims', report commissioned by the Crown Forestry Rental Trust, 2007 (doc A9), p 309). The text is a contemporary translation; the original te reo Māori was not available with the source.

2. Waitangi Tribunal, *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*, Wai 1040 (Wellington: Legislation Direct, 2014), pp 528, 529.

3. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 430–431. The Crown cited these figures for 'Northland' in closing submissions (#3.3.412), p 3. The claimants' generic submissions simply said that 'over 500' old land claims were investigated: submissions (#3.3.223), p 16.

4. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1.

5. Dr Barry Rigby, 'Validation Review of the Crown's Tabulated Data on Land Titling and Alienation for the Te Paparahi o Te Raki Inquiry Region: Old Land Claims, Surplus Land and Scrip', report commissioned by the Waitangi Tribunal, 2014 (docs A48, A48(a)–(e)).

6. Professor Alan Ward, *National Overview*, 3 vols, Waitangi Tribunal

Rangahaua Whanui Series (Wellington: GP Publications, 1997), vol 2, pp 64–65. This was as quoted in Dr Donald M Loveridge, '"The Knot of a Thousand Difficulties": Britain and New Zealand, 1769–1840', report commissioned by the Crown Law Office, 2009 (doc A18), p 240 fn 688.

7. These figures are produced using the Crown approximation of the size of each taiwhenua and the overall size of the district (2,123,148 acres): Crown closing submissions (#3.3.404), pp 5–6; Crown closing submissions (#3.3.412), p 6.

8. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 275.

9. Church Missionary Society, *The Missionary Register for MDCCCXVI* (London: L B Seeley, 1816), p 327.

10. Duncan Moore, Dr Barry Rigby, and Matthew Russell, *Old Land Claims*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997) (doc H1), pp 282, 285, 289, 299, 305–307, 310, 311, 317, 318 (cited in Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 275).

11. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), pp 283, 285–286, 288, 295–296, 306–307; Kathleen Shawcross, 'Maoris of the Bay of Islands, 1769–1840: A Study in Changing Maori attitudes to Europeans' (MA thesis, University of Auckland, 1966), fols 351–352, fig 19; Jack Lee, *The Bay of Islands* (Auckland: Reed, 1996), pp 162–164; Angela Ballara, 'Warfare and Government in Ngapuhi Tribal Society, 1814–1833' (MA thesis, University of Auckland, 1973), fol 97; see also Henry Williams, *Early Journals of Henry Williams, Senior Missionary in New Zealand of the Church Missionary Society, 1826–40*, ed Lawrence M Rogers (Christchurch: Pegasus Press, 1961), pp 166, 168–169.

12. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 276.

13. Bruce Stirling, 'From Busby to Bledisloe: A History of the Waitangi Lands', report commissioned by the Waitangi Marae Trustees and Sir James Henare Maori Research Centre, 2016 (doc W5), p 55.

14. Paula Berghan, 'Northland Block Research Narratives', report commissioned by the Crown Forestry Rental Trust, 2006 (doc A39(a)), pp 14–15; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1605–1606; see also closing submissions for Wai 2206 (#3.3.400), pp 140–142. Busby shared his Ngunguru claim with Gilbert Mair and John Lewington. The agreement was signed on 29 January 1840 and so post-dated Hobson's proclamation and was found to be invalid. For discussion of these transactions in more detail, see section 6.7.2.

15. Shawcross, 'Maoris of the Bay of Islands, fols 370–372; Alan Ward (doc A19), pp 23–28; Dr Grant Phillipson, 'Bay of Islands Maori and the Crown, 1793–1853', report commissioned by the Crown Forestry Rental Trust, 2005 (doc A1), pp 136–139; Moore, Rigby, and Russell, *Old Land Claims* (doc H1), pp 281–324.

16. Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 18.

17. Ibid, p 357.

18. See Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 110, 131, 139; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 32–33, 167–204.

19. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 50–51, 182; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 193.

20. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 206–208, 276.

21. Shawcross, 'Maoris of the Bay of Islands', pp 370–372, fig 23; Ward (doc A19), pp 23–28; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 99, 136–139; Moore, Rigby, and Russell, *Old Land Claims* (doc H1), pp 281–324; see also Ormond Wilson, *From Hongi Hika to Hone Heke: A Quarter Century of Upheaval* (Dunedin: McIndoe, 1985), pp 200, 206–207; Jack Lee, *Hokianga* (Auckland: Hodder and Stoughton, 1987), pp 111–112.

22. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 520–531, 606; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 139.

23. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 136–139.

24. The following discussion is based largely on the information provided within Berghan, 'Northland Block Research Narratives' (doc A39(a)) and is not comprehensive.

25. Tony Walzl, 'Ngati Rehia: Overview Report', report commissioned by the Ngati Rehia Claims Group, 2015 (doc R2), p 85.

26. Opening statement for Te Waimate, Taiāmai, and Kaikohe taiwhenua (doc E58), p 3; for interested hapū, see also app C (doc E58(c).

27. See OLCS 594–595, 633, 658–659, 734–735, 13, 116, 616, 638, 871, 118, 181–183, 469, 739–743, 785, 798, 1004 (Berghan, 'Northland Block Research Narratives' (doc A39(a)).

28. Te Kēmara was originally known as Tāreha, 'not to be confused with Tāreha of Waimate': see 'Te Kēmara, NZ *History*, Ministry for Culture and Heritage, https://nzhistory.govt.nz/politics/treaty/signatory/1–19, accessed 17 October 2022.

29. Stirling, 'From Busby to Bedisloe' (doc W5), p 55.

30. Walzl, 'Ngati Rehia: Overview Report' (doc R2), pp 83–84.

31. Closing submissions for Wai 354, 1514, 1535, and 1664 (#3.3.399), pp 147–149; deeds excluding Ngāti Manu for lands in which they asserted rights are listed in submission (#3.3.399), pp 150–158.

32. Closing submissions for Wai 354 and others (#3.3.399), p 42.

33. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 112, 180, 183, 233, 279, 363, 393, 457, 467, 502, 539, 555, 602.

34. Closing submissions for Wai 2355 (#3.3.275), pp 19–20.

35. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 357, 536–7, 632; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1707–1713.

36. Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 202.

37. Ibid, p 593.

38. Ibid, pp 51, 161, 163, 215, 249, 313–314, 343–344, 412, 578, 601, 629–630.

39. Dr Manuka Henare, Dr Hazel Petrie, and Dr Adrienne Puckey, '"He Whenua Rangatira": Northern Tribal Landscape Overview' (Hokianga, Whangaroa, Bay of Islands, Whangarei, Mahurangi and

Gulf Islands)', report commissioned by the Crown Forestry Rental Trust, 2009 (doc A37), pp 510–514, 523–527; Angela Ballara, 'Wāhine Rangatira: Māori Women of Rank and their Role in the Women's Kotahitanga Movement of the 1890s', NZJH, vol 27, no 2 (October 1993), p 135.

40. Nichole Scully, transcript 4.1.31, Ōtangaroa Marae, Whangaroa, p 827; see also Brooke Loader, transcript 4.1.30, Terenga Parāoa Marae, Whāngārei, pp 131–132; Stuart Kett, transcript 4.1.30, Terenga Parāoa Marae, Whāngārei, pp 551–554.

41. Vincent O'Malley, transcript 4.1.12, North Harbour Stadium, pp 131, 134.

42. Meretini Waina Ryder (doc F15), pp 1–2; Meretini Waina Ryder, transcript 4.1.7, Waitaha Events Centre, Waitangi, p 343.

43. Awhirangi Lawrence (doc S15(b)), pp 7–8.

44. Ani Taniwha, transcript 4.1.8, Turner Centre, Kerikeri, pp 198–199, 216; Ruiha Collier, transcript 4.1.8, Turner Centre, Kerikeri, pp 384, 392–399; Rihari Dargaville, transcript 4.1.8, Turner Centre, Kerikeri, p 456; Ruiha Collier (doc G13), p 24.

45. Patu Hohepa, transcript 4.1.13, Mōria Marae, Hokianga, pp 9–10; Patu Hohepa, transcript 4.1.18, Tuhirangi Marae, Waimā, pp 103–104.

46. Angela Ballara, 'Turikatuku', in *Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, https://teara.govt.nz/en/biographies/1t114/turikatuku, accessed 17 October 2022; Henare, Petrie, and Puckey, '"He Whenua Rangatira"' (doc A37), pp 252–254.

47. Ani Taniwha (doc G3), pp 8–9; see also Awhirangi Lawrence (doc S15(b)), p 8.

48. It is difficult to be certain of the extent of their exclusion because Māori names were often non-gender-specific until English names began to be bestowed or adopted.

49. For a discussion of other women in the Northland region who signed te Tiriti, see Henare, Petrie, and Puckey, '"He Whenua Rangatira"' (doc A37), pp 453–454.

50. Williams, *Early Journals*, p 34 fn 15.

51. Evidence of Hamu (Berghan, supporting papers (doc A39(m)), vol 14, pp 8581–8585); Henry Hanson Turton, comp, *Maori Deeds of Old Private Land Purchases in New Zealand, from the Year 1815 to 1840, with Pre-emptive and Other Claims* (Wellington: Government Printer, 1882), deed 86, Te Wahapu, pp 76–78.

52. Rihari Dargaville, transcript 4.1.6, Te Tii Marae, Waitangi, p 185; Marsha Davis, transcript 4.1.7, Waitaha Events Centre, Waitangi, p 443.

53. Ruiha Collier, transcript 4.1.8, Turners Centre, Kerikeri, p 397.

54. Pairama Tahere, transcript 4.1.8, Turners Centre, Kerikeri, pp 175–176.

55. Joel Samuel Polack, *Manners and Customs of the New Zealanders*, 2 vols (London: James Madden, 1840), vol 2, p 81.

56. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45 (Wellington: GP Publications, 1997), p 106.

57. Ibid, p 76.

58. Ibid, p 392.

59. Ibid, pp 68, 106.

60. Ibid, pp 106–108, 392.

61. See, for example, Waitangi Tribunal, *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims*, Wai 215 (Wellington: Legislation Direct, 2004), p 213; Crown closing submissions (#3.3.412), p 9.

62. Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, Wai 215, p 217.

63. Ibid, pp 203–218, 413.

64. Waitangi Tribunal, *The Hauraki Report*, Wai 686, 3 vols (Wellington: Legislation Direct, 2006), vol 1, pp 86, 89.

65. Ibid, p 87.

66. Ibid.

67. Ibid, pp 87–88.

68. Ibid, pp 91, 153.

69. Ibid, pp 153–154.

70. Ibid, pp 153–154, 163.

71. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, 3 vols (Wellington: Legislation Direct, 2010), vol 1, p 31.

72. Ibid, p 121.

73. This report was published after our stage 1 report, *He Whakaputanga me te Tiriti*.

74. Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report*, Wai 903, 3 vols (Lower Hutt: Legislation Direct, 2015), vol 1, pp 241–242.

75. Ibid, pp 104–105.

76. Ibid, pp 105, 242.

77. Ibid, p 243.

78. This report was published after our stage 1 report, *He Whakaputanga me te Tiriti*.

79. Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims*, Wai 898, 6 vols (Lower Hutt: Legislation Direct, 2023), vol 1, pp 264–265.

80. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, pp 126, 171–172; Waitangi Tribunal, *The Kaipara Report*, Wai 674 (Wellington: Legislation Direct, 2006), pp 112–114; Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, pp 154, 156, 163–164; Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, pp 269–270; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, vol 1, pp 265–266, 269–270.

81. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 178.

82. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, pp 159–160.

83. Waitangi Tribunal, *The Muriwhenua Land Report*, Wai 45, pp 75, 126, 392–394; Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, pp 100–104, 109, 154–160, 163–164; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, vol 1, pp 238–250, 269–270.

84. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, Wai 201, 2 vols (Wellington: Legislation Direct, 2006), vol 1, p 20.

85. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, pp 110–111.

86. See discussion of these aspects of policy in Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, pp 111–122.

87. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, vol 1, pp 250–262, 268–269.

88. Crown statement of position and concessions (#1.3.2), p 54.

89. Ibid, p 52.

90. Ibid.

91. Ibid, p 66.
92. Ibid, p 56.
93. Ibid.
94. Ibid.
95. Ibid, p 55.
96. Crown closing submissions (#3.3.412), p 6.
97. Crown statement of position and concessions (#1.3.2), p 56.
98. Ibid, pp 1–2, 57.
99. Ibid, p 2.
100. Ibid.
101. Closing submissions for Wai 354 and others (#3.3.399), p 105.
102. Claimant closing submissions (#3.3.223), pp 28–31.
103. Ibid, pp 7–19.
104. Ibid, pp 14–16.
105. Ibid, pp 19–24.
106. Ibid, pp 21–24.
107. Ibid, pp 24–25.
108. Claimant closing submissions (#3.3.207), pp 35–36; claimant closing submissions (#3.3.208), pp 34–50.
109. Claimant closing submissions (#3.3.223), pp 25–26.
110. Ibid, pp 13–14, 26–27.
111. Ibid, p 27.
112. Ibid, pp 45–46.
113. Ibid, pp 28–31.
114. Ibid, p 7.
115. Ibid, p 9.
116. Joint memorandum of counsel, app A (#3.3.236(a)), p 2.
117. Claimant closing submissions (#3.3.223), p 11.
118. Ibid, p 15.
119. Ibid, p 17.
120. Ibid, p 24.
121. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [298] (claimant closing submissions (#3.3.223), p 40).
122. Claimant closing submissions (#3.3.208), pp 45–47.
123. Ibid, p 44.
124. Ibid, p 46.
125. Ibid, pp 47–48.
126. Ibid, pp 35–36.
127. Claimant closing submissions (#3.3.223), p 26.
128. Ibid, pp 25–26.
129. Ibid, p 31; Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 115.
130. Claimant closing submissions (#3.3.223), p 31.
131. Closing submissions for Wai 354 and others (#3.3.399), p 143.
132. Claimant closing submissions (#3.3.223), pp 26–27.
133. Ibid, p 27.
134. Closing submissions for Wai 49 and Wai 682 (#3.3.382(b)), pp 37–38; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1055–1056, 1066.
135. Claimant closing submissions (#3.3.223), pp 41–42.
136. Crown closing submissions (#3.3.412), p 13.
137. Ibid, p 18.
138. Ibid, p 9.
139. Ibid, pp 16–17, 23–24, 40–50.
140. Ibid, pp 2, 25; Crown statement of position and concessions (#1.3.2), pp 59–60.
141. Crown closing submissions (#3.3.412), pp 35–39.
142. Ibid, pp 29–35.
143. Ibid, pp 50–52.
144. Ibid; Crown closing submissions (#3.3.404).
145. Crown closing submissions (#3.3.412), pp 3–4.
146. Ibid, p 3.
147. Ibid, p 4.
148. Ibid, pp 61–62.
149. Ibid, p 82.
150. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 274.
151. Ibid, p 276.
152. Claimant closing submissions (#3.3.223), p 20; Crown closing submissions (#3.3.412), p 9.
153. Claimant closing submissions (#3.3.223), p 28.
154. Ibid.
155. Ibid, p 29.
156. Closing submissions for Wai 354 and others (#3.3.399), pp 114–115.
157. Claimant closing submissions (#3.3.223), p 8.
158. Ibid, pp 8–11; see also closing submissions for Wai 354 and others (#3.3.399), p 108.
159. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 108 (closing submissions for Wai 354 and others (#3.3.399), p 115).
160. Closing submissions for Wai 354 and others (#3.3.399), p 115.
161. Joint memorandum of counsel (#3.3.236(a)), para 29; Linda Thornton, transcript 4.1.28, Te Whakamaharatanga Marae, Waimamaku, p 99; claimant closing submissions (#3.3.223), p 9.
162. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 76 (closing submissions for Wai 354 and others (#3.3.399), p 104).
163. Crown closing submissions (#3.3.412), p 9.
164. Ibid.
165. Ibid, p 18.
166. Ibid, p 179.
167. Ibid, pp 10–14.
168. Ibid, pp 8, 18.
169. Ibid, p 3.
170. Closing submissions for Wai 1514 (#3.3.357), p 31.
171. Te Ihi Tito (doc J18(b)), p 8.
172. Ibid.
173. Marsha Davis (doc F33(c)), pp 5–6.
174. Ibid, p 4.
175. Tahua Murray (doc S21(b)), p 33.
176. Pairama Tahere (doc G17(b)), p 53.
177. Ibid, p 54.
178. Erimana Taniora (doc G1), pp 58–59.
179. Ibid, p 59.
180. Nuki Aldridge (doc AA154), pp 11–12.
181. Ibid, p 12.

182. For example, see Arapeta Hamilton (doc F22(a)), p 4; Marsha Davis (doc F33(c)), pp 3–5; Lloyd Pōpata (doc G9), p 26; Rose Huru (doc G10), p 7; Rihari Dargaville (doc G18), pp 50–51, 59; Hineamaru Lyndon (doc I7(b)), p 5; Popi Tahere (doc I20), p 9; Waimarie Bruce-Kingi (doc I25), pp 9–10, 18–21; Arapeta Hamilton (doc K7(b)), pp 8–10; Michael Beazley (doc K8), p 33; Patuone Hoskins (doc P3), p 5; Haami Piripi (doc Q11), p 14; Hugh Rihari (doc R7), pp 29–31.
183. Hugh Te Kiri Rihari (doc R7), pp 30–31.
184. Closing submissions for Wai 1540 (#3.3.357), p 31.
185. Closing submissions for Wai 354 and others (#3.3.399), p 113.
186. Ibid, p 114.
187. Closing submissions for Wai 1514 (#3.3.357), p 31.
188. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 35–36; see also Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 54 fn 1; Philippa Wyatt, 'The Old Land Claims and the Concept of "Sale": A Case Study' (MA thesis, University of Auckland, 1991) (doc E15).
189. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 37; Wyatt, 'Old Land Claims' (doc E15), fols 59–71.
190. See Fergus Sinclair, 'Issues Arising from Pre-Treaty Land Transactions', report commissioned by the Crown Law Office, [1992] (Wai 45 ROI, doc I3).
191. We do not discuss the evidence of Salmond and the others since they concentrated on Muriwhenua rather than Bay of Islands examples.
192. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, p 87.
193. Ibid.
194. Margaret Mutu (doc AA91), p 43.
195. Ibid, p 44.
196. Ibid, p 45.
197. Mereata Kawharu (doc W10), pp 5–6; Mereata Kawharu, transcript 4.1.24, Oromāhoe Marae, Oromāhoe, pp 99, 103–104.
198. Mereata Kawharu (doc W10), p 2.
199. Ibid, p 7.
200. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 113, 158; see also Dr Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, pp 199–200, 242.
201. Phillipson, report summary (doc A1(f)), p 2. During the hearings, Dr Phillipson agreed that the first point should be amended as shown: transcript 4.1.26, Turner Event Centre, Kerikeri, p 194.
202. Phillipson, report summary (doc A1(f)), p 2.
203. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 76.
204. Phillipson, report summary (doc A1(f)), p 2.
205. Dr Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, pp 220–221.
206. Phillipson, report summary (doc A1(f)), p 4.
207. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 130.
208. Crown closing submissions (#3.3.412), pp 10–11.
209. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 130–131; see also Dr Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, p 181.
210. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 131–132; Dr Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, pp 199–200, 242.
211. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 131; Dr Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, pp 215–216.
212. Davis to Church Missionary Society, 1 March 1839 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 131).
213. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 131–132.
214. Ibid, pp 130–132.
215. Dr Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, pp 199–200, see also p 242.
216. Bruce Stirling and Richard Towers, presentation summary (doc A9(b)), p [4].
217. Ibid, pp [4]–[5].
218. Ibid, p [5].
219. Walzl, 'Ngati Rehia: Overview Report' (doc R2), p 78.
220. Ibid, p 102.
221. Ibid.
222. Ibid, p 103.
223. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 114, 123.
224. Minutes of evidence to House of Lords Select Committee on NZ, 1838, IUP/BPP, vol 1, p 39 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 115).
225. Ibid, p 337 (pp 115–116).
226. Ibid.
227. Ibid, p 80 (p 116).
228. Ibid, p 83 (p 116).
229. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 116.
230. Wilkinson saw this as an act of charity on Pōmare's part, but another possible explanation is that they had rights in those lands.
231. Minutes of evidence to House of Lords Select Committee on NZ, 1838, IUP/BPP, vol 1, p 107 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 117–118).
232. Ibid, p 297 (p 121).
233. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 121.
234. Minutes of evidence to House of Lords Select Committee on NZ, 1838, IUP/BPP, vol 1, p 6 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 114).
235. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 49.
236. Minutes of evidence to House of Lords Select Committee on NZ, 1838, IUP/BPP, vol 1, p 18 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 114–115).
237. Dr Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, p 221; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 40–41, 114–115.
238. For example, see Wiremu Reihana (doc T10(b)), p 6.
239. Dr Grant Phillipson, transcript 4.1.26, Turner Event Centre,

Kerikeri, p 221; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 40–41.
240. Ibid, pp 114–115.
241. Minutes of evidence to House of Lords Select Committee on New Zealand, 11 May 1838, IUP/BPP, vol 1, p 171 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 119).
242. Ibid (p 120).
243. Evidence of Captain FitzRoy, 11 May 1838, IUP/BPP, vol 1, pp 173–174 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 179).
244. Minutes of evidence to House of Lords Select Committee on NZ, 1838, IUP/BPP, vol 1, p 337 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 121).
245. Ibid (p 122).
246. See Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 122.
247. Ibid.
248. Ibid, p 120.
249. Sinclair, 'Issues Arising from Pre-Treaty Land Transactions' (Wai 45 ROI, doc I3), pp 212–220.
250. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 118–119.
251. Ibid, p 123.
252. Ibid, pp 146–147; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 276, David Armstrong, 'The Land Claims Commissions: Practice and Procedure, 1840–1845', report commissioned by the Crown Law Office, 1992 (Wai 45 ROI, doc I4), pp 138–139.
253. Ernst Dieffenbach, *Travels in New Zealand; With Contributions to the Geography, Geology, Botany, and Natural History of that Country*, 2 vols (1843; repr Christchurch: Capper Press, 1974), vol 2, pp 142–144 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 146–147).
254. Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), pp 140–142.
255. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 146–147.
256. Ibid.
257. Ibid, p 123.
258. Ibid.
259. Busby to Busby, 17 November 1834 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 124).
260. Kemp to McLean, 26 July 1854 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 168–169).
261. Edward Shortland, *Traditions and Superstitions of the New Zealanders*, 2nd ed (London: 1856), pp 270–288, 298–299. See Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 145–146; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 275–276.
262. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 146.
263. Russell to Hobson, 9 December 1840, IUP/BPP, vol 3, p 150 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), pp 66–67).
264. Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), pp 40–59.
265. Clarke to Colonial Secretary, 25 February 1841 (cited in Armstrong, The Land Claims Commission' (Wai 45 ROI, doc I4), pp 48–49).
266. New Zealand Company 12th Report, app E (cited in Armstrong, The Land Claims Commission' (Wai 45 ROI, doc I4), p 70).
267. Clarke, half yearly report to the Governor, 30 September 1841 (cited in Armstrong, The Land Claims Commission' (Wai 45 ROI, doc I4), p 71).
268. Clarke, half yearly report to the Governor, 30 September 1841 (cited in Armstrong, The Land Claims Commission' (Wai 45 ROI, doc I4), pp 70–71).
269. Clarke, 'supplementary' report, 1 November 1843 (cited in Armstrong, The Land Claims Commission' (Wai 45 ROI, doc I4), p 75).
270. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 145.
271. Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 75.
272. Clarke to Colonial Secretary, 25 July 1840 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 69).
273. Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 68.
274. Ibid, p 69.
275. Armstrong concluded that transactions were not 'tuku whenua': Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), pp 84, 144.
276. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 20.
277. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 268–269.
278. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 144.
279. Hobson to Gipps, 16 January 1840 (cited in Dr Donald Loveridge, 'The New Zealand Land Claims Act of 1840', report commissioned by the Crown Law Office, 1993 (Wai 45 ROI, doc I2), p 26).
280. FitzRoy to Lord Stanley, 16 May 1843, IUP/BPP, vol 2, p 387 (Crown document bank (doc H20), p 107).
281. Governor Grey to Earl Grey, 17 October 1848 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 196–197).
282. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 275.
283. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 49.
284. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 278–279.
285. See Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 168–169.
286. Ibid, p 170.
287. Henry Williams to Colonial Secretary, 5 November 1840; and Protector Clarke to Colonial Secretary, 16 November 1840 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 168).

288. Extract from Church Missionary Society trust deed for Waimate, 1838 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 168).
289. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 168–169.
290. Extract from Church Missionary Society trust deed for Waimate, August 1837 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 168).
291. Extract from Church Missionary Society trust deed for Waimate, August 1837 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 168).
292. See Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 198–200.
293. Ibid, pp 171, 188.
294. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 131; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 170–171, 175–176.
295. Sinclair, 'Issues Arising from Pre-Treaty Land Transactions' (Wai 45 ROI, doc I3), pp 152–153; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 139.
296. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 131.
297. Ibid, pp 131, 139.
298. Ibid, pp 139–140.
299. Ibid, pp 130–131; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 171–172.
300. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 171–172.
301. Ibid, p 177.
302. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 139–140.
303. Davis, journal, 8 November 1839 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 177).
304. Ibid.
305. Shepherd to Church Missionary Society, 12 September 1838 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 181).
306. Davis to Church Missionary Society, 17 June 1840 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 140); Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 180.
307. On this point, see Margaret Mutu (doc AA91), p 43.
308. Williams, 'Land Purchase' manuscript, no date (cited in Rose Daamen, Paul Hamer, and Barry Rigby, *Auckland*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996) (doc H2), p 138).
309. Kemp, Kerikeri, to Colonial Secretary, 26 January 1848 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 182).
310. Evidence of Captain FitzRoy, 11 May 1838, IUP/BPP, vol 1, pp 173–174 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 179).
311. Puckey to Church Missionary Society, 22 January 1846 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 180).
312. Busby to Alexander Busby, 14 September 1839 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 182).
313. George Grey, marginal comments on Clarke to Colonial Secretary, 30 March 1846 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 193).
314. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 131, 150–151, 366.
315. Davis to Church Missionary Society, 1 March 1839 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 131).
316. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 131, 150–151, 366; see also Phillipson, report summary (doc A1(f)), pp 2–3.
317. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 127.
318. Bruce Stirling, 'Historical Report on Taumarere River; Opua Okiato; Pomare Bay and Kororareka; Church Missionary Society Pre-Treaty Land Transactions; and the Kawakawa and Ruapekapeka Crown Purchases', report commissioned by the Karetu Māori Committee, 2016 (doc W8), p 68.
319. Ibid.
320. Evidence of the Reverend Henry Williams, Kororāreka, 6 January 1842 (Berghan, supporting papers (doc A39(m)), vol 14, p 8596).
321. Agreement (translation) Tuperiri and Hamu, 26 July 1831 (Berghan, supporting papers (doc A39(m)), vol 14, p 8581).
322. For deeds, see Berghan, supporting papers (doc A39(m)), vol 14, pp 8581, 8599.
323. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 114; also cited in Phillip Bristow (doc M16), p 114.
324. Tuckwell and McIvor on behalf of Fairburn to Busby, 10 January 1835 (Stirling, 'Historical Report on Taumarere River' (doc W8), p 69).
325. Arapeta Hamilton (doc F22), para 17; Stirling, 'Historical Report on Taumarere River' (doc W8), p 69; Williams, *Early Journals*, pp 386, 407.
326. Williams to Burrows, 26 February 1836 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 127–128).
327. Busby, Victoria (Waitangi), to Colonial Secretary, 12 October 1848 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1489).
328. Davis, Kaikohe, to Church Missionary Society, 7 December 1850 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1490).
329. Ibid.
330. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1491.
331. Davis to Burrows, 9 January 1849 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 166).
332. Williams to Heathcote, 18 June 1850 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 167).
333. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 167.
334. Williams to Church Missionary Society, 30 January 1850 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 167).

335. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 18–19.
336. Grey to Gladstone, 21 June 1846 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 159).
337. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 289, 292. The claimant Shirley Hakaraia explained how Te Whareraki acquired rights in the south-eastern Bay of Islands as part of a peacemaking with Ngāre Raumati following a series of military victories. This was part of a more general realignment that saw the Ngāpuhi 'northern alliance' take control of the whole coast, including Kororāreka: Shirley Hakaraia (doc F24), p 13.
338. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 130; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 287–289; see also evidence of Montefiore in the Court of Claims, Russell, 25 January 1841 (Berghan, supporting papers (doc A39(m)), vol 1, pp 30–31).
339. Evidence of Ware Rahi [*sic*], 25 January 1841 (Berghan, supporting papers (doc A39(m)), vol 1, pp 37–40); see also evidence of Pau, 26 January 1841 (Berghan, supporting papers (doc A39(m)), vol 1, p 41).
340. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 152; evidence of Montefiore in the Court of Claims, Russell, 25 January 1841 (Berghan, supporting papers (doc A39(m)), vol 1, pp 30–31).
341. [Sworn Statement] of William Manery, 25 January 1841 (Berghan, supporting papers (doc A39(m)), vol 1, p 35).
342. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 288.
343. Clendon presented this as an agreement to grant Te Whareraki a 'life interest' in the hapū lands, but the deed contained no such condition: Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 78–79; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 130. See also evidence of the Reverend Charles Baker, 2 February 1841 (Berghan, supporting papers (doc A39(m)), vol 1, p 42).
344. Evidence of James Clendon, 30 January 1841 (Berghan, supporting papers (doc A39(m)), vol 1, pp 44–45).
345. Shirley Hakaraia (doc F24), p 22.
346. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 130; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 291–292.
347. Deed of transfer, 15 January 1841, OLC 1, 13 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 130).
348. Evidence of Cooke, 21 February 1842 (Berghan, supporting papers (doc A39(m)), vol 3, p 1548). Regarding Cooke's marriage, see Jack Lee, *I Have Named it the Bay of Islands* (Auckland: Hodder and Stoughton, 1983), p 165; see also notes of evidence, 19 March 1858 (Berghan, supporting papers (doc A39(m)), vol 3, p 1561).
349. Te Kapotai Hapu Korero, 'Mana i te Whenua' (doc F26(b)), p 19; Daamen, Hamer, and Rigby, *Auckland* (doc H2), p 104.
350. Evidence of Pi, 21 February 1842 (Berghan, supporting papers (doc A39(m)), vol 3, p 1549); evidence of Baker, 21 September 1842 (Berghan, supporting papers (doc A39(m)), vol 3, pp 1549–1550).
351. Evidence of William Cooke, 19 March 1858 (Berghan, supporting papers (doc A39(m)), vol 3, p 1560).
352. Bell note, 19 March 1858 (Berghan, supporting papers (doc A39(m)), vol 3, p 1562); Bell memo, 3 April 1858 (Berghan, supporting papers (doc A39(m)), vol 3, pp 1562–1563).
353. Warren Moetara (doc C10(a)), p 10; Berghan, 'Northland Block Research Narratives' (doc A39(a)), vol 2, p 192.
354. Frederick E Maning, *Old New Zealand: A Tale of the Good Old Days* (1863, repr Auckland: Robert J Creighton and Alfred Scales, 1956), p 78.
355. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 121; David Colquhoun, 'Frederick Edward Maning', in *Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, https://teara.govt.nz/en/biographies/1m9/maning-frederick-edward, accessed 17 October 2022.
356. Evidence of Rangatira, 8 December 1842, OLC 1/539 (Berghan, supporting papers (doc A39(m)), vol 11, p 6303); see also Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1121.
357. Evidence of Rangatira, 8 December 1842, OLC 1/539 (Berghan, supporting papers (doc A39(m)), vol 11, p 6303).
358. John Klaricich (doc L1), p 27; Berghan, 'Northland Block Research Narratives' (doc A39(a)), vol 2, pp 342–343.
359. Evidence of Rangatira, 8 December 1842, OLC 1/539 (Berghan, supporting papers (doc A39(m)), vol 11, p 6303).
360. Commissioner's report, 10 November 1843 (Berghan, supporting papers (doc A39(m)), vol 11, p 6297).
361. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1121, 1354.
362. See Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 329; closing submissions for Wai 2003 and Wai 250 (#3.3.272), pp 22, 27.
363. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 125, 151–152, 366; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 18–19.
364. Peter Shaw, *Waitangi* (Napier: Cosmos, 1992), pp 31, 41 (cited in Stirling, 'From Busby to Bledisloe' (doc W5), p 34).
365. Busby recorded his name as Rete, see Stirling, 'From Busby to Bledisloe' (doc W5), p 41, fn 133. For discussion of the conflict between Busby and Rete, see Waitangi Tribunal, *He Whakaputanga*, Wai 1040, pp 135–137.
366. Busby to Colonial Secretary, 11 May 1835 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 124–125).
367. Busby to Colonial Secretary, 25 September 1835 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 125).
368. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 125.
369. Ibid, p 124.
370. Busby to Colonial Secretary, 28 March 1837 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 125).
371. Busby to Busby, 5 May 1837 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 125).
372. House of Commons Committee on New Zealand, 1840 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 126).
373. Johnson evidence, no date (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1597).

374. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 126; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1488–1489.
375. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1494.
376. Busby, Victoria (Waitangi), to Colonial Secretary, 12 October 1848 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1491).
377. Stirling, 'From Busby to Bledisloe' (doc W5), p 65.
378. Busby, Victoria (Waitangi), to Colonial Secretary, 29 December 1848 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1495).
379. Busby, Victoria (Waitangi), to Colonial Secretary, 29 December 1848 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1495).
380. Heke to Irving, 11 January 1849 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1498).
381. Dr Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, p 196.
382. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 166. Governor Grey, who was highly critical of the failure to protect wāhi tapu and FitzRoy's decision to extend and issue grants without survey (see section 6.5.2(3)), referred the matter to both the Surveyor-General and the Attorney-General. It was Grey's view that the grant of any wāhi tapu 'for purposes which could subject them to desecration' was contrary to the 'invariable policy of the British Crown, in occupying a country, not to offend the feelings and prejudices of the inhabitants'. He also condemned the boundaries in Busby's grant as being 'so vague as to render it valueless'. Grey was equally critical of the grant of 3,000 acres to the missionary Davis and the failure to reserve the urupā located on it, the desecration of which had recently prompted threats of a muru against Davis's son. Grey thought his ownership of the wāhi tapu questionable and the acquisition of any land of that nature 'entirely repugnant to the policy of the British Government'. In spite of his strongly worded comments on the need to reserve such areas to Māori, ultimately Grey did nothing to ensure their retention, and Busby's ownership of the wāhi tapu, along with the surrounding land, was confirmed in 1870: Grey file note, 15 November 1848 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1492).
383. Ibid, p 150.
384. Woon to Wesleyan Missionary Society, London, 9 November 1842 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 155).
385. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 170.
386. Evidence of Pompallier, Board of Inquiry, 1856 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 81).
387. Evidence of Taratikitiki, 21 October 1841 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 78).
388. For example, see Joel Samuel Polack, *New Zealand: Being a Narrative of Travels and Adventures during a Residence in that Country between the Years 1831 and 1837*, 2 vols (1838; repr Christchurch: Capper Press, 1974), vol 2, p 355 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 82).
389. Sinclair, 'Issues Arising from Pre-Treaty Land Transactions' (Wai 45 ROI, doc I3), pp 273–275.
390. Merata Kawharu (doc W10), p 8.
391. Arapeta Hamilton (doc F22(a)), p 4.
392. See Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 83, 178, 370.
393. This was a large, shallow pot used to boil down waste from pigsties to make potassium nitrate, also called saltpetre, an ingredient of gunpowder. It suggests Ngāpuhi were making their own gunpowder in the 1820s. The other ingredients were sulphur and charcoal.
394. Manuka Henare, Hazel Petrie, and Adrienne Puckey, 'Ko Te Tino o Taiamai: Te Waimate – Taiamai Oral and Traditional History Report', report commissioned by Auckland UniServices Ltd, 2009 (doc E33), p 134.
395. Evidence of William Cook, no date, OLC 25-A (Berghan, supporting papers (doc A39(m)) vol 26, p 15418).
396. Evidence of Taratikitiki, 21 October 1841, OLC 306 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 76).
397. For discussion of Māori expectation of additional and ongoing payments in general, see Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 72–89. Examples in which Māori vendors appeared in support of derivative claimants, testifying to the original transaction at Kororāreka and Bay of Islands, include Hugh McLiver (OLC 305), James Stuart (OLC 450), Benjamin Evans Turner (OLC 469), and John Scott (OLC 643): Berghan, 'Northland Block Research Narratives' (doc A39(a)), vol 2, pp 185, 283–284, 301, 422.
398. Evidence of Kitara, Timotiu and Mangonui, 29 October 1841, OLC 1/441 (Berghan, supporting papers (doc A39(m)), vol 8, pp 4757–4759); Berghan, 'Northland Block Research Narratives' (doc A39(a)), vol 2, p 272.
399. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 80.
400. Evidence of Hector, 15 February 1842 (Berghan, supporting papers (doc A39(m)), vol 18, p 10955).
401. Evidence of Wariki, 30 September 1842 (Berghan, supporting papers (doc A39(m)), vol 18, p 10957).
402. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 80.
403. See, for example, OLC 305 and OLC 450, in Berghan, 'Northland Block Research Narratives' (doc A39(a)), vol 2, pp 185, 283.
404. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 135.
405. See Walzl, 'Ngati Rehia Overview Report' (doc R2), pp 102–103.
406. Evidence of Ewai, 17 December 1841, OLC 1/100 (Berghan, supporting papers (doc A39(m)), vol 3, pp 1103–1104).
407. Evidence of Moko, 9 November 1841 (Berghan, supporting papers (doc A39(m)), vol 9, p 5540).
408. See Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 68–85, 261–274. For Spicer's transactions on behalf of the

Kororareka Land Company, see Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 520–525, 527–533.

409. See examples in Berghan, 'Northland Block Research Narratives' (doc A39(a)), OLC 47 Atherton, p 24; OLC 65 Bedgood, p 42; OLC 75, William Brown, p 47; OLC 89, Charles Henry Chambers, p 56; OLC 94, Alexander Chapman, p 62; OLC 96, Christie and Duffies, p 65; OLC 117, Clendon, p 91; OLC 122, Cochrane, p 98; OLC 140, Cooper, p 108; OLC 162, Donovan, p 112; OLC 172, John Edmonds, p 115; OLC 272 James Kelly and others, p 172; OLC 656, James Stiles, p 431. For reference to settlers on-selling without Māori knowing, see Rosemarie Tonk, 'The First New Zealand Land Commissions, 1840–1845' (MA thesis, University of Canterbury, 1986), pp 92–93.

410. See Michael Belgrave, Tracy Tulloch, and Grant Young, 'Marutuahu Historical Overview', report commissioned by the Marutuahu Treaty Claims Committee, 2002 (Wai 686 ROI, doc V1), pp 103–104.

411. Caroline Fitzgerald, ed, *Letters from the Bay of Islands: The Story of Marianne Williams* (Auckland: Penguin, 2010), p 94.

412. Ibid, p 91.

413. Awhirangi Lawrence (doc S15(b)), p 8.

414. OLC 667 (Berghan, supporting papers (doc A39(m)), vol 14, pp 8581–8584).

415. OLC 669 (Berghan, supporting papers (doc A39(m)), vol 14, pp 8590, 8594–8596); Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 305.

416. Evidence of Ngangia, 3 February 1842 (cited in Berghan, 'Northland Block Research Narratives' (doc A39(a)), vol 2, p 244); statement of Tiraha, 2 April 1858 (Berghan, supporting papers (doc 38(m)), vol 3, p 1561).

417. Kawharu (doc W10), pp 5–6 (closing submissions for Wai 354 and others (#3.3.399), p 121).

418. Merata Kawharu, transcript 4.1.24, Oromāhoe Marae, Oromāhoe, p 103.

419. Dr Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, pp 215–216.

420. Claimant closing submissions (#3.3.222), para 36.

421. Ibid, para 37.

422. Ibid, paras 39, 41.

423. Closing submissions for Wai 1968 (#3.3.337), pp 46, 48.

424. Crown closing submissions (#3.3.412), pp 23–24.

425. Crown memorandum (#3.2.2677(b)), no 8.

426. Crown closing submissions (#3.3.412), p 20.

427. Berghan, 'Northland Block Research Narratives' (doc A39(a)), vol 2.

428. Crown memorandum (#3.2.2677), p 13; and Crown memorandum (#3.2.2677(b)). It seems that, while there are other deeds in existence, they are indecipherable.

429. See submissions in reply for Wai 354 and others (#3.3.475), p 34.

430. Charles Terry, *New Zealand, its Advantages and Prospects as a British Colony: With a Full Account of the Land Claims, Sales of Crown Lands, Aborigines etc etc* (London: T & W Boone, 1842), pp 97–108 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 137; and Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 322–323).

431. Owen Kingi (doc N15), pp 12–13.

432. Submissions in reply for Wai 354 and others (#3.3.475), p 41.

433. Arena Munro (doc R16), p 53.

434. Crown closing submissions (#3.3.412), pp 23–24.

435. Ibid, pp 22–23.

436. Ibid, pp 14–15.

437. Crown memorandum (#3.2.2677(b)), no 83.

438. Ibid, no 1.

439. Ibid, no 3.

440. Ibid.

441. Ibid, no 5.

442. Ibid.

443. Ibid, no 6.

444. Ibid, no 10.

445. Ibid, no 34.

446. Ibid, no 36.

447. Ibid, no 64.

448. Ibid, no 90.

449. Ibid, no 65.

450. Ibid, no 94.

451. Ibid, pp 23–24.

452. Ibid.

453. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 116. The Tribunal acknowledged Dame Joan Metge as the source of the phrase.

454. Wyatt, 'Old Land Claims' (doc E15), fol 79.

455. Ibid, p 92.

456. Ibid, pp 69–71; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 106.

457. Closing submissions for Wai 1968 (#3.3.337), p 48.

458. Nuki Aldridge (doc AA154), p 31.

459. Joan Metge, 'Cross Cultural Communication and Land Transfer in Western Muriwhenua, 1832–1840', submission to the Waitangi Tribunal, 1992 (Wai 45 ROI, doc F13), p 86.

460. Bruce Biggs, 'Humpty-Dumpty and the Treaty of Waitangi', in *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, ed Ian Hugh Kawharu (Auckland: Oxford University Press, 1989), p 304.

461. Ibid.

462. The Reverend John Whiteley, 20 July 1843 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 46).

463. Merata Kawharu, transcript 4.1.24, Oromāhoe Marae, Oromāhoe, p 127.

464. See deeds 3 and 111 in Crown memorandum (#3.2.2677(b)).

465. Submissions in reply for Wai 354 and others (#3.3.475), pp 34–35.

466. Ibid, p 35.

467. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 187–190; submissions in reply for Wai 354 and others (#3.3.475), p 35.

468. Deed in Crown memorandum (#3.2.2677(b)), no 1.

469. Ibid, nos 1, 7.

470. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 392.

471. William Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi, New Zealand, February 5 and 6, 1840* (1890; repr Christchurch: Capper Press, 1971), p 18.
472. Crown closing submissions (#3.3.412), pp 11, 14–16.
473. Emma Gibbs-Smith (doc B18(a)), pp 15–17; Emma Gibbs-Smith, transcript 4.1.24, Oromāhoe Marae, Oromāhoe, pp 407–408; Maryanne Baker (doc E44), pp 3, 5, 7–8; Maryanne Baker, transcript 4.1.24, Oromāhoe Marae, Oromāhoe, pp 12, 19, 43–44; see also Merata Kawharu, transcript 4.1.24, Oromāhoe Marae, Oromāhoe, pp 125–126; claimant closing submissions (#3.3.223), p 9.
474. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 130.
475. Ibid, p 142.
476. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, p 89.
477. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 280.
478. Ibid, p 382.
479. Ibid, pp 281–282.
480. Ibid, p 523.
481. Crown closing submissions (#3.3.412), p 16.
482. Te Kemara evidence as interpreted by Henry Tacy Kemp (cited in Crown closing submissions (#3.3.412), pp 16–17).
483. Crown closing submissions (#3.3.412), p 17; for Crown analysis of the deed, see pp 14–15. The English version of the deed stated, 'we give over and sell to Mr Williams, to his children, and his seed for ever, the land called the Hihi, for them to reside on, to work on, to sell, or do what they like with it'; see deed no 83 in Crown memorandum (#3.2.2677(b)).
484. Merata Kawharu (doc W10), p 20.
485. See Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 156–157.
486. Evidence of Ware RarI [*sic*], 25 January 1841 (Berghan, supporting papers (doc A39(m)), vol 1, pp 37–40).
487. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 157.
488. Ibid.
489. Ibid.
490. Ibid, p 179; Clarke to Hobson, 18 June 1842, IUP/BPP, vol 2, p 191 (Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), pp 136–137); letter to editor, *Auckland Chronicle and New Zealand Colonist*, 10 June 1843 (Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 136); Godfrey and Richmond to Colonial Secretary, 4 May 1843, IUP/BPP, vol 2, p 334 (Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 174).
491. Merata Kawharu (doc W10), p 20.
492. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 99, 129, 146–147.
493. Crown statement of position and concessions (#1.3.2), p 64.
494. Crown closing submissions (#3.3.412), pp 14–17.
495. Williams to Heathcote, 18 June 1850 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 166–167).
496. See Dr Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, pp 163–165; see also Vincent O'Malley and John Hutton, 'The Nature and Extent of Contact and Adaptation in Northland, c 1769–1840', report commissioned by the Crown Forestry Rental Trust, 2013 (doc E35), pp 19–20; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 1, 70–76.
497. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 366 (Crown closing submissions (#3.3.412), p 10). Phillipson was explaining here how Richard White had described the 'middle ground'.
498. Dr Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, pp 241–242.
499. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 131. Phillipson discussed these issues in transcript 4.1.26, Turner Event Centre, Kerikeri, pp 216–222, 240–241.
500. Submissions in reply for Wai 2389 and others (#3.3.443), p 11.
501. Crown statement of position and concessions (#1.3.2), p 64.
502. Ibid, p 62.
503. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 430. The Crown cited these figures for 'Northland' at #3.3.412, p 3. The claimants stated that 'over 500' old land claims were investigated: claimant closing submissions (#3.3.223), p 16.
504. Claimant closing submissions (#3.3.223), pp 11–14; closing submissions for Wai 1477 (#3.3.338), pp 73–74.
505. Claimant closing submissions (#3.3.223), pp 11–14.
506. Closing submissions for Wai 354 and others (#3.3.399), p 103.
507. Claimant closing submissions (#3.3.223), pp 15–16, 18, see also pp 20–21.
508. Ibid, p 23.
509. Closing submissions for Wai 1477 (#3.3.338), pp 73–74.
510. Ibid, pp 75–76.
511. Claimant closing submissions (#3.3.223), pp 15, 20–21.
512. Ibid, pp 21–24.
513. Ibid, p 23.
514. Crown closing submissions (#3.3.412), pp 3–4.
515. Ibid, pp 2–3.
516. Crown statement of position and concessions (#1.3.2), p 52.
517. Crown closing submissions (#3.3.412), pp 24–36.
518. Crown statement of position and concessions (#1.3.2), p 66.
519. Crown closing submissions (#3.3.412), pp 36–38.
520. Crown statement of position and concessions (#1.3.2), p 56.
521. Ibid.
522. Ibid.
523. Crown closing submissions (#3.3.412), pp 29–36.
524. Ibid, p 8.
525. Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 5; Gipps, proclamation, 14 January 1840, IUP/BPP, vol 3, pp 38–39.
526. For further details of the ordinance, see Ward, *National Overview*, vol 2, p 34; Alan Ward (doc A19), p 91; Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), pp 7–11; Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 17. Armstrong used the title New South Wales Act. As Ward explained, that was in fact the title of an imperial Act passed in 1841 to repeal the original ordinance and transfer jurisdiction to New Zealand.
527. Richard Boast, 'Surplus Lands: Policy-making and Practice in the Nineteenth Century', report commissioned by the Waitangi Tribunal,

1992 (Wai 45 ROI, doc F16), p 76; see New Zealand Land Claims Ordinance 1841 (David Armstrong, supporting papers (Wai 45 ROI, doc I4(a)), p 376).

528. 'Report from the Select Committee on New Zealand', 1844, IUP/BPP, vol 2, p 3; Boast, 'Surplus Lands' (Wai 45 ROI, doc F16), pp 71–72.

529. New Zealand Land Claims Ordinance 1841, s 2; Boast, 'Surplus Lands' (Wai 45 ROI, doc F16), p 87.

530. Gipps to Hobson, 30 November 1840 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 20).

531. Hobson to Gipps, 17 February 1841, IUP/BPP, vol 3, p 439 (Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), pp 19, 20).

532. New Zealand Land Claims Ordinance, 9 June 1841, IUP/BPP, vol 3, p 471.

533. Gipps to Hobson, 6 March 1841, IUP/BPP, vol 3, p 439 (Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 19).

534. Ibid.

535. Russell to Hobson, 3 August 1841, IUP/BPP, vol 3, p 440.

536. Ward, *National Overview*, vol 2, p 34; Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 9; Moore, Rigby, and Russell, *Old Land Claims* (doc H1), pp 15–17, 20.

537. Dr Donald Loveridge, '"An Object of the First Importance": Land Rights, Land Claims and Colonization in New Zealand, 1839–1852', report commissioned by the Crown Law Office, 2004 (Wai 863 ROI, doc A81), p 84.

538. Governor's speech, 'Opening of the Legislative Council', 14 December 1841, IUP/BPP, vol 3, p 548; see also 'Opening of the Second Session of the Legislative Council', *New Zealand Herald and Auckland Gazette*, 15 December 1841, p 2 (cited in Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 84).

539. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), pp 87–88.

540. See Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), pp 93–106.

541. Gipps instructions to commissioners, 2 October 1840, IUP/BPP, vol 3, p 429 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 14).

542. Commissioners to Gipps, 18 September 1840 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 17).

543. Gipps to Hobson, 30 November 1840 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), pp 20–21).

544. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 393; closing submissions for Wai 354 and others (#3.3.399), pp 103–104.

545. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 76 (cited in closing submissions for Wai 354 and others (#3.3.399), pp 103–104).

546. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, pp 393–394.

547. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, pp 95–96.

548. Ibid, p 96.

549. Ibid, p 97.

550. See Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 35.

551. Ibid, pp 11–12; see also Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 252.

552. An additional commissioner, Robert FitzGerald, was later appointed by Governor FitzRoy, in 1844, to revisit the decisions of Godfrey and Richmond. See Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 33.

553. Clarke to Colonial Secretary, 9 December 1840 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 40).

554. Godfrey to Hobson, 19 January 1841 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 43).

555. Clarke to Colonial Secretary, 9 February 1841 (cited in Armstrong, "The Land Claims Commission' (Wai 45 ROI, doc I4), pp 46–47).

556. Clarke to Colonial Secretary, 25 February 1841 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), pp 48–49).

557. Ibid.

558. Enclosed in Clarke to Colonial Secretary, 16 July 1841 in H H Turton, *Epitome of Official Documents Relative To Native Affairs and Land Purchases in the North Island of New Zealand* (Wellington: Government Printer, 1877), B, p 3 (cited in Wyatt, 'Old Land Claims' (doc E15), fols 211–212).

559. 'Notices of Hearing Claims to Grants of Land in the Bay of Islands District', *New Zealand Herald and Auckland Gazette*, 28 August 1841, p 2 (supplement).

560. Bruce Stirling, Turner Event Centre, Kerikeri, transcript 4.1.9, p 137.

561. Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), pp 20–21.

562. The schedule setting out the fees to be paid to the commission implied that two witnesses would be required. In February 1842, Richmond informed Busby that at least two of the vendors were required to appear in support of his claim. In practice, the word of two vendors was considered sufficient to confirm a sale: see Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 127; Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, pp 122, 126, 169; Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, p 96.

563. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 354–363.

564. Ibid, p 363.

565. Crown closing submissions (#3.3.412), p 41. The Crown analyses these cases on pp 42–49.

566. A derivative claim refers to one that is derived from another, usually where the connection to the original transaction has become blurred (for example, by further transactions).

567. Commissioner's award, OLC 615, 23 March 1843 (cited in Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 405).

568. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 261–262.

569. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 358.
570. Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 247; Rigby, 'Old Land Claims, Surplus Land and Scrip' (doc A48), app A.
571. Crown closing submissions (#3.3.412), p 41. The Crown analyses these cases on pp 42–49.
572. See Didier Huma Joubert OLC 789 (cited in Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 488).
573. Godfrey [judgment] on Claim 260 Walter Brodie, 29 April 1843 (Berghan, supporting papers (doc A39(m)), vol 12, p 7002).
574. Evidence of E Moka, 6 May 1847, and Wariaria and Harris, 14 July 1847 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7051–7056).
575. Statement by Waka Nene, 16 September 1846 (Berghan, supporting papers (doc A39(m)), vol 12, p 7081).
576. Sketch map, 14 July 1847 and Bell report, 21 June 1862 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7057–7058, 7026); Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 356.
577. Grey to Lt Gov Wynyard, 9 February 1852 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7073–7079); evidence of Brodie, 12 October 1847 (Berghan, supporting papers (doc A39(m)), vol 12, p 7096); Bell report, 21 June 1862 and evidence of Brodie, 12 October 1857 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7026, 7095–7098).
578. Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 372.
579. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 372, 1229; Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 196–197; Berghan, supporting papers (doc A39(m)), vol 6, pp 3371–3373.
580. We note that the Crown included the 500 acres in its surplus total, but this was unable to be confirmed by Rigby, 'Validation Review of the Crown's Tabulated Data' (doc A48), app A; see also Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 144; Crown closing submissions (#3.3.412), pp 43–44.
581. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 362.
582. Ibid, pp 363, 380, 430.
583. Ibid, p 372.
584. Ibid, p 364.
585. Ibid, p 365.
586. Ibid, pp 366–367. This was presumably the island now known as Waewaetorea, which has a coast known as Ōtāwake.
587. Ibid, pp 370–371.
588. Evidence of Mohi Tawhai, 18 March 1844 (Berghan, supporting papers (doc A39(m)), vol 23, p 13476).
589. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 364.
590. Ibid, pp 375–377.
591. Crown closing submissions (#3.3.412), p 40.
592. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 380–381.
593. Ibid, p 381.
594. Waetford to Bell, 21 May 1860, OLC 202 (Berghan, supporting papers (doc A39(m)), vol 5, p 2370).
595. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 381–382.
596. Evidence of Waiotara, 28 February 1843, OLC 87 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 382–383).
597. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 383–384.
598. Crown closing submissions (#3.3.412), p 49.
599. Ibid, pp 49–50.
600. Claimant submissions in reply (#3.3.430), pp 21–23.
601. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 394.
602. Brodie's evidence to the Select Committee on New Zealand, 4 June 1844 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 125).
603. Ibid.
604. Brodie, 'The Adventures of a Roving Englishman', 1845, p 66 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 126).
605. S M Martin, *New Zealand in a Series of Letters* (London: Simmonds and Ward, 1845), p 111 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 132).
606. McDonnell's evidence to the Select Committee on New Zealand, [June] 1844 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 135).
607. McDonnell's evidence to the Select Committee on New Zealand, [June] 1844 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 135).
608. Petition by McDonnell to the House of Representatives, 1856 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 135).
609. See Tonk, 'The First New Zealand Land Commissions', fol 84.
610. George Clarke, Half Yearly Report, June 1842 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), pp 135–136).
611. George Clark to Colonial Secretary, 4 January 1843 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 173).
612. Godfrey to Colonial Secretary Shortland, 4 May 1843 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 174).
613. Clarke to Godfrey, 20 June 1841 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 51).
614. See Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 51; Crown closing submissions (#3.3.412), p 29.
615. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 216, 353–354, 432–433.
616. Ibid, pp 353–354, 361.
617. Ibid, p 216.

618. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 367; Dr Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, p 164.
619. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 367; Dr Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, p 164.
620. Crown statement of position and concessions (#1.3.2), pp 60, 65.
621. Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 69.
622. Crown Titles Bill 1849, second reading, IUP/BPP, vol 9 [1280], p 71 (cited in Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, p 96).
623. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, p 96.
624. Shortland to Clarke, [21 April 1843] (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 175).
625. Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 175.
626. Kemp to Clarke, 19 November 1843 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 176).
627. Kemp to Clarke, 19 November 1843, OLC 1/537 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 348).
628. See Crown document bank (doc H20), p 16; Crown closing submissions (#3.3.412), p 31; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 346.
629. Submissions in reply for Wai 354, Wai 1514, Wai 1535, and Wai 1664 (#3.3.475), pp 48–49.
630. FitzRoy minute, 16 December 1843 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 350).
631. Godfrey to Colonial Secretary, 4 May 1843 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 342).
632. Terry, *New Zealand* (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 137, and Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 322–323).
633. Godfrey to Colonial Secretary, 9 March 1842 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 61).
634. Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), pp 63–64.
635. Crown closing submissions (#3.3.412), p 75.
636. Report by Richmond and Godfrey, 2 May 1842 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 118); Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 148.
637. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 148.
638. Ibid, p 149.
639. Clarke to Colonial Secretary, 25 July 1840 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), pp 20, 69).
640. Gipps to Hobson, 30 November 1840 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), pp 20–21); Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 239–240.
641. See evidence of McDonnell before the 1844 Select Committee (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 135); see also Stanley to FitzRoy, 30 November 1840, IUP/BPP, vol 4, p 209 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 144).
642. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 242–243.
643. Evidence of Busby, Ōkiato, 30 January 1841 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 243–244).
644. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 124.
645. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 249–251.
646. Ibid, p 237.
647. Closing submissions for Wai 1968 (#3.3.337), pp 22–32; closing submissions for Wai 2382 (#3.3.339), pp 16–30.
648. Rueben Porter (doc S6), p 9.
649. Ibid, pp 9–10; Rueben Porter, transcript 4.1.20, Te Tapui Marae, Matauri Bay, pp 492–494.
650. Rueben Porter (doc S6), pp 9–10.
651. Ibid, pp 10–15.
652. Nuki Aldridge (doc AA154(c)), pp 21–27. For example, Mr Aldridge specifically referred to claims by McLiver (OLC 302–304), Powditch (OLC 383–385), Baker (OLC 549–550), Kemp (OLC 559–602), and Cooper (OLC 713), all from Whangaroa; Turner and Evans at Kororāreka (OLC 178–183); Spicer at 'Paramatta and Waeparoa' (OLC 430 and 432); and Spicer and Graham at 'Paramatta' (OLC 643).
653. Nuki Aldridge (doc AA154(c)), pp 21–30.
654. Ibid, p 21.
655. See Crown cross-examination, transcript 4.1.20, Te Tapui Marae, Matauri Bay, pp 517–518.
656. See Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 22, 269–271; Rueben Porter (doc S6), p 11.
657. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 269–270.
658. Claimant closing submissions (#3.3.223), pp 7, 42, 44.
659. Crown closing submissions (#3.3.412), p 8.
660. Ibid, p 2.
661. Russell to Hobson, 28 January 1841, IUP/BPP, vol 3, p 174.
662. Gipps to Hobson, 2 October 1840 (Armstrong, supporting papers (Wai 45 ROI, doc I4(a)), pp 213–214).
663. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 304–306, 383, 412.
664. Commissioner's recommendation, 8 April 1843 (Berghan, supporting papers (doc A39(m)), vol 13, p 7801); Daamen, Hamer, and Rigby, *Auckland* (doc H2), p 86.
665. Commissioner's recommendation, 30 May 1843 (Berghan, supporting papers (doc A39(m)), vol 13, p 7977).
666. See Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 95.
667. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 152.
668. 'Supposed Contents' (Berghan, supporting papers (doc A39(m)), vol 14, p 8095).
669. Evidence of Charles Korokoro, 3 January 1842 (Berghan, supporting papers (doc A39(m)), vol 14, pp 8102–8103).

670. Evidence of William Powditch, 10 January 1842 (Berghan, supporting papers (doc A39(m)), vol 14, p 8105).
671. Evidence of Polack, 10 June 1842 (Berghan, supporting papers (doc A39(m)), vol 14, p 8117).
672. Evidence of Rewa, 5 May 1842 (Berghan, supporting papers (doc A39(m)), vol 14, p 8109).
673. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 152–153.
674. Te Kapotai Hapu Korero, 'Mana i te Whenua' (doc F26(b)), p 19; Daamen, Hamer, and Rigby, *Auckland* (doc H2), p 104.
675. See Daamen, Hamer, and Rigby, *Auckland* (doc H2), p 86; Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 440.
676. Evidence of Henry Williams, 4 November 1841 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 108).
677. Specifically: Warehuinga and Ngā Mahanga were excluded from the recommended awards for OLC 521 but included in OLC 522 and 523; Te Umatakiura was also excluded from OLC 521 but included in OLC 523; Tomotomokia was excluded from OLC 521 and 523 but included in OLC 525. See commission report, 2 February 1842 (Berghan, supporting papers (doc A39(m)), vol 10, p 5851); commission report, 2 May 1842 (Berghan, supporting papers (doc A39(m)), vol 10, p 5905); commission report on OLC 522 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1525).
678. See Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1526–1529.
679. Ibid, p 1530.
680. Ibid, pp 1531–1533; Daamen, Hamer, and Rigby, *Auckland* (doc H2), p 139.
681. Daamen, Hamer, and Rigby, *Auckland* (doc H2), p 139.
682. Stirling and Towers described this case in detail: see '"Not with the Sword but with the Pen"' (doc A9), pp 1487–1498.
683. Godfrey and Richmond to Colonial Secretary, 2 May 1842 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 179).
684. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 184–185.
685. In the case of Fanny Wing, Tutu her uncle and other hapū leaders gave evidence of their 'free gift' to the girl. The commission recommended that a grant be issued if it was the Government's intention to recognise gifts. Fanny died, however, and Captain Wing's later attempt to have the title for himself was unsuccessful. See Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 616–617.
686. Evidence of Aperahama and Wiremu Kīngi, 10 November 1842, OLC 1/777 (Berghan, supporting papers (doc A39(m)), vol 17, p 10144).
687. Schedule of land sold by a Native Chief of the River Hokianga (Berghan, supporting papers (doc A39(m)), vol 22, p 12480).
688. Evidence of Hua, 17 April 1843 (Berghan, supporting papers (doc A39(m)), vol 22, p 12478).
689. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 123, 373.
690. Ibid, pp 124, 372, 1331–1332.
691. See comment by Polack that '[g]ifts of land from the natives to Europeans are not valid, nor are the promises of a chief to a European who obtains land in consequence of his cohabitating with the daughter or female relative to the chief'. In such cases, the land was sold again to another European: Polack, *Manners and Customs of the New Zealanders*, vol 2, p 81.
692. Crown closing submissions (#3.3.412), p 25.
693. Submission in reply for Wai 354 and others (#3.3.475), p 43; an example of the standard form may be found in Berghan, supporting papers (doc A39(m)), vol 15, pp 8651–8653.
694. See Daamen, Hamer, and Rigby, *Auckland* (doc H2), p 82.
695. Submission in reply for Wai 354 and others (#3.3.475), p 43.
696. Ibid, p 54.
697. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 167.
698. Crown closing submissions (#3.3.412), p 27.
699. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 154.
700. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 168.
701. Tāmati Waka Nene, 20 July 1860, 'Proceedings of Kohimarama Conference' (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 161).
702. See Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 125.
703. See Vincent O'Malley, *The Meeting Place: Maori and Pakeha Encounters, 1642–1840* (Auckland: Auckland University Press, 2012), p 146.
704. Crown closing submissions (#3.3.412), p 33.
705. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 144.
706. Ibid, pp 144–145.
707. Ibid.
708. See Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 170.
709. Herbert Rihari (doc R7), pp 29–31.
710. Willow Jean Prime (doc F27(a)), p 3.
711. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 103.
712. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 3.
713. Ibid, p 7.
714. Waitangi Tribunal, *The Kaipara Report*, Wai 674 (Wellington: Legislation Direct, 2006), p 96.
715. Ibid, p 99.
716. Ibid, pp 98, 100–101.
717. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua: The Report on the Turanganui a Kiwa claims*, Wai 814, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 744.
718. Ibid, p 536.
719. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 412–413.
720. Ibid, pp 599–600, 639–642.
721. Claimant closing submissions (#3.3.223), p 25.
722. Closing submissions for Wai 2382 (#3.3.339), pp 33–34.
723. Claimant closing submissions (#3.3.223), pp 24, 40.
724. Closing submissions for Wai 678 (#3.3.248), pp 15–17.
725. Crown memorandum (#3.2.2682), pp 3–5.
726. Crown closing submissions (#3.3.412), p 54.
727. Crown memorandum (#3.2.2682), pp 4–5.
728. Crown closing submissions (#3.3.412), pp 55–56.

729. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 178–179; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 412–414. Richmond was appointed Chief Police Magistrate for the Southern District in July 1843, and early in 1844 became Superintendent.
730. Report of Select Committee, 16 July 1856, IUP/BPP, vol 10, p 623 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 190).
731. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 414.
732. Clause 6 stated that nothing in the ordinance obliged the Governor to make any grant: see Crown memorandum (#3.2.2682), pp 3–4.
733. FitzRoy (cited in Armstrong, 'The Land Claims Commission: Practice and Procedure' (Wai 45 ROI, doc I4), p 184); Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 415.
734. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 415.
735. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 180.
736. Ibid; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 415; for FitzRoy's interpretation of his prerogative, see Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 183; Crown memorandum (#3.2.2682), pp 3–4.
737. FitzRoy quoted in 'Legislative Council', *New Zealand Gazette and Wellington Spectator*, 31 January 1844, p 3 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 186, and Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 414).
738. Godfrey to Colonial Secretary, 8 June 1844, IUP/BPP, vol 5, p 584 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 180).
739. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 180.
740. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 429–430, see also p 1091.
741. For discussion of this case, see Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 635, and Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 200. According to those sources, Richmond and Godfrey recommended against a grant to Beattie, and FitzGerald later repeated that advice, though FitzRoy did not follow it. FitzGerald appears to have challenged the Governor on two other occasions. One concerned Mair's second Whāngārei claim (OLC 1047), which Te Tirarau disputed. On this occasion, FitzGerald warned the Governor about ignoring Te Tirarau's concerns: Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1697–1698, 1713–1719. The other occasion concerned land in Kororāreka that was claimed by two settlers, Polack and Baker: Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 637.
742. FitzRoy memorandum, 20 March 1847 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 182).
743. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 182; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 413.
744. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 182–183.
745. Ibid, p 183.
746. Crown memorandum (#3.2.2682), pp 4–6.
747. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 423.
748. Minutes of the Executive Council, 12 June 1844 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 180).
749. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 636.
750. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 387–388, 393–394; Berghan, supporting papers, vol 12 (doc A39(m)), p 7283.
751. Bell memorandum, 4 July 1860 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7460–7465).
752. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 309; see also Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 395–399.
753. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 481–482.
754. Berghan, supporting papers (doc A39(m)), vol 13, p 7957.
755. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 627. According to Stirling and Towers, the final award subsumed Hamangi's portion at Waiohanga, while it is not clear what became of Hake's.
756. This distinction escaped Grey's notice, and they were included in his legal challenge. Since this was conducted largely on the basis that the missionary grants were contrary to the commission's recommendations, a new warrant had to be sworn out, on the advice of Attorney-General Swainson: see Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1376–1380; Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 500–506.
757. Ligar, 'List of Land Claimants who have received grants exceeding 2560 acres', no date, IUP/BPP, vol 5, p 583.
758. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 353, 423–424; Berghan, supporting papers (doc A39(m)), vol 11, pp 6582–6583.
759. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1690–1692.
760. According to the evidence of claimant witness Marina Fletcher, the understanding of their tūpuna was that an agricultural school based on the Waimate model would be established there: Marina Fletcher (doc I35), p 5.
761. Land Claims Commission report, 29 April 1843 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1695).
762. See Tangi Rudolph (doc U6(a)), p 8; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1690–1691, 1695.
763. Land Claims Commission report, 29 April 1843 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1695); Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 189.
764. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1689, 1695.

765. Land Claims Commission report, 29 April 1843 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1696).
766. Commissioners Godfrey and Richmond to Colonial Secretary, 10 July 1843 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1696).
767. FitzRoy minute, 10 May 1844 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1697).
768. FitzGerald minute, 27 May 1844 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1698).
769. Ibid.
770. Hone Wiremu Heke Pokaia, Tautoro, to Mair, 16 October 1844 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1699–1700).
771. Commissioner for Quieting Titles to Colonial Secretary, 7 March 1853 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1701).
772. Surveyor-General Ligar to Colonial Secretary, 16 March 1853 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 598, 1701–1702).
773. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 598–599.
774. Ibid, pp 416–417, 766.
775. FitzRoy minute, June 1845 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 379).
776. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 376, 417.
777. Ibid, p 417.
778. Grey marginal comments on Clarke to Colonial Secretary, 30 March 1846, IUP/BPP, vol 5, p 563 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 193).
779. Grey to Gladstone, 23 June 1846, IUP/BPP, vol 5, pp 581–582 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 193).
780. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 193.
781. Grey to Gladstone, 24 June 1846, IUP/BPP, vol 5, p 591 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 193).
782. Grey to Gladstone, 25 June 1846, IUP/BPP, vol 6, pp 78–79 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 194).
783. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 194.
784. Grey to Selwyn, 30 August 1847, IUP/BPP, vol 6, p 209 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 194).
785. Grey to secretary, Church Missionary Society, 6 August 1847, IUP/BPP, vol 6 [1002], p 116.
786. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 194.
787. Grey to Earl Grey, 2 August 1847, IUP/BPP, vol 6, p 110 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 195).
788. Grey to Earl Grey, 1 September 1847, IUP/BPP, vol 6, p 117 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 195).
789. Ibid.
790. Crown memorandum (#3.2.2682), pp 3–4.
791. Merriman to Clarke, 10 July 1848 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 195).
792. Williams to Earl Grey, 1 November 1848, IUP/BPP, vol 6, p 86 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 196).
793. Grey to Earl Grey, 17 October 1848 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 196).
794. Ibid (pp 196–197).
795. Ibid (p 197).
796. Ibid (p 198).
797. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 199.
798. Grey to Earl Grey, 3 November 1848 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 200).
799. See Grey to Earl Grey, 10 February 1849, IUP/BPP, vol 6 [1120], pp 73–74.
800. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 633; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 200.
801. Grey to Earl Grey, 24 July 1849, IUP/BPP, vol 6, [1280], p 1.
802. Ibid.
803. Ibid.
804. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 639–640; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 200–201.
805. Governor Grey's opening address, 15 August 1849, IUP/BPP, vol 6 [1280], pp 28–29.
806. Ibid, pp 29–30.
807. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 201.
808. See Grey to Earl Grey, 3 October 1849, IUP/BPP, vol 6, p 67 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 198).
809. See Grey to Earl Grey, 17 October 1848 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 198).
810. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 640–641.
811. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 201, 202.
812. See Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 641.
813. Crown memorandum (#3.2.2682), p 4.
814. Crown Quieting Titles Ordinance 1849, cl 1.
815. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 640.
816. Ibid, p 692.
817. Ibid, p 649.
818. Taylor was awarded 1,666 acres as his share of the transaction but onsold. Bell eventually awarded the new 'owner' 2,235 acres: see Berghan, 'Northland Block Research Narratives', vol 2 (doc A39(a)), p 291.
819. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1524–1528; Berghan, 'Northland Block Research Narratives', vol 2 (doc A39(a)), p 460. Berghan commented that there are no details on the claim record as to the circumstances of this decrease.
820. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 641.

821. Grey to Earl Grey, 17 October 1848 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 198).
822. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 643; Paul Monin, 'The Islands Lying between Slipper Island in the South-East, Great Barrier Island in the North and Tiritiri-Matangi in the North-West', report commissioned by the Waitangi Tribunal, 1996 (Wai 406 ROI, doc C7), p 34.
823. Monin, 'The Islands' (Wai 406 ROI, doc C7), p 34.
824. Ibid.
825. Grey to Earl Grey, 18 July 1850, IUP/BPP, vol 7 [1420], p 26.
826. Monin 'The Islands' (Wai 406 ROI, doc C7), p 34.
827. Grahame to Colonial Secretary, 1 July 1850 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 643–644).
828. Tamati Waka [Rewa] to Native Secretary, no date (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 644–645).
829. Grey to Earl Grey, 18 July 1850, IUP/BPP, vol 7 [1420], p 27.
830. Nugent to Donnelly, 8 July 1851 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 645).
831. Nugent memorandum, 21 August 1851 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 646).
832. Nugent to Donnelly, 24 October 1851 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 646).
833. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 646–647.
834. See Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 202; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 647–648.
835. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 647–648.
836. See Mark Hickford, 'Settling Some Very Important Principles of Colonial Law: Three "Forgotten" Cases of the 1840s', *Victoria University of Wellington Law Review*, vol 35, no 1 (2004), p 25.
837. Heinrich Ferdinand von Haast, ed, *New Zealand Privy Council Cases, 1840–1932* (Wellington: Butterworths, 1938), p 520.
838. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 639.
839. Crown closing submissions (#3.3.412), p 54.
840. Polack to Colonial Secretary, 5 January 1844 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 183).
841. FitzRoy to Sinclair, 13 January 1844 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 183).
842. Ligar report on Polack's claim, 28 June 1849 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 184); see also Berghan, supporting papers (doc A39(m)), vol 14, p 8117.
843. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 190.
844. *R v Clarke* [1851] NZPC 1.
845. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 [298].
846. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 40; W H Oliver, 'The Crown and Muriwhenua Lands: An Overview', report commissioned by the Crown Forestry Rental Trust, 1994 (Wai 45 ROI, doc L7), p 15; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 200, 202–203.
847. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 203.
848. FitzRoy, proclamation, 26 March 1844, IUP/BPP, vol 4, p 202; proclamation, 10 October 1844, IUP/BPP, vol 4, pp 401–402; Rose Daamen, *The Crown's Right of Pre-emption and FitzRoy's Waiver Purchase*s, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1998), pp 73, 84.
849. Select committee report on outstanding land claims, 16 July 1856, IUP/BPP, vol 11, p 593.
850. Claimant closing submissions (#3.3.208(a)), pp 17–19.
851. Ibid, p 19.
852. Barry Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report', report commissioned by the Waitangi Tribunal, 2015 (doc A53), p 11 (cited in claimant closing submissions (#3.3.208(a)), p 16).
853. Claimant closing submissions (#3.3.208(a)), p 19.
854. Closing submissions for Wai 678 (#3.3.248(a)); closing submissions for Wai 354 and Wai 1535 (#3.3.392); closing submissions for Wai 354 and others (#3.3.399). See Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1860–1863, for a listing of the rangatira who were vendors of land in Mahurangi over which pre-emption waivers were secured.
855. Claimant closing submissions (#3.3.223), p 38.
856. Claimant closing submissions (#3.3.208), p 40.
857. Memorandum 2.6.255, p 3.
858. Claimant submissions in reply (#3.3.430), p 31.
859. Memorandum of counsel for Wai 1531, Wai 2005, Wai 2206, Wai 1957, Wai 1477, Wai 2061, Wai 2362, Wai 2382, Wai 1716, Wai 2063, Wai 2377 and Wai 2394 (#3.3.235), pp 8–9; see also claimant closing submissions (#3.3.336); claimant closing submissions (#3.3.400), p 202.
860. Closing submissions for Wai 1531, Wai 2005, Wai 2206, Wai 1957, Wai 1477, Wai 2061, Wai 2362, Wai 2382, Wai 1716, Wai 2063, Wai 2377 and Wai 2394 (#3.3.235), p 5.
861. Ibid, p 7.
862. Closing submissions for Wai 320, Wai 736, Wai 1307, Wai 2026, Wai 2476 and Wai 1958 (#3.3.234), pp 10–11; *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641.
863. Closing submissions for Wai 121, Wai 230 and other (#3.3.262), p 31.
864. Memorandum of counsel for Wai 861, Wai 914, Wai 224, and Wai 2071 (#3.3.233), p [2].
865. Ibid, p [3]. We note that, on their own, the equitable duties assumed under the Ordinance are in the nature of a political trust only.
866. Ibid.
867. Ibid, p [4].
868. Ibid.
869. Ibid, p [5].
870. *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 24; memorandum of counsel for Wai 861, Wai 914, Wai 224, and Wai 2071 (#3.3.233), pp [5]–[6].
871. Crown statement of position and concessions (#1.3.2), p 2.

872. Crown statement of position and concessions (#1.3.2), pp 2, 52.
873. Crown closing submissions (#3.3.412), pp 62–63.
874. Ibid, p 63.
875. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, pp 109–110.
876. 'Levee', *Daily Southern Cross*, 30 December 1843, p 2.
877. Ibid (cited in Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, p 111).
878. 'Levee', *Daily Southern Cross*, 30 December 1843, p 2.
879. Ibid.
880. Samuel McDonald Martin, 'Address from the Inhabitants of Auckland to Governor FitzRoy', 26 December 1843, IUP/BPP, vol 4, p 237; Daamen, *The Crown's Right of Pre-emption*, p 66.
881. 'His Excellency's Reply', *Daily Southern Cross*, 6 January 1844, p 3.
882. The first was signed by Āpihai Te Kawau, Te Tinana, and others of Ngāti Whātua and the second by Pōtatau Te Wherowhero, and Takiwaru Kati, Epiha Putini, Tamati, and Paora: see 'Levee', *Daily Southern Cross*, 30 December 1843, p 3.
883. *Daily Southern Cross*, 17 February 1844 (cited in Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 182).
884. FitzRoy, 26 March 1844, IUP/BPP, vol 4, p 197.
885. Daamen, *The Crown's Right of Pre-emption*, p 77.
886. FitzRoy to Stanley, 15 April 1844, IUP/BPP, vol 4, p 179.
887. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, p 111.
888. Stanley to FitzRoy, 30 November 1844, IUP/BPP, vol 4, pp 209, 210.
889. 'Proclamation', *Daily Southern Cross*, 11 January 1845, p 2.
890. FitzRoy, 26 March 1844, IUP/BPP, vol 4, p 202.
891. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 460.
892. 'The Purchases of Land from the Natives', *Daily Southern Cross*, 3 August 1844, p 2.
893. 'The Late Proclamation', *Daily Southern Cross*, 6 April 1844, p 2.
894. 'Extracts from "The Southern Cross, 'of 7 September 1844', IUP/BPP, vol 4, pp 366–370.
895. Daamen, *The Crown's Right of Pre-emption*, p 124.
896. Clarke to Colonial Secretary, 31 July 1844, IUP/BPP, vol 4, p 457.
897. Clarke to FitzRoy, 9 October 1844, IUP/BPP, vol 4, p 406.
898. Ibid. For discussion of purchases under the March 1844 regulations see Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 462–467.
899. Daamen, *The Crown's Right of Pre-emption*, p 126.
900. 'The Government Gazette,' *Auckland Chronicle and New Zealand Colonist*, 10 October 1844, p 3.
901. 'Extract from Minutes of the Executive Council', 10 October 1844, IUP/BPP, vol 4, pp 404–405.
902. Daamen, *The Crown's Right of Pre-emption*, p 128.
903. Ibid, p 129.
904. FitzRoy to Stanley, 14 October 1844, IUP/BPP, vol 4, p 401.
905. 'Government Notices,' *Southern Cross*, 14 December 1844, p 3.
906. Daamen, *The Crown's Right of Pre-emption*, pp 89, 91.
907. Ibid, pp 131–132.
908. Daamen suggested that Clarke may have regarded the 26 March 1844 Proclamation as a temporary expedient intended to avert the perceived threat of insurrection: Daamen, *The Crown's Right of Pre-emption*, p 192.
909. Ibid, p 104.
910. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 498.
911. Ibid, pp 501–502.
912. Daamen, *The Crown's Right of Pre-emption*, p 110.
913. Grey to Stanley, 9 June 1846, IUP/BPP, vol 5, pp 555–557; Grey to Gladstone, 21 June 1846, IUP/BPP, vol 5, pp 575–577. Examples of certificates being issued for Mahurangi lands already purchased include those for Fulton and Elliot (OLC 1141), White and Wilson (OLC 1158), Harris and Hatfield (OLC 1156 and OLC 1157), Langford and Gardiner (OLC 1187), Chisholm and Langford (OLC 1165), and the three Smithson claims at Waiwerawera (OLC 1136, OLC 1137, and OLC 1138): see Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 499–500.
914. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 481–483.
915. Ibid, pp 483, 493.
916. Ibid, p 499.
917. See Daamen, *The Crown's Right of Pre-emption*, pp 134–143.
918. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1777.
919. Ibid, pp 1779–1780.
920. Ibid, p 1781.
921. Ibid, p 1780.
922. Ibid, p 510.
923. Ibid, p 515.
924. Ibid, pp 567–568.
925. Ibid, pp 567–568.
926. Ibid, pp 511–514.
927. Ibid, pp 516–517.
928. Ibid, p 517.
929. Ibid, p 514.
930. Select committee report on outstanding land claims, 16 July 1856, IUP/BPP, vol 11, p 589.
931. Grey to Stanley, 10 December 1845, IUP/BPP, vol 5, p 358; Grey to Stanley, 9 June 1846, IUP/BPP, vol 5, p 555; see also James Rutherford, *Sir George Grey KCB, 1812–1898: A Study in Colonial Government* (London: Cassell, 1961), p 119.
932. Grey to Stanley, 9 June 1846, IUP/BPP, vol 5, pp 555–556; Grey to Gladstone, 21 June 1846, IUP/BPP, vol 5, pp 575–576.
933. Encl in Grey to Gladstone, 18 June 1846, IUP/BPP, vol 5, p 570.
934. Select committee report on outstanding land claims, 16 July 1856, IUP/BPP, vol 11, p 593.
935. Ibid.
936. FitzRoy, address to chiefs, 26 March 1844, IUP/BPP, vol 4, p 198 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 457); FitzRoy, proclamation, 15 April 1844, IUP/BPP, vol 4, p 202.

937. Matson commanded the first detachment of the 58th Regiment, which arrived in Auckland in March 1845.
938. Grey to Earl Grey, 19 April 1847, IUP/BPP, vol 6 [892], p 30 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 541).
939. Grey to Grey, 10 February 1847, IUP/BPP, vol 5, pp 578–580.
940. Grey to Earl Grey, 19 April 1847, IUP/BPP, vol 6 [892], p 32 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 542).
941. Grey to Earl Grey, 5 July 1847, IUP/BPP, vol 6 [892], p 64; 'Judgment of Mr Justice Chapman', no date, IUP/BPP, vol 6 [892], pp 64–71.
942. FitzRoy, proclamation, 26 March 1844, IUP/BPP, vol 4, p 202; proclamation, 10 October 1844, IUP/BPP, vol 4, p 402.
943. Minute of His Excellency the Governor to the Legislative Council, 7 August 1847, IUP/BPP, vol 6 [1002], pp 47–48.
944. Earl Grey to Grey, 10 February 1847, IUP/BPP, vol 5, p 579; Minute of His Excellency the Governor to the Legislative Council, 7 August 1847, IUP/BPP, vol 6 [1002], p 47.
945. Minute of His Excellency the Governor to the Legislative Council, 7 August 1847, IUP/BPP, vol 6 [1002], p 47.
946. Matson had served under Colonel Despard in the Northern War and was promoted to Brevet-Major for his services: Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 541.
947. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 549.
948. Daamen, *The Crown's Right of Pre-emption*, p 167.
949. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 549.
950. Ibid, p 557.
951. Barry Rigby, 'The Crown, Maori and Mahurangi 1840–1881', report commissioned by the Waitangi Tribunal, 1998 (doc E18), p 87.
952. Ibid, pp 87–88; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 550.
953. Closing submissions for Wai 354 and Wai 1535 (#3.3.392), p 66.
954. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 550.
955. Ibid, pp 1801–1802.
956. Ibid, pp 1802–1803.
957. Closing submissions for Wai 678 (#3.3.248), p 25.
958. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1804–1805.
959. Ibid, pp 1805–1806.
960. Closing submissions for Wai 678 (#3.3.248), p 26.
961. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1807.
962. Governor Grey to Secretary of State, 24 June 1846 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1808).
963. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1809.
964. Governor Grey to Secretary of State, 9 August 1847 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1809).
965. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1810.
966. Ibid, p 1809.
967. Ibid, p 1810.
968. Ibid, p 1811.
969. Ibid.
970. Ibid, p 1813.
971. Resident Magistrate White, Mangonui, to Colonial Secretary, 13 October 1851 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1813).
972. Ligar to Colonial Secretary, 9 December 1851 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1813).
973. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 549–550.
974. Ibid, p 551.
975. Ibid, pp 552–553.
976. Ibid, p 557.
977. Report of the Select Committee on Outstanding Land Claims, 16 July 1856, IUP/BPP, vol 10, p 628.
978. Ibid.
979. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [11].
980. Ibid at [12].
981. Ibid at [17].
982. Ibid at [18]–[19].
983. Ibid at [31].
984. Ibid at [1].
985. Ibid at [392]–[416].
986. Ibid at [572].
987. Ibid at [726].
988. Ibid at [908]–[924].
989. Ibid at [385].
990. Ibid at [391].
991. Ibid at [784] fn 1012.
992. Ibid at [377].
993. Lindsay Breach, 'Fiducia in Public Law' *Victoria University of Wellington Law Review*, vol 48, no 3 (2017), p 421.
994. Waitangi Tribunal, *Te Maunga Railways Land Report*, Wai 315 (Wellington: Brooker's Ltd, 1994), p iii.
995. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, pp 283, 389.
996. Waitangi Tribunal, *Turangi Township Report 1995*, Wai 84 (Wellington: Brooker's Ltd, 1995), pp 289–290.
997. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [336].
998. Carwyn Jones, 'Analysis: *Proprietors of Wakatū and Others v Attorney-General* [2017] NZSC 17', 13 May 2017, International Association of Constitutional Law, https://blog-iacl-aidc.org/test-3/2018/5/26/analysis-proprietors-of-wakat-and-others-v-attorney-general-2017-nzsc-17, accessed 13 December 2022.

999. Claimant closing submissions for Wai 1666 and Wai 2149 (#3.3.323), p 10.
1000. Claimant closing submissions for Wai 1957 (#3.3.235), p 3; see also claimant closing submissions for Wai 2382 (#3.3.339) and claimant closing submissions for Wai 1522 and Wai 1716 (#3.3.341).
1001. Claimant closing submissions for Wai 1957 (#3.3.235), p 3.
1002. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [380].
1003. Claimant closing submissions (#3.3.223), p 37.
1004. Copy of Minutes of a Meeting of Native Chiefs, 26 March 1844, encl in FitzRoy to Stanley, 15 April 1844, IUP/BPP, vol 4, p 198.
1005. FitzRoy to Stanley 14 October 1844, IUP/BPP, vol 4, pp 400–401.
1006. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), pp 248–250.
1007. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 452, 481, 483, 499.
1008. Daamen, *The Crown's Right of Pre-emption*, pp 59–61.
1009. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 556–557.
1010. Ibid, p 559.
1011. This figure includes 1,010 acres awarded to Busby by arbitration.
1012. Closing submissions for Wai 1333 (#3.3.313), pp 11–13; claimant closing submissions (#3.3.223), pp 30–31; closing submissions for Wai 2003 and Wai 250 (#3.3.272), pp 23–24.
1013. Closing submissions for Wai 354 and others (#3.3.399), p 143; closing submissions for Wai 1514 (#3.3.357), p 35; closing submissions for Wai 1354 (#3.3.292), para 109; closing submissions for Wai 1333 (#3.3.313), pp 13–14; claimant closing submissions (#3.3.223), pp 25–26.
1014. Closing submissions for Wai 1333 (#3.3.313), pp 13–14.
1015. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 147; closing submissions for Wai 354 and others (#3.3.399), p 143.
1016. Closing submissions for Wai 549, Wai 1526, Wai 1728, and Wai 1513 (#3.3.297(a)), paras 149, 218–219; claimant closing submissions (#3.3.222), para 115.
1017. Claimant closing submissions (#3.3.222), paras 122, 126; claimant closing submissions (#3.3.223), paras 87–90, 95; closing submissions for Wai 354 and others (#3.3.399(b)), para 10.126/108 (a) (v); closing submissions for Wai 1538 (#3.3.303), paras 56–58; closing submissions for Wai 1464 and Wai 1546 (#3.3.395), paras 4.20, 4.49–4.51.
1018. Closing submissions for Wai 354 and others (#3.3.399(b)), para 10.126; closing submissions for Wai 1666 and Wai 2149 (#3.3.323), paras 47–49; closing submissions for Wai 2355 (#3.3.275(a)), paras 5.8–5.23.
1019. Claimant closing submissions (#3.3.222), paras 20–22, 113–116; claimant closing submissions (#3.3.223), paras 101–104; closing submissions for Wai 354 and others (#3.3.399(b)), para 10.126; closing submissions for Wai 1538 (#3.3.303), paras 56–58; closing submissions for Wai 549, Wai 1526, Wai 1728, and Wai 1513 (#3.3.297(a)), paras 201, 209–211, 212–214.
1020. Closing submissions for Wai 549, Wai 1526, Wai 1728, and Wai 1513 (#3.3.297(a)), paras 201, 208, 212–214, 218–219, 224; closing submissions for Wai 1538 (#3.3.303), paras 33–41, 66; closing submissions for Wai 2072 (#3.3.279), para 29; closing submissions for Wai 1354 (#3.3.292), paras 122–123; closing submissions for Wai 1666 and Wai 2149 (#3.3.323), paras 47–49; closing submissions for Wai 2355 (#3.3.275(a)), paras 5.8–5.23; closing submissions for Wai 1666 and Wai 2149 (#3.3.323), paras 47–49; closing submissions for Wai 156 (#3.3.401), paras 105–106, 130–132.
1021. Closing submissions for Wai 1354 (#3.3.292), paras 111–118, 120–121.
1022. Amended closing submissions for Wai 549, Wai 1526, Wai 1728, and Wai 1513 (#3.3.297(a)), paras 212–214.
1023. Crown statement of position and concessions (#1.3.2), p 52.
1024. Ibid, pp 55–56.
1025. Crown closing submissions (#3.3.412), pp 4, 59–60.
1026. Ibid, pp 4, 59–60.
1027. Ibid, pp 4, 59–62.
1028. Ibid, p 56.
1029. Ibid, p 4.
1030. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, pp 81–83; see also Ward, *National Overview*, vol 2, p 32: '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.' As Ward explained, this was the reasoning behind Gipps's sliding scale of land prices. It was not intended to determine whether fair prices had been paid to Māori, but rather to determine the proportions that would be allocated to settlers or retained by the Crown.
1031. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), pp 11–12.
1032. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 359.
1033. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, p 84.
1034. Ward, *National Overview*, vol 2, p 32; Moore, Rigby, and Russell, *Old Land Claims* (doc H1), pp 15–16.
1035. Gipps to Hobson, 2 October 1840 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 14). Armstrong explicitly described this instruction as a policy for 'surplus' lands, even if Normanby did not use that term at the time.
1036. Gipps to Hobson, 30 November 1840 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), pp 20–21).
1037. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 6; Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, p 84.
1038. Busby to Hope, 17 January 1845, IUP/BPP, vol 4, p 517.
1039. Loveridge, 'The New Zealand Land Claims Act of 1840' (Wai 45 ROI, doc I2), pp 84, 128.
1040. Busby to Hope, 17 January 1845, IUP/BPP, vol 4, p 517.
1041. James Busby letter, *Bay of Islands Observer*, 17 March 1842 (cited in David Armstrong and Bruce Stirling, 'Surplus Lands: Policy and Practice, 1840–1950' (Wai 45 ROI, doc J2), p 21).
1042. Loveridge, 'The New Zealand Land Claims Act of 1840' (Wai 45 ROI, doc I2), p 128.

1043. George Clarke to Colonial Secretary, 9 February 1841, p 19 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 47).
1044. Samuel McDonald Martin, *New Zealand: In a Series of Letters* (London: Simmonds & Ward, 1845), p 307.
1045. See Brodie evidence, 4 June 1844, IUP/BPP, vol 2 [556], p 41.
1046. Terry, *New Zealand* (cited in Armstrong and Stirling, 'Surplus Lands' (Wai 45 ROI, doc J2), p 23).
1047. Clarke to Colonial Secretary, 30 March 1846 (cited in Armstrong and Stirling, 'Surplus Lands' (Wai 45 ROI, doc J2), pp 29–30).
1048. FitzRoy to Lord Stanley, 16 May 1843, IUP/BPP, vol 2, p 387 (Crown document bank (doc H20), p 107).
1049. Ibid.
1050. Stanley to FitzRoy, 26 June 1843, IUP/BPP, vol 2, p 390 (Crown document bank (doc H20), pp 109–110).
1051. Ibid.
1052. FitzRoy memorandum, 20 March 1847, IUP/BPP, vol 5, pp 624–625; Crown memorandum (#3.2.2682), pp 7–8; Phillipson, 'Bay of Islands and the Crown' (doc A1), p 189. We note that FitzRoy's memorandum linked that discontent directly to the outbreak of the Northern War (as discussed in chapter 5).
1053. Samuel McDonald Martin, 'Address from the Inhabitants of Auckland to Governor FitzRoy', 26 December 1843, IUP/BPP, vol 4, p 237.
1054. *Southern Cross*, 30 December 1843 (Crown document bank (doc H20), p 111); Crown closing submissions (#3.3.412), p 58.
1055. *Southern Cross*, 30 December 1843 (Crown document bank (doc H20), p 111); Crown closing submissions (#3.3.412), p 59.
1056. Submissions in reply for Wai 354 and others (#3.3.475), p 29.
1057. Kempthorne, minutes of discussions with FitzRoy, 29 December 1843, 3 January 1844 (cited in Armstrong and Stirling, 'Surplus Lands' (Wai 45 ROI, doc J2), p 14).
1058. Crown closing submissions (#3.3.412), p 59.
1059. Ibid.
1060. Cotton journal, 5 September 1844 (cited in Grant Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 339).
1061. Report of FitzRoy meeting with Maori, 2 September 1844 (cited in Armstrong and Stirling 'Surplus Lands' (Wai 45 ROI, doc J2), pp 14–15).
1062. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 346.
1063. Ibid, p 339.
1064. Extracts of the *Southern Cross*, 7 September 1844, IUP/BPP, vol 4, pp 365–370; see also submissions in reply for Wai 354 and others (#3.3.475), p 30.
1065. FitzRoy to Stanley, 15 October 1844, IUP/BPP, vol 4, p 409.
1066. Ibid (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 340).
1067. Crown closing submissions (#3.3.412), pp 60–61.
1068. Ibid, p 59.
1069. Ibid.
1070. See Phillipson on this point, 'Bay of Islands Maori and the Crown' (doc A1), p 340.
1071. Stanley to FitzRoy, 23 June 1843, IUP/BPP, vol 2, p 390 (Crown document bank (doc H20), pp 109–110).
1072. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 340.
1073. Submissions in reply for Wai 354 and others (#3.3.475), p 31.
1074. Ibid, p 29.
1075. Nugent to Colonial Secretary, 2 January 1848, IUP/BPP, vol 6 [1002], pp 99–100.
1076. W H Oliver, 'The Crown and Muriwhenua Lands' (Wai 45 ROI, doc L7), p 6.
1077. McLean to Kemp, 17 November 1855, AJHR, 1861, C-1, p 43, encl 6.
1078. 'Settlement of Land Claims', 21 June 1854, *New Zealand Parliamentary Debates*, vol A, p 112.
1079. Gisborne, memorandum about old land claims and about pre-emption claims, 7 July 1855, enclosures to messages from His Excellency, *Votes and Proceedings of the House of Representatives, 1855*, p 3 (Armstrong and Stirling, 'Surplus Lands' (Wai 45 ROI, doc J2), pp 47–48).
1080. Select committee report on outstanding land claims, 16 July 1856, IUP/BPP, vol 11, p 587.
1081. Ibid.
1082. Ibid, pp 588, 592.
1083. Ibid, p 588.
1084. Ibid, p 590.
1085. Ibid, p 591.
1086. Ibid.
1087. Ibid, p 592.
1088. Ibid, pp 591, 593.
1089. Raewyn Dalziel, 'Francis Dillon Bell', in *Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, https://teara.govt.nz/en/biographies/1b16/bell-francis-dillon, accessed 17 October 2022.
1090. See Oliver's view that Bell was acting for political reasons rather than as an impartial arbiter according to legal criteria: Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 171.
1091. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 24–25; Richard P Boast, 'Surplus Lands. Policy-making and Practice in the Nineteenth Century', report commissioned for the Waitangi Tribunal, 1992 (Wai 45 ROI, doc F16), pp 163, 177–178. Boast analysed the Act's provisions on pp 163–167 of his report.
1092. Native Land Claims Settlement Act 1856, s 23(c), (f). Section 23 also provided for circumstances in which the surveyed boundaries were smaller than the original grant, or where more than one settler was claiming land within the surveyed boundaries.
1093. Section 38 also prohibited any grants of land that might be needed for 'public utility or convenience'.
1094. Boast, 'Surplus Lands' (Wai 45 ROI, doc F16), p 167.
1095. Ibid, pp 166, 184–185.
1096. Ibid, pp 185–186.
1097. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 395.

1098. 'Memorandum by the Chief Commissioner of Land Claims on the "Land Claims Settlement Extension Bill"', 1852, AJHR, 1858, C-2, pp 2–3.
1099. Boast, 'Surplus Lands' (Wai 45 ROI, doc F16), p 176.
1100. 'Memorandum of the Chief Commissioner of Land Claims', 15 May 1858, AJHR, 1858, C-2, p 3.
1101. Ibid, p 4.
1102. Boast, 'Surplus Lands' (Wai 45 ROI, doc F16), pp 178–179.
1103. 'Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1862, D-10, p 18.
1104. See Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1152–1156.
1105. 'Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1862, D-10, pp 17, 18.
1106. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 159.
1107. Ibid, p 171.
1108. Boast, 'Surplus Lands' (Wai 45 ROI, doc F16), pp 170–171, 174.
1109. Section 7 of the Land Claims Settlement Act 1856 empowered the commissioners to set the rules for sitting and notification. These were issued in the *New Zealand Gazette*, 8 September 1857: 'Rules', 8 September 1857, *New Zealand Gazette*, 1857, no 25, pp 144–145. A form of notice was attached in schedule B to the Act.
1110. 'A Word to the Ngapuhi', *Maori Messenger / Te Karere Maori*, 31 August 1857, pp 3–4.
1111. Davis evidence, 13 October 1857, OLC 1/773 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 697).
1112. Davis to Bell, 26 July 1858 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 697).
1113. Te Morenga Kēmara to Bell, no date [1857] (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 698).
1114. Bell minutes, 13 October 1857, OLC 5/34 (cited in Boast, 'Surplus Lands' (Wai 45 ROI, doc F16), p 173).
1115. Bell minutes, 13 October 1857, OLC 5/34 (cited in in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 691).
1116. Bell minutes, 13 October 1857, OLC 5/34 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 691).
1117. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 698.
1118. Bell notes, 23 March 1858, OLC 1/773 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 701).
1119. Bell notes, 26 March 1858, OLC 1/595 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 681).
1120. See Bell notes, 26 March 1858 and report, 20 April 1859, OLC 1/595 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 682, 702–703).
1121. Bell minute, 24 March 1858, OLC 1/634 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 693–694).
1122. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 692.
1123. Te Tao to Bell, 3 October 1857 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 704).
1124. Bell minute, no date, on Te Tao to Bell, 3 October 1857 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 705).
1125. Minutes of Commission, Waimate, 12 October 1857, OLC 5/34; Bruce Stirling and Richard Towers, supporting papers (doc A9(a)), vol 6, pp 3646–3647; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1539–1541.
1126. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 705–706.
1127. Ibid, p 1522.
1128. Eugene Stock, 'Extracts Pertaining to New Zealand from the "History of The Church Missionary Society"', vol 1, 1899, https://www.waitangi.com/cms/cms_vol1a.html; Peter J Lineham, 'Missions and Missionaries – First Missionaries', in *Te Ara – The Encyclopedia of New Zealand*, Ministry for Culture and Heritage, https://teara.govt.nz/en/missions-and-missionaries/page-2, last modified 8 August 2018.
1129. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 718.
1130. Ibid, p 78.
1131. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 395–399.
1132. Ibid, pp 395–399.
1133. Minute of Executive Council, 18 July 1844 (Berghan, supporting papers (doc A39(m)), vol 13, pp 7524–7525).
1134. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 51–52; evidence of King, 18 February 1842 (Berghan, supporting papers (doc A39(m)), vol 13, pp 7515–7516).
1135. Evidence of King, 18 February 1842 (Berghan, supporting papers (doc A39(m)), vol 13, pp 7511–7512).
1136. Evidence of Clarke, 13 October 1857 (Berghan, supporting papers (doc A39(m)), vol 13, pp 7580–7582).
1137. Ibid.
1138. Bell report, 29 March 1858 (Berghan, supporting papers (doc A39(m)), vol 13, pp 7597–7598).
1139. Ibid. The same Court of Claims document records that after subdivision the total of grants to King family members measured 140 acres less, at 12,480 acres; compare with Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 400. Prior to subdivision, 'After making the necessary calculations, Bell determined that an award of 12,637 acres would be recommended.'
1140. See Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 718–727.
1141. Kidd to Waimate Civil Commissioner, 24 December 1861 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 718).
1142. Waimate Resident Magistrate Williams, Puketona, to Waimate Civil Commissioner Clarke, 23 January 1862 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 719).
1143. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 719–721.
1144. Ibid, pp 721–723.
1145. Ibid, pp 723–724.

1146. Ibid, pp 724–727.
1147. Te Wirihana Poki to Clarke, 3 November 1864 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 724–726).
1148. Te Wirihana Poki to Clarke, 16 (no month) (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 726).
1149. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 727.
1150. Ibid.
1151. Walzl, 'Ngati Rehia: Overview Report' (doc R2), pp 192–193.
1152. Closing submissions for Whangaroa taiwhenua (#3.3.385), pp 31–32; Crown closing submissions (#3.3.412), p 6; submissions in reply for Whangaroa taiwhenua (#3.3.499), pp 58–59.
1153. Tahana Murray (doc S21(b)), pp 50–51; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 181.
1154. Closing submissions for Wai 1613 and others (#3.3.328), p 18; closing submissions for Wai 1312 (#3.3.319), pp 34–35.
1155. Closing submissions for Wai 1613 and others (#3.3.328), p 18; closing submissions for Wai 1312 (#3.3.319), p 33.
1156. Berghan, 'Northland Block Research Narratives' (doc A39(a)), vol 2, p 501.
1157. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1374–1376, 1402–1408; evidence of Toro and Shepherd, 9 December 1842 (Berghan, supporting papers (doc A39(m)), vol 18, pp 10404–10405).
1158. Evidence of Shepherd, 9 December 1842 (Berghan, supporting papers (doc A39(m)), vol 18, p 10405). The third deed is missing from Shepherd's file.
1159. Ibid (pp 10402, 10405).
1160. See Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1371, 1373–1374.
1161. Evidence of Toro, 9 December 1842 (Berghan, supporting papers (doc A39(m)), vol 18, p 10404).
1162. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1373.
1163. The boundaries were appended to the file. See Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1374.
1164. Report of Land Claims Commission, 8 April 1843 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1375).
1165. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1375–1376.
1166. Bell memorandum, 9 September 1861 (Berghan, supporting papers (doc 39(m)), vol 18, p 10648).
1167. Ibid.
1168. See Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1379–1381.
1169. Ibid, p 1381.
1170. Ibid.
1171. Bell memorandum, 9 September 1861 (Berghan, supporting papers (doc A39(m)), vol 18, pp 10648–10652).
1172. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1383–1384.
1173. Evidence of Heremaia, 8 October 1857 (Berghan, supporting papers (doc A39(m)), vol 18, p 10514).
1174. Shepherd to Bell, 8 October 1857 (Berghan, supporting papers (doc A39(m)), vol 18, p 10536).
1175. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1384.
1176. Heremaia Te Ara and Naihi Te Pakaru, Kaeo, to Bell, 10 November 1858 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1385). For the spelling of 'Naihi Te Pakaru', see Erima Taniora (doc C2), p 2.
1177. Heremaia Te Ara and Naihi Te Pokaru, Kaeo, to Bell, 10 November 1858 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1386).
1178. Bell minute, 26 November 1858, on Heremaia Te Ara and Naihi Te Pakaru to Bell, 10 and 11 November 1858 (Berghan, supporting papers (doc A39(m)), vol 18, p 10521).
1179. Heremaia Te Ara to Bell, 27 September 1859 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1389–1390).
1180. Bell minute, 13 February 1860, on Heremaia Te Ara to Bell, 27 September 1859 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1390).
1181. Notes of Auckland sitting, 16 February 1860 (Berghan, supporting papers (doc A39(m)), vol 18, p 10588).
1182. Bell memorandum, 9 September 1861 (Berghan, supporting papers (doc A39(m)), vol 18, pp 10649–10650).
1183. Bell to Heremia Te Ara, 23 September 1860 (Berghan, supporting papers (doc A39(m)), vol 18, p 10529); Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1394–1395.
1184. Report of Land Claims Commission, 8 April 1843 (Berghan, supporting papers (doc A39(m)), vol 18, p 10401); Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1375–1376, 1395, 1397–1398.
1185. Shepherd to Bell, 8 November 1860 (Berghan, supporting papers (doc A39(m)), vol 18, pp 10581–10583).
1186. Heremaia Te Ara to Bell, 16 November 1860 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1395–1396).
1187. Bell memorandum, 22 March 1864 (Berghan, supporting papers (doc A39(m)), vol 18, p 10653).
1188. Evidence of Heremaia Te Ara, 24 January 1862 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1403–1404).
1189. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1404–1405.
1190. Evidence of Shepherd, 24 January 1862 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1405–1406).
1191. Bell memorandum, 9 September 1861 (Berghan, supporting papers (doc A39(m)), vol 18, p 10652).

1192. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1401.
1193. Ibid, p 1408.
1194. Bell memorandum, 22 March 1864 (Berghan, supporting papers (doc A39(m)) vol 18, p 10653).
1195. According to Berghan, the archives file is incomplete and there are limited details available for the claim: Berghan, 'Northland Block Research Narratives' (doc A39(a)), vol 2, p 285; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 780–782.
1196. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1725–1729.
1197. Ibid, pp 1729–1731.
1198. Ibid; Berghan, 'Northland Block Research Narratives' (doc A39(a)), vol 2, p 632.
1199. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1731.
1200. Ibid, pp 1731–1732.
1201. Stirling and Towers, supporting papers (doc A9(a)), vol 6, p 440; 'Report of Royal Commission to Inquire into and Report on Claims Preferred by Members of the Maori Race Touching Certain Lands known as Surplus Lands of the Crown', AJHR, 1948, G-8, p 36.
1202. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1731.
1203. Ibid, pp 785–789; Berghan, supporting papers (doc A39(m)), vol 11, pp 6664, 6667–6669, 6671.
1204. David Armstrong and Evald Subasic, 'Northern Land and Politics, 1860–1910', report commissioned by the Crown Forestry Rental Trust, 2007 (doc A12), pp 265–266, 269–270.
1205. 'Land Claims Finally Settled (Return of, since 8th July, 1862)', AJHR, 1878, H-26, p 5.
1206. Dr Barry Rigby, old land claims spreadsheet (doc A48(d)).
1207. 'Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1862, D-10, p 7 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 562).
1208. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 563.
1209. Ibid, p 1783.
1210. Ibid, pp 1783, 1785–1786.
1211. Ibid, p 1786.
1212. Ibid, p 1837.
1213. Ibid, p 1791.
1214. Crown closing submissions (#3.3.412), p 52.
1215. Crown memorandum (#3.2.2677), p 15.
1216. Kemp had also purchased two of Hamlin's claims, bringing his Bay of Islands grants to a total of 5,363 acres. See Bell memorandum, 20 April 1859 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7460–7463).
1217. Bell report 20 April 1859 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7460–7462).
1218. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1556.
1219. Bell report 20 April 1859 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7460–7462).
1220. Tom Bennion, 'Kororipo Pa', report commissioned by the Waitangi Tribunal, 1997 (doc E7), pp 20–21.
1221. Bell report, 20 April 1859 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7460–7461).
1222. Bell report, 21 April 1859 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7463–7465).
1223. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1585.
1224. Crown memorandum (#3.2.2677), p 17.
1225. Bennion, 'Kororipo Pa' (doc E7), p 12; Crown memo (#3.2.2677), p 15.
1226. Bennion, 'Kororipo Pa' (doc E7), pp 22–27.
1227. Evidence of Rewa, 29 December 1841 (Berghan, supporting papers (doc A39(m)), vol 12, p 7275).
1228. Evidence of Kemp, 20 January 1842 (Berghan, supporting papers (doc A39(m)), vol 12, p 7258).
1229. Kemp to Colonial Secretary, 26 January 1848 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7300–7301).
1230. Bell report, 20 April 1859 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7460–7462).
1231. 'Abstract of Documents and Correspondence' (Berghan, supporting papers (doc A39(m)), vol 12, pp 7386–7390).
1232. Kemp to Sinclair, 11 October 1847 (Berghan, supporting papers (doc A39(m)), vol 12, p 7291).
1233. Crown memorandum (#3.2.2677), p 16.
1234. Kemp to Colonial Secretary, 11 October 1847 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7291–7294).
1235. Ibid (pp 7293–7294).
1236. Grey minute, 3 December 1847, on Kemp to Colonial Secretary, 22 November 1847 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7297–7298).
1237. Grey minute on Kemp to Colonial Secretary, 11 October 1847 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7291–7294).
1238. Kemp to Colonial Secretary, 26 January 1848 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7299–7303).
1239. Ibid (pp 7299–7302).
1240. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1549.
1241. Nugent minute, 18 May 1854, on Tāmati Waka Nene to Grey, 13 May 1854 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1550).
1242. Tāmati Waka Nene to Grey, 13 May 1854 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1550).
1243. Kemp to Colonial Secretary, 8 March 1848 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7306–7307).
1244. Petition to House of Representatives, June 1854 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7327–7329).
1245. Letter from Ururoa, 9 August 1848, Petition to House of Representatives, June 1854 (Berghan, supporting papers (doc A39(m)), vol 12, p 7331).

1246. See Stirling and Towers on this point, '"Not with the Sword but with the Pen"' (doc A9), pp 1576–1577.
1247. Bell file note, 17 March 1858 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1385).
1248. Kemp's plan gave a figure of 6,598 acres but was recorded by Bell as 6,674 acres. Stirling and Towers considered the latter figure as the more accurate; see discussion in '"Not with the Sword but with the Pen"' (doc A9), p 1561.
1249. Daamen, Hamer, and Rigby, *Auckland* (doc H2), p 92, fn 138.
1250. Bell notes, Kerikeri, 26 March 1858 (Berghan, supporting papers (doc A39(m)), vol 12, p 7429).
1251. Ibid, 23, 26 March 1858 (pp 7428–7429).
1252. Pirika Pinamahue to Bell, March 1858 (as translated by Dr Jane McRae) (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1554).
1253. Hira Tauahika to Bell, March 1858 (as translated by Dr Jane McRae) (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1554–1556).
1254. Bell memo, 23 March 1858 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1556).
1255. Court notes, Mangonui, 3 October 1857 (Berghan, supporting papers (doc A39(m)), vol 12, p 7424).
1256. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1577.
1257. Evidence of Heremaia, 3 October 1857 (Berghan, supporting papers (doc A39(m)), vol 12, p 7425).
1258. Ibid (p 7426).
1259. Evidence of Henry Clarke, 24 March 1858 (Berghan, supporting papers (doc A39(m)), vol 12, p 7431).
1260. Heremaia Te Ara, Pumipi Waitua, and Roro, 15 February 1858 (as translated by Dr Jane McRae) (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1582).
1261. Evidence of Henry Clarke, 29 March 1858 (Berghan, supporting papers (doc A39(m)), vol 12, p 7432).
1262. Bell report, 21 April 1859 (Berghan, supporting papers (doc A39(m)), vol 12, p 7463).
1263. Bell report, 21 April 1859 and minute, 4 July 1860 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7462–7463); Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 947, 1583.
1264. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1583.
1265. Submissions in reply for Whangaroa Taiwhenua (#3.3.499), p 63.
1266. Ibid, p 66.
1267. Bell report, 21 April 1859 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7463–7464).
1268. Bell report, 20 April 1859 (Berghan, supporting papers (doc A39(m)), vol 12, p 7460).
1269. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1564.
1270. Ibid, p 1565.
1271. Report on OLC 595, no date (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1566).
1272. There was a survey of Te Mata in 1866 but it encroached on Kemp's land and was not approved: Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1556–1567.
1273. Northern Native Land Court minute book 2, p 63 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1569).
1274. John Rameka Alexander (doc H7), pp 7–8.
1275. Crown Land Ranger to Humphries, Crown Lands, 20 May 1890 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1571).
1276. Ward, *National Overview*, vol 1, p 47; Stirling and Towers, presentation summary (doc A9(b)), p [12].
1277. Daamen, Hamer, and Rigby, *Auckland* (doc H2), p 106.
1278. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 55.
1279. 'Notice to land claimants', 27 September 1842 (cited in Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 55).
1280. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 55.
1281. Ibid, p 56.
1282. Ibid.
1283. Ibid.
1284. For a discussion of official concern, see Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 56.
1285. Stanley to FitzRoy, 21 August 1843 (cited in 'Report of Royal Commission to inquire into and report on claims preferred by members of the Maori race touching certain lands known as surplus lands of the Crown', AJHR, 1948, G-8, p 31).
1286. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 74.
1287. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 56.
1288. Crown closing submissions (#3.3.412), p 2.
1289. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 194–195.
1290. FitzGerald comment, 19 December 1844 (Berghan, supporting papers (doc A39(m)), vol 5, p 2434).
1291. Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 479; Francis Dillon Bell, 'Appendix to the Report of the Land Claims Commissioner', AJHR, 1863, D-14, p 59.
1292. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 233–234.
1293. FitzGerald to Clarke, 31 October 1844 (Berghan, supporting papers (doc A39(m)), vol 11, pp 6581–6583). Baker was also awarded a further 1,242 acres for his other two claims.
1294. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 357–358; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 784–786, 789.
1295. Original document (Berghan, supporting papers (doc A39(m)), vol 8, p 4525). On page 4525 there is mention, as part of an account of the history of the land claim by Salmon, 'This was opposed by George Clark on behalf of the Kawakawa tribe'. On page 4533 is a note from George Clarke, Kororāreka, 2 November 1841: 'No 206 David Salmon 7,000 acres, Disputed by the Natives of Kawakawa who [wahitapued]

it as a Native reserve. It is held in trust by Church Missionary Society – Deeds of trust in the Protectors Office/signed George Clarke.'

1296. FitzGerald note, 9 December 1844 (Berghan, supporting papers (doc A39(m)), vol 20, pp 11729–11730); Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 569.

1297. Crown closing submissions (#3.3.412), p 2.

1298. See Bell's report on derivative claims of William Powditch, OLC 196, OLC 196a, and OLC 196b, 11 September 1861 (Berghan, supporting papers (doc A39(m)), vol 7, p 4140).

1299. Ibid (pp 4135, 4140–4141); Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 767–768.

1300. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 837–838, 841, 843, 849–850; Taitokerau Maori Land Court minute books, 1865–1910, 2 Northern MB (doc A49), pp 7726, 7732–7735.

1301. *Te Huia; Ota or Waitaha* (1876) 2 Northern MB 261 (doc A49), p 7735.

1302. Earl to Macdonald, 18 December 1884 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 848).

1303. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 849–850; Stirling and Towers, supporting papers (doc A9(a)), vol 5, pp 522–523.

1304. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 933–934.

1305. Ibid, pp 926, 932–933.

1306. Ibid, p 1252; see also Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 237–241.

1307. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 136–137.

1308. Ibid, pp 229–230; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1152.

1309. 'Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1862, D-10, p 7.

1310. Calculated from Dr Barry Rigby, corrections to validation reports (doc A48(e)), p 4. The Crown's figures were based on the work of Brent Parker: Crown closing submissions (#3.3.412), paras 9–10, 18–19.

1311. Enclosure to Kemp to Chief Commissioner, Land Purchase Department, 11 February 1857, AJHR, 1861, C-1, p 17.

1312. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1289–1290.

1313. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 65–66, 348–349, 357–358; Francis Dillon Bell, 'Appendix to the Report of the Land Claims Commissioner', 1863, AJHR, 1863, D-14, pp 7, 42.

1314. Lands and Survey file 2173 (Stirling and Towers, supporting papers (doc A9(a)), vol 5, pp 495–519; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 789–792.

1315. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 810–811.

1316. Rigby, corrections to validation reports (doc A48(e)), p 4.

1317. Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 89.

1318. Ibid, pp 86–89.

1319. Rigby's calculation included the acreage for Whāngārei (which had been accidentally transposed into the Whangaroa column of his summary table). Rigby's analysis has not been able to identify with certainty any Whangaroa scrip land.

1320. This area is alluded to in a note on the survey plan (OLC Plan 69) of Spickman's OLC 878–880 grant; see submissions in reply to Crown closing submissions for Whangaroa claimants (#3.3.499), pp 58–60. It should be noted that the Waitapu and Te Huia blocks (783 acres and 1,470 acres respectively) were counted by Rigby as surplus land rather than scrip land, which accounts for part of the discrepancy between the two figures.

1321. Stirling and Towers, supporting papers (doc A9(a)), vol 5, p 519.

1322. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1106–1112.

1323. Ibid, pp 1123–1124.

1324. Ibid, pp 1081, 1264.

1325. Ibid, p 1132.

1326. Ibid.

1327. Ibid, p 1134.

1328. Ibid, p 1135.

1329. Stirling and Towers, supporting papers (doc A9(a)), vol 8(a), pp 468, 471–474.

1330. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 24.

1331. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 317, 325–326.

1332. Ibid, pp 1296–1297.

1333. Berghan, supporting papers (doc A39(m), vol 4, p 2245; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1297.

1334. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1297.

1335. Ibid, p 1311.

1336. Ibid.

1337. Ibid, p 1300.

1338. Ibid, p 1297; Berghan, supporting papers (doc A39(m)), vol 9, pp 5462–5463.

1339. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1303–1308.

1340. Ibid, p 1298.

1341. Ibid, pp 1291–1294.

1342. *Ota* (1882) 6 Northern MB (doc A49), p 41.

1343. William Powditch to Colonial Secretary, 20 June 1845 (Berghan, supporting papers (doc A39(m)), vol 7, pp 4026).

1344. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1773.

1345. Ibid, pp 1153, 1191.

1346. The only exceptions were John Grant and John Marmon's claims, which occupied the coast between the two river mouths: see Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1194, 1196, 1208, 1282.

1347. Ibid, pp 1080–1082.
1348. Ibid, pp 1082–1084.
1349. Evidence, Godfrey and Richmond report, 30 May 1843 (Berghan, supporting papers (doc A39(m)), vol 27, pp 15969–15970, 15993–15995); Francis Dillon Bell, 'Appendix to the Report of the Land Claims Commissioner', 1863, AJHR, 1863, D-14, p 39.
1350. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 19–20, 294–295.
1351. Ibid, p 195; Berghan, supporting papers (doc A39(m)), vol 6, pp 3409–3413.
1352. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1192–1195.
1353. Evidence of Wiremu Hopihana Tahua and Rawiri [Whane Ringomutu], Hokianga, 11 March 1858 (Berghan, supporting papers (doc A39(m)), vol 22, pp 12550–12551); statement of a claim, Hokianga, 7 December 1840 (Berghan, supporting papers (doc A39(m)), vol 26, p 15231).
1354. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1192.
1355. Ibid, p 1195.
1356. Ibid, pp 1204–1208.
1357. Ibid, pp 1200–1204. For a map of the alternative survey lines, see Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 138.
1358. Russell's interpretation was that the stopping of the timber 'coming through' was meant to apply to the timber on the scrip land (Moore, Rigby, and Russell, *Old Land Claims* (doc H1), pp 140–142), although as a timber merchant would have had no way of being certain which side of the survey line the timber was cut from, there may have been little difference between a prohibition against one and a prohibition against both.
1359. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1141–1142, 1200, 1205–1206.
1360. Ibid, pp 1205–1207.
1361. Ibid, pp 1192, 1198–1200, 1311.
1362. Ibid, p 1311.
1363. Ibid.
1364. Ibid, pp 1266–1267, 1301–1302.
1365. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 100, 237.
1366. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1152.
1367. Turton, *Maori Deeds of Old Private Land Purchases*, deed 255, Mangaraupo, p 230.
1368. Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 316.
1369. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1266–1267, 1302.
1370. Ibid, p 1267.
1371. Evidence of Thomas Cassidy, 21 December 1842 (Berghan, supporting papers (doc A39(m)), vol 7, pp 4148–4149; William White to Richmond, 12 December 1842 (Berghan, supporting papers (doc A39(m)), vol 7, p 4154.
1372. See White, Report of Proceedings in Hokianga, 8 August 1859, OLC 4.4 (Stirling and Towers, supporting papers (doc A9(a)), vol 6, pp 3156–3157); Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1215–1216, 1300–1301.
1373. The Crown had paid only £361 in scrip but expanded its acquisition through the use of abandoned and latent claims. See Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 50, 57; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1246–1247.
1374. Richmond report, 17 April 1843 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 282).
1375. Tuite to Colonial Secretary, 7 February 1843 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 282).
1376. Richmond to Colonial Secretary, 17 April 1843 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 282).
1377. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 283.
1378. Ibid, pp 284–285.
1379. Clarke minute, 2 June 1843 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 285).
1380. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 281.
1381. Ibid, pp 1247–1248.
1382. Ibid, pp 1250–1251, 1266.
1383. Ibid, p 1250.
1384. Ibid, p 1312.
1385. Bell, 'Memorandum of the Chief Commissioner of Land Claims', AJHR, 1858, C-2, pp 3, 4.
1386. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1249.
1387. Ibid, pp 1247–1248, 1311.
1388. Ibid, p 1312.
1389. Ibid, pp 1248–1249.
1390. Ibid, pp 1314–1315.
1391. Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 627; Francis Dillon Bell, 'Appendix to the Report of the Land Claims Commissioner', 1863, AJHR, 1863, D-14, p 76.
1392. Evidence of Thomas McDonnell, 6 June 1843 (Berghan, supporting papers (doc A39(m)), vol 22, pp 12608–12609); evidence of Taonui, [6] June 1843 (Berghan, supporting papers (doc A39(m)), vol 22, pp 12611–12612); evidence of Whatia, 7 June 1843 (Berghan, supporting papers (doc A39(m)), vol 22, pp 12612–12614).
1393. Plan of Motukaraka, no date (Berghan, supporting papers (doc A39(m)), vol 22, p 12633).
1394. Evidence of Atua, Hone Koherangi, Turau, Chapman and Paul Kaipuke (Berghan, supporting papers (doc A39(m)), vol 22, pp 12614–12619).
1395. Statement by Richmond, 18 November 1844 (Berghan, supporting papers (doc A39(m)), vol 22, p 12605).
1396. Ibid.

1397. Evidence of Thomas McDonnell, 6 June 1843 (Berghan, supporting papers (doc A39(m)), vol 22, p 12609); evidence of Taonui, [6] June 1843 (Berghan, supporting papers (doc A39(m)), vol 22, p 12612).
1398. Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 627; Berghan, supporting papers (doc A39(m)), vol 22, p 12604.
1399. Commissioner Richmond report, 18 November 1844, Abstract of Correspondence and Documents of Thomas McDonnell (Berghan, supporting papers (doc A39(m)), vol 22, pp 12652–12653); 'Report of the Select Committee on the petition of Capt McDonnell, RN', *Votes and Proceedings of the House of Representatives*, 23 May 1856.
1400. Report by Bell, 9 March 1858 (Berghan, supporting papers (doc A39(m)), vol 22, pp 12637–12638).
1401. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 877–878.
1402. Ibid, pp 1334, 1342–1344.
1403. Ibid, pp 1344–1347.
1404. Ibid, pp 878–880, 1336–1337, 1347.
1405. Ibid, pp 949–950.
1406. Ibid, p 880.
1407. Ibid, pp 880, 882.
1408. Ibid, pp 881–882.
1409. 'Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1862, D-10, p 3.
1410. Ibid, p 17.
1411. Ibid, p 18.
1412. Ibid, p 6.
1413. Ibid, p 15.
1414. Ibid, p 6.
1415. Ibid, pp 3, 9, 16–17.
1416. Ibid, pp 9–11.
1417. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1324.
1418. Stirling, 'From Busby to Bledisloe' (doc W5), pp 38–394.
1419. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 134–135; Stirling, 'From Busby to Bledisloe' (doc W5), p 41.
1420. Stirling, 'From Busby to Bledisloe' (doc W5), pp 55–56.
1421. Ibid, pp 49–51, 63.
1422. Evidence of Te Tao, 2 February 1841 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1466).
1423. Colenso, *The Authentic and Genuine History*, p 21 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 129).
1424. Stirling, 'From Busby to Bledisloe' (doc W5), p 55.
1425. Ibid, p 52.
1426. Stirling, 'From Busby to Bledisloe' (doc W5), pp 53, 55.
1427. Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 14.
1428. Ibid, p 15.
1429. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1605–1606.
1430. Stirling, 'From Busby to Bledisloe' (doc W5), pp 58–59.
1431. Bell memorandum, 16 August 1861 (Stirling and Towers, supporting papers (doc A9(a)), vol 3, p 1697; Stirling, 'From Busby to Bledisloe' (doc W5), pp 62–6.
1432. Report of Commissioners, 29 January 1840 (cited in Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 14).
1433. Bell memorandum, 16 August 1861 (Stirling and Towers, supporting papers (doc A9(a)), vol 3, p 1697).
1434. Bell memorandum, 16 August 1861 (Stirling and Towers, supporting papers (doc A9(a)), vol 3, p 1697).
1435. Stirling, 'From Busby to Bledisloe' (doc W5), p 64.
1436. Ibid, pp 67–68; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1510–1512.
1437. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1610–1614, 1617–1618.
1438. Ibid, pp 1619–1622.
1439. Ibid, pp 1623–1625, 1654.
1440. Ibid, pp 1509–1510.
1441. Bell memorandum, 16 August 1861 (Stirling and Towers, supporting papers (doc A9(a)), vol 3, pp 1697–1698).
1442. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1622–1623.
1443. Johnson to McLean, 16 September 1861 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1613–1614).
1444. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1622–1623.
1445. Ibid, p 1626.
1446. Ibid, pp 1624–1625, 1627–1629, 1633–1635.
1447. Evidence of Busby, 25 July 1839 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1634–1635).
1448. Bell memorandum, 16 August 1861 (Stirling and Towers, supporting papers (doc A9(a)), vol 3, p 1698).
1449. Busby to Bell, 16 January 1860 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1637).
1450. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1638.
1451. Searancke to Bell, 9 July 1862 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1640).
1452. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1628–1629, 1640.
1453. Searancke to Bell, 31 August 1862 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1645).
1454. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1650.
1455. Searancke to Bell, 12 May 1863 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1651).
1456. Bell report on Ngunguru claim, 31 March 1864 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1652).
1457. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1653.
1458. Land Claims Arbitration Act 1867, s 5.
1459. Arnold Bruce Maunsell (doc T19), p 23.

1460. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1515–1516, 1657–1659.
1461. Ibid, pp 1660–1661.
1462. Jackson and Mackelvie to Busby, 15 October 1868, AJHR, 1869, D-11, p 4 (cited in Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 70).
1463. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 70.
1464. Ibid.
1465. Busby to Domett, 6 May 1870 (cited in Moore, Rigby, and Russell, *Old Land Claims* (doc H1), pp 70–71).
1466. Stirling, 'From Busby to Bledisloe' (doc W5), pp 69, 74.
1467. Wirikake statement, 1 December 1868, encl Busby to Domett, 6 May 1870 (cited in Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 71).
1468. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 71.
1469. Stirling, 'From Busby to Bledisloe' (doc W5), pp 69–70.
1470. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 73.
1471. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 564, 1814.
1472. Kemp to Bell, 14 May 1861 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 564).
1473. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 564.
1474. Ibid, pp 564–565.
1475. Ibid, pp 1816–1817.
1476. Ibid, p 1817.
1477. Charles Marshall to Native Minister, 29 March 1878 (cited in Angela Wanhalla, *Matters of the Heart: A History of Interracial Marriage in New Zealand* (Auckland: Auckand University Press, 2013), p 54).
1478. George Augustus Selwyn, *A Charge Delivered to the Clergy of the Diocese of New Zealand, at the Diocesan Synod, in the Chapel of St John's College, On Thursday, September 23, 1847* (London: F & J Rivington, 1850), pp 76–78 (cited in Wanhalla, *Matters of the Heart*, p 52).
1479. Shortland to Whittaker, 6 May 1842 (cited in Wanhalla, *Matters of the Heart*, p 53).
1480. Dieffenbach approved of intermarriage but thought the land should 'remain the property of the women and children': see Dieffenbach, *Travels in New Zealand*, vol 2, p 152 (cited in Wanhalla, *Matters of the Heart*, pp 54 n, 179).
1481. Fannin memorandum for Land Claims Commissioner Domett, 21 March 1873 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1320).
1482. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 121, 404, 1138–1141; Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 20; Berghan, supporting papers (doc A39(m)), vol 1, p 314.
1483. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1140.
1484. Evidence of Hare Hongi, 30 March 1858, OLC 1357 (Berghan, supporting papers (doc A39(m)), vol 26, p 15256).
1485. Maning to Domett (Berghan, supporting papers (doc A39(m)), vol 26, p 15234).
1486. Te Uruti and others, Hokianga, 17 March 1859, OLC 1370 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1332).
1487. White memorandum, 1 August 1859 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1333).
1488. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1334.
1489. Mohi Tawhai and others, Waimā, deed of gift, 31 October 1859, translated by E W Puckey for Native Department, OLC 1367 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1323).
1490. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1323.
1491. White memorandum, 26 August 1865, OLC 4/11 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1324).
1492. Domett minute for Rolleston, 8 September 1865, on White memorandum, 26 August 1865, OLC 4/11 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1324).
1493. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1325.
1494. Maning, Hokianga, to Commissioner Woodhouse, 28 May 1872, OLC 1367 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1325).
1495. 'Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1862, D-10, p 15.
1496. 'Return of Land Claims Finally Settled since 8th July 1862', 1878, AJHR, 1878, H-26, pp 5–6, 8–10.
1497. Supplementary Order Paper, 13 August 1878; Bell, 21 August 1878, NZPD, vol 28, 1878, p 359.
1498. Land Claims Final Settlement Bill 1878.
1499. 'Return of Land Claims Finally Settled since 8th July 1862', 1878, AJHR, 1878, H-26, pp 1–10.
1500. 'Final Return of Land Claims Definitely Settled since 20th August 1878', 1881, AJHR, 1881, C-1, pp 1–5.
1501. Crown statement of position and concessions (#1.3.2), p 52.
1502. Crown closing submissions (#3.3.412), p 2.
1503. Boast, 'Surplus Lands' (Wai 45 ROI, doc F16), p 161.
1504. Bell minutes, 13 October 1857, OLC 5/34 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 691).
1505. Closing submissions for Wai 49 and Wai 682 (#3.3.382(b)), pp 29–38; closing submissions for Wai 120 (#3.3.320), pp [19]–[22]; closing submissions for Wai 354 and others (#3.3.399), pp 168–174; closing submissions for Wai 1445 (#3.3.343), pp 11–12.
1506. Closing submissions for Wai 1464 and Wai 1546 (#3.3.395), pp 27–39.
1507. Closing submissions for Wai 492 (#3.3.311), pp 3–12; closing submissions for Wai 1314 (#3.3.396), pp 12–15.
1508. Closing submissions for Wai 1384 (#3.3.286(b)), pp 81–82.
1509. Closing submissions for Wai 549, Wai 1526, Wai 1728, and Wai 1513 (#3.3.297(a)), p 52.

1510. Closing submissions for Wai 2244 (#3.3.326), pp 13–14; closing submissions for Wai 49 and Wai 682 (#3.3.382(b)), p 32; closing submissions for Wai 354 and others (#3.3.399), p 138; closing submissions for Wai 1445 (#3.3.343), p 10. The islands were originally awarded to the Church Missionary Society and subsequently treated by the Crown as surplus. Māori brought a claim to the islands before the land court in the 1940s and were initially awarded title by Judge Acheson but that decision was overturned by the Appellate Court: see Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 952–962.
1511. Closing submissions for Wai 49 and Wai 682 (#3.3.382), pp 33–36; closing submissions for Wai 354 and others (#3.3.399), pp 144, 170.
1512. For criticism of the Myers commission, see claimant closing submissions (#3.3.222), pp 35–37; closing submissions for Wai 2371 (#3.3.327), p 13; closing submissions for Wai 1508 and Wai 1757 (#3.3.330(d)), p 151; closing submissions for Wai 49 and Wai 682 (#3.3.382(b)), pp 33–36.
1513. Crown closing submissions (#3.3.412), pp 78–80.
1514. Ibid, p 82.
1515. Ibid, p 83.
1516. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 303–305, 885.
1517. Ibid, pp 304–305, 686, 885.
1518. Stirling, 'Historical Report on Taumarere River' (doc W8), pp 70–71.
1519. Ibid, pp 76–77; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 306, 885. Other witnesses also referred to these developments including Peter McBurney, 'Northland: Public Works and other Takings, c 1871–1993', report commissioned by the Crown Forestry Rental Trust, 2007 (doc A13), pp 213–219; David Alexander, 'Land Based Resources, Waterways and Environmental Impacts', report commissioned by the Crown Forestry Rental Trust, 2006 (doc A7), pp 118–119; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 938. The Kawakawa Mining Company had been operating since the late 1860s, taking coal by tram or train to Taumārere. The mining operation was settler controlled and Māori saw few benefits. Ngāti Hine Māori had also protested the construction of the tramway from Kawakawa to Taumārere.
1520. Ngāti Hine, 'Te Wahanga Tuatahi – Rangatiratanga' (doc M24(b)), pp 51–52.
1521. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 888–889; Stirling, 'Historical Report on Taumarere River' (doc W8), p 76. Taiwhanga and Renata Te Pure had interests in Takauere, a block at the Te Haumi end of the peninsula.
1522. Hirini Taiwhanga, Kaikohe, to Minister of Native Affairs, 24 August 1881 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 888).
1523. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 888.
1524. Ngāti Hine, 'Te Wahanga Tuatahi – Rangatiratanga' (doc M24(b)), pp 51–52; Stirling, 'Historical Report on Taumarere River' (doc W8), pp 71–73; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 884–885.
1525. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 884.
1526. Ibid, p 885.
1527. Ibid, p 888.
1528. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 175.
1529. Puataata to Bryce, 22 October 1883 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 175).
1530. Clendon to Lewis, Whāngārei, 10 October 1887 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 175).
1531. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 175.
1532. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 889.
1533. See John Rameka Alexander (doc H7), pp 7–8.
1534. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 890.
1535. 'Report of the Commission appointed to inquire into the subject of the Native Land Laws', AJHR, 1891, G-1, p xiii (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 890–891).
1536. Ibid.
1537. 'Parliamentary News', *New Zealand Herald*, 4 September 1891, p 5.
1538. Ibid.
1539. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 896.
1540. Ibid.
1541. Typescript of petition of Reihana Moheketanga and 47 others (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 897).
1542. Mueller to Surveyor-General, 28 July 1894 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 897).
1543. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 897, 926.
1544. Mueller to Surveyor-General, 28 July 1894 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 897).
1545. 'Reports of Native Affairs Committee', AJHR, 1894, I-3, p 10 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 898).
1546. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 899.
1547. Ibid.
1548. Ibid, pp 900–901.
1549. Assistant Surveyor-General to Auckland Chief Surveyor, 20 July 1897, and Auckland Chief Surveyor to Assistant Surveyor-General, 20 August 1897 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 900–901).
1550. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 901.

1551. 'Country News', *New Zealand Herald*, 15 November 1893, p 3; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 901.
1552. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1776.
1553. 'Pakeha and Maori: A Narrative of the Premier's trip through the Native Districts of the North Island', 1895, AJHR, 1895, G-1, pp 34–35 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 903).
1554. The Puketotara block is examined in detail by Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 851–2, 936–943.
1555. 'Pakeha and Maori', AJHR, 1895, G-1, p 36 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 905).
1556. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 905.
1557. Ibid, p 906.
1558. 'Pakeha and Maori', AJHR, 1895, G-1, p 36 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 905).
1559. 'Pakeha and Maori', 1895, AJHR, 1895, G-1, p 36.
1560. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 906.
1561. *Notes of meetings between His Excellency the Governor (Lord Ranfurly), the Rt Hon R J Seddon, Premier and Native Minister, and the Hon James Carroll, Member of the Executive Council Representing the Native Race, and the Native Chiefs and People at Each Place, Assembled in Respect of the Proposed Native Land Legislation and Native Affairs Generally, during 1898 and 1899* (Wellington: Government Printer, 1899), p 68 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 908).
1562. *Notes of Meetings*, pp 72–73.
1563. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 909.
1564. *Notes of Meetings*, pp 72–73.
1565. Ibid (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 910–11).
1566. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 911.
1567. Ibid, p 912.
1568. Ibid, p 913.
1569. 'Rangitaane Station', 21 October 1903, NZPD, vol 126, p 654; see also Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 901.
1570. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 916.
1571. Kensington to Minister of Lands, 27 May 1902 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 915).
1572. Sheridan minute for Justice Under-Secretary Waldegrave, 25 January 1905 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 916).
1573. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 917.
1574. Waldegrave to Edger, 30 January 1905 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 918).
1575. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 914.
1576. Ibid, p 918.
1577. Ibid, p 914.
1578. Ibid, pp 919–920.
1579. 'North of Auckland Surplus Lands, Minutes of evidence', 1907, AJHR, 1907, C-18, p 4.
1580. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 920.
1581. Ibid, p 921; closing submissions for Wai 354, Wai 1514, Wai 1535, and Wai 1664 (#3.3.399), p 172.
1582. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 921.
1583. Ibid, pp 921–922.
1584. Ibid, p 922.
1585. 'Report of R M Houston, North Auckland Surplus Lands', 1907, AJHR, 1907, C-18, p 1.
1586. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 923.
1587. 'Report of R M Houston, North Auckland Surplus Lands', 1907, AJHR, 1907, C-18, p 1.
1588. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 925.
1589. Ibid, p 926. For details of these claims see Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 103–107, 138–142, 317–319, 338–340.
1590. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 926–933.
1591. Ibid, p 933.
1592. Ibid, p 934.
1593. 'Native Land Claims Commission', AJHR, 1921, G-5, pp 5–6; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 935.
1594. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 925.
1595. Ibid, p 936.
1596. Bell, memorandum, 26 March 1858, OLC 1/595 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 939).
1597. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 940.
1598. Ibid, pp 940–942.
1599. Ibid, p 942.
1600. Ibid, p 943.
1601. 'Report of the Royal Commission to Inquire into Confiscation of Native Lands and Other Grievances Alleged by Natives', 1928, AJHR, 1928, G-7, pp 1–3.
1602. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 944–945.
1603. Ibid, pp 946–947.
1604. Bennion, 'Kororipo Pa' (doc E7), p 23.

1605. Bennion, 'Kororipo Pa' (doc E7), p 23.
1606. Ibid.
1607. Ibid.
1608. Ibid, p 22.
1609. Ibid, p 23.
1610. Ibid, pp 23–24.
1611. Ibid, p 24.
1612. Ibid, p 25.
1613. Ibid.
1614. Ibid (see also fn 145).
1615. Ibid, p 25.
1616. Ibid, p 26.
1617. *Kororipo Pa* (1935) 14 Bay of Islands MB 161 (cited in Bennion, 'Kororipo Pa' (doc E7), p 26).
1618. Bennion, 'Kororipo Pa' (doc E7), p 26.
1619. *Kororipo Pa* (1935) 14 Taitokerau MB 236 (Bennion, 'Kororipo Pa' (doc E7), pp 26–27 (see also fn 155)).
1620. Ibid (p 27).
1621. Ibid, p 237 (p 27).
1622. BAAI 1030/102a 9/2/30fpl (National Archives Auckland) (cited in Bennion, 'Kororipo Pa' (doc E7), pp 27–28).
1623. Ibid (p 28).
1624. Ibid.
1625. Bennion, 'Kororipo Pa' (doc E7), p 29.
1626. 6 July 1936 BAAI 1030/102a 9/2/30fpl (National Archives Auckland) (cited in Bennion, 'Kororipo Pa' (doc E7), p 29).
1627. Bennion, 'Kororipo Pa' (doc E7), p 30, see also fn 174.
1628. Ibid, p 30.
1629. 21 January 1938, BAAI 1030/102a 9/2/30fpl (National Archives Auckland) (cited in Bennion, 'Kororipo Pa' (doc E7), p 30).
1630. *Kororipo Pa* (1935) 16 Taitokerau MB 241–242 (cited in Bennion, 'Kororipo Pa' (doc E7), p 30).
1631. BAAI 1030/102a 9/2/30fpl (National Archives Auckland) (cited in Bennion, 'Kororipo Pa' (doc E7), p 31).
1632. Bennion, 'Kororipo Pa' (doc E7), p 31.
1633. Ibid, p 33.
1634. Ibid, p 33; Native Purposes Act 1939, s 8.
1635. Bennion, 'Kororipo Pa' (doc E7), p 33.
1636. BAAI 1030/102a 9/2/30fpl (National Archives Auckland) (cited in Bennion, 'Kororipo Pa' (doc E7), p 33).
1637. Bennion, 'Kororipo Pa' (doc E7), p 34.
1638. Ibid.
1639. Ibid, p 36.
1640. Ibid, p 40.
1641. See Nora Rameka (doc R17(b)), pp 4, 10–11, 17–20, 41–42, 44.
1642. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 955.
1643. Ibid, p 963.
1644. Michael Nepia, 'Muriwhenua Surplus Lands; Commissions of Inquiry in the Twentieth Century', 1992 (doc E39), p 38; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 963–964.
1645. 'Royal Commission to Inquire into and Report on Claims Preferred by Members of the Maori Race Touching Certain Lands Known as Surplus Lands of the Crown', 1948, AJHR, 1948, G-8, p 3.
1646. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 3.
1647. Ibid, pp 3–4.
1648. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 964.
1649. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 4.
1650. See Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 982.
1651. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 5.
1652. Meredith introduced himself variously as 'counsel to assist the commission' and 'counsel for the Crown, assisting the commission', but it is clear from the minutes that he was the Crown's representative, and that is how he is described in the commission's report: Nepia, 'Muriwhenua Surplus Lands' (doc E39), pp 40–41, fn 122; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 966; 'Report of the Surplus Lands Commission', AJHR, 1948, G-8, p 13.
1653. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 966–967; 'Report of the Surplus Lands Commission', AJHR, 1948, G-8, p 13. According to Nepia, the Northern Maori member Tapihana Paikea had promised to consult while in the north, but this was pre-empted when someone from Ngāpuhi, acting unilaterally, wired the Government accepting Cooney's appointment.
1654. Nepia, 'Muriwhenua Surplus Lands' (doc E39), p 42.
1655. Record of proceedings, p 2 (cited in Nepia, 'Muriwhenua Surplus Lands' (doc E39), p 44).
1656. Ibid, p 4 (p 44).
1657. Ibid, p 5 (p 45).
1658. Ibid, pp 5–6 (p 45).
1659. Nepia, 'Muriwhenua Surplus Land' (doc E39), p 46.
1660. Record of proceedings, p 8 (cited in Nepia, 'Muriwhenua Surplus Lands (doc E39), p 46).
1661. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 968.
1662. Record of proceedings, pp 5–6 (cited in Nepia, 'Muriwhenua Surplus Lands (doc E39), p 45).
1663. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 269.
1664. Nepia, 'Muriwhenua Surplus Lands' (doc E39), p 47.
1665. Report of proceedings, p 10 (cited in Nepia, 'Muriwhenua Surplus Lands (doc E39), pp 47–48).
1666. Report of Proceeding of Surplus Lands Commission (Stirling and Towers, supporting papers (doc A9(a)), vol 5, p 430).
1667. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 3.
1668. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 971–972; Nepia, 'Muriwhenua Surplus Land' (doc E39), p 75.

1669. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 973–974.
1670. Report of Proceedings of Surplus Land Commission (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 973).
1671. Michael Nepia, 'Muriwhenua Surplus Lands: Commissions of Inquiry in the Twentieth Century', report, 1992 (Wai 45 ROI, doc G1), p 76.
1672. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 975–976.
1673. Report of Proceeding of Surplus Lands Commission (Stirling and Towers, supporting papers (doc A9(a)) vol 5, p 430.
1674. Cooney's reasoning is explained in Nepia, 'Muriwhenua Surplus Lands' (doc E39), p 71.
1675. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 975.
1676. Nepia, 'Muriwhenua Surplus Lands' (doc E39), p 72.
1677. Ibid, pp 73–74.
1678. Ibid, pp 50–51.
1679. Ibid, p 51.
1680. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 980.
1681. Ibid, p 981.
1682. Ibid, pp 983–984.
1683. Ibid, p 985.
1684. Cooney, 21 October 1947, 'Proceedings of Surplus Lands Commission' (Stirling and Towers, supporting papers (doc A9(a)), vol 5, p 421.
1685. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 12.
1686. Ibid, p 17.
1687. Ibid, p 13.
1688. Ibid, p 3.
1689. Ibid, p 15.
1690. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 988–989.
1691. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 15.
1692. Ibid, p 16.
1693. Ibid, pp 16–17.
1694. Nepia, 'Muriwhenua Surplus Lands' (doc E39), p 68.
1695. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 18.
1696. Ibid, p 32.
1697. Ibid, pp 64–65. Myers explained his view of the issue with the following example: A deed entitled a settler to 1,000 acres, and he was allowed 800 acres by the yardstick applied by the first Land Commission and the claim was later surveyed at 5,000. Bell then might make additions to the 800 acres in accordance with the provisions of the Land Claims Settlement Act, 1856. If that brought the 800 acres to 1,200, a new grant would be issued for 1,200 acres. Thus there would be left 3,800 acres of 'surplus land'. The question would then be 'as to which party – the purchaser or the Maori vendor – had the right in equity and good conscience to such 3,800 acres'.
1698. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, pp 53–54, 72.
1699. Ibid, pp 32–33.
1700. Ibid, pp 60–61.
1701. Ibid, p 40. For detailed analysis of the Commission's reasoning see Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1004–1021.
1702. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 64.
1703. Ibid, pp 64–65.
1704. Ibid, pp 34–35.
1705. Ibid, pp 4, 13.
1706. Ibid, p 16.
1707. Ibid, p 17.
1708. Myers made this comment in assessing the allocation of compensation to Maori Land Boards. See 'Report of the Surplus Lands Commission', AJHR, 1948, G-8, p 78; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1027.
1709. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 32.
1710. Ibid, p 15.
1711. Nepia, 'Muriwhenua Surplus Lands' (doc E39), p 100.
1712. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 36. The figures for regions do not provide a breakdown between old land claims and pre-emption waivers: see Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 999–1000.
1713. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 1027, 1030–1031.
1714. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 78.
1715. Nepia, 'Muriwhenua Surplus Lands' (doc E39), pp 100–101.
1716. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 35; for discussion of Stanley's dispatch, see p 31.
1717. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 36.
1718. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1001.
1719. Ibid, pp 1032–1034.
1720. Ibid, pp 1035–1036.
1721. Ibid, p 1042.
1722. Ibid, p 1045.
1723. Closing submissions for Wai 2063 (#3.3.255), p 17.
1724. Ward, *National Overview*, vol 1, p 48.
1725. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 392.
1726. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [11].
1727. George Grey, file note, 15 November 1848 (Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 166).
1728. Grey to Grey, 17 October 1848 (Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 196).

1729. Grey to Grey, 3 October 1849, IUP/BPP, vol 6 [1280], p 67.
1730. Burrows Journal, 28 November 1845 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 612).
1731. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 556–557.
1732. Crown closing submissions (#3.3.412), p 3.
1733. Closing submissions for Wai 1477 (#3.3.338); closing submissions for Wai 2244 (#3.3.326); closing submissions for Wai 1716 and Wai 1522 (#3.3.341(a)); closing submissions for Wai 2027 (#3.3.312); closing submissions for Wai 1314 (#3.3.396); closing submissions for Wai 1140 and Wai 1307 (#3.3.354); closing submissions for 1341 (#3.3.377); closing submissions for Wai 354, Wai 1514, Wai 1535, and Wai 1664 (#3.3.399); closing submissions for Wai 120 (#3.3.320); closing submissions for Wai 1464 and Wai 1546 (#3.3.395); closing submissions for Wai 2394 (#3.3.336); closing submissions for Wai 1140 and Wai 1307 (#3.3.354); closing submissions for Wai 48 and Wai 682 (#3.3.382(b)).
1734. Closing submissions Wai 1312 (#3.3.319); closing submissions for Wai 1661 (#3.3.369); closing submissions for Wai 1333 (#3.3.313); closing submissions for Wai 1613, Wai 1838, Wai 1846, and Wai 2389 (#3.3.328); closing submissions for Wai 2382 (#3.3.339(a)); closing submissions for Wai 1968 (#3.3.337); closing submissions for Wai 421 and others; closing submissions for Wai 1259 (#3.3.378(a)).
1735. Closing submissions for Wai 1516 and Wai 1517 (#3.3.247); closing submissions for Wai 1857 (#3.3.291); closing submissions for Wai 549, Wai 1526, Wai 1728, and Wai 1513 (#3.3.297(a)); closing submissions Wai 1538 (#3.3.303); closing submissions for Wai 2149 and Wai 1666 (#3.3.323); closing submissions for Wai 1857 (#3.3.291); closing submissions for Wai 250 and Wai 2003 (#3.3.272).
1736. Closing submissions for Wai 1516 and Wai 1517 (#3.3.247); closing submissions for Wai 619 (#3.3.295); closing submissions for Wai 2368 (#3.3.243); closing submissions for Wai 179, Wai 620, Wai 1524, Wai 1537, Wai 1541, Wai 1673, Wai 1681, Wai 1917, and Wai 1918 (#3.3.393); closing submissions for Wai 354 and Wai 1535 (#3.3.392).
1737. Closing submissions for Wai 2063 (#3.3.255); closing submissions for Wai 678 (#3.3.248(a)); closing submissions for Wai 1514 (#3.3.357); closing submissions for Wai 678 (#3.3.248), pp 15–17.
1738. Crown statement of position and concessions (#1.3.2), p 52.
1739. Crown closing submissions (#3.3.412), p 54.
1740. Crown statement of position and concessions (#1.3.2), pp 2, 52, 55.
1741. Closing submissions for Wai 1333 (#3.3.313), p 17.
1742. Annette Sykes, transcript 4.1.31, Ōtangaroa Marae, Whangaroa, p 23.
1743. Closing submissions for Wai 2377 (#3.3.333), p 87.
1744. Erimana Taniora (doc G1), p 65.
1745. Crown closing submissions (#3.3.412), p 2.
1746. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 310.
1747. Claimant closing submissions (#3.3.222), p 6.
1748. Ibid, pp 31–32.
1749. Claimant closing submissions (#3.3.222), p 34.
1750. Ibid, p 7.
1751. Ngāti Hine, 'Te Whanga Tuarua – Whenua' (doc M25(d)), p 11.
1752. Bryan Gilling, transcript 4.1.31, Ōtangaroa Marae, Whangaroa, p 181.
1753. Phillip Bristow (doc M16), pp 16–17, 29.
1754. Isabella Urlich (doc G8), p 22.
1755. Popi Tahere (doc N23), p 7.
1756. Annette Sykes, transcript 4.1.31, Ōtangaroa Marae, Whangaroa, p 39.
1757. Ngāti Hine, 'Te Whanga Tuarua – Whenua' (doc M25(d)), p 10.

Page 455: Table 6.1

The figures in table 6.1 are sourced from the technical evidence produced for this inquiry and the reports produced by Commissioner Francis Bell. The material from these sources has been modified by the removal of OLC 284, which is located in Kaipara not in Te Raki district, and the corrections made by Dr Rigby in dated September 2017: Francis Dillon Bell, 'Appendix to the Report of the Land Claims Commissioner', AJHR, 1863, D-14; Paula Berghan, 'Northland Block Research Narratives', report commissioned by the Crown Forestry Rental Trust, 2006 (doc A39(a)); Dr Barry Rigby, 'Validation Review of the Crown's Tabulated Data on Land Titling and Alienation for the Te Paparahi o Te Raki Inquiry Region: Old Land Claims, Surplus Land and Scrip', report commissioned by the Waitangi Tribunal, 2014 (doc A48); Dr Barry Rigby, old land claims spreadsheet (doc A48(d)); Dr Barry Rigby, 'Validation Review of the Crown's Tabulated Data on Land Titling and Alienation for the Te Paparahi o Te Raki Inquiry Region: Pre-Emption Waiver Claims', report commissioned by the Waitangi Tribunal, 2015 (doc A51); Dr Barry Rigby, corrections to validation reports (doc A48(e)).

Page 467: Marriages between Women Rangatira and Early Settlers in Te Raki

1. Evidence of Tamati Waka Nene, 18 March 1858 (Berghan, supporting papers (doc 39(m)), vol 26, pp 15275, 15415–15457.
2. Bruce Stirling and Richard Towers, '"Not with the Sword but with the Pen": The Taking of the Northland Old Land Claims', report commissioned by the Crown Forestry Rental Trust, 2007 (doc A9), pp 121, 123, 124, 125, 126, 164, 372, 373, 404, 1322–1323; Margie Hohepa, 'Hokianga Waiata a Nga Tupuna Wahine: Journeys through Mana Wahine – Mana Tane', in *Mana Wahine Reader: A Collection of Writings 1987–1998*, 2 vols, ed Leonie Pihama, Linda Tuhiwai Smith, Naomi Simmonds, Joeliee Seed-Pihama, and Kirsten Gabel (Hamilton: Te Kotahi Research Institute, 2019), vol 1, p 112.

Page 491: An Implied Understanding that they Should Continue to Cultivate the Ground: The View of Ernest Dieffenbach

1. Ernst Dieffenbach, *Travels in New Zealand*, vol 2, pp 143–144 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 146–147; also cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 276); David Armstrong, 'The Land Claims Commissions: Practice and Procedure, 1840–1845', report commissioned by the Crown Law Office, 1992 (Wai 45, doc I4), pp 138–139.

Page 499: Women Rangatira Exercise Manaakitanga at Paihia

1. Letters, 12 January, 11 February, 17 March 1824, in *Letters from the Bay of Islands: The Story of Marianne Williams*, ed Caroline Fitzgerald (Auckland: Penguin, 2004).

Page 510: 'Lady Proprietresses' and Signing the Deed

1. Bruce Stirling and Richard Towers, '"Not with the Sword but with the Pen": The Taking of the Northland Old Land Claims', report commissioned by the Crown Forestry Rental Trust, 2007 (doc A9), p 58; Jocelyn Chilsolm, 'Joel Samuel Polack', *Dictionary of New Zealand Biography*, Ministry of Culture and Heritage, https://teara.govt.nz/en/biographies/1p18/polack-joel-samuel, last modified March 2006.
2. Chisholm, 'Joel Samuel Polack'.
3. Joel Samuel Polack, *Manners and Customs of the New Zealanders*, 2 vols (London: James Madden, 1840), vol 2, pp 80–81; Polack memorandum on claims, no date (Berghan, supporting papers (doc A39(m), vol 14, pp 8142–8146).

Page 534: Notices of Hearing

1. *New Zealand Herald and Auckland Gazette*, 28 August 1841

Page 537: 'Their Word Considered Valid, and an Honest Englishman's Oath . . . Defective'

1. Commissioner's report, 23 March 1843 (Paula Berghan, 'Northland Block Research Narratives', report commissioned by the Crown Forestry Rental Trust, 2006 (doc A39(a)), p 373).
2. Brodie to Shortland, 28 September 1842, IUP/BPP, vol 2, p 47 (David Armstrong, 'The Land Claims Commissions: Practice and Procedure, 1840–1845', report commissioned by the Crown Law Office, 1992 (Wai 45 R01, doc I4), p 124); see also Bruce Stirling and Richard Towers, '"Not with the Sword but with the Pen": The Taking of the Northland Old Land Claims', report commissioned by the Crown Forestry Rental Trust, 2007 (doc A9), p 368.

Page 567: *Queen v Clarke*

1. *New Zealander*, 28 June 1848.
2. Ibid.
3. *R v Clarke* [1851] NZPC 1.
4. *Proprietors of Wakatu v Attorney General* [2017] NZSC 17 at [298].
5. Bell report, 15 April 1859 (Berghan, supporting papers (doc A39(m)), vol 13, pp 7975–7977, 8043–8044).

Page 573: An Ordinance for Quieting Titles to Land in the Province of New Ulster, 1849

1. Crown Titles Act 1849 (13 Victoriae 1849 No 4)

Page 585: Governor FitzRoy's 'Penny-an-Acre Proclamation', 10 October 1844

1. FitzRoy, 'Proclamation', 10 October 1844, *New Zealand Gazette*, 1844, no 23, pp 138–139.

Page 607: 'Abominable and grossly unjust . . .'

1. Samuel M D Martin, *New Zealand; In a Series of Letters* (London: Simmonds & Ward, 1845)

Page 621: Table 6.6

The figures in table 6.6 are based on the technical evidence in our inquiry: Bruce Stirling and Richard Towers, '"Not with the Sword but with the Pen": The Taking of the Northland Old Land Claims', report commissioned by the Crown Forestry Rental Trust, 2007 (doc A9); Dr Barry Rigby, old land claims spreadsheet (doc A48(d)); Paula Berghan, 'Northland Block Research Narratives', report commissioned by the Crown Forestry Rental Trust, 2006 (doc A39(a)).

Page 626: Table 6.7

The figures in table 6.7 are based on a number of sources including the reports of the Bell commission and the technical evidence in our inquiry: Bruce Stirling and Richard Towers, '"Not with the Sword but with the Pen": The Taking of the Northland Old Land Claims', report commissioned by the Crown Forestry Rental Trust, 2007 (doc A9); Dr Barry Rigby, old land claims spreadsheet (doc A48(d)); Paula Berghan, 'Northland Block Research Narratives', report commissioned by the Crown Forestry Rental Trust, 2006 (doc A39(a)).

Page 657: Map 6.9
Map 6.9 is based on information from Bruce Stirling and Richard Towers, '"Not with the Sword but with the Pen": The Taking of the Northland Old Land Claims', report commissioned by the Crown Forestry Rental Trust, 2007 (doc A9), pp 1518–1520.

Page 675: 'We then Found that the Government Claimed the Surplus Land': Hōne Peeti to Rees Commission, 1891
1. 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', AJHR, 1891, G-1, pp 63–64 (John Rameka Alexander (doc H7), pp 7–8).

Page 682: Petition of Patu Hohaia and Others, 14 July 1925
1. Bruce Stirling and Richard Towers, supporting papers (doc A9(a)), vol 5, p 2590a

Page 695: Memorandum by Samuel and Reedy, Report of the Surplus Lands Commission, 1948
1. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, pp 34–35.

CHAPTER 7

TINO RANGATIRATANGA ME TE KĀWANATANGA, 1846–65: TE TIKANGA O TE HEPETA O KUĪNI WIKITORIA

TINO RANGATIRATANGA AND KĀWANATANGA, 1846–65: THE MEANING OF THE QUEEN'S SCEPTRE

> Na, e mea ana ahau kia tino rapua e matou, te tino tikanga o te hepeta o Kuini Wikitoria: ki te kahore e kitea o Niu Tirani taua hepeta, ka pena o matou whakaaro me te koura kua pau i te waikura.
>
> Now I say let us fully enquire into the meaning of Queen Victoria's sceptre. If we of New Zealand do not understand that sceptre we shall be like unto gold eaten up of rust.
>
> —Honatana (a rangatira from the Bay of Islands), speaking at the Kohimarama Rūnanga on Friday, 27 July 1860[1]

7.1 Hei Tīmatanga Kōrero / Introduction

In the aftermath of the Northern War, the Crown and Te Raki Māori each maintained their distinct approach to the treaty relationship. The Crown held the view that the treaty had enabled it to proclaim sovereign authority, tempered only by an obligation to protect Māori in possession of their lands. It therefore acted on the basis that Te Raki Māori must at some point become subject to the colony's laws. Māori, on the other hand, saw the relationship in broader terms: as a power-sharing agreement that would protect their right to exercise tino rangatiratanga while also providing a basis for economic partnership.

Neither party wanted a renewal of hostilities, so neither forcefully asserted its authority. Indeed, the Crown largely neglected the north from the late 1840s through to the end of the 1850s. Although it stationed a small military force in the Bay of Islands and sent a few local officials to negotiate for Māori acceptance of the colony's laws, its presence had little direct impact on Māori communities. Te Raki Māori, for their part, made several attempts to restore the economic partnership and attract settlers back to the north. They showed little enthusiasm for submitting to the Governor's authority over their day-to-day affairs, but they were willing to affirm their alliance with the Queen. To this end, they restored the flagstaff on Maiki Hill in 1858 as an expression of unity between Māori and Pākehā. The Governor, in turn, promised to establish a township at Kerikeri and

encourage settlers to return to the north. In other regions, the Crown's determination to assert its authority and advance the interests of the growing settler population were leading it into conflict with Māori.

A key factor in the political developments during this period were the significant steps taken by the Crown to establish settler institutions of self-government and a constitutional framework for the colony. In 1852, the British Parliament passed legislation establishing representative national and provincial assemblies in New Zealand, and settlers were given wide legislative powers over internal affairs, subject to certain reserve powers of the Queen. In 1855, the Colonial Office instructed the Governor to introduce 'responsible government' (whereby elected representatives, rather than Crown-appointed officials, would exercise executive power (see sidebar at section 7.2)). The first responsible ministry was formed in 1856. On the advice of Governor Thomas Gore Browne, control of Māori affairs was withheld from the settler Government. Subsequently however, the British government progressively granted settler politicians control of the Crown–Māori relationship – a process that was essentially complete by February 1865, though New Zealand did not become fully independent of Britain until much later. During the 1860s, the settler Government became less willing to recognise even limited Māori self-government and instead pursued an increasingly assimilationist course, which continued through to the end of the century and beyond. This policy direction involved, among other things, the establishment of the Native Land Court, which opened the way for large-scale alienation of Māori lands, and the determination that Māori must submit to the colony's laws.

In this chapter, we examine the significance of these major constitutional changes for Te Raki Māori and the extent to which they would be involved in the representative governing institutions that were being established. The New Zealand Constitution Act 1852 provided for limited Māori participation in the new national and provincial assemblies, as the franchise required that voters meet property tests that excluded many Māori. However, section 71 of the 1852 Act made specific provision for the establishment of native districts, where Māori hapū and iwi might continue to govern themselves under their own customs and laws. This important provision presented the Crown with an opportunity to recognise Māori tino rangatiratanga as it transferred governing authority to the growing settler population. However, section 71 was never used by the Crown, and no native districts were established during this period.

We ask why this was, and why Governors Gore Browne and Grey each sought different solutions to provide for Māori involvement in the governance of their communities. When war broke out in Taranaki in 1860, Gore Browne feared Māori resistance might spread. He sought to shore up support among Māori leaders by calling a national rūnanga at Kohimarama that same year, where he offered to provide for ongoing Māori input into the colony's laws and policies, and to recognise Māori rights of self-government at a local level. Māori from our inquiry district regarded these promises as significant steps towards restoration of the treaty partnership. In 1861, Gore Browne's successor, Sir George Grey, returning for a second term as Governor, rejected the plan for regular national rūnanga as agreed at Kohimarama, but did provide legal recognition for local and district rūnanga with some powers of self-government. Te Raki Māori engaged with and worked through these institutions until the colonial Government withdrew its support from them.

In the second part of this chapter, we consider the importance of these short-lived initiatives of the two Governors to Te Raki Māori in the context of the Crown's transfer of governing authority and responsibility to the settler population. We discuss whether they provided Te Raki Māori with meaningful involvement in the governance of their communities, and what the impact was of Crown withdrawal of its support for the continuation of the Kohimarama Rūnanga and of Grey's rūnanga system by 1865.

Claimants regarded the imperial government's transfer of authority to colonial institutions as a fundamental breach of the treaty partnership, exacerbated by the Crown's failure to provide for adequate Māori representation in the colonial legislature.[2] Claimants also told us

that the Crown failed to keep its promises after the 1860 Kohimarama Rūnanga to establish an annual national conference of rangatira, and to ensure that Māori played a role in forming and administering the law in their districts 'consistent with tino rangatiratanga and a tikanga-based system of law'.[3] Having established district rūnanga in 1861 with the promise that these would be permanent institutions of local self-government, the Crown quickly broke that promise and disestablished them in 1865.[4]

7.1.1 Purpose of this chapter

Chapter 4 considered the treaty compliance of the Crown's exercise of its kāwanatanga from 1840 to 1845, and its impact on the ability of Te Raki Māori to exercise their tino rangatiratanga. This chapter continues the analysis of this dynamic into the post-Northern War period, from 1846 to 1865. In this chapter, we investigate claims that Crown actions, omissions, legislation, and policy undermined Māori autonomy and tino rangatiratanga from the middle of the nineteenth century, after the Northern War. We consider the steps the Crown took to establish institutions of settler self-government and grant the colony a system of responsible government (see sidebar at section 7.2).

These were major constitutional and political changes that had the potential to undermine the basis of the treaty agreement as Te Raki Māori understood it: the Governor's sphere of authority was to control British subjects, while they would retain their tino rangatiratanga and independent authority.[5] The transfer of governing authority from the Governor to the settler population thus raises questions about the extent to which the Crown sought Māori input on the new constitution and institutions of government, and how Te Raki Māori rights and interests would be protected as settlers increasingly controlled the colonial Government's policies.

In this chapter, we consider a number of the options that were available to the Crown to provide recognition for Te Raki Māori tino rangatiratanga alongside or within the colonial Government. In the first part of the chapter, we look at section 71 of the Constitution Act which provided for the creation of self-governing native districts, yet was never used; and at the restrictive franchise (sections 7 and 42) which excluded nearly all Māori men because they could not meet a property qualification couched in terms in English law. In the second part, we examine the significance for Te Raki leaders of other steps the Crown took to afford hapū and iwi some role in the governance of colonial New Zealand and in their own districts, notably the 1860 Kohimarama Rūnanga (also known as Kohimarama Conference) and the establishment of district and local rūnanga in Te Raki. Our overarching aim in exploring these issues is to assess whether the Crown adequately recognised, respected, and gave effect to the tino rangatiratanga of Te Raki Māori during the colony's transition to responsible government.

7.1.2 How this chapter is structured

We begin this chapter by considering claimant and Crown submissions, and previous Tribunal guidance on relevant matters, in order to identify the issues for determination (section 7.2).

On each issue, we first set out the key arguments advanced by the parties (sections 7.3–7.5). We analyse those arguments in light of the evidence to reach a series of conclusions and findings on the treaty compliance of the Crown's actions in respect of the issues before us. All our findings are brought together in section 7.6, followed by our overall assessment of the prejudice Te Raki Māori sustained through the Crown's attempts to assert sovereignty in the inquiry district.

7.2 Ngā Kaupapa / Issues

7.2.1 What previous Tribunal reports have said

The issues in this chapter concern the political relationship between Te Raki Māori and the Crown, including their relative authority and spheres of influence. As we noted in chapter 4, the Tribunal has consistently found that the treaty guaranteed Māori rights to autonomy and self-government over the full range of their affairs, and through institutions of their choosing; that these rights constrained or fettered the Crown's power of kāwanatanga; and that the relationship between Crown and

Māori spheres of influence was subject to ongoing negotiation and adjustment in which neither side could impose its will.[6]

(1) *The Crown's decision to transfer responsibility for the Crown–Māori relationship to the colonial Government*

In the *Report of the Waitangi Tribunal on the Orakei Claim* (1987), the transition to responsible government was considered in some depth. The Tribunal found that during the 1840s and 1850s the imperial government generally attempted to honour its understanding of the treaty, and in particular to stand between Māori and settlers by protecting Māori land and resource rights. But that changed as settlers acquired more influence over Māori affairs.[7]

The Tribunal considered that the Constitution Act enshrined '[t]he broad principle . . . that the Maori people might retain their own lands in accordance with their own customs', and might furthermore maintain 'their own customs to govern their dealings with each other'. Section 71 'provided for native laws to govern native people and native districts in which [Māori] laws would be supreme' – a principle that was important for Māori, as evidenced by New Zealand's history which is 'marked by continuing Maori attempts to assert tribal law and autonomy, both before and after the Constitution Act 1852'.[8]

The Tribunal stated that there was 'good reason to believe native laws would have adapted and developed had tribal autonomy and native districts been allowed' under section 71 – but they were not. Instead, the colonial Government asserted its authority over Māori affairs, and '[t]he colonists were wedded to a view of one law for all, which was of course to be their law'. From 1854, the colonial Government 'was to move very strongly to assert British law over Maori people, Maori lands and Maori society and there was never any support in the General Assembly for applying section 71'. Section 73 of the Constitution Act 'acknowledged the communal nature of native land ownership' and affirmed the Crown's right of pre-emption, but 'colonists were equally anxious to overturn this provision'. The Native Territorial Rights Bill 1859 was passed by the General Assembly to abolish the Crown's right of pre-emption. However, the Bill was disallowed by the imperial government, which considered it an infringement of the treaty. Nonetheless, the Tribunal found:

> The right of the tribes to retain their lands in accordance with their own customs, and not to be exposed to settler pressure to sell them was soon abrogated in domestic laws. The election of the first House of Representatives in 1855 was rapidly followed by overt War (1860–1867), the relinquishment of Imperial control of Native Affairs (1861), the confiscation of Maori lands (1863), and the individualisation of remaining Maori titles (1865). The general view of the Colonial Office, that laws should not contravene the Treaty of Waitangi, suffered a sudden decline.[9]

For Māori, the treaty, which 'should have been the fundamental law and was a constitution in itself, was effectively overturned by a settler population no longer a minority'. Māori were initially powerless to influence the new colonial Parliament:

> The settlers then had not sought the 1852 constitution in order to advance their responsibilities to the Maori and nor did they welcome it for the opportunity to provide for Maori laws and districts. They had sought instead, and had soon gained, self Government freed of Imperial controls.[10]

In the *Orakei* report, the Tribunal noted a tension between the principle that 'tribes or tribal individuals should retain sufficient lands for their needs' and settler impatience for land.[11] A fundamental question during this period was whether the Crown took 'sufficient steps' to protect Māori against excessive alienations and to ensure that they retained enough land.[12] This is a question we will be asking in our inquiry district, not just regarding land but also whether Māori rights of self-government were protected as responsibility for Māori affairs was transferred to the settler Government.

In the *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (1988), the Tribunal noted

that Māori in that district retained independent control of their affairs until the 1860s. From that point, growth in the settler population, Britain's transfer of political authority to settlers, and the Crown's declaration of war against Māori in some districts combined to undermine Māori autonomy. Racial attitudes hardened, and laws were enacted to break the Māori control of land and resources and undermine Māori competitiveness in trade.[13]

In *The Taranaki Report: Kaupapa Tuatahi* (1996), the Tribunal found that Governor Grey's arrival in New Zealand in 1846 had already heralded a significant shift in the Crown's policy towards Māori. Grey abolished the Protectorate of Aborigines, made the same officials responsible for land purchasing and Māori affairs, and embarked on an ambitious land purchasing programme aimed at meeting the needs of a growing population of British settlers. Matters then 'worsened when representative institutions were introduced in New Zealand from 1853 without effective provision for Maori representation'. From that point, 'Maori custom, law, and institutions were judged by those who did not know them; and the judgments were wrong'. Under settler influence the Crown negated Māori rights to make their own decisions about land, causing war in Taranaki and elsewhere. It was then a revolution in land tenure that destroyed the capacity of Māori to manage their own properties. The colonial Government 'was unable to see that the essence of peace is not the aggregation of power but its appropriate distribution'.[14]

(2) *Māori institutions of self-government*

Several Tribunal reports have considered Māori rights to self-government at national, tribal, and local levels. In particular, the Tribunal in *He Maunga Rongo: Report on Central North Island Claims* (2008) analysed in detail the options available to the colonial Government throughout the nineteenth century. The Tūranga and Te Rohe Pōtae inquiries also considered these matters closely.

In broad terms, in *He Maunga Rongo* the Tribunal found that the treaty guaranteed Māori 'their autonomy and the right of self-government by representative institutions responsible to their communities'.[15] The Tribunal adopted the conclusions of the *Taranaki* report, that the guarantee of autonomy under article 2 offered Māori the right to 'constitutional status as first peoples', and the right to 'manage their own policy resources and affairs, within minimum parameters necessary for the proper operation of the state'.[16] The Tribunal also found that the Crown could not establish institutions of government with authority over Māori unless it had first secured Māori consent. As the Tribunal explained, this was because the right of tino rangatiratanga acted as an ongoing constraint on the Crown's right to govern.[17]

In addition, the *He Maunga Rongo* report identified a futher dimension of the treaty guarantee of self-government, arising from article 3, and the promise that as British citizens Māori would receive equal treatment to Europeans.[18] The Tribunal noted that by the mid-nineteenth century, 'British subjects in the colonies were entitled to a minimum of local self-government through municipal and other bodies, and to representative institutions at a national level'.[19] During this period, Central North Island Māori sought self-government on the same basis as settlers, 'that is, they sought fully responsible self-government'.[20] The Tribunal concluded that denying the Queen's Māori subjects self-government through representative institutions 'was in clear violation of the constitutional norms and standards of nineteenth-century New Zealand'.[21] Furthermore, this was what was required under article 3,

> either by full and fair incorporation in the franchise and representative institutions of the colony, or by their own institutions, or some mix of the two acceptable both to the Crown and Māori.[22]

The Tribunal recognised that the Crown's obligation to provide Māori with legal powers of self-government should also be judged by what was reasonable in the circumstances of the nineteenth century.[23] In *He Maunga Rongo*, and its Tūranga, Te Rohe Pōtae, and other inquiries, the Tribunal considered the Crown's decision not

to use section 71 of the Constitution Act to establish self-governing Māori districts. In *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (2004), it found that, so long as Māori retained autonomy within their territories, the provision could have been used, and it 'would have provided for Maori autonomy within a constitutional and Treaty framework', delivering the tino rangatiratanga guaranteed by the treaty.[24] Section 71 gave the Crown 'a unique opportunity to protect Turanga Maori within its own kawanatanga framework', but, in breach of the treaty, it 'chose, instead, to wait until it could assert its own authority and so defeat Maori autonomy'.[25] In *He Maunga Rongo* and *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (2018), the Tribunal found that there was no legal or constitutional barrier to the Crown using section 71, nor any practical barrier until late in the century when Māori no longer exercised practical autonomy in their territories.[26]

In the *He Maunga Rongo* report, the Tribunal found that the Kohimarama Conference had been a significant step towards Māori self-government, and that the promised future conferences had potential to evolve into a Māori parliament, with consultative and legislative functions, in a manner that would have been consistent with the treaty.[27] However, the Tribunal concluded that, when Governor Grey refused to hold future conferences,

> the most promising opportunity for a Māori parliament in the history of this country, endorsed by Maori and by the settler Parliament of the time, was deliberately rejected on very inadequate grounds.[28]

(We discuss this in section 7.4.) This 'was a critical missed opportunity for meaningful Maori participation and power in central government'.[29] In making these decisions, the Tribunal cited the settler Parliament's decision to provide funding for the planned annual conference as evidence that infrastructure and costs did not reasonably constrain what could have been afforded to Māori.[30] Furthermore, the Tribunal did not consider that the Crown was constrained by settler ideologies and politics from providing Māori self-government, noting that protective measures were a 'recurring possibility in Parliament in the nineteenth century'.[31]

In *Te Mana Whatu Ahuru*, the Tribunal found that Grey refused to reconvene the conferences because neither he nor his ministers wanted a national Māori authority that might rival the colonial Government.[32] Instead, Grey established district rūnanga that provided for some degree of local self-government, but then withdrew support after a few years. The Tribunal found that when Grey offered rūnanga to Te Rohe Pōtae Māori, they were required to disassociate themselves from the Kīngitanga. The 'New Institutions' were 'intended to control Māori in the Waikato and Te Rohe Pōtae'.[33] In *He Maunga Rongo*, the Tribunal found that the district rūnanga that Grey established in 1861 provided Māori with significant powers of self-government in conjunction with the Government and local officials. The policy was, in their view, 'a Treaty-compliant one that showed great promise'. But the Government abandoned the policy and dismantled the rūnanga in 1865 while also rejecting other options for Māori self-government. In the Tribunal's view, this was a serious breach of treaty principles.[34]

7.2.2 The claimants' submissions

Claimants said that, throughout the decades after the signing of te Tiriti, the Crown 'consistently and stridently' sought to impose its kāwanatanga over all Te Raki Māori people, lands, and resources, while Te Raki Māori 'strove to exercise their tino rangatiratanga and establish a relationship with the Crown based on their understanding of te Tiriti/the Treaty'.[35]

The claimants said that the Crown, having proclaimed sovereignty in 1840, then progressively attempted to assert power over Māori. The Constitution Act, in breach of te Tiriti, effectively severed the direct relationship between rangatira and the Queen, and instead handed law-making powers to a settler assembly from which Māori were effectively excluded. The colonial Parliament subsequently enacted legislation to bring Māori under the authority of the colony's system of law and government.[36]

On occasions, the Crown did make some provision for Māori to exercise some degree of self-government or

Māori quickly adopted kara into their protocols and traditions. Some are regarded as taonga associated with particular tūpuna, acts of tino rangatiratanga or as expressions of the relationship with the Crown. Here at Waimā, the Te Māhurehure kara flies above red ensigns gifted to Ngāti Hurihanga and Mahuri, Ngāti Pākau and Ngāti Rauwaewae. In the middle is the rarely seen kara of Ngāpuhi-nui-tonu. Underpinning them is the kara of the United Tribes of New Zealand. Outside of frame, another kara of the United Tribes – a potent symbol of mana and Māori rangatiratanga – flies at equal height.

influence on Crown decision-making, albeit under the control of the colonial state, but these provisions were either not used or quickly abandoned. Specifically:

- Section 71 of the New Zealand Constitution Act 1852 provided for the establishment of districts in which Māori 'laws, customs, and usages' could have continued in force. In generic closing submissions about tino rangatiratanga and Māori autonomy, claimants said that this 'would have provided for Te Raki Māori to exercise tino rangatiratanga in their self-governing districts'.[37] In other submissions, claimants argued that section 71 was not sufficient to provide for the fullest exercise of tino rangatiratanga.[38] In any event, the provision was never used.[39]
- At the Kohimarama Rūnanga in 1860, Governor Gore Browne assured Te Raki chiefs that, in future, 'they would take up a significant role in their own governance through annual conferences, Māori districts and establishing a means of ascertaining tribal boundaries and land titles'.[40] In the claimants' view, these roles would be 'consistent with tino rangatiratanga and a tikanga-based system of law'.[41] However, Gore Browne's successor, George Grey, abandoned the conferences, seeing them as a threat to the Queen's sovereignty, meaning no further discussion was held.[42]
- The Native Districts Regulation Act 1858 and the Native District Circuit Courts Act 1858 provided the statutory basis for a system of local government through district rūnanga. Māori were not consulted on this proposal, which was aimed at encouraging assimilation and was considerably more limited than section 71. Parliament initially refused to fund district rūnanga.[43] District rūnanga were established from 1862, providing a mechanism by which Māori could exercise some degree of self-government. Governor Grey promised that the rūnanga would be permanent.[44] The Crown quickly broke this promise: the rūnanga were starved of funds and then terminated 'because the Crown had made a political decision to disestablish any manifestation of Māori political autonomy'.[45]

Through its handling of these initiatives, claimants argued, the Crown failed to recognise Te Raki Māori autonomy or rights to a meaningful role in their own governance.[46] The colonial Government had acquired full responsibility for Māori affairs by 1865, and from that

Kara fly at the entrance of Moria Marae, Whirinaki, as expressions of hapū rangatiratanga. They are: 'Te Rama Roa' (the maunga that guided Kupe into Hokianga harbour); 'Whiria Paiaka o te Riri te Kawa o Rahiri 1943' (translated by Dr Patu Hohepa as 'Whiria – the taproot of strife and the laws of Rāhiri', an important whakatauki for Ngāpuhi that also refers to the war council of Rāhiri'); and 'Ngatihau'.

time, claimants said, 'the Crown turned away from policies promoting self-government' and instead began to pursue policies that were aimed at asserting the Crown's de facto authority while assimilating Māori into the colony's system of law and government.[47]

Claimants said that the Crown also asserted its authority through warfare (both the Northern War and campaigns elsewhere across the North Island); the promotion of settlement; and legislative initiatives that included successive Native Lands Acts and the Native Rights Act 1865, which declared that every Māori was a natural-born British subject and provided that the colonial courts had jurisdiction over Māori.[48]

Claimants submitted that the Crown's 'imposition of . . . kāwanatanga' over Te Raki Māori and their taonga 'without their informed consent, cannot co-exist with their rightful exercise of tino rangatiratanga'.[49] They asserted that Te Raki Māori did not at any time willingly acquiesce in the gradual Crown encroachment on their exercise of tino rangatiratanga but rather continued, throughout this period and beyond, to assert their rights of autonomy and self-government.[50]

In closing submissions on tikanga, claimants said the doctrine of parliamentary supremacy or parliamentary sovereignty, brought into effect by the Constitution Act, had severed the constitutional relationship between Māori and the Queen, 'formalise[d] the subjugation of Tikanga Māori by stating that Parliament is the supreme law-making body over all of New Zealand', and provided a foundation for all other legislative regimes affecting Māori rights and interests.[51]

Claimants submitted that parliamentary supremacy is in breach of he Whakaputanga and the treaty, and denies

> Te Raki Māori their inherent right, under their Tino Rangatiratanga, to retain their own customary law and institutions and the right to determine their own decision makers and land entitlements.

Parliamentary supremacy 'does not allow for Tikanga Māori to operate in independence. It is a unitary model only and doesn't provide space for a Tiriti partner.'[52]

7.2.3 The Crown's submissions

Counsel submitted that, from the mid-1840s, the Crown 'sought to apply British law to Northland Māori in a gradual way and one that respected the role of rangatira'.[53] During the 1840s and 1850s, the Crown made few attempts to impose its authority on Te Raki Māori, and for the most part, Māori continued to govern themselves according to their own laws. During the 1860s, counsel submitted, the

Crown provided mechanisms through which Northland Māori could exercise tino rangatiratanga in respect of their lands and taonga; in particular, through district rūnanga.[54] Furthermore, Crown counsel submitted that Māori were adequately represented in the colonial Parliament and the decision to abandon annual conferences was not prejudicial to Te Raki Māori.[55] In response to the claimants' submissions:

- Crown counsel did not specifically address the claim that the Crown had breached the treaty by handing law-making powers and responsibility for the treaty relationship to a settler Parliament. Counsel acknowledged that the Crown had not established self-governing Māori districts as provided for under section 71 of the Constitution Act, but said the Crown was not obliged to under the treaty, and had caused no prejudice to Te Raki Māori by not doing so.[56]
- Crown counsel submitted that, during the Kohimarama Conference in 1860, Te Raki leaders acknowledged the Crown's sovereignty and expressed their desire to unite with Pākehā and live together under one law.[57] Counsel acknowledged that Governor Grey chose not to convene any further national conferences of rangatira, but submitted that this was not a breach of the treaty, as Grey provided other means by which Te Raki leaders could exercise their tino rangatiratanga.[58]
- Crown counsel submitted that the Crown had 'actively supported Northland Māori in self-government through the runanga scheme'. The powers exercised by rūnanga were broadly comparable to those of provincial government and allowed Te Raki Māori to make and enforce law – that is, a mix of tikanga and English law – at the local level. They held a wide civil and criminal jurisdiction. Counsel denied that the Crown had abolished rūnanga in 1865, arguing that they were affected by government-wide funding cuts but continued to operate beyond that date. However, counsel accepted that the legislation under which the rūnanga were established was repealed in 1891, which suggested 'that by at least 1891, and probably from about 1865, official runanga were no longer in operation'; but it was 'more than likely that unofficial runanga, councils and committees continued to operate at a tribal level'.[59]

7.2.4 Issues for determination

Arising from the findings of previous Tribunal reports, the key differences between the parties, and the evidence presented in our inquiry, the issues for determination in this chapter are as follows:

- Did the Crown make appropriate provision for the exercise of Te Raki Māori tino rangatiratanga as it took steps to establish institutions for settler self-government?
- What was the significance of the 1860 national rūnanga at Kohimarama for the exercise of tino rangatiratanga by Te Raki Māori?
- To what extent did Governor Grey's 'new institutions' adequately provide for the exercise of tino rangatiratanga by Te Raki Māori?

7.3 Did the Crown Make Appropriate Provision for the Exercise of Te Raki Māori Tino Rangatiratanga as it Took Steps to Establish Institutions for Settler Self-Government?

7.3.1 Introduction

Between 1852 and 1865, the Crown progressively transferred authority over New Zealand's internal affairs from the Governor to a colonial Parliament and executive, and to provincial governments. It did so in response to the agitation of New Zealand's growing settler population, who argued consistently for rights of self-government. These constitutional changes occurred at a national level, but during the nineteenth century and beyond have had profound effects on Māori in this district.

The Crown took the first steps towards granting the settlers self-government when the British Parliament passed the New Zealand Constitution Act 1846, providing for representative institutions. However, in 1848 the British Parliament suspended those parts of the Act that

related to the provincial and general assemblies after strong criticism by Governor Grey and others, halting this process for five years.[60] The New Zealand Constitution Act 1852 established a colonial Parliament with two houses: an appointed Legislative Council and an elected House of Representatives. The 1852 Act also established six provinces, each with their own elected superintendent and elected provincial council.[61] It contained two major provisions that were significant for Te Raki Māori constitutional and political rights. First, it spelled out the entitlement to the franchise for provincial councils and the national Legislature (sections 7 and 42). The franchise was granted to men aged 21 and over, if they met a property test that, in practice, excluded almost all Māori.[62] Secondly, section 71 of the Act provided for the establishment of native districts in which Māori would continue to govern themselves according to their own laws until the colonial Government could establish authority over the whole country. Responsible government (under which the Government was responsible to the colonial Parliament) was not granted until 1855. The first responsible ministry was formed in 1856, and from then until 1865, responsibility for the Crown–Māori relationship was progressively transferred from the Governor to the colonial ministry.

By any measure, these were very significant constitutional developments. Claimants expressed four principal concerns. First, they said, the Crown breached the treaty by establishing and delegating authority to its own institutions of government under the New Zealand Constitution Act 1852. Specifically, the Crown 'imposed their Kāwanatanga over Te Raki Māori' by establishing the three branches of government;[63] and denied tino rangatiratanga and subjugated Māori customary law by granting the colonial Parliament supreme law-making authority.[64]

Secondly, claimants said, the Crown severed the constitutional relationship between Te Raki Māori and the Queen by enacting the New Zealand Constitution Act 1852 and establishing settler self-government without Māori consent.[65] Thirdly, Māori were not adequately represented in the colony's Parliament.[66] Lastly, as the Crown never in fact established any native districts under section 71, it failed to protect the tino rangatiratanga of Māori communities.[67]

The Crown did not respond directly to claims about the delegation of sovereign power to colonial institutions of government. Crown counsel argued that the Crown was under no obligation to establish native districts,[68] and that it provided other means by which Māori could exercise their tino rangatiratanga.[69]

In this section, we consider the claims regarding these constitutional developments, with a particular focus on the following questions:

- What provision did the 1846 constitution make for the protection of Te Raki Māori rights and interests?
- What provisions did the New Zealand Constitution Act 1852 make for the protection of Te Raki Māori rights and interests?
- Why did responsibility for Māori affairs become such a fraught issue between the imperial and the colonial Governments, and how was it finally resolved?
- Why did the Government never use section 71 of the Constitution Act 1852
- Were Te Raki Māori appropriately represented in the colonial Legislature and Government between 1840 and 1865?

7.3.2 The Tribunal's analysis

(1) *What provision did the 1846 constitution make for the protection of Te Raki Māori rights and interests?*

We begin with the British government's first attempt to provide self-government to New Zealand settlers in the 1846 constitution. Though it did not get off the ground, it would lead to a Constitution Act in 1852 which did come into operation, and which (like its predecessor) contained an important provision allowing for recognition of Māori law and customs in certain districts. We return to this provision later.

During the first years after the signing of te Tiriti, the Crown's power of kāwanatanga was vested in the Governor. Although the Governor could and did seek advice from appointed executive and legislative councils, final responsibility for governing the colony rested with him. Throughout those initial years of Crown colony

government, many settler communities clamoured for the right to govern themselves, and the Crown responded by making plans to delegate power to settler institutions. In February 1846, the directors of the New Zealand Company petitioned the British Parliament for representative institutions for settlers.[70] The imperial government responded in August 1846 when an Act was passed 'to make further provision for the Government of the New Zealand Islands'.[71]

The New Zealand Constitution Act 1846 (also referred to as the New Zealand Government Act 1846) provided for the establishment of municipal, provincial, and national legislative bodies.[72] The franchise was limited to adult males who owned or leased property of a certain value held under Crown grant and were literate in English – discriminatory tests that effectively excluded almost all Māori from the franchise.[73] According to the Crown's historian Dr Donald Loveridge, the Secretary of State for War and the Colonies, Earl Grey, was aware of this, and he provided a mechanism by which particular districts might be created within the two provinces where Māori systems of law and government would remain in force 'for the present'. Provision might be made for the maintenance of Māori law and custom, so far as they were not 'repugnant' to English laws or to New Zealand laws.[74]

The Governor could appoint rangatira or others to govern the 'Aboriginal Districts', and Māori law would apply to Māori.[75] The Queen's Instructions specified however that non-Māori should respect and observe Māori laws and customs within these districts or be penalised for breaching them by 'any court or magistrate' within the relevant province.[76] This provision for Māori districts acknowledged the reality that settlers were vastly outnumbered at the time (100,000 to 13,000, according to the mid-century parliamentary historian Alexander McLintock).[77] We note that Earl Grey also foreshadowed the Crown's intention that such Māori districts would be a temporary measure.[78] As the settler population and Crown resources grew, the Crown expected that the municipal districts would gradually expand and the colony's system of law and government would come to apply to Māori.[79]

The Act was sent to New Zealand with an accompanying Royal Charter and instructions to Governor Grey from then Secretary of State Earl Grey, which provided further detail on the new system of government. But the dispatch and the Queen's Instructions had grave implications for Māori ownership of their lands. As we discuss further in chapter 8, Earl Grey's instructions also outlined the 'waste lands' principles that the Governor was to adopt, with a legal rationale for the Crown to claim ownership over all Māori lands deemed uncultivated or unoccupied. This shift in the Crown's recognition of Māori land rights was presaged by an 1844 parliamentary select committee report that advocated Crown adoption of this policy. The arrival of the report in New Zealand in 1845 had provoked considerable suspicion among Māori, leading missionaries and government officials to give assurances that the treaty would be honoured, and Māori would retain their lands, whether 'occupied' or not; we discuss the select committee report further in chapter 8.

The Northern War had only ended in January 1846, a year prior to the arrival of Earl Grey's instructions, and war in the Wellington region had continued until August. Further conflict broke out in Whanganui in April 1847.[80] In this context, Governor Grey reasoned that both the land policy and the grant of self-government to a small minority of settlers would be highly inflammatory. He wrote to the Colonial Office accordingly, and warned that Māori vastly outnumbered settlers, were 'well armed, proud, and independent', 'much the more powerful' of the two populations, and highly unlikely to submit to rule by a settler minority.[81] Grey therefore sought and obtained a deferral of the 1846 Act for 'four or five years', by which time he hoped that the Māori 'fondness for war' would be in decline, their land disputes would be resolved, and they would have 'made great progress' in adopting British cultural values.[82] He suggested the adoption of a semi-representative system that allowed Māori men who possessed property in 'Government securities, in vessels, or in tenements' to vote.[83]

The imperial government consulted Grey and other New Zealand officials during the second half of 1846, but we have seen no evidence of any direct consultation with Māori leaders, let alone any attempt to negotiate

New Zealand's Early Constitutional Arrangements

Between 1840 and 1865, the New Zealand colony was governed under a succession of constitutional arrangements. New Zealand was initially part of the colony of New South Wales, then became a Crown colony in its own right in 1841. In 1846, a constitution was granted providing for the establishment of representative institutions, which were not established, however. The British Parliament then passed a new Constitution Act in 1852, under which a national General Assembly and six provincial assemblies as well as provincial superintendents were elected. Finally, over the following years responsible government was granted by Britain, which changed the composition of the executive: the Governor must now take advice not from appointed officials but from ministers responsible to the elected House of Representatives. The first responsible ministry was formed in 1856.

Crown colony government

The Crown colony system of government involved the administration of a colony by the government of the United Kingdom through a Crown-appointed Governor.

Crown colony government was established in New Zealand when the British assumed legal sovereignty in accordance with their own processes (see the sidebar on page 188).[1] Captain William Hobson was initially Lieutenant-Governor of New Zealand (while Sir George Gipps remained Governor of the colony of New South Wales, whose territory had been extended to include the islands of New Zealand). In December 1840, New Zealand was constituted as a separate colony, and Hobson was appointed its Governor. The new colony was officially proclaimed in May 1841. The Governor was required to act in accordance with Royal Instructions. He received advice from two appointed councils: the Executive Council (responsible for policy and government) and the Legislative Council (responsible for legislation, known then as ordinances). The Executive Council initially consisted of three senior officials: the Colonial Secretary, the Treasurer, and the Attorney-General. These same three people were members of the Legislative Council, along with three Justices of the Peace.[2]

Ultimate decision-making power within the colony lay with the Governor, who could direct the councils as he wished.[3] The Governor chose all officials of the councils, with the exception of the Attorney-General, who was sent by the Colonial Office in 1841.[4]

Crown colony government was intended to be an initial, temporary arrangement for the governance of New Zealand until a representative assembly could be 'safely' established.[5]

The 1846 constitution

Very soon after the colony was founded, settlers began to apply pressure for their voices to be heard in the colony's system of government. Accordingly, in 1846, the Crown incorporated an element of representative democracy (in which the Legislature is elected) into New Zealand's constitutional arrangements.

The New Zealand Constitution Act 1846, passed by the British Parliament, provided for a three-tiered representative system for male settlers.[6] Government was based on elected local municipal corporations, which operated as part of a complex machinery of indirect election. The Act provided for two provincial governments for the provinces of New Ulster (north of a line drawn east from the mouth of the Patea River) and New Munster, each composed of a mix of officials and nominees. A national General Assembly would sit above the provincial bodies and would comprise the Governor and Legislative Council (both appointed by the Crown), and a House of Representatives (made up of and elected by members of the provincial

Houses of Representatives).[7] The Governor retained final decision-making powers within the colony. Franchise would be granted to all male British subjects over the age of 21 who owned or occupied a dwelling and could read and write in English.

Within a year of the Act arriving in the colony however, those parts of it relating to the provincial and central assemblies were suspended for five years, following Governor Grey's vigorous protest at the plan for settler self-government in the northern province of New Ulster; he warned that it would provoke an uprising from Māori, who still greatly outnumbered settlers at the time. Earl Grey agreed that things were moving too fast, and in March 1848 the British Parliament passed a Suspending Act.[8]

The New Zealand Constitution Act 1852

The New Zealand Constitution Act 1852, which was also passed by the British Parliament, subsequently established a colonial Parliament as well as six provinces, each with its own elected superintendent and provincial council.[9] The Act gave the colony representative government but made no mention of the relationship of the Legislature to the Executive Council.[10]

At a national level, the Act created a General Assembly comprising the Governor, a Crown-appointed Legislative Council, and an elected House of Representatives.[11]

Elections for the House of Representatives were to be held every five years. All males aged 21 years or older were eligible to vote in any district where they owned a freehold estate valued over £50, or possessed a leasehold estate of an annual value of £10 for at least three years within the limits of a town, or £5 outside a town.[12] The removal of the literacy requirement meant that a small number of Māori were now eligible to vote, and did so during the 1850s. However, the property test excluded most Māori.[13]

The General Assembly could enact laws required for the colony's 'peace, order, and good government', provided the law was not repugnant to the law of England.[14] This restriction did not however apply to Maori laws and customs which might be observed within particular districts set apart by the Queen, where they might govern themselves.[15] Provincial governments might also make laws, though they were prohibited from enacting laws about various specified matters including Māori lands under customary title.[16]

Responsible government

Under the New Zealand Constitution Act 1852, executive authority remained with the Governor. Within New Zealand, as in other British colonies in the mid-nineteenth century, settlers sought the right to become self-governing by securing a grant of 'responsible government' from the Crown.

'Responsible government' means that executive authority is exercised on the advice of Ministers who are chosen from the House of Representatives, and are therefore responsible to voters. Constitutional law expert Professor Philip Joseph has noted that responsible government implied three things: 'that members of the Executive Council be appointed from the House of Representatives, that the Governor accepts the advice of the Council, and that the members of the Council have the confidence of the House'.[17]

Under this system, the Governor retains final executive authority, but also in contrast to the central role played by Crown-appointed officials under Crown colony and representative governments, the responsible government's executive was selected from elected representatives, giving colonies and their enfranchised populations close to autonomous control over their governance. Under responsible government, some matters, including diplomatic relations and external defence, continued to be imperial responsibilities.

In 1848, Nova Scotia became the first responsible government outside of the United Kingdom. Twelve years later, all four Maritime provinces in Canada had the 'standard' responsible government structure: a Governor, an elected Legislative Assembly, an appointed Legislative Council, and an Executive that had been chosen by the Assembly.[18] Similarly, by 1867, five of the six colonies in Australia had achieved some form of responsible government.[19]

In New Zealand, when the House of Representatives first met in 1854, it passed a resolution requesting that the Crown grant it responsible government, and in December 1854 the Colonial Office sent a dispatch giving government approval; it was received in New Zealand in March 1855.[20] The Acting Governor was advised that legislation was not required to make the change. 'Responsible government was a matter of convention and practice, not law'. When Parliament met in 1856, Henry Sewell was called upon to form the first responsible government composed of settler ministers. Provincial councils had already been constituted ahead of the General Assembly, and the first moves towards responsible government were made in Canterbury and Wellington provinces.[21]

Nationally, the Governor initially retained executive responsibility for Māori affairs, but the General Assembly had control of the budget and legislative agenda.[22] During the early 1860s, the imperial government tried to transfer control of Māori affairs to the colonial Government, along with responsibility for funding its own defence, while the colonial Government tried to achieve control of Māori affairs without assuming this responsibility.[23]

with them to determine how settler and Māori authority might interact.[84] Crown officials clearly understood that any move towards settler self-government would affect Māori rights and interests. Nevertheless, the constitution made only limited provision for Māori and treaty rights – through a highly restrictive franchise and a provision to Māori to occupy self-governing districts during a transitional period until the Crown's authority could be established. This plan, 'fashioned in ignorance of local conditions' according to one historian,[85] was abandoned partly due to its impracticality for such a small colony, but mainly because it was feared it might provoke a Māori uprising at a time when the Crown's authority in the colony remained far from secure.

In the following years, Grey proposed several options for a new constitution, including one in which settlers would be granted responsible government for Stewart Island, the South Island, and the main North Island townships, while the Crown would directly rule over Māori elsewhere.[86] He enacted the Provincial Councils Ordinance 1848, which confirmed the establishment of two provincial councils for New Ulster and New Munster to be composed of both officials and nominees, and proclaimed himself Governor of both provinces.[87] However, the New Munster Legislative Council was convened only once for a single session, and the New Ulster Legislative Council never met.[88] Over subsequent years, settler interests continued to lobby the Government in New Zealand and Britain for greater control over their lands and land revenue.[89] Missionaries and humanitarian associations also continued to advocate for treaty rights to be acknowledged and for Māori to be given a genuine share in the government of the colony.[90] The Aborigines' Protection Society[91] argued that Māori had been excluded from any share in state power under Grey's governorship, and the situation was only likely to worsen once settlers took control.[92] The Wesleyan Missionary Society argued that, if authority was to be handed to the colonial Government, it should also face legally enforceable treaty obligations – thus preventing any attempt to evade the 'spirit and obvious meaning of the Treaty as understood by the natives at the time of its signing'.[93]

Neither of these societies had any influence on the ultimate decisions of the imperial government.[94] Nor did

New Zealand's first Parliament building, erected in 1854 and pictured here in 1861.

Hōne Heke, who wrote to the Queen in June 1849 explaining that his people had understood the treaty as providing for Crown protection of Māori from foreign interference and uncontrolled settlement; and that Māori, under the treaty, retained authority over their own lands and people.[95] As we will see, during the 1850s and 1860s the Crown proceeded to transfer its authority and treaty responsibilities to colonial institutions of government, providing very few safeguards for Māori rights and interests.

(2) *What provisions did The New Zealand Constitution Act 1852 make for the protection of Te Raki Māori rights and interests?*

Ultimately, the Crown granted settlers representative government at both the provincial and national level. The New Zealand Constitution Act 1852 provided for the establishment of a bicameral national legislature comprising an elected lower house (the House of Representatives) and an appointed upper house (the Legislative Council),[96] as well as six provincial governments, each with its own elected assemblies and superintendents.[97] Similar to the 1846 Constitution, the franchise was granted to males aged 21 and over who owned freehold estate or leased or occupied property above certain financial thresholds. Because the tests applied to property held under Crown title, very few Māori men qualified. There was no provision for a special franchise for Māori – though the British government considered making one.[98]

The General Assembly (comprising the Governor and both Houses of Parliament) was empowered to make laws 'for the peace, order and good government of New Zealand', provided those laws did not conflict with English law.[99] The assembly also had extensive control over the colony's budget, though powers of executive government remained (for the time being) with the Governor and his appointed Executive Council, creating a system in which

Governor George Grey's January 1853 proclamation that brought into operation the New Zealand Constitution Act 1852. The 1852 Act provided for the establishment of New Zealand's colonial Parliament and six provincial governments.

responsibilities were divided. The Governor also retained some powers over legislation, including the power to propose, assent to, reject, reserve, or amend legislation on the Crown's behalf. In carrying out his duties, the Governor was required to act in accordance with instructions from the imperial government, which retained final authority to assent to or disallow legislation even after the Governor had given his assent.[100]

Grey's hope was that Māori would rapidly assimilate into the colony's legal and governing framework; to that end, he had established the resident magistrate system, which we discuss later in the chapter.[101] Nonetheless, just in case Grey's assimilationist plans did not come to fruition, the Constitution Act 1852 retained (in section 71) the 1846 provision for native districts in which Māori for the time being could continue to exercise decision-making in accordance with their 'laws, customs, and usages', even if they were 'repugnant' to the law of England, 'or to any law, statute or usage in force in New Zealand, or in any part thereof.'[102] As Dr Loveridge argued (in evidence originally filed in the Whanganui Lands inquiry), the Crown had no real intention of using this provision except in that circumstance. Loveridge noted 'strong objections' in New Zealand at the outset to the idea of separate 'Aboriginal Districts'. In the words of one newspaper editor, they would prevent Māori from 'advanc[ing] in the scale of civilization', and would undermine British authority.[103]

The Act's provisions for settler self-government were vigorously debated in both houses of the British Parliament.[104] However, according to Dr Loveridge, there

was 'very little comment on the few sections relating specifically to Māori, and virtually no discussion of the effects which the new arrangements might have on them.'[105] McLintock similarly had concluded that Māori interests 'did not appear even as a side issue.'[106] As he explained, a few members of the House of Commons sought assurances that Māori would be fairly treated under the new constitution, and were quickly placated after hearing Grey's assurance that Māori and settlers 'already formed one harmonious union.'[107]

Another mid-century historian, Professor BJ Dalton, whose study *War and Politics in New Zealand* remains an important one, regarded the constitution as 'surely the most liberal and elaborate ever devised for 26,000 colonists', indicating that Māori continued to far outnumber settlers at this time.[108] He also considered the constitution as making very limited provision for Māori, in his view chiefly because Grey had misled the imperial government.[109] It is notable that a decade or so after the Act was passed, Britain's parliamentary Under-Secretary for the Colonies, Chichester Fortescue, commented in the House of Commons that it 'appeared to have been framed in forgetfulness of the existence of large native tribes within the dominions to which it was intended to apply'.[110]

Under the Act, provincial councils could not enact legislation that affected Māori customary lands or discriminated against Māori, but no such restriction was imposed on the General Assembly except in one respect. Section 73 of the Act restated the Crown's right of pre-emption: only Her Majesty might purchase or acquire land belonging to or occupied by them 'as Tribes or Communities'; otherwise, the General Assembly could legislate as it wished, subject to Crown assent, and its responsibility for approving the colony's budget meant, in effect, that it could exert significant influence over government policy towards Māori, and could also – if it wished – impose taxes on Māori who were not represented.[111] However, the General Assembly did not hold effective control over the Native Department and Māori affairs, as these were the domain of the Governor. We discuss the approach taken by Governors Grey and Gore Browne to Māori affairs in the next section.

The first general election was held over several months in 1853 to elect provincial superintendents and councils and the national House of Representatives.[112] The latter met for the first time in May 1854. The electoral districts covered all of New Zealand, including areas where Māori vastly outnumbered settlers. In the Bay of Islands electorate, broadly encompassing all territories north of a line between Whāngārei and the northern Kaipara Harbour, the journalist Hugh Francis Carleton (the son-in-law of Henry Williams) was elected unopposed. Two other members were elected to represent the 'Northern Division' electorate, which encompassed territories south of the Bay of Islands electorate as far as the Manukau Harbour.[113]

The General Assembly's first substantive act was to pass a resolution calling for responsible government, under which the government comprises Ministers appointed from and responsible to Parliament, and the Governor is bound to act on ministerial advice.[114] Grey had left New Zealand late in 1853, and Colonel Robert Wynyard served as the government administrator until Governor Gore Browne took over in 1855. Wynyard's response to the calls for responsible government was to appoint a 'mixed ministry' by adding three elected representatives to the existing Crown-appointed Executive Council. However, this compromise proved unworkable, and the elected representatives resigned in August 1854.[115] In December 1854, the Colonial Office sent a dispatch advising Wynyard that he might inaugurate responsible government forthwith. It added that there was no need for further reference to London before Wynyard effected the change and admitted responsible Ministers.[116]

The introduction of representative institutions (that is, settler Legislatures), and particularly of responsible government, which from 1856 was exercised by members of a settler Executive Council appointed from the House of Representatives, had significant, lasting effects on Te Raki Māori, their exercise of autonomy, and their relationship with their treaty partner. Te Raki Māori had understood te Tiriti as establishing a personal relationship with the Queen – and her agent, the Governor – that was in the nature of a rangatira-to-rangatira alliance, under which they would receive the Queen's protection. As the Crown

progressively transferred responsibility for 'Native affairs' to a Government responsible to a Legislature elected by settlers, it also in effect transferred responsibility for the treaty relationship. Because of the importance of this issue to claimants in this inquiry, we examine in some detail how this change came about, and the struggle for authority over Māori affairs between the colonial and imperial governments that preceded the final acceptance of authority by the colonial Government.

(3) *Why did responsibility for Māori affairs become such a fraught issue between the imperial and the colonial Governments and how was it resolved?*

Gore Browne arrived in New Zealand in September 1855, and the following year marked a crucial turning point in New Zealand's governance. Gore Browne's commission as Governor provided that he was to act with the advice of the Executive Council, in accordance with his instructions. His instructions however gave him a 'general discretion' to act in opposition to the council's advice, though he had to report to London as quickly as possible his reasons for doing so.[117] In March 1856, Gore Browne reported to the Colonial Office his views on the administration of Māori affairs. His understanding was that,

> On matters affecting the Queen's prerogative and imperial interest generally, I should receive advice [from Ministers]; but when I differ from them in opinion, I should, if they desire it, submit their views for your consideration, but adhere to my own until your answer is received. Among imperial subjects, I include all dealings with the native tribes, more especially in the negotiation of the purchases of [Māori customary] land.[118]

Gore Browne envisaged the role of Ministers in Māori land purchase as confined to setting the amount to be spent in any one year. He had two main reasons for retaining authority over Māori affairs. First, Māori affairs were viewed as closely tied to the defence of the colony, and how those defences were resourced and employed. In 1856, two regiments of British troops were stationed in New Zealand, and Gore Browne considered it his responsibility as Governor, and representative of the Crown, to manage their deployment. His fear was that the peace of the colony would be endangered if 'Native' affairs were in the hands of constantly changing ministries responsible to the colonists. For this reason, he also considered that the Chief Land Purchase Commissioner and his subordinates should take their orders only from himself.[119] Secondly, under English law, Māori were subjects of the Queen and had accepted her sovereignty, not that of settlers.[120] Therefore, as historian Dame Claudia Orange explained, Gore Browne believed the Crown had a 'duty . . . to stand between settlers and Maori'. In particular, he was aware that settlers wanted Māori land and would pressure their political leaders accordingly.[121] Gore Browne explained his intentions later in a note to then member of the House of Representatives Henry Sewell:

> as Govr I consider myself a Guardian & trustee for the Native Race & can never willingly delegate my power & responsibilities to a council the members of which are responsible to neither the Crown nor the Native Race, who are liable to constant change & always subject to pressure from their own constituents and the members of the Assembly.[122]

Colonial politicians accepted Gore Browne's position in April 1856, particularly because they recognised that the Governor's control was the price they had to pay for military defence. William Fox, second premier of New Zealand, later explained that there was 'a strong disinclination' among many members of the House to accept Gore Browne's position, but there was a great wish for responsible government in other matters, so a majority finally agreed.[123] But opposition soon surfaced as issues arose which tested their resolve – particularly funding for Māori purposes.[124] After some negotiation, Gore Browne and colonial Ministers agreed on a somewhat unwieldy compromise under which the Native Secretary would answer directly to the Governor, who would make all final decisions about Māori affairs, but the new Native Department would be part of the ordinary public service under the day-to-day oversight of a responsible Minister. In effect, the colonial Parliament would determine the budget for Māori affairs, and Ministers would have

Governor Thomas Gore Browne, who was appointed Governor in 1855 and served in that role until 1861. During this period, he retained imperial responsibility for Māori affairs, despite the efforts of colonial politicians to exert greater influence over the Crown's policies. In 1860, Gore Browne convened the Kohimarama Rūnanga against the backdrop of growing tension between Māori, the Crown, and settlers over questions of relative authority. He was replaced by Governor George Grey following the outbreak of war in Taranaki.

operational oversight, but the Governor would determine the policy and possess a power to prevent any action of which he did not approve.[125]

For its part, the Colonial Office viewed control of Māori affairs by the Governor as a 'temporary political expedient'.[126] Britain's permanent Under-Secretary for the Colonies, Herman Merivale, did not accept Gore Browne's argument that the Crown bore a special responsibility to protect Māori welfare, and did not

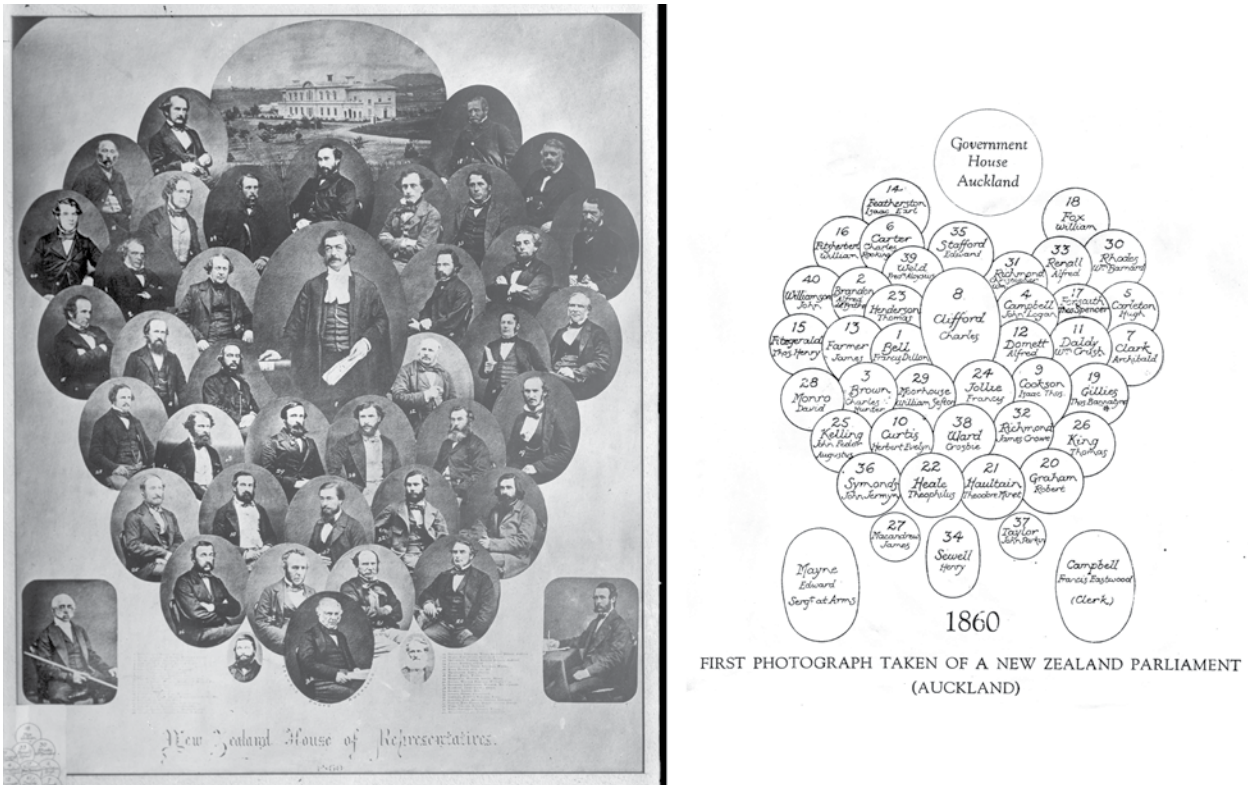
> think it possible with advantage to withhold native affairs from the cognizance of the responsible advisers, the matter being so closely connected with other points of domestic administration.

But the Colonial Office was also concerned that transferring control of Māori affairs to Ministers solely responsible to settler interests would risk conflict, and therefore greater expense (in the form of armed conflict) for the imperial government. Accordingly, in 1857, the imperial government supported Gore Browne's arrangements for control of Māori affairs 'without reservation', in Loveridge's words. But the Colonial Office's qualms about those arrangements were not conveyed to him, leaving the Governor, in Dalton's view, in a 'false' position by

> misrepresenting the real opinions of his superiors, and, by grounding the decision on factors of long term importance, it increased the difficulty of withdrawing from a position originally intended to be strictly temporary.[127]

The complex division of responsibility between Governor and Ministers did not work well. Policy priorities differed, and lines of accountability were unclear. Settler politicians, for their part, also assumed that it was a temporary arrangement and regularly sought to assert their authority over Māori affairs. Gore Browne, on the other hand, remained sympathetic to some form of Māori self-government under Crown oversight. He complained that many settler parliamentarians (especially those from the South Island) knew little or nothing of Māori society, and that the colonial Parliament hampered his efforts to encourage Māori development by denying the necessary funding.[128]

In February 1858, Gore Browne visited the Bay of Islands where he met several leading rangatira, assuring them of the Queen's desire for their peace and prosperity, and emphasising his own role as the Queen's representative. Gore Browne made no mention of the colonial Parliament or of settlers' increasing responsibility for the government of the country.[129] Yet, within months, he had accepted that the system of 'double government' (in



Members of New Zealand's House of Representatives in 1860. When the Parliament met in 1856, the Premier, Henry Sewell, was called upon to form the first responsible government composed of settler ministers.

which authority over Māori affairs was split between the Governor and the settler Government) could work only if the colonial Parliament and Ministers had significant influence on Māori policy – since it was they who held the purse strings.[130]

In August, the first Native Minister – C W Richmond, a leading Taranaki settler – was appointed,[131] and the House of Representatives in the same month enacted a suite of legislation aimed at (in Dr Orange's words) 'deal[ing] comprehensively with the Maori situation'.[132] These Acts related to Māori lands, schooling, the regulation of local social and economic matters (including public health), and the administration of justice in Māori communities by courts (comprising itinerant resident magistrates assisted by assessors appointed from among local leaders); all were intended to hasten Māori acceptance of English culture and colonial law.[133] Notwithstanding the previous agreement about the administration of Māori affairs, Parliament sought to constrain the Governor by judicious insertion of the 'Governor in Council' phrase, which provided that in specified key matters he could act only on the advice of the Executive Council – that is, on ministerial advice.[134] Parliamentary historian John Martin has described the phrase as a 'legislative wedge levering the Governor out of responsibility for Maori affairs'.[135]

Gore Browne reluctantly assented to much of this legislation but stood his ground on the Native Territorial Rights Act 1858, which provided a process by which the

'Governor in Council' might issue certificates of title to Māori land, either to communities or individuals. There was also limited provision for the issue of Crown grants, which were circumscribed to 50,000 acres per year. If the Bill had come into force, the provision would have allowed settlers to purchase some Māori land directly at the cost of a substantial fee per acre for land purchased or leased, under a waiver of the Crown's right of pre-emption. (Loveridge stated that there was strong support in the House for abolition of the Crown's right of pre-emption, but members also realised that there was little prospect that the Governor or his superiors would approve such a measure.)[136] Gore Browne regarded the Bill as an attack on Māori land rights, and as undermining the Crown's honour and threatening the colony's peace. As he put it to the Colonial Office, the evident intent of his advisers to invalidate Māori rights to their unoccupied lands involved 'the rights of the natives secured to them by the Treaty of Waitangi, and the fulfillment of engagements made by successive Governors, and confirmed by successive Secretaries of State'. He reserved the Bill for consideration by the imperial government, which refused assent.[137]

These experiences highlighted for Gore Browne the potential risks associated with full devolution of authority to a settler Government. In 1858, the Governor wrote a lengthy memorandum to the Colonial Office outlining his views. First, he noted:

> it was a hackneyed expression of the party who strenuously agitated for, and succeeded in obtaining parliamentary and responsible government . . . that government and taxation without representation are tyranny.

Gore Browne thus questioned what grounds settlers had to demand the right to govern Māori 'who are unrepresented in their councils'.[138] Secondly, Māori did not wish to be governed by the settler assembly; on the contrary, 'it is well known that the Maories refuse to acknowledge any [British] authority' other than the Queen and Governor. The imperial government could not be asked to bear the expense of maintaining armed forces in New Zealand for the purpose of coercing Māori and 'forcing on them a government which . . . they fear and distrust'.[139] Thirdly, settlers could not be trusted to protect Māori interests; rather, they would tend to govern in their own interests. Attempts by settler politicians to curtail Māori voting rights were one example of this. It was for this reason that colonists had not been allowed to govern indigenous populations in other colonies such as India and Ceylon. Settlers in one province would never tolerate another province having power over them, '[y]et it will scarcely be alleged that the interests of the Maories and the Europeans are more identified than those of the English settlers in two different Provinces.'[140]

Lastly, any transfer of responsibility would sever the direct relationship between the Crown and Māori. Instead, control of that relationship would be handed to 'a constantly changing body of persons elected by the Colonists', whose policies might change from year to year. For these reasons, Gore Browne remained determined to exercise final control over Māori affairs, by retaining control over the Native Department and a power of veto over legislation. Any final transfer of authority would be 'neither prudent, [nor] just, nor expedient'.[141] There is no evidence of Gore Browne directly consulting Māori before forming his views, although he did seek advice from some 38 missionaries and others he regarded as familiar with Māori affairs; he reported that they were in broad agreement with his views.[142]

Although Gore Browne successfully maintained some degree of control over Māori affairs, the colonial ministry continued to press for increased influence, particularly over land policy. As the Tribunal found in its *Taranaki* report, the Governor bore primary responsibility for the outbreak of war in that region in March 1860 – chiefly because of his presumption that his authority must prevail over that of Māori, in a manner that was contrary to the treaty.[143] But, as the *Taranaki* report and several historians have pointed out, Gore Browne reached the point of taking military action only after facing significant pressure from settlers and colonial politicians – among them Donald McLean, his trusted advisor and Native Secretary – to complete the Waitara purchase by any means, including force if necessary. Ultimately, the Governor, colonial

politicians, and settlers all bore some responsibility for the outbreak of war.[144]

The contest between imperial and colonial authorities for control of Māori affairs took a new turn in 1860 when the imperial Parliament attempted to enact legislation establishing a council to take control of Māori affairs on the Crown's behalf. Gore Browne had raised the idea with the Colonial Office in September 1859.[145] This was three months after war had begun in Taranaki, and two weeks into the 1860 national rūnanga at Kohimarama. According to the official minutes, Gore Browne did not discuss the Native Council idea with Māori leaders at Kohimarama, or mention the increasing determination of colonial politicians to take control of the Crown's relationship with Māori, presumably because at that point he remained determined to retain control of Māori affairs himself. On the contrary, everything about Kohimarama would have given rangatira the impression that Gore Browne and his Native Secretary McLean were the Crown's representatives in the treaty relationship. The Governor, in his speeches, emphasised that he was the Queen's representative, sent to protect Māori from harm.[146] Nor did Gore Browne mention the views of colonial politicians when he visited the north in February 1861 though he did offer the prospect of local self-government for Māori who remained loyal to the Crown.[147]

In response to Gore Browne's Native Council proposal, the imperial government introduced the New Zealand Bill 1860 to the House of Lords. It was titled 'An Act for the better Government of the Native Inhabitants of New Zealand, and for facilitating the Purchase of Native Lands', and provided for the establishment of a Native Council, appointed directly by the Queen (by Letters Patent) and presided over by the Governor. The council would be empowered, among other things, to establish native districts 'within which Native Law shall be maintained' under section 71 of the Constitution Act; to declare, with Māori consent, the laws that would apply in those districts; to investigate and determine title to Māori lands; and to make rules for the administration of Māori lands, including for their lease and sale.[148] The establishment of such a council, in Loveridge's view, 'would largely have decided the contest over control of Maori affairs in favour of the Governor, at the expense of the General Assembly'.[149]

The Bill was eventually passed in the House of Lords, but met with 'substantial opposition' there, largely on the grounds that it was proposed to impose a Council on the colony 'without the sanction of the constituted ministers of the colony or the Assembly', when control of a 'large portion of their domestic affairs' was at stake. Among documents produced in the Lords were two pamphlets by J E Fitzgerald, who declared,

> The policy of the Ministers and the Assembly is to save the native race, by amalgamating them with the English; by extending to them English laws and English civilization. The policy of this Bill is a policy of separating the races, of maintaining native customs, of sowing in the minds of the Maori a jealousy and mistrust of the Government of the settlers. The passing of this Bill will be the death warrant of the Maori race . . .[150]

Facing greater opposition in the House of Commons, the imperial government withdrew the Bill.

Meanwhile there was, in Loveridge's words, 'alarm' in New Zealand that such legislation should have appeared before the imperial Parliament. The General Assembly had just finished its own consideration of the colonial Government's policy towards Māori and it was appalled that the British government should make 'so important an alteration of the Constitution Act' without consultation. Many colonial politicians were enraged, partly by the content of the Bill but mainly by the fact that Britain was purporting to legislate on New Zealand affairs.[151]

A joint committee of both the House and Legislative Council, set up to consider Parliament's response, recommended that if the imperial Bill was passed, the Governor be requested to defer bringing it into operation until the Colonial Office had seen the General Assembly's own legislation for establishing a Native Council. It also suggested that the British government be asked to pass an Act enabling the General Assembly to pass its own legislation relating to Māori customary lands. The Executive Government would then exercise its powers, subject to its

hearing the advice of the Native Council on Māori lands and their partition and colonisation, as well as promoting the civilisation and welfare of Māori and preparing them for the exercise of political power. It is clear that achieving control of the titling, alienation, and administration of Māori lands was a key concern of the General Assembly. A new Native Council Bill was then drafted and passed through the assembly quickly. It provided that a council of between three and five members be established to advise and assist the Governor 'and his Responsible advisers' in the administration of Māori affairs; it was the 'duty' of the Government to consult it on all important questions relating to the management of Māori affairs.[152]

Gore Browne forwarded the Act to the Secretary of State for the Colonies, the Duke of Newcastle, and submitted it 'for Her Majesty's pleasure' in a dispatch setting out his views on the disadvantages of the division of responsibility. He recognised that the General Assembly was responsible to settlers, whose interests diverged from those of Māori.[153] In his view, a possible result of any further transfer of responsibility could be a settler assembly claiming rights to the revenue deriving from Māori taxation and the profits arising from the purchase and on-sale of Māori lands, as well denying Māori the right to have Crown grants and to alienate their own land – all without Māori having any representation in the colony's Parliament. In that case, the question must be asked, 'what right the Assembly has to govern and tax a race it does not represent'? The Crown, furthermore, would be called upon to bear the costs of the inevitable Māori uprising. By taking such a step, he warned, the Crown would be abdicating its responsibility to protect Māori:

> It may . . . be asked whether the Crown, having obtained the Sovereignty of the Islands on certain conditions by which it is virtually understood to act as guardian to the Maori race, can now disclaim these engagements because they are onerous, and transfer its power and its duty to others.[154]

Gore Browne was critical of the 1852 New Zealand Constitution Act, which had made insufficient provision for the Crown to 'act independently as guardian of the Maori race'.[155] It was evident, he added, that 'the existing relations between the Governor and his Responsible Adviser on the subject of Native affairs are not satisfactory'. In particular, it was unsatisfactory that, while responsibility remained with the Governor, 'the power of the purse, which is all but absolute, has been altogether in the hands of ministers'.[156] He did not have access to enough funding, independent of the Assembly, to enable him to discharge his responsibility to Māori. But on the whole, he concluded, the Native Councils Act was the 'best compromise' that could be reached, and he recommended it receive the Royal Assent.[157] The Colonial Office neither accepted nor rejected the Act. Instead, the Secretary of State waved warning flags regarding the relationship between control of native policy and the cost of military protection; and of the 'serious' objections so often raised to changing the relationship between the Governor and Māori. But it sent no decision to the Governor. In other words it withheld assent for two years, and the Bill became void.[158]

In sum, then, after acquiring powers of responsible government in 1856, colonial politicians increasingly sought to assert their authority over Māori affairs in general, and government land purchasing in particular. Governor Gore Browne responded with numerous warnings about the potential for injustice and conflict if settlers acquired control of Māori affairs and the responsibility of the Governor to protect Māori interests were set aside. Both the Governor and the Colonial Office attempted to manage these risks, for example by rejecting legislation and proposing new forms of government for Māori. Ultimately, settler pressure for land, and the Crown's determination to assert its sovereignty by dismissing the right of rangatira to protect community lands from alienation, combined to lead to war in Taranaki. During the early 1860s, as we will see in the following sections, the colonial Government did acquire full responsibility for Māori affairs, but only after a struggle that at times became bitter.

In June 1861, George Grey was appointed Governor of New Zealand for a second term, replacing Gore Browne. Grey was sent with instructions to bring lasting peace to the colony through a combination of military strength when needed, and 'fairness and consideration'

otherwise.[159] The first Taranaki War (from 1860 to 1861) had ended by the time he arrived, but no permanent peace had been concluded with Taranaki or the Kīngitanga; on the contrary, Gore Browne had been preparing for an invasion of Waikato when he received news that he would be replaced.[160] The issue of responsibility for Māori affairs would preoccupy the imperial and colonial Governments during the early years of Grey's governorship. Grey himself was a key player in the conflict that characterised this debate. Even when it had apparently been resolved in 1864 by the colonial Government's final acceptance of responsibility, Grey prevaricated. He evaded his instructions to finalise the return of British regiments, which finally led to his recall in 1868. It is beyond the scope of this inquiry to examine the details of this struggle. We focus here on the main points at issue between the two governments.

The Secretary of State instructed Grey to clarify the relationship between the Governor and his Ministers with respect to Māori affairs – the previous division of responsibilities being, in officials' eyes, one of the factors that had driven the colony towards war. Grey's instructions made no mention of the Crown standing between settlers and Māori. The Colonial Office had great faith in Grey as an experienced Governor, and Newcastle indicated the imperial government would accept any division of responsibility that seemed both 'safe' (in that it would not provoke further warfare) and likely to win the support of settlers.[161] We add that it was at this point that Newcastle also asked Grey to work with the settler administration to bring institutions of civil government and 'some rudiments of law and order' to Māori communities. He suggested that the Governor might establish 'native districts' (evidently in conjunction with section 71 of the New Zealand Constitution Act) in which Māori could in the meantime continue to govern themselves, albeit with the guidance of magistrates.[162]

Soon after Grey's arrival, the Premier William Fox wrote a series of papers to the Governor on the affairs of the colony. In the second minute, outlining the views of his Ministers on 'the machinery of government for Native purposes', Fox explained their opposition to Gore Browne's 1856 decision. In particular, it is clear that they resented the Governor's reliance for guidance on Māori issues on a single adviser who was not a Minister but who exercised 'absolutely (subject only to instructions from the Governor himself) all the executive functions of Government in relation to Native affairs'. This was Donald McLean, who since 1856 had held the positions of both Native Secretary and Chief Land Purchase Commissioner, until the House succeeded in pressuring the Governor to secure his resignation from the Native Secretaryship in 1861. The antipathy of Ministers to McLean was evident; Fox described the existence of the Native Secretary's Department, free from all ministerial control, and a barrier to ministerial action, as 'a very serious evil'. Fox also urged that McLean's tenure in both roles had led to Māori mistrust of the Government: 'they have learned to look upon the Government as a gigantic land broker'.[163] This comment reflected the then enthusiasm among settlers for 'direct purchase' of Māori land, and criticism of the Native Land Purchase Department's monopoly and (it was claimed) inadequate supply of land for settlement.[164] According to Fox, the Government's Native Council Bill – though 'not very popular' in the House – was supported because it subordinated all the executive functions of government to responsible Ministers. The current position, he explained, was that Her Majesty's assent had been withheld until Sir George Grey reported on it.[165]

Grey agreed with his Ministers that the existing division of responsibility for Māori affairs was unworkable. In a dispatch of 30 November 1861, clearly written after the event, he stated that he had agreed to act on ministerial advice regarding Māori affairs, just as he did on other matters. If there was any 'serious difference' between them, he must 'resort to other advisors', and appeal to the General Assembly. Grey did not seek approval of his decision in so many words; rather he invited Newcastle to let him know if he wished to 'discontinue this arrangement', adding that he thought it would be best to leave it in operation permanently.[166] Dalton considered this an 'airy gesture', which Newcastle received 'a little sourly'.[167]

Within weeks, Grey's new arrangement for ministerial responsibility was showing signs of tension. According to Dr Orange, Ministers found Grey to be 'disconcertingly

ambivalent in attitude and devious in dealings'. According to Fox's Attorney-General, William Sewell, it was evident that the Governor 'intended to have the determining say in Maori affairs, yet hold the ministry responsible – a "sham" responsibility'.[168]

Despite Grey's transfer of responsibility to Ministers before the end of 1861, the matter was not resolved until the conclusion of 1864, three years later. At issue was the cost of British troops – in other words, the cost of the Crown's war in Waikato and Tauranga over that period. Imperial concern about the expense of troops was evident from the outset of Grey's term. He was under instructions to make use of imperial troops 'in suppressing native disturbances' only if he were fully acquainted with, and had agreed to, every measure of his Ministers which might have led to the need to use them. He was in fact to retain a power of veto over native policy so long as imperial troops remained in New Zealand, since under those circumstances any misstep by colonial politicians could involve considerable cost for the imperial government – a point we will return to when we later discuss the 'new institutions'.[169]

Within months, the colonial Government would transfer responsibility for Māori affairs back to the Governor, following a blunt reply from Newcastle to Grey's dispatch. In May 1862, Newcastle approved the steps Grey had taken to place 'the management of the Natives under the control of the [General] Assembly', noting that the existing system had 'failed' (that is, failed to prevent war) and that it was 'mischievious' for the imperial government to retain 'a shadow of responsibility' when it no longer had effective control of Māori affairs. But Newcastle warned that settler control of Māori affairs also required settlers to bear the costs – notably the costs of defending settlers and settlements. Accordingly, the colony should 'expect, though not an immediate, yet a speedy and considerable diminution' in the number of imperial troops, and must themselves provide a military police force to protect their out-settlers. Likewise, it must pay for the costs of local militia and volunteers. Later, we will discuss the financial arrangements Newcastle agreed to in respect of imperial government sums to be expended towards the cost of Grey's 'new institutions', which were to be counted as military contributions.[170]

Newcastle's dispatch provoked a critical response from the colonial Parliament. While still eager to influence policy on Māori affairs, settler politicians were unwilling to take on the considerable costs of the expected war against the Kīngitanga. In July 1862, Fox had moved a resolution asserting ministerial responsibility for the 'ordinary conduct of Native Affairs' while asserting that the Governor should take decisions on matters involving imperial interests. The imperial government should continue to fund the colony's internal defence. Parliament did not support this resolution, and Fox resigned.[171]

It was left to the new Premier, Alfred Domett, to respond to Newcastle's dispatch. In August, he moved a resolution aimed at transferring responsibility for Māori affairs back to the Governor. Specifically, Domett moved that Ministers should administer and advise on Māori affairs, but only at the Governor's discretion; the decision 'in all matters of Native policy' was reserved to the Governor, and Ministers' advice shall not 'bind the colony to any liability, past or future, in connection with Native affairs beyond the amount authorized or to be authorized by the House of Representatives'.[172] Domett listed several reasons the imperial government should retain responsibility for the colony's defence, including the prospect that '[a]ny war carried on wholly by the colonists against the Native would . . . leave feelings of hostility which would not die out for many years'.[173]

The General Assembly adopted the resolutions on 19 August 1862. Domett later moved an Address to the Queen objecting to the policy outlined in Newcastle's dispatch, arguing that responsibility for governing Māori might not at that moment be transferred to the colony because of the associated costs, especially the cost of troops, who could not be dispensed with. Grey informed the Assembly that he would for now act in accordance with their resolution, but would also 'refer the question for the consideration of Her Majesty's Government'.[174]

The response of the General Assembly led Newcastle to express the imperial government's frustration in no uncertain terms. In essence, from its point of view,

colonial politicians sought authority over Māori affairs at least partly to fulfil settlers' demands for access to Māori land – yet the same politicians were not willing to bear the responsibility or the costs for these policies. In a lengthy dispatch to Grey on 26 February 1863, Newcastle charged that the Parliament was in essence rejecting the power it had been seeking for several years.[175]

In fact, Newcastle said, colonial authorities had already been exerting considerable influence over Māori affairs since responsible government was first granted in 1856. Up to that time, in his view, the imperial government had sought to use its sovereign authority in a manner that would protect Māori from the harms arising from settlement. Adopting the moral high ground, he asserted that the Government had aimed to maintain that protective authority either until Māori and settlers had amalgamated, or until a system of government had emerged that provided Māori with 'some recognised constitutional position' that would provide a 'guarantee against oppressive treatment' and 'thus at once satisfy and protect them'.[176]

Yet, since 1856, the imperial government had stepped back from its position of 'imperial trusteeship', as the colonial Parliament instead used its legislative and budgetary authorities to increasingly determine policy on Māori affairs. In particular, Newcastle argued, pressure from colonial politicians – including Executive Council resolutions – had led Gore Browne to complete the Waitara Purchase by force and thereby start a 'settlers' war' in Taranaki.[177] The growing influence of the colonial Parliament and Government meant that the Governor no longer had sufficient power to carry out the imperial government's role as trustee. He could not tax Māori or relieve them from taxation. He had no power to make laws for them. He had no adequate revenue at his disposal for administrative, educational, or police purposes; the sums reserved for these objects in the Constitution Act were inadequate.[178] Therefore, the imperial government had little choice but to hand authority to responsible Ministers. Attempting to retain authority under the circumstances was 'not really of use to the natives'.[179] In Newcastle's view, the colonial Government should accept responsibility for Māori affairs, and also accept 'the cost of all war and government', since those costs were incurred to benefit settlers. The British taxpayer did not benefit. And it was clear that:

> the duty of civilizing and controlling the aborigines of New Zealand, rests in the first place with the inhabitants of the colony, who are primarily interested in the order, prosperity, and tranquillity of their own country.[180]

Newcastle concluded by reiterating that responsibility for Māori affairs now lay with the colonists, as they wished; the imperial government had already accepted the New Zealand Government's request for responsibility over Māori affairs, and had therefore 'resigned' its own responsibility – a decision that remained effective regardless of the views of the colonists. Grey was no longer required by the imperial government to take charge of the Native Secretary's department; if he did so, it would only be because his responsible Ministers requested him to do so. Accordingly, Newcastle instructed Grey:

> Your constitutional position with regard to your advisers will (as desired by your late Ministry) be the same in regard to native as to ordinary colonial affairs; that is to say, you will be generally bound to give effect to the policy which they recommend for your adoption, and for which, therefore, they will be responsible.[181]

There were, however, some exceptions to this general policy:

> You would be bound to exercise the negative powers which you possess, by preventing any step which invaded Imperial rights, or was at variance with the pledges on the faith of which Her Majesty's Government acquired the Sovereignty of New Zealand, or [was] in any other way marked by evident injustice towards Her Majesty's subjects of the native race.[182]

In other words, the Governor should not assent to legislation that contravened the treaty (at least as Britain understood that agreement). If any policy was 'clearly disastrous', the Governor might also appeal to the General

Assembly; that is, as legal experts Dame Alison Quentin-Baxter and Professor Janet McLean explained, he might dismiss the leader of a Government, and appoint a new leader who was prepared to advise a dissolution so that a new election might be held.[183] This, in their view, was the first time that, in relation to New Zealand, a Governor's only alternative (other than his own resignation) to accepting the advice of his responsible Ministers had been spelt out.[184]

The Governor was also instructed to make his own decisions regarding the use of imperial forces; although he could seek advice from Ministers, 'the responsibility would rest with yourself and with the Officer in Command'. Finally, given that imperial forces were still defending the colony, the imperial government retained 'a right to require from the colonists that their native policy, on which the continuance of peace or renewal of war depends, should be just, prudent, and liberal'. Britain's willingness to leave troops in New Zealand would depend on the Government pursuing policies that removed existing difficulties and placed future race relations 'on a sound basis'.[185] Altogether, these instructions provided Grey with significant scope to veto policies that might breach the treaty's land guarantees or otherwise result in injustice to Māori.

Ironically, the dispatch reached New Zealand as Governor Grey was finalising his plans for the British invasion of Waikato, and the injunction to pursue 'just, prudent and liberal' policies did not deter him. Since June 1862, armed forces had been building a military road into the district, and on 12 July 1863 imperial troops crossed the Mangatāwhiri River, entering Waikato and starting the invasion. The Waikato War would last for nine months until April 1864; the peoples living south of Auckland and in Waikato were ejected from their villages into exile, to be replaced by military settlers. Peace between the Crown and Kīngitanga would not be finalised until many years later.[186] A series of disagreements between Grey and his Ministers would erupt during and immediately after the war, as the Whitaker–Fox ministry asserted ministerial responsibility and presided over the passing of the Suppression of Rebellion Act 1863 and the confiscation legislation (the New Zealand Settlements Act 1863). The tension would see the imperial government clarifying that the Governor had sole responsibility for control of the Queen's troops and the conduct of war, and for concluding peace. Grey, outraged by the extent of the planned confiscations, was assured that he could reject Ministers' advice with respect to these; he must be 'personally satisfied with the justice' of any particular confiscation before it could proceed.[187]

Against the background of a war concluded, conflict over the policy of confiscation, and the collapse in October 1864 of the ministry led by Frederick Whitaker and William Fox after the imperial government refused to guarantee the whole of the large loan sought by Whitaker, came political change. Colonial politicians were willing both to accept authority over Māori affairs and to bear the costs of doing so. In November 1864, a new Government was formed under Premier Frederick Weld, who believed firmly that war would only end when imperial control of Māori affairs ended and was replaced by full settler control. Weld came into office promising a 'self-reliant policy' – that is, the colony would fund its Māori and defence policies, and rely on its own resources for internal defence; in return, it would be given full control over matters relating to Māori and manage its relationships with them.[188] Weld was regarded by his colleagues as a man of principle; he was committed to ensuring that responsible government worked and had seen 'little chance' of that happening with Grey in command and a Whitaker–Fox Government advising him.[189]

At the beginning of December 1864, the two houses of the General Assembly each adopted resolutions in support of the Government. In a series of resolutions, they asked that the Governor be guided entirely by ministerial advice 'in native as in ordinary affairs', except in matters that directly affected imperial interests or the Crown's prerogative. Weld had taken office only when Grey agreed to formally assent to a written statement of policy that included a statement that if Ministers had any 'material difference' with the Governor, they would resign immediately.[190] Recognising that the imperial government would not hand over control of its troops, and opposed

to the increased annual payment it sought for them, a further resolution asked that the 'whole of its land force' be removed from New Zealand.[191] The division between Governor and Ministers, the motion said, had caused 'great evil' to both Māori and settlers, and had imposed heavy costs on Britain and New Zealand; in essence, the Assembly was asserting that this division of responsibility had caused the New Zealand Wars.[192] Weld, we note, was a firm believer that the war at Waitara had begun not because of a small land dispute but in reaction to 'an intolerable challenge to the Queen's sovereignty'.[193]

The following month, the Weld administration formally requested that responsibility for Māori affairs transfer to the colonial Government, in return for it agreeing to bear the costs of future internal defence.[194] In February 1865, the imperial government indicated its 'entire satisfaction' with the Assembly's resolutions – noting that Grey had previously been instructed to provide for responsible government, and that the Governor retained responsibility for Māori affairs and defence only so long as imperial troops were engaged in New Zealand. Those troops, wrote the new Secretary of State for the Colonies, Viscount Cardwell, would be gradually removed as land confiscations were completed and peace restored.[195] Cardwell's relief that Grey's relations with his new Ministers seemed to have turned a corner was palpable. But as it turned out, this would not be the end of the conflicts of the 1860s, and the colonial Government had to find its own forces when there were further Māori challenges to its war and confiscation policies in other parts of the North Island.

In this dispatch, as in most others after the end of 1864, there is no evidence that the imperial government regarded itself as having any ongoing obligations to Māori, under the treaty or otherwise. Perhaps Cardwell was sufficiently reassured by Weld's assurance of the 'sincere and earnest desire on the part of the colonists to advance the condition of the native inhabitants' – as was evident in the legislation they had passed since 1852.[196]

Certainly, Cardwell's dispatch did not suggest any further steps to protect Māori rights and interests if they happened to differ from those of the settler majority. Cardwell expressed hope that the colonial Government would take steps to prevent any repeat of the circumstances that had led to war in Taranaki, and that – except where land was to be confiscated – Māori would feel 'safe in the possession and peaceful occupation of all their remaining land'. Otherwise, Cardwell was concerned that the colonial Government should assert authority over 'insurgent' Māori, 'place the Colony in a position of self-defence against internal aggression', and relieve the imperial government from:

> responsibilities which we have most unwillingly assumed, and from an interference in the internal affairs of the Colony which nothing but a paramount sense of duty would ever have induced us to exercise'.[197]

The transfer of responsibility was completed when the last imperial troops left New Zealand in 1870,[198] thus concluding what Dr Orange described as an 'untidy, ill-defined retreat' by the imperial government from the 'principle of trusteeship' under which it had taken responsibility for protecting Māori from settlers.[199] As constitutional theorist Professor F M Brookfield has written, the imperial government 'shed its Treaty responsibilities on to the colonial government in Wellington' by extending the conventions of responsible government to include Māori affairs. This 'shift in paramount power from London to Wellington' occurred without Māori consent and in a manner beyond Māori control.[200]

(4) *Why did the Government never use section 71 of the Constitution Act 1852?*

We turn here to a question of particular concern to claimants. As we have seen, the New Zealand Constitution Act 1852 provided that the Queen, by Letters Patent, could establish native districts in which Māori would continue to govern themselves according to their own 'laws, customs and usages'.[201] This important provision (section 71) reflected the existing political reality that most Māori populations were already self-governing and unlikely at that time to submit to laws made by a settler Parliament;

Colonial Government Responsibility for Māori Affairs: A Timeline

New Zealand's transition to responsible government began in 1856 and was substantially completed by 1870 – but the British Parliament retained some residual responsibility for New Zealand affairs until well into the twentieth century. The following are the key steps in the constitutional transition.

1840: The Crown proclaims sovereignty over New Zealand.
1846: The imperial parliament passes the New Zealand Constitution Act 1846 but those parts of it relating to the provincial and general assemblies were later suspended.
1852: The imperial parliament passes the New Zealand Constitution Act 1852 providing for the establishment of a representative Parliament and six provincial legislatures in New Zealand.
1854: New Zealand's General Assembly meets for the first time.
1856: Responsible government is inaugurated in the colony after it is granted by the imperial government. The Governor chooses to retain responsibility for Māori affairs (as well as defence and foreign affairs).
1858: The General Assembly exercises its powers under the 1852 Constitution and enacts its first legislation concerning Māori affairs.[1]
1861: Governor Grey agrees to transfer responsibility for Māori affairs to the colonial ministry.
1862: The imperial government approves the transfer of responsibility for Māori affairs so long as the colonial authorities fund the colony's defence. The General Assembly rejects this, and Governor Grey resumes control over Māori affairs.
1864: After the Waikato War, the colonial Government adopts Weld's 'self reliance' policy, accepting full responsibility for Māori policies and their funding. The Governor retains control of imperial armed forces in New Zealand.
1865: The imperial government accepts this new arrangement, but as war in the North Island spreads, Weld does not deliver on his defence promises. Grey delays the return of imperial regiments.
1870: The last imperial troops depart from New Zealand, leaving the colonial Government in full control of Māori affairs.[2]

yet Crown officials expected Māori to ultimately assimilate into settler society, and therefore saw the provision as a temporary expedient until that occurred. At various times before 1865, Governors and officials considered whether to use this section to provide for some form of Māori self-government and ease Māori–settler tensions. However, section 71 was ultimately never brought into effect.

In the previous section, we discussed the struggle between the imperial and colonial Governments over authority for Māori affairs that formed an important context for debates over the governance of Māori communities. Throughout this period, Governors Gore Browne and Grey faced pressure from settlers and colonial politicians to establish Crown control over Māori communities and overcome Māori resistance to Crown land purchasing, leading to the outbreak of war in Taranaki and Waikato during the 1860s. In the following sections, we ask why the Crown did not use section 71 to make provision for Māori tino rangatiratanga as the Crown transferred governing authority to the colonial Government.

A number of claimants submitted that section 71 was a means by which the Crown could have protected Māori autonomy and tino rangatiratanga.[202] The Crown did not see itself as having any treaty obligation to use the

provision and said that it had caused no prejudice to Te Raki Māori by not doing so.[203]

(a) Why did Grey not use section 71 when it first became available in 1852?

The Constitution Act 1846 had provided for a system of local government through Māori districts and settler municipalities. Crown officials regarded such arrangements as a temporary measure until Māori – under the influence of missionaries and other agents of British civilisation – assimilated into settler society.[204] The architects of the Constitution Act 1846 therefore assumed that municipalities would gradually expand, and Māori districts would commensurately shrink.[205]

While some colonial officials favoured this gradual approach, others – including Governor George Grey, in his first term in office (1845 to 1853) – sought to actively bring Māori under the rubric of the colonial system of law and government. Colonial officials essentially argued that 'amalgamation' was necessary to protect vulnerable Māori from exploitation and violence at the hands of the growing settler population. Such paternalistic views were heavily coloured by underlying beliefs about British racial and cultural superiority, including the superiority of the British system of government.[206]

Grey, in his response to the 1846 Act, argued that the formal establishment of native districts would perpetuate 'the barbarous customs of the Native Race', and once established, would become impossible to eradicate.[207] As several scholars have observed, Grey's paternalism masked another agenda, under which the Crown sought to hasten the breakdown of Māori tribal authority in order to pave the way for settlement and an extension of the Crown's de facto sovereignty.[208] Whatever his reasons, Grey had little interest in perpetuating any system under which (in McLintock's words) 'the Maori race [would] progress along lines dictated by its own needs and guided by its traditions'.[209]

Grey's preferred approach, which he presented to the Colonial Office in 1850, was for representative government to apply only in the main Pākehā towns and cities, while the Crown retained direct rule over territories in which Māori were the majority. Under this scheme, Māori would effectively possess neither self-government nor any prospect of representation in the colonial Parliament; their personal relationship with the Governor would be their sole means of influencing the colony's laws.[210] According to historian Dr Alan Ward, Grey intended to use direct rule to

> draw the Maori into the web of government control by a variety of devices designed to manage and placate them, without open discussion of the fundamental questions about land, law, police power, or political representation.[211]

One of these measures was the Resident Magistrates Court Ordinance, which Grey brought into force in November 1846, extending the Crown's legal system into most parts of the country as well as making provision for Māori assessors to resolve some civil disputes.[212] He also proposed to expand Crown support for health care, education, and the development of Māori communities, while continuing his 'flour and sugar' policies, which sought to buy the allegiance of influential rangatira by granting them salaries and gifts.[213] At that time, Grey misleadingly advised the Colonial Office that Māori would be fully amalgamated into the colonial system of law and government within a matter of years.[214]

The imperial parliament accepted only part of what Grey suggested. The 1852 Act provided for representative government throughout the colony, for the enfranchisement of Māori who could meet a property test couched in terms of English law, and for the retention of self-governing Māori districts. Specifically, section 71 provided that it would be lawful for the Crown to establish such districts, on the basis that:

> it may be expedient that the laws, customs, and usages of the Aboriginal or Native Inhabitants of *New Zealand*, so far as they are not repugnant to the general principles of humanity,

> should for the present be maintained for the government of themselves, in all their relations to and dealings with each other. [Emphasis in original.][215]

We note that section 71 went on to clarify that Māori laws, customs, and usages might be maintained even if they were incompatible with the law of England or to any law in force in New Zealand.

This was identical to the native districts provision in the 1846 Act.[216] Britain's Secretary of State for the Colonies, Earl Grey, explained that it had been retained because of 'the uncertainty which must necessarily attend an experiment of this kind as to its effects on the native race'. Section 71 had, in essence, been retained as a backstop in case this constitutional experiment should go wrong. Nonetheless, Earl Grey continued, 'I have not sufficient information to enable me to judge whether there is any present or probable necessity for the use of that power.'[217] In the same dispatch, Earl Grey explained his reasons for rejecting any special franchise for Māori in the new colonial Parliament.

Earl Grey's successor, Sir John Pakington, was even less enthusiastic: 'This is a power not to be exercised without strong ground, and which, it is rather to be hoped, you may not find it necessary at present to exercise.'[218] Dr Loveridge was unable to find that any instructions relating to the districts were issued during the 1850s, and he pointed out that there was no provision for extra funding, such as Grey had proposed, which would have enabled a Governor to encourage Māori development 'within a segregated system.'[219] Yet, Loveridge added, if the Act had required any fixed percentage of the proceeds of the land fund to be set aside for Māori purposes, even a small percentage of the land receipts from the 1850s (over £3.6 million between 1853 and 1865) would have produced a very substantial sum.[220]

In other words, the Crown retained the provision for self-governing districts without having any clear intention to use it. Governor Grey certainly did not intend to. To the end of his first governorship in 1853, he remained determined that his policies would (in Professor Ward's words) placate Māori 'until the spread of settlement had encompassed them.'[221] In Ward's view, Grey's approach revealed a fundamental dishonesty at the heart of the Crown's policy, both then and later: its officials favoured assimilation if that meant denying Māori self-government, but not if it meant providing for effective Māori involvement in the colonial Government.[222] The rhetoric of humanitarian assimilation disguised other motives, including racial prejudice and hunger for Māori land, which were incompatible with enduring Māori authority:

> If Grey's rejection of the Native Districts concept had been accompanied, not by the mere rhetoric of assimilation, but by a genuine attempt to engage the Maori in the mainstream of politics and administration, his solution would have been much more satisfactory. But . . . a frank inclusion of the Maori leadership in state power was just what Grey and the settlers could not make. Their deep-seated notions of racial and cultural superiority, and the competition for land, persistently worked against it.[223]

(b) Why did Gore Browne not use the provision during his term of office?

Grey's first term as Governor ended in 1853, before the colonial Legislature had been established. His successor, Thomas Gore Browne, arrived to a land in which Māori and settlers were far from amalgamated. On the contrary, he informed the Colonial Office in 1860, 'English law has always prevailed in the English settlements, but remains a dead letter beyond them', enforceable against neither Māori nor settlers. Colonial officials who attempted to enforce the law were 'exposed to contempt'.[224] As a result, in Gore Browne's view, most territories of the North Island continued to be 'native districts' in practice, if not in law.[225]

Gore Browne's views echoed those of the colony's Native Minister, C W Richmond, who, in an 1858 memorandum, had conceded the impossibility of enforcing English law against Māori, even in the main settler townships: '[T]he British Government in New Zealand has no reliable means

but those of moral persuasion for the government of the Aborigines'. It was 'powerless to prevent the commission by natives against natives of the most glaring crimes', and in cases of Māori aggression against settlers was 'compelled to descend to negotiation with the native chiefs for the surrender of the offender'.[226] Such was the gap between the Crown's presumed sovereignty and its authority on the ground, in this and many other North Island districts.

In 1857, after a visit to Waikato, Gore Browne wrote to the Secretary of State for the Colonies saying that he had no power to establish native districts, since doing so would interfere with the authority of the provincial government. Furthermore, he expressed concern that section 71 provided only for the maintenance of pre-existing customary law: 'it does not provide for the establishment of any other law'. In his view, Māori at that time needed a new legal code that was 'different from but not repugnant to English law', yet the Constitution Act provided no means of establishing such a code, and in particular made no provision for Māori law covering matters such as adultery to apply to settlers within a native district.[227] The following year, the chief justice advised that section 71 would allow Māori to adapt their laws to new circumstances. The Central North Island Tribunal's view was that Gore Browne took an unnecessarily restrictive view of section 71 at that point, and we agree.[228]

While the Governor appears to have accepted the chief justice's advice, he retained other concerns about section 71. In 1860, he wrote to the Colonial Office arguing that, during the early years of the colony, the Crown should have formalised a division between Māori and Crown territories. Instead, 'English law was by a fiction assumed to prevail over the whole Colony.' Gore Browne said he would have liked to use section 71 to 'declare English Provinces and leave Maori districts beyond their pale, to be governed by laws specially adapted to the people inhabiting them'. But he retained some practical reservations. First, the New Zealand Constitution Act required the Crown to suppress warfare and violence among Māori communities, and more generally 'customs which are repugnant to the principles of humanity', when it had no practical means of doing so. Secondly, section 71 had an uncertain effect on settlers 'who have been permitted to scatter themselves thinly over the whole Northern Island'. If section 71 was brought into force, those settlers would be beyond the reach of the colony's laws without being legally subject to Māori law. In the Governor's view, this situation would inevitably lead to trouble.[229]

From 1856, as the colonial Parliament had increasingly asserted its right to be involved in decisions about Māori affairs, it pressed for the establishment of 'some system of government' for Māori, 'adapted to their circumstances'.[230] Over the next two years, Gore Browne and his Ministers cooperated (with some disagreements) on plans to draw Māori into the colony's system of law and government, and more specifically to undermine the emerging Kīngitanga movement by providing Māori with an alternative system of self-government under the Crown's control. To this end, they proposed a system of local administration that would recognise the status of rangatira and provide for some degree of local autonomy, without establishing any authority that was outside the reach of the colony's laws.[231]

Accordingly, in 1858, the colonial Parliament enacted a series of laws applying to Māori affairs. The Native Circuit Courts Act 1858 modified the existing system of resident magistrates and expanded the role of native assessors. The Native Districts Regulation Act 1858 empowered the Governor to make local regulations for Māori communities, with their consent, and was intended to pave the way for the recognition of local rūnanga under the colony's system of law. Both these Acts applied only to Māori customary lands, and both had Gore Browne's support.[232] According to the author and researcher Dr Phil Parkinson, these were the first Acts of the colonial Parliament to be translated into Māori and circulated among Māori communities, albeit there had been no consultation on either law prior to enactment.[233]

As the Tribunal noted in the *He Maunga Rongo* report, Māori had no hand in devising this suite of laws, and they 'had some limitations in Treaty terms'. Notably, they offered less than section 71 in terms of Māori autonomy – their objective being to create institutions that were

compatible with existing Māori law and authority but would ultimately evolve into an English-style system of local government. Nonetheless, as the Tribunal found, the legislation provided for some Crown recognition for and empowerment of Māori self-government.[234]

The Native Territorial Rights Act (mentioned earlier) provided for the Governor, acting on ministerial advice, to award certificates of ownership to Māori tribes or individuals. These certificates were intended as a transitional step towards Crown grants and reflected the determination of settler politicians to bring Māori land under the colony's laws and open the way for free trade.[235] As the Tribunal found in *He Maunga Rongo*, this was a 'sting . . . in the tail' of the colonial Parliament's suite of legislation for Māori.[236] The imperial government rejected this law, since it constrained the Governor's right to reject ministerial advice on Māori affairs.[237]

As we noted in section 7.3.2(3), in 1859 various proposals were made for a native council or board to advise the Governor about Māori affairs. Gore Browne drew on these to draft his own proposal for a native council of seven members, responsible to the Crown, which would assist him and would also operate a system of land purchase and land development. The Governor would retain his right of veto. In other words, his proposal would have strengthened his powers under the 1856 agreement on the control of Māori affairs. The proposal was sent to the Colonial Office, but Ministers, unsurprisingly, found it unacceptable.[238]

Ultimately, this consideration of a native council would lead to a brief revival of a debate among politicians about Māori self-government. Gore Browne had circulated his proposal to a number of (largely sympathetic) parties, among them New Zealand's first Anglican Bishop, George Augustus Selwyn. Early in 1860, Selwyn suggested that one or more new Māori provinces be created in the central and eastern North Island, and that the powers of existing provinces be restricted to districts where 'native title' had been or would very soon be extinguished. The Governor thought this a promising idea. Representative James FitzGerald, later the Native Minister in the Weld Government, was also enthusiastic and advocated for the establishment of Māori provinces under existing provincial government legislation. He suggested that the Governor might appoint superintendents, and the 'whole tribe assembled' should elect the council.[239] Loveridge stated that the idea of Māori provinces 'fared less well in the House', where it led to detailed consideration of various resolutions about the management of Māori affairs, and how land purchase was to be conducted. The final consensus that emerged there by September 1860 was in favour of urging Māori to adopt the 1858 legislation,[240] with a chief or chiefs nominated in each district 'as organs of communication with the Government', and a greater emphasis on rūnanga as decision-making bodies. The reconvening of another national meeting of chiefs was also strongly supported.[241]

It was against this background that a new bombshell arrived from London. As we discussed earlier, the Colonial Office had drawn up a Bill 'for the better Government of the Native Inhabitants of New Zealand, and for facilitating the Purchase of Native Lands' (the New Zealand Bill 1860), which was its response to the Governor's proposals sent in 1859. The Bill provided for the establishment of a native council of appointed members empowered to declare native districts under section 71 of the Constitution Act 'within which Native Law shall be maintained', at least while Māori lands remained under customary title. The council could also 'declare, record, and amend the Native Law' thereby addressing Gore Browne's concerns over the jurisdiction. Councillors were furthermore empowered to develop a system for ascertaining title to Māori lands, as a transitional step towards opening those territories for settlement.[242]

The colonial Government perceived the Bill to be an intrusion into its sphere of responsibility and lobbied furiously against the measure.[243] Ministers also opposed the specific provision for self-governing Māori districts on grounds that it was contrary to the Government's assimilationist agenda.[244] Native Minister Richmond declaimed that separate Māori legislative institutions were 'worse than useless' and 'highly dangerous'.[245] The Bill

did not proceed, and the colonial Parliament passed its own Native Council Act which included no reference to the creation of native districts under section 71.[246] As we noted in section 7.3.2(3), Gore Browne considered that this was a suitable compromise.[247]

In sum, then, Gore Browne did not use section 71 because of concerns about its legal effects – in particular, its effect on settlers living within native districts, and on Māori actions that were 'repugnant' to British sensibilities. Working with Ministers, he therefore sought to develop other options that would bring Māori under the rubric of the colony's system of government while also providing some flexibility for a continuation of Māori laws and customs. Legislation aimed at supporting this policy later provided a basis for Governor Grey's district rūnanga, which we discuss in section 7.5.

(c) Why did Grey not establish native districts under section 71 in 1861–62?

In June 1861, with the colony still in a turbulent state after the first Taranaki War, the Secretary of State (Newcastle) encouraged Governor Grey to consider means by which 'some institutions of Civil Government, and some rudiments of law and order' might be introduced 'into those Native Districts whose inhabitants have hitherto been subjects of the Queen in little more than name'. He recommended a system in which 'a certain number of the native chiefs should be attached to the Government, by the payment of salaries and the recognition of their dignity', to keep order in their territories, with assistance from resident magistrates.[248]

Yet, he also suggested that law and order might best be achieved through the establishment of native districts under section 71. The power to declare native districts was, in Newcastle's view, 'the most important of the Crown's powers, not hitherto exercised'. Any district declared under section 71 would become exempt from the jurisdiction of colonial or provincial government. Grey was asked to consider whether taking this step, through which would be established 'a distinct legislation and administration, in which the natives themselves should take a part', might not 'better promote the present harmony and future union of the two races, than the fictitious uniformity of law which now prevails'.[249]

Despite the clear invitation from the British government in its own New Zealand Bill to make use of section 71, the colonial Government subsequently fell back on the rūnanga model provided for in the Native Districts Regulation Bill 1858, and Newcastle ultimately accepted this approach in March 1862.[250] As we will discuss in section 7.5.2, rūnanga operated in this district from 1861 until the Crown withdrew support in 1865.[251]

After that, as settlers tightened their control over the Crown's agenda, government policy and legislation increasingly moved in the direction of assimilation and Crown control. Successive Native Land Acts sought to bring Māori land into the colony's system of land tenure and make it available for sale. The Native Rights Act 1865 declared that Māori were natural-born subjects of the Crown and therefore were subject to the colony's laws and court system. The Outlying Districts Police Act 1865 empowered the Crown to confiscate lands from Māori communities that harboured anyone accused of murder or other violent crimes – the essential aim being to impose the colony's laws on Māori while relieving the settlers of the costs.[252] The Maori Representation Act 1867 (which we discuss in chapter 11) provided for limited Māori representation in Parliament. These laws, according to historian Professor Keith Sorrenson, 'set the seal for an assimilation policy that lasted for a hundred years'.[253] While the Crown did subsequently consider other schemes for local self-government by Māori communities, these offered powers that were much more limited than section 71 and were always under the control of the Crown.[254]

To summarise, the Crown did not establish native districts under section 71 because it chose to pursue a different course, aimed not at supporting autonomous Māori institutions but at hastening Māori integration into the colony's system of law and government. It furthermore pursued this course without providing for Māori to play any substantive role within the machinery of government, aside from very limited Māori representation in the Legislature. Gore Browne's questions about jurisdiction over settlers in native districts required consideration,

but this was not insurmountable. Far more significant was the transfer of authority to settlers who were less inclined than the Governor to protect Māori interests and more determined to bring Māori land into the colony's legal system.[255]

We have seen no evidence that the Crown informed Te Raki Māori about section 71 at any time during the period under consideration in this chapter, let alone consulted them about whether the section should be brought into force or how settlers should be governed in Māori districts. The same is true of proposals for Māori provinces (though it does not seem that it was intended such a province might be formed north of Auckland) and of a succession of proposals and Bills relating to the establishment of a Native Council. Rather, successive Governors made decisions based on advice from colonial officials or Ministers, with occasional input from others who had worked in Māori districts, such as missionaries.[256] The Governor and Ministers discussed how best to 'manage' Māori and their lands; they talked about Māori, rather than to them.

In 1894, the Northern Maori Member of the House, Hōne Heke Ngāpua, complained that his people had never been given an opportunity to exercise the rights provided for in section 71.[257] We therefore cannot know how Te Raki Māori would have responded if they had been offered a self-governing district. In practice, during the period covered by this chapter, they were already self-governing in terms of their day-to-day affairs and engaged with the Crown principally to seek economic partnership or to use the resident magistrate as a neutral mediator (see section 7.4.2.1).

Some scholars have argued that the Crown did practically recognise Māori districts through measures such as the Resident Magistrates Ordinance 1847, the Native Circuit Courts Act 1858, and the Native Districts Regulation Act 1858.[258] As legal scholar Mark Hickford observed, those measures demonstrated that the possibility of establishing Māori districts was 'very much within the lexicon of colonial governance'.[259] However, as we will see, those Acts were not intended to recognise and preserve Māori self-government; rather, they were intended to bring existing Māori governance structures under the control of colonial authorities. Furthermore, these provisions assumed that Māori customary authority must necessarily give way as soon as Māori were awarded Crown title to their lands.[260]

As we will see in later chapters, section 71 assumed considerable importance to Te Raki Māori from the 1870s through to the end of the century, as they sought to protect their tino rangatiratanga from the rising tide of settler influence. As one example, in 1888, the Northern Maori representative Hirini Taiwhanga asked Parliament to pass an Act granting Māori self-government under section 71, along with 'a Council of their own'. War had broken out, and mistrust had developed between Māori and the Crown 'because this Act was hidden from the Natives'.[261] On rare occasions, the Crown briefly considered making use of the section, particularly in Waikato, but for the most part its path from the late 1850s through to the end of the century and beyond was aimed at bringing Māori under the authority of its system of government.[262]

(5) *Were Te Raki Māori appropriately represented in the colonial Legislature and Government between 1840 and 1865?*

The first legislative body in the new colony was the Legislative Council, comprised of three nominated members. None were Māori. The 1846 constitution was suspended for five years. Governor Grey did pass a Provincial Councils Ordinance in 1848 which provided for the establishment of a provincial council in the two provinces, New Ulster and New Munster. The members were officials or nominated members. The northern New Ulster council never met. The first opportunity for Māori (as for settlers) to have any representative institutions came with the passing of the Constitution Act 1852.

The Constitution Act 1852 enfranchised all New Zealand males aged 21 or over who met certain property tests – specifically, that they owned freehold property worth £50, or they held a leasehold interest worth £10 per year, or they were householders occupying a 'tenement' worth £10 a year in a town or £5 a year in the country. Men could vote in every electorate where they met any of these tests.[263] These property tests have been described as

'minimal', reflecting a nineteenth-century trend in Britain and its colonies towards broadening a franchise that had previously been held only by property-owning elites.[264] Māori men were not specifically excluded from voting in New Zealand elections, but in practice very few could vote because their property was held in common and was not under Crown title.[265] In the first national election in 1853, only about 100 of the 5,849 registered voters were Māori.[266] New Zealand's first elected Parliament comprised 37 European males, at a time when Māori were a majority of the population and held the vast majority of the North Island's land.[267]

Crown officials had been aware that Māori would be effectively excluded from representation, and that this was a potential point of tension between Māori and the Crown. While the Constitution Act 1852 was being framed, they considered other options, including the establishment of a special Māori franchise. On the one hand, they feared – presciently – that excluding Māori would lead to significant Crown–Māori tensions; on the other hand, their notions of racial and cultural superiority meant they could not conceive of Māori playing a full role in any Legislature established along British lines.[268] In 1849, Under-Secretary for the Colonies Merivale summed up this dilemma, writing that Māori were a people 'whom it is obviously impossible to admit to full & adequate representation; and yet extremely dangerous to leave unrepresented'.[269]

The property franchise was the Crown's solution to this perceived dilemma. We note the irony of this idea: even though Māori owned by far the greater part of land in New Zealand under customary title, they would be disenfranchised under the system proposed. As Earl Grey put it in 1852, the Crown had rejected any special enfranchisement and chosen instead to trust that Māori would 'advance in civilisation and the acquisition of property' to a point that would 'enable them, by degrees, to take their share in elections along with the inhabitants of the European race'. Put another way, Māori would be excluded for the time being but would be entitled to representation once they had submitted to the Crown's authority, at least with respect to their lands. For the Crown, this seemed to resolve two issues. It could keep Māori out of Parliament without enacting legislation that specifically excluded them; and it could provide an incentive for Māori to convert their lands to Crown grant.[270] As we discuss in chapter 8, Chief Native Land Purchase Commissioner McLean soon afterwards introduced his repurchase scheme that encouraged Māori to agree at the point of sale of hapū land to spend the proceeds buying back individual sections under Crown grant. One of his key incentives to Māori to adopt his scheme was that their Crown grants would confer on them the right to vote. The scheme was not a marked success in Te Raki (see chapter 8, sections 8.4.2.4 and 8.5.2.7).

Initial Māori responses to the establishment of the General Assembly were mixed. Some (including leaders in this district) regarded it as a settler institution of little relevance to their day-to-day lives or their treaty relationship with the British monarch. They therefore paid it little attention and made scant effort to secure voting rights.[271] Others (such as Waikato Māori) recognised its potential implications for the Crown–Māori relationship and explicitly rejected its authority while also working to establish their own institutions of government.[272] In Otago, 78 Māori (doubtless Ngāi Tahu) put forward their claims to register as electors, which led to a split among local settler dignitaries, and a fierce correspondence published in the local newspaper. The Māori claims hinged on their status as freeholders or leaseholders of lands or buildings in the native reserves. In reply to a letter signed by eminent Otago colonists, the Attorney-General of New Munster (comprising the lower North Island, South Island, and Stewart Island), Daniel Wakefield, clarified from Wellington on 13 May 1853 that:

> the qualification required by the Act from Aboriginal Natives is precisely the same as that which is required from any other British subjects. . . . [But t]hese qualifications must be possessed severally or separately as individuals. I conceive, therefore that few, if any, Aboriginal Natives will be entitled to be placed on the register. I believe they dwell together in their Pahs just as they do here. If so, there will hardly be found

> a freeholder, a leaseholder, or an occupant, in his own right as required.[273]

Subsequently, Wakefield was able to be more precise, as he had discovered that the native reserves in question (made by the New Zealand Company at the time of its Otakou purchase in 1844) were held back from the purchase by Ngāi Tahu, and as such were still in native title. Thus, none of those who lived on the reserves qualified as voters.[274]

The equality of Māori to vote therefore depended, as Wakefield explained, on their holding property 'by some tenure known to the law of England, as that law exists in the Colony'.[275] On the one hand, the British government expected that Māori would, in time, convert their land tenure to a recognisably British form and secure for themselves the right to vote. Meanwhile, however, the Government was willing for Māori – the majority of the population – to remain disenfranchised in both provincial and national elections.

Other Māori protested at their exclusion from the General Assembly and sought representation partly on the basis of equity and partly as a means of protection against the land hunger of settlers.[276] Māori who did register to vote often met resistance from colonial politicians and Crown officials, sometimes on the basis that they did not meet the property qualification but often because of settler fears that Māori enfranchisement would dilute their own power.[277] In 1859, after a request by the House of Representatives, the imperial government clarified that Māori could qualify only if they held property rights (whether freehold, leasehold, or rights of occupancy) under English law. Therefore, Māori could not be enfranchised on the basis of property held communally or under native title.[278]

By the early 1860s, with the colony at war in Taranaki and heading towards war in Waikato, colonial politicians began to turn their attention to the question of Māori enfranchisement. While some settler politicians were completely resistant,[279] others were aware that continued disenfranchisement posed a threat to the colony's peace, especially as the General Assembly drew a considerable portion of its revenue from Māori and was increasingly legislating to govern their affairs.[280]

Accordingly, on several occasions during the 1860s, the House of Representatives considered proposals for a special franchise for Māori until such time as the Native Land Court had converted most or all Māori land to Crown-derived titles. These proposals provided for a small number of Māori electorates, typically between two and five. Some proposals envisaged Māori electing settlers to represent them, others provided for the universal enfranchisement of Māori men, while still more sought to expand the property qualification in general electorates to include land held by Māori under communal and customary tenure.[281]

In essence, the sponsors of these proposals hoped to reduce Māori dissatisfaction with the colonial Government and to encourage Māori assimilation into the colony's system of government. The most detailed proposal came from the Lyttelton member, James FitzGerald, whose 1862 motion that Māori be represented in the executive branch and in both Houses of Parliament was narrowly defeated. FitzGerald acknowledged that his aim was to undermine both the Kīngitanga and Grey's district rūnanga. 'I admit that what the natives want is a separate nationality,' he told the House. 'But is not this pining for a nationality the offspring of a desire for law and order?' Parliament should therefore say to Māori, FitzGerald continued, 'Accept our nationality. Accept a far higher and nobler nationality . . . than any which you can create for yourselves.'[282]

In 1865, the Weld Government, which had assured the Colonial Office that it wished to see Māori make further 'advances', considered a new proposal for Māori representation.[283] According to Henry Sewell, then Attorney-General, 'the question of defining Native Political rights' was at the top of their agenda for the forthcoming parliamentary session.[284] It was decided not to appoint chiefs to the Legislative Council because of the difficulty of choosing some without offending others. The decision therefore was that Māori should be represented in the lower house.

And a further decision was taken that rather than create a 'distinctive franchise' and add additional Māori members to the House, the existing franchise would be broadened so that Māori could vote in existing electoral districts. The Maori Electoral Bill that was drafted provided that any adult male would be eligible to vote who possessed

> a right or title in the nature of an absolute proprietary right or title according to Maori custom in or to land or share of land to which Maori title shall not have been extinguished of the value of Fifty Pounds.

The value of property was to be estimated on the basis of certain set values per acre (10 shillings in towns, and an unstated value elsewhere). But the Bill also made provision for adult members of a tribe, hapū, or family who held their land communally. The total acreage of land held would be divided by the number of adult males. And if the quotient amounted to a certain value (discussed earlier), all those men could vote. Those qualified to vote would also be eligible to become Members of the House of Representatives, the superintendent of a province, or members of a provincial council.[285]

The Bill however was strongly opposed by the Native Minister Walter Mantell, and Sewell's efforts to work out a compromise with him were unsuccessful. Soon afterwards, Mantell resigned. This resulted in a change to the ministry's electoral policy.

The new Native Minister, James FitzGerald, introduced the Native Commission Act 1865, which provided for the establishment of a temporary commission, comprising some 20 to 35 rangatira and three to five Pākehā, to inquire into the best means of providing for Māori representation. So far as we can determine, this was the Crown's only attempt to directly consult Māori about representation in Parliament. Soon after the legislation came into force, the Weld Government was defeated and the commission never met.[286] As we will see in chapter 11, in 1867 the colonial Parliament would enact legislation providing for four Māori electorates (including one for Northern Maori) to be established on a temporary basis.[287]

7.3.3 Conclusions and treaty findings

The treaty, as we have explained, provided for the Crown and Māori to share authority, each within distinct though potentially overlapping spheres of influence. A significant element of the Crown's power of kāwanatanga involved its promise to control settlers and settlement, thereby keeping the peace and protecting Māori interests.[288] In the Tiriti debates, and in the preamble to the treaty itself, the Crown placed considerable emphasis on its protective intent; indeed, it presented the treaty as a necessary step to ensure that uncontrolled settlement did not threaten Māori lands and lives.[289]

The terms used in te Tiriti confirmed Te Raki leaders' understanding that they were making a personal agreement with the Queen, and that she was giving them personal assurances in her capacity as head of the British empire.[290] As discussed in our stage 1 report, Ngāpuhi had deliberately cultivated relationships with British kings during the 1820s and 1830s, explicitly to secure British protection while advancing trade and technological advancement.[291] Viewing these relationships in personal terms was consistent with the lens of whanaungatanga through which rangatira understood political leadership and alliance building.[292] From a Māori perspective, the Queen's mana was also that of her people, and her word was tapu.[293] In Ngāpuhi tradition, this personal dimension – and the inference that the Queen could and would personally guarantee their tino rangatiratanga – was crucial in persuading rangatira to sign.[294]

Yet this image of Queen Victoria as offering Māori her personal protection was (as some legal scholars have said) 'a fiction'.[295] To British officials, the 'Kuini' referred to in te Tiriti was not the Queen in her personal capacity, but 'the Crown' – a term that is capable of many meanings, but in the context of the treaty in 1840 can best be understood as referring to the sovereign power of the State, or the political authority exercised in the sovereign's name.[296] Thus, as Professor McLean has explained, officials distinguished between 'personal Queen and political Crown' in a way that was never explained to Māori who signed te Tiriti.[297] In practical terms, the 'political Crown' in fact referred to

numerous institutions that exercised power in nineteenth-century Britain and its colonies. Within Britain, by 1840, the feudal notion of an all-powerful monarch had long since given way to the tradition of constitutional monarchy, and the Queen's legislative powers were therefore exercised by the imperial parliament. Her executive powers were exercised on the advice of Ministers or directly by Ministers themselves, while they retained the confidence of parliament to which the imperial government (including the Colonial Office) was answerable. While power was exercised in the Queen's name, she had very little residual authority.[298]

Within New Zealand during the Crown colony period, there was no Parliament in which sovereign authority could reside. The Governor was required to act in accordance with the Royal Instructions issued by the sovereign, acting on the advice of her British Ministers. In practice, they were composed by the Colonial Office. Although the Governor acted under these Colonial Office instructions, his powers were broad and encompassed both legislative and executive authority in a manner that (according to legal scholar Professor David Williams) was 'somewhat reminiscent of the powers exercised by Stuart kings'.[299] Dr Orange observed that Governor Grey (and to a lesser extent, other Governors) deliberately fostered personal relationships with leading rangatira, and so reinforced the notion that the treaty could be understood in personal terms.[300] The rangatira–Governor relationship became 'an acceptable adjunct to traditional Maori authority structures', which officials deliberately used 'to reinforce the concept of a personal relationship between the Crown and the Maori people'. Rangatira, 'disposed by custom to favour reciprocity, often responded with expressions of loyalty [and] with the wish to be one with settlers'.[301]

Yet, having proclaimed sovereignty in 1840 unilaterally in breach of treaty guarantees (see chapter 4), the Crown took only six years before it took steps to transfer authority to settlers. While the 1846 constitution was never put into effect, the New Zealand Constitution Act 1852 provided for elected provincial and national assemblies – the latter with authority over the colony's budget, taxation, and legislative agenda. The colonial Parliament first met in 1854; the first responsible ministry was formed in 1856; Governor Gore Browne – despite his retention of responsibility for Māori affairs – began to accept the advice of settler Ministers on Māori affairs (1858); the General Assembly began to legislate on Māori affairs (1858); Governor Grey accepted the principle of ministerial responsibility for Māori affairs (1861); Secretary of State Newcastle rejected Ministers' attempts to give up responsibility (1863); Weld's new settler ministry accepted full responsiblity, including its financial costs (1864); and the imperial government confirmed that principle (1865). From that time, the colonial Parliament and Government had almost complete control of the Crown's relationship with Māori – all that remained for the imperial government was the conduct of warfare against Māori. Even then, the colonial Government did assemble its own forces, as Weld had planned, who would specialise in bush fighting. But for several years, the struggle over who would have responsibility for Māori affairs became little more than a struggle over which government would pay for British troops engaged in quelling Māori resistance. It was a bad beginning to the establishment of colonial Government.

British officials did not understand the treaty as Māori did, but they were nonetheless aware of the Crown's duty to use its power in a manner that protected Māori rights and interests – to provide 'a guarantee against oppressive treatment', in Newcastle's words,[302] or (as Dr Orange put it) 'to stand between settlers and Maori'.[303] Officials were also aware that any transfer of authority to a growing settler population would potentially threaten Māori authority, possession of land, and lives.[304] Yet, by February 1865, the imperial government had effectively delegated its power of kāwanatanga to colonial institutions of government under the control of settlers, who were a small minority of the population in 1852 and a bare majority in the early 1860s. This was undemocratic as well as antithetical to treaty rights.

The transfer of authority from imperial to colonial Government was of immense significance for the treaty relationship. In their traditional history of Ngāpuhi, Drs

Manuka Henare, Hazel Petrie, and Adrienne Puckey described this transition as 'a significant change in the socio-political landscape' of the fledgling colony. 'Māori had signed Te Tiriti o Waitangi in expectation of an enduring direct relationship with the British monarch', they said, 'whereas the New Zealand Constitution Act of 1852 effectively severed that relationship.' This 'affected Māori in a number of ways, one of the most significant of which was the concentration of political power, both formal and informal, in the hands of Pākehā settlers'.[305] Professor Brookfield observed that rangatira who signed te Tiriti could scarcely have been expected to anticipate, let alone consent to, a constitutional arrangement under which the Crown's authority would be exercised by a settler-dominated colonial Parliament and Government, which was empowered to adopt policies inconsistent with the treaty itself. In Brookfield's view, so long as responsibility for the treaty remained with the imperial government, the fiction of the Queen's sovereign powers had little practical effect. But that changed when the imperial government transferred responsibility for Māori affairs to the colonial Government.[306]

This shift towards settler self-government was consistent with constitutional convention for the colonies, and doubtless appeared inevitable to the imperial and colonial Governments by the mid-nineteenth century. But in making the transfer of governing authority to the colonial Government, the Crown left unanswered two crucial questions: how was self-government to be implemented in a colony that had a majority Māori population, and how was provision to be made for the exercise of tino rangatiratanga?

At the very least, under the treaty any such transfer required careful negotiation between the Crown and rangatira – yet there is no evidence of the Crown attempting this. Rather, as we explained earlier, the New Zealand Constitution Act 1852 was drafted by officials with some influence from the New Zealand Company and humanitarian organisations such as the Aborigines' Protection Society. The Act was not translated into te reo Māori and does not appear to have been circulated among or discussed with Māori communities by officials even after it was passed. When Gore Browne arrived in New Zealand, he sought input from missionaries and others he regarded as familiar with Māori. He also visited the Bay of Islands and Mangonui in 1858, and Grey visited in 1861, but there is no record of either of them discussing the colony's system of government. Māori throughout New Zealand were aware that change was occurring, and in many places there was growing unease. It was expressed in different districts in different ways: in Rotorua as disenchantment with the Queen and Governor; in Waikato as dissatisfaction that no code of laws had been provided; and in Hokianga as disappointment that the expected benefits of settlement (so often promised) had not materialised at all.[307]

The only truly substantive Crown–Māori consultation during this period occurred at the Kohimarama Rūnanga held after war had broken out in 1860 (discussed in section 7.4), where Crown officials in essence offered Māori a choice between the Queen's protection and continued conflict. At no point during that rūnanga did Crown officials suggest that settler Ministers might soon take over responsibilities at that time exercised by the Governor; on the contrary, the Governor and Native Secretary played prominent roles in the proceedings while Ministers observed.

The Crown had promised to protect Māori in possession of their tino rangatiratanga, their lands, and their independence, yet none of these protections were built into the colony's constitutional arrangements. According to Dr Orange, neither did the Crown ever consider any formal transfer of the Crown's treaty obligations to the colonial Parliament.[308] As mentioned earlier, the Wesleyan Missionary Society argued that the colonial Government should be legally required to act in accordance with the treaty, but the imperial authorities took no action on this issue.[309] Neither the New Zealand Constitution Act 1852 nor any subsequent constitutional instrument provided meaningful safeguards for treaty rights. Section 71 of the Constitution Act provided for self-governing Māori districts but contained no requirement that these be established or recognised. Section 7 enfranchised males aged 21

or over, subject to a property test that effectively excluded almost all Māori men. (Māori women, like Pākehā women, were not enfranchised at all.) Officials were aware that the property test would effectively disenfranchise almost all Māori, meaning they would go unrepresented in the colonial and provincial assemblies.

Yet it need not have been the case. The Maori Electoral Bill (1865) provided for Māori male voting rights – and rights to become members of the House of Representatives and provincial councils, and to be provincial superintendents – by reason of ownership of customary land. It provided a creative formula for allocating votes to hapū members on the basis of their collective ownership of land. Yet the Bill foundered before it got to the floor of the House. The Native Commission Act 1865 fared better. It provided for real consultation of rangatira as to the best means of providing for Māori representation in Parliament. But the ministry which passed the legislation fell soon afterwards, and it never came into effect. That, too, was an initiative that showed that Pākehā governments could engage with the important issues of Māori representation and suggest useful approaches to them. What was much harder was making them work.

The Crown's obligations went beyond protecting Te Raki Māori interests from the whims of colonial politicians. The guarantee of tino rangatiratanga over their people and territories was paramount to the 1840 agreement. As previous Tribunal reports (including our stage 1 report) have found, the Crown was not entitled to impose institutions of government on Māori without their consent – yet the establishment and transfer of responsibility to colonial institutions of government had exactly this effect, at least under English law.[310] The Crown had a further obligation to ensure that any institutional arrangements established after 1840 did not interfere with tino rangatiratanga and Māori rights and interests. On both counts, the Crown failed in its treaty duties.

It is striking that colonial officials agonised over settler calls for responsible government while giving only limited regard to Māori interests. The Constitution Act 1852 made elaborate provision for settler representative institutions. Officials in the 1850s and 1860s were acutely aware that many Māori in this district and elsewhere continued to live in self-governing communities that were either mostly or wholly beyond the reach of English law. Though section 71 of the Act made what we consider a positive constitutional provision for tribal self-governing districts and recognition of tikanga, the decision to declare such districts remained in the hands of the Governor. The failure of successive Governors to implement the provision was a significant missed opportunity. Governor Gore Browne did consider using section 71 during the 1850s but chose not to for various reasons, including uncertainty about whether it would allow Māori to adopt new forms of law and government (as opposed to maintaining customary law), and about the application of the colony's laws to settlers within Māori districts and Māori who committed acts that were 'repugnant' in British eyes. The first of these concerns arose from the Governor's misunderstanding of the section, as he later appears to have accepted; the other issues, in our view, were not insurmountable, though they would have required discussion with Māori.

In the early 1860s, the Colonial Office encouraged Governor George Grey to use section 71, but he chose not to, this time because he did not want to entrench Māori independence. Grey instead chose to introduce new institutions that provided for limited Māori self-government through district rūnanga under the control of the Governor and colonial officials. Crown counsel submitted to us that it was not obliged to declare Māori districts under section 71 of the Constitution Act, and had caused Māori no prejudice by choosing not to do so. It argued that the district rūnanga arrangement introduced by Grey provided for the exercise of tino rangatiratanga and was therefore treaty compliant. We will consider whether that was the case in section 7.5.

During the 1860s, the colonial Parliament enacted a series of laws aimed at extending the Crown's authority over Māori lands and communities. These included the Native Lands Acts of 1862 and 1865, which established the Native Land Court (discussed in chapter 9); the Native Rights Act 1865, which confirmed the article 3 rights of

Māori as British subjects; and the Maori Representation Act 1867 (chapter 11) which made temporary provision for Māori representation in the House of Representatives. These laws reflected a general view among colonial politicians that both the colony's safety and Māori welfare would be served by bringing Māori communities under the authority of the colony's system of law and government – a course that the Crown would continue to pursue after 1865, as we will see in chapter 11.

Accordingly, we find that:

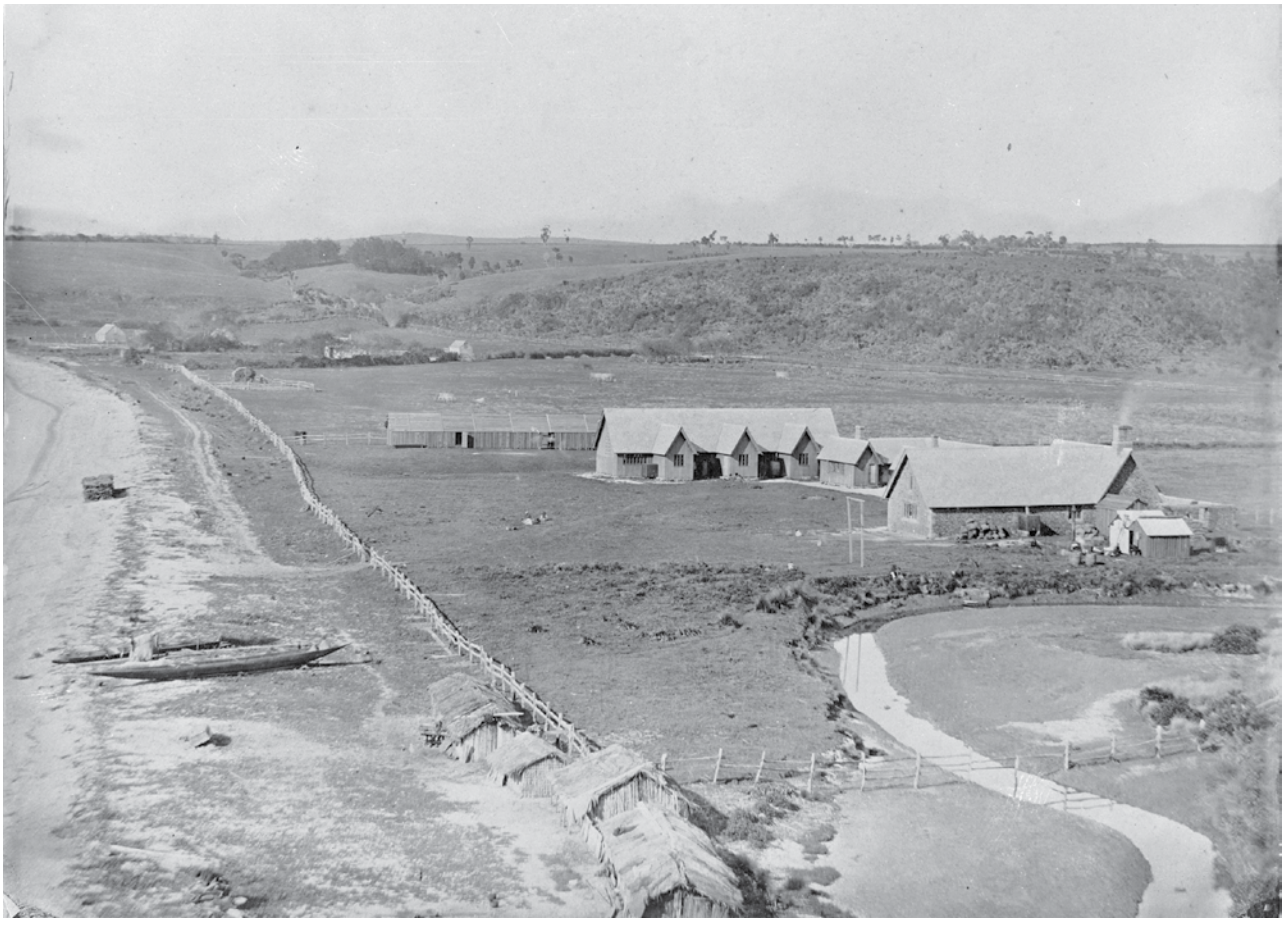
- The Crown failed to recognise, respect, and give effect to Māori political rights when it enacted a constitution that provided for provincial and national representative assemblies in 1852 without negotiating with Te Raki Māori, without ensuring that Te Raki Māori were able to exercise a right to vote alongside settlers, and without providing safeguards that would secure ongoing Te Raki Māori autonomy and tino rangatiratanga. These Crown actions and omissions, which came at a crucial juncture in New Zealand history, breached te mātāpono o te tino rangatiratanga. These actions also breached te mātāpono o te houruatanga me te mātāpono o te whakaaronui tētahi ki tētahi/the principles of partnership and of mutual recognition and respect.
- By providing for responsible government by colonial ministries from 1856, and ultimately allowing those ministries to assume responsibility for the Crown–Māori relationship, the Crown fundamentally undermined the treaty relationship. The Crown did not negotiate with Te Raki Māori or provide safeguards to ensure that Māori could continue to exercise autonomy and tino rangatiratanga. This breached te mātāpono o te tino rangatiratanga. It also breached te mātāpono o te houruatanga me te mātāpono o te whakaaronui tētahi ki tētahi/the principles of partnership and of mutual recognition and respect.
- By failing to declare self-governing Māori districts under section 71 of the Constitution Act 1852, and thus to ensure provision was made for Māori autonomy within its own kāwanatanga framework, the Crown breached te mātāpono o te houruatanga/the principle of partnership.
- By effectively denying the great majority of Māori representation in the General Assembly prior to 1867, the Crown breached te mātāpono o te mana taurite/the principle of equity. The Crown also breached this principle by failing to ensure that Māori were represented in the Legislative Council and in provincial assemblies (the Auckland Provincial Council in the case of Te Raki Māori).

7.4 What Was the Significance of the 1860 National Rūnanga at Kohimarama for the Exercise of Te Raki Tino Rangatiratanga?

7.4.1 Introduction

Growth in the settler population and settlers' political influence during the 1850s had significant impacts on the Crown–Māori relationship – in particular by threatening Māori authority and possession of land. Māori responded in various ways, due among other things to variations in local circumstances and the historical treaty relationship. Some rejected the Queen, Governor, and colonial Parliament, and asserted their rights of self-government. Some resisted the Crown's attempts to purchase and survey land. In this district, Māori continued to value their alliance with the Queen while also expressing disappointment that the promised benefits of settlement had not come to fruition.

During 1860, the Crown–Māori relationship reached a crisis point. War broke out in Taranaki; and the Kīngitanga, which Governor Gore Browne perceived as a direct threat to the Crown's sovereignty, was growing in strength and support. The Governor responded to these circumstances by calling a national rūnanga of Māori leaders, aimed at defusing Māori opposition and thereby shoring up support for the Crown's authority. Te Runanga o Nga Rangatira Maori (more commonly known as the Kohimarama Conference) took place over five weeks in July and August, at Kohimarama (which then lay outside Auckland township). More than 200 rangatira attended,



The Melanesian Mission Station at Kohimarama (present day Mission Bay, Auckland), which hosted more than 200 rangatira over five weeks at the 1860 Kohimarama Rūnanga. Native Secretary Donald McLean had advocated for a national conference of Māori leaders for several years prior to the rūnanga, but this was the first occasion on which the Government had initiated discussion with rangatira from across the motu. The Crown's objectives in convening the 1860 rūnanga included securing Crown loyalty from rangatira against the backdrop of war in Taranaki, increasing tensions with the Kīngitanga and extending Crown authority in the North Island.

including a significant contingent of Te Raki leaders. Waikato had few representatives, and Taranaki was notably absent, but the rūnanga was nonetheless, according to Dr Orange, the most representative gathering of Māori ever called by the Crown up to that point.[311] For leaders from this district, which the Crown had neglected since the Northern War, it was a chance to meet and hold discussions with the Governor and other Government leaders.[312]

For those who were present, the rūnanga provided a rare opportunity for meaningful dialogue about the nature of the treaty relationship and the mutual rights and

The Kohimarama Rūnanga

The meeting of Māori leaders that took place at Kohimarama during July and August 1860 is commonly known as 'The Kohimarama Conference'. But throughout the event, Māori leaders referred to it as a rūnanga – a formal decision-making body. The government newspaper the *Maori Messenger/Te Karere Maori* also used the term, describing the event as 'Te Runanga o Nga Rangatira Maori e noho nei i Kohimarama'.[1] In English, the official minutes referred to the event as a 'council' or 'assembly',[2] the same constitutional terms as were used for the colony's institutions of government (the General Assembly, and Executive and Legislative Councils). We do not think that the word 'conference' captures the event's significance as a national decision-making body for rangatira and the Crown. For this reason, we choose to refer to the event as a rūnanga.

obligations involved. In order to achieve its objectives, the Crown made significant concessions, presenting itself as a source of protection for Māori mana and proposing that rangatira should exercise significant influence within the colony's system of government. In return, officials sought expressions of loyalty to the Queen, and condemnation of Taranaki and Kīngitanga 'rebels'. According to historians for the claimants, both the Crown and rangatira saw the rūnanga as a renewal and reaffirmation of the treaty which would pave the way for Crown and Māori spheres of authority to coexist.[313]

Notwithstanding this apparent meeting of minds, the parties in our inquiry had contrasting perspectives on the outcomes of the rūnanga. To the claimants, its significance was in the promises made by Gore Browne and other Crown representatives that Māori would become equal participants in the machinery of the State through a combination of annual assemblies, local self-government, and self-determination over land. In the claimants' view, these promises amounted to a restatement of the treaty guarantees of ongoing Māori rights to exercise their collective authority in accordance with tikanga. Their principal concern was with the Crown's subsequent backtracking on its promises: its unilateral abandonment of annual national rūnanga, and its failure to implement a system that provided for Māori control over land.[314]

In the Crown's view, rangatira at Kohimarama acknowledged the Queen's sovereign authority, expressed their desire to live under the colony's laws, and accepted that any future exercise of tino rangatiratanga would occur under the Queen's protective authority or mantle. The Crown acknowledged that it had not kept all its promises, while submitting that the course it took was reasonable and did not prejudice Te Raki Māori.[315]

7.4.2 The Tribunal's analysis

(1) *What was the state of the relationship between the Crown and Te Raki Māori before the Kohimarama Rūnanga?*

Te Raki Māori had signed te Tiriti expecting that they would retain their lands, and their autonomy and authority; that they would receive the Crown's protection from foreign powers and troublesome settlers; and furthermore, that they would strengthen their economic partnership with the Crown and settlers, securing ongoing peace and prosperity.

By 1846, the Crown had already taken several steps that were inconsistent with Māori expectations. It had declared its *de jure* sovereignty over the whole of New Zealand, moved its capital to Auckland, interfered with Te Raki Māori trade, attempted to impose its laws within the district irrespective of Māori consent, asserted its authority over Māori lands through its land commission, and asserted its sovereign authority through warfare. In the years following the Northern War, Te Raki Māori retained a very high degree of autonomy. On a day-to-day basis, they largely continued to manage their own affairs in accordance with tikanga – partly because the Crown had no means of asserting its authority other than by

force, and partly because the Crown and settlers chose to neglect the district. In the post-war years, Te Raki Māori had autonomy and peace, but not prosperity.[316]

As discussed in chapter 5, Te Raki leaders made a series of post-war attempts to restore their relationship with the Crown, while the Crown showed a marked reluctance to involve itself in the district for fear of renewing hostilities. On several occasions in the late 1840s, Ngāpuhi leaders sought to involve the Crown in a joint project to rebuild the flagstaff, but Governor Grey variously refused or avoided the issue.[317] Grey did eventually meet Heke and Kawiti in 1848, prior to a formal peacemaking hosted by Ngāti Manu in 1849.[318]

Notwithstanding this peacemaking, the Crown and settlers continued to neglect the north. From the late 1840s, northern leaders regularly appealed for a restoration of the relationship, and especially for townships to be established to restore the declining local economy. Notably, hapū who had supported the Crown during the Northern War suffered as much hardship as those who had fought with Heke and Kawiti.[319] Things drifted for several years until the rise of the Kīngitanga sparked a reaction from the Crown. In 1856, responding to apparent threats from Waikato, Mohi Tāwhai and other Hokianga leaders wrote to the Governor reminding him of the long-standing Crown–Ngāpuhi relationship.[320]

The following year, they wrote again, saying they had called a hui to discuss the emergence of the Kīngitanga movement. The letter that survives is in English. Anxious to reassure the Crown of their peaceful intentions, they wrote that 'the only King is the Queen of England for these Islands' (that is, they were loyal to the Queen and the terms of the treaty, not to King Tāwhiao). They wrote of their plans to hold a hui at Maiki Hill, 'when the flagstaff at Maiki is to be again erected; which is the King the Ngapuhi acknowledge'.[321]

In January 1858, a few months before Pōtatau Te Wherowhero was confirmed as King, Governor Gore Browne visited the north. There, rangatira repeated their assurances that they would not align with the Kīngitanga. On 7 January at Kororāreka, Nene and others met the Governor, urging him to establish a town in their midst and assuring him that they accepted the Queen '[h]ei rangatira mo ratou' (which we translate as: 'as a rangatira for them'), and 'ki ona Ture hoki ka whakarangona e ratou akenei akenei' ('to obey the Queen's laws in future'). The government newspaper the *Maori Messenger/Te Karere Maori* translated these sentiments as a 'resolution to acknowledge Her Sovereignty and to obey Her laws in future'.[322]

We think this statement must be seen in context. This was the first visit by a Governor since Grey had formally made peace with Heke and Kawiti in 1849.[323] Both Grey and his predecessor, FitzRoy, had emphasised that any relationship must be based on acknowledgement of the Queen's authority, and in return that authority would be used to protect Māori rights and interests.[324] Having made peace many years earlier, Ngāpuhi leaders in 1858 were seeking to restore their economic partnership with the Crown, in particular by attracting settlers and establishing a township. In this context, it is not surprising that they would express respect for the Queen's status as their protector, or for her 'ture', which in this context might be understood as a commitment to peaceful relations under the Queen's protection. As a symbol of this commitment, the rangatira told the Governor they planned to restore the flagstaff on Maiki Hill and had already prepared a spar. Gore Browne told those present that Ngāpuhi had misunderstood the flag as a symbol of oppression, when in fact it was a symbol of protection. If they had now seen their error, that was well.[325]

The following morning, Kawiti's son Te Kūhanga (more generally known by the name Maihi Parāone Kawiti) met the Governor on board the HMS *Iris* seeking an assurance that the Crown and Ngāpuhi were now reconciled and to offer land at Kawakawa for a township. As symbols of his commitment to peace, Te Kūhanga gifted the Governor a taiaha and repeated the offer to re-install the flagstaff at Maiki Hill.[326] In fact, Ngāpuhi had spent several months making preparations to rebuild the flagstaff. Some 1,379 individuals and 32 hapū had contributed funds; Te Kūhanga had personally overseen the selection and felling

of a tree from Waikare by Te Kapotai and its transport to Ōkiato (known today as 'Old Russell') where carpenters were paid to complete the work.[327] Gore Browne assured Te Kūhanga that the past had been forgotten, and that Ngāpuhi were now 'looked upon as friends'.[328]

Later the same day, some 600 Māori attended a hui with the Governor at Waitangi. There, rangatira offered expressions of unity with the Crown ('kua hono te ngakau o te Maori ki to te Kuini') while making it clear that they expected the Governor to reciprocate by promising them a town.[329] As historian Dr Vincent O'Malley observed, from a Ngāpuhi perspective:

> The re-erection of the flagstaff provided a basis of mutual reconciliation and forgiveness, and a token of their commitment to a peaceful and prosperous future together, which demonstrated their readiness to receive a township.[330]

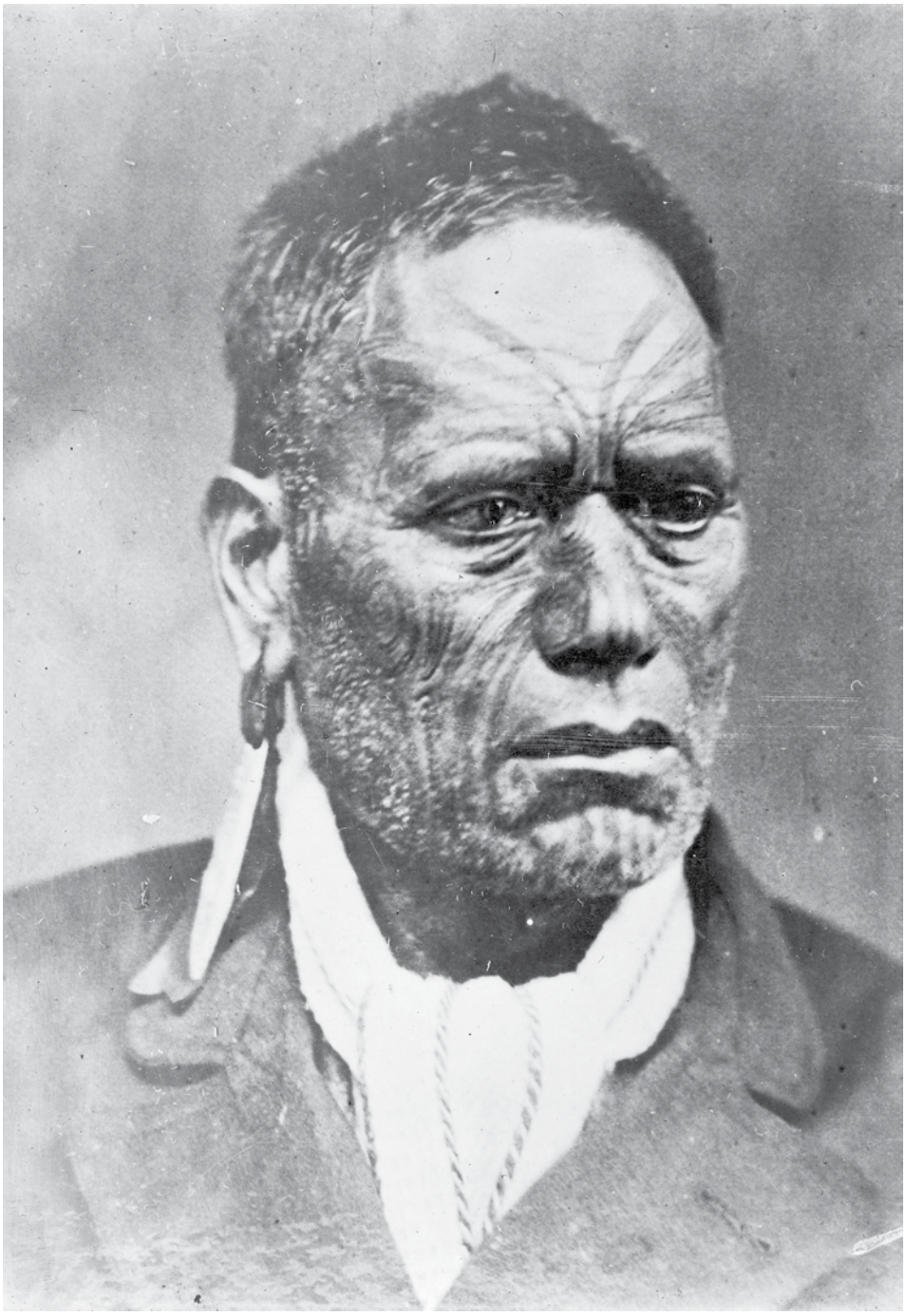
Gore Browne duly obliged, telling the assembled rangatira that one of his principal objectives 'was the selection of a proper site for a township', where Māori and settlers could 'cultivate their fields and build their houses side by side' and so show the world 'the reality of the union between the two races'. Many of the rangatira offered lands within their rohe, including Te Kēmara who offered Waitangi as a site and reminded Gore Browne that Ngāpuhi had invited the Crown into New Zealand only for it to remove its capital to Auckland.[331] According to the *New Zealander* newspaper, Gore Browne's promise was unambiguous: 'A township would be laid out wherever the most eligible site could be found.'[332] Gore Browne also visited Waimate and Māngungu, where Māori similarly appealed for a township and for government spending in their territories. Nene told the Governor that his claim was the greatest, since he had bled for the Crown.[333]

In the middle of January, when Gore Browne was expected back in the Bay, Maihi Parāone went ahead with his plan to rebuild the flagstaff on Maiki Hill. Some 500 rangatira gathered to carry the flagstaff up from the beach and install it in place. The Governor, though expected to be present at the naming ceremony, indicated that he would not attend. His vessel sailed on 17 January. On 29 January, Maihi Parāone invited the rangatira to the naming ceremony held at the foot of the flagstaff.[334] The flagstaff was named 'Te Whakakotahitanga o Ngā Iwi', referring to the unification of Te Raki Māori with the Crown and settlers. Kawiti told those assembled:

> [T]e Pou kua nei na Heke na Kawiti i turaki, na matou i whakaara inaianei, e kore tetahi o matou a tae a muri nei ki te tapahi i tenei pou ka tapaia te ingoa mo te Pou ko te whakakotahitanga. Ka tukua atu te kara ki te kawanatanga ka tukua atu he whenua hei whariki mo te kara oti atu kei kawanatanga anake te tikanga mo tena kara inaianei, kahore i te maori.
>
> The pole which stood before this one, was felled by both Kawiti and Heke. The one which we have raised today, will not ever be touched by an axe by any of us. The pole shall be named whakakotahitanga.
>
> The flag belongs to the Government. Some land will be given as a mat for the flag. The flag belongs to the Government and not to the Maori.[335]

According to the Ngāti Hine kaumātua Erima Henare, Maihi Parāone was asking the Crown to take responsibility for the flag. He expected the Kawakawa land to be held in trust and used to pay for the flagstaff's maintenance. Maihi Parāone, Mr Henare continued, was 'signalling his willingness to try and work with the Kāwanatanga'. His expression of unity was 'not the language of someone who believes that he has surrendered his rangatiratanga or has had any of his power or authority taken from him'.[336] Five days after Whakakotahitanga was erected on Maiki Hill, Whangaroa Māori also erected a flagstaff at Mangonui, naming it 'Victoria and Albert' and also describing it as a symbol of Māori–Crown unity:

> It is symbolical of the love of the Maories to the Queen and the Government. This Flagstaff shall be named Victoria and Albert, and shall be considered a token of our love and friendship for the Europeans.
>
> no reira ano hoki tenei kara i meinga ai kia whakaarahia e nga Maori, he tikanga ano hoki tana; i mea ai, ko tena heo



Maihi Parāone Kawiti, who succeeded his father as leader of Ngāti Hine. Like his father, he had signed te Tiriti, using his birth name, Te Kūhanga. He thought deeply about how the relationship of Ngāti Hine with the Crown should reflect he Whakaputanga, te Tiriti, and section 71 of the Constitution Act, which is evident in the many letters and documents he wrote. He reasserted the status of Ngāti Hine as an independent iwi, established Te Rūnanga o Ngāti Hine in 1876 to guide the development of the iwi, defined the boundaries of Te Porowini o Ngāti Hine (the province of Ngāti Hine), and built the whare Te Porowini for the parliament of the province. In 1887, he issued a declaration of ownership, Ko Te Ture Mo Nga Whenua Papatupu, signed by his council of elders, affirming the mana, tino rangatiratanga, and tikanga of Ngāti Hine and their authority over their ancestral whenua.

> whakakotahitanga i runga i te tino aroha ki a Te Kuini, me Te Kawanatanga ano hoki. Na, ka mea ano ia, kia karangatia te ingoa o te kara ko Te Kuini Wikitoria raua ko Arapata; hei tohu ano hoki mo to ratou aroha, whakahoatanga hoki ki te Pakeha.[337]

Though still in the Bay of Islands at this time, Gore Browne avoided these ceremonies due to fear that Māori 'might change their mind and throw down the flag as quickly as they raised it', though he wrote later that he was 'very sorry' not to have taken part at Kororāreka.[338] As Dr O'Malley observed, this was

> a measure of how nervously the Crown looked upon the north, even more than a decade [after the war], that officials continued to lack confidence in their ability to successfully defend the flagstaff there and remained suspicious of the overt statements of loyalty and friendship expressed by northern Māori.[339]

Gore Browne did meet Te Kūhanga in the ceremony around this time, proposing that the rangatira adopt his surname as a symbol of the friendly relations between them. Te Kūhanga gave up his birth name and adopted the name Marsh Browne or Maihi Parāone, the name we will use from this point. According to Mr Henare, this was 'akin to a tatau pounamu', one that placed Maihi Parāone and Gore Browne in positions of equality.[340] Either during this meeting or soon afterwards, Maihi Parāone asked the Governor to provide him with a seal, of the rangatira's own design, to be called Te Rongomau. Gore Browne agreed, and promised to send the seal as soon as it was made. As Mr Henare explained when the seal was shown to us during the hearing at Whitiora Marae in 2010, its handle is in the shape of Queen Victoria's clasped hand:

> the metaphor is this; this is Victoria's hand, the seal sitting on the table doesn't jump onto the wax by itself, but with Victoria's hand and my hand then the seal can be applied. So me and her the same – her hand, my hand and we can apply the seal, that is the metaphor, that is what Maihi believed he was signing when he signed Te Tiriti o Waitangi, side by side with God above.[341]

The ivory seal Te Rongomau (peace is made), in the shape of Queen Victoria's hand. The seal was designed by Maihi Parāone Kawiti and in accordance with his wishes was sent to him by Governor Thomas Gore Browne in 1858 as a token of unity and lasting peace between Māori and Pākehā. At that time, the rangatira also adopted the proposal of the Governor that he take the name Browne as a symbol of the friendly relations between them. He gave up his birth name and was known from then on as Maihi Parāone Kawiti (Marsh Browne Kawiti); it was a form of tatau pounamu. Erima Henare explained the seal as a metaphor for the agreement that Maihi Parāone believed he was making when he signed te Tiriti o Waitangi – that both Queen Victoria and the rangatira had to put their hand to the seal to apply it and give it force. They made their agreement side by side, with God above. The wording on the wax seal stamp itself reads: Maihi Paraone Kawiti Waiomio. The rangatira applied the seal to important documents and, after his death, it passed to his son, Te Riri Maihi Kawiti.

Gore Browne departed soon afterwards in late January 1858, leaving Ngāpuhi under the impression that their decades-old alliance with the Queen had been revived after a period of neglect following the Northern War, and that their wish for a township (and the associated economic benefits) would soon be fulfilled.[342]

As we discussed in chapter 4, the Crown subsequently chose Kerikeri as a site for the township and quickly enacted the Bay of Islands Settlement Act 1858, which allowed it to set aside up to 250,000 acres for the purpose.[343] The site did not possess the best anchorage in the bay but was regarded as easier to defend than the bay at Kororāreka – an indication that the risk of Māori uprising continued to occupy officials' minds.[344] The Crown already owned a considerable portion of the necessary land, or expected to acquire it as a result of the old land

claims processes of the Bell commission; and the Act allowed private land to be taken (with compensation) if needed.[345] Officials hoped the scheme would be self-funding, with proceeds from sales of town sections used to cover development expenses, establish schools, and promote immigration and settlement.[346]

Introducing the legislation, Native Minister Richmond presented the township as a kind of insurance against any renewal of Ngāpuhi nationalism. The Bay of Islands was like an 'extinct volcano' whose 'slumbering fires might break out again' if the Government did not safeguard against that possibility. Māori were 'well-disposed', having 'of their own accord . . . re-erected the flagstaff, the emblem of the Queen's sovereignty'. The Government therefore sought to take the opportunity 'to form a settlement in which Natives and Europeans could meet upon absolutely equal terms, and be governed in reality by the same laws'.[347]

This, like other legislation passed in 1858, was aimed at bringing Māori under the authority of the colony's laws. Richmond hoped that Māori would be induced to give up their existing lands in return for town sections – in his view, allowing them to 'ascend another step in the social scale'. While they would enjoy equality before the law, the town itself would be administered 'by old and experienced settlers'.[348] The legislation received Royal Assent in August 1859, causing considerable excitement in the Bay of Islands, and the Crown continued to acquire land from Māori and settlers into the early 1860s. But the outbreak of war in Taranaki undermined confidence in the scheme's prospects for success and diverted government funding away from land development. These and some other factors delayed the development, leaving Te Raki Māori still waiting into the early 1860s for the promise to be kept.[349]

(2) *Why did the Crown call the Kohimarama Rūnanga?*

The Kohimarama Rūnanga took place against the backdrop of growing tension between Māori, the Crown, and settlers over questions of relative authority. In the late 1850s, the national settler population had surpassed that of Māori for the first time, though Māori remained in a majority in the northern part of this district for several more decades. Settlers were increasingly exerting influence over the Crown's relationships with Māori, pushing for policies that would support further settlement by opening Māori lands and extending the colony's laws over Māori communities. To Crown officials, the challenge was to secure Māori acquiescence and thereby avoid outright conflict. In turn, Māori leaders, including those in Te Raki, were seeking new ways to manage their relationships with the Crown and settlers, and to invite commerce and peace, while also preserving their traditional authority and tikanga. By 1860, these questions had come into stark relief.[350]

For several years, while Governor Gore Browne and the colonial Parliament had been testing proposals for local government in Māori districts, Native Secretary Donald McLean had been advocating for a national conference of Māori leaders. McLean reasoned that the Crown had little hope of exerting its authority in the north or in many other parts of the country except through the influence of rangatira, and that the Crown had therefore better work with them. He proposed a conference that would occur every year or two, at which rangatira could explain their 'wants, requirements, and grievances', and put forward suggestions that would benefit their communities and reconcile them as much as possible to the Crown's system of law and government.[351]

By 1857, Gore Browne too was entertaining the idea of a national conference similar in conception to McLean's. In June of that year, Waikato Māori leaders called for such an event, and this might have encouraged the Governor. At some point after that, the Governor asked the General Assembly to fund a conference – though it was not until he renewed his call, a month after the outbreak of war in Taranaki in 1860, that (he said) the Stafford ministry 'got alarmed & engaged to let me have the money'.[352]

The Crown presented the conference as an opportunity for open discussion about the future relationship between Māori and settlers.[353] But, as many scholars have observed, the Crown's underlying objectives were to isolate Taranaki and Waikato leaders, placate 'friendly' Māori, and secure

expressions of loyalty to the Crown – and by these means extend its effective authority over the rest of the island.[354] At this time, the Crown's practical authority in the North Island was mainly confined to the principal Pākehā settlements, even if English law and international law assumed the Crown to be sovereign over all New Zealand territories.[355]

The Crown therefore sought means by which it could secure and extend this de facto authority while avoiding the costs, uncertainty, and destruction associated with a general war.[356] As Orange has observed, this forced the Crown to walk a fine line: 'British sovereignty somehow had to be confirmed', and it was therefore 'essential to obtain Maori assent without appearing to trespass on Maori rights, or mana, particularly those relating to land'. To achieve these objectives, the Crown needed to persuade Māori that its intentions were entirely protective, and consistent with chiefly authority.[357]

In their turn, rangatira attended because they were seeking ways to engage with the Crown and settlers, consistent with the original treaty promise of mutual protection and benefit. Many, including those in the north, believed they had missed out on the promised benefits of settlement, and that the Crown was now increasingly focusing on land purchasing and the advancement of settler interests.[358] As Ward has explained, Māori wanted to foster a positive treaty partnership and 'to engage with the European order',

> [B]ut they did not want to do so on terms of subordination and contempt for their values. Rather, they wanted to be involved, as responsible and well-intentioned parties, in the machinery of state and the shaping of laws and institutions appropriate to the emerging bi-racial New Zealand.[359]

The conference also provided an opportunity for rangatira to seek dialogue and reassurance about the Crown's intentions. Although the Crown's neglect of this district had to some degree insulated it from the forces that had brought war to Taranaki, northern rangatira nonetheless viewed those events with some concern – and in any case were still seeking opportunities to engage with the Government and rebuild the economic partnership. The rūnanga provided one such opportunity.[360]

(3) *Who was at the Kohimarama Rūnanga?*

The Kohimarama Rūnanga began on 10 July 1860 and continued for a month and a day.[361] The proceedings were recorded in the *Maori Messenger/Te Karere Maori*.[362] Altogether, some 200 rangatira were invited, from among those Gore Browne and McLean considered 'the intelligent chiefs and leading men in the country'[363] – that is, according to Dr Loveridge, those who were known to be well disposed towards the Crown and settlement.[364] Commenting on the rūnanga in 1860, Chief Justice William Martin stressed that the invitees were a 'carefully selected body' of people who, 'with few exceptions . . . were known to be friendly to the government'.[365]

Some 112 rangatira were present at the beginning of the rūnanga,[366] and another 41 arrived after proceedings had begun.[367] Others could not attend, giving various reasons including illness and bereavement. Some declined their invitations for political reasons.[368] Waikato was poorly represented, and no one was present from Taranaki. This led to claims that the Crown had stacked the rūnanga, which Dr Orange remarked were 'officially denied' but concluded were 'substantially true'.[369] She noted that Gore Browne, for instance, informed the Colonial Office that all tribes had been invited, irrespective of their opinions, 'except those in arms against Her Majesty, and a very few of the most violent agitators or supporters of the King movement'.[370]

From Ngāpuhi, according to the Crown's official minutes of the rūnanga, 18 rangatira attended. Tāmati Waka Nene was present at the start of the rūnanga, as were Wiremu Kaitara, Huirua Mangonui, Wiremu Hau, Tango Hikuwai, Wiremu Te Tete, and Hori Kingi Tahua. Those who arrived later (because their invitations did not reach them in time[371] included Patuone, Maihi Parāone Kawiti, Hōri Te Hau, Honetana Te Kero, Wī Tana Pāpāhia, Wetiriki Te Mahi, Kuhukuhua, Wiremu Te Hakiro, Wiremu Kawiti, Matiu, Wiremu Te Whatanui, and Hāre Pōmare.[372] Several Hokianga leaders – Hōne Mohi Tāwhai, Arama Karaka Pī, Makoare Taonui, and Rangatira Moetara – did not receive

their invitations in time and were absent. Whangaroa leaders such as Hāre Hongi Hika were also absent, apparently for the same reason.[373]

Te Parawhau of Whāngārei was represented by Te Manihera Te Iwitahi, Wiremu Pohe, Taurau, and Te Tirarau.[374] Te Hemara Tauhia represented Mahurangi.[375] Te Hakitara Wharekawa represented Te Rarawa after arriving late. The official minutes recorded seven Kaipara rangatira as attending: Paikea Te Wiohau, Hōne Waiti, Parāone Ngāwake, Tīpene Te Awhato, Te Matenga Te Whe, Arama Karaka Haututu, and Manukau Matohi.[376] The Kaipara and Waipoua leader Parore Te Āwha also attended.[377]

The Crown was represented by Gore Browne and McLean (the president of the rūnanga), as well as members of the Executive Council, the chief justice, the commander of the armed forces in Auckland, and several members of the House of Representatives.[378]

(4) *At the rūnanga, what was the Crown's stance on the treaty relationship?*

Particularly in the context of challenges to settler Government authority by Waikato and Taranaki iwi, the rūnanga offered a valuable opportunity for rangatira to clarify the Crown's understanding of the treaty in practical terms – including the rights and obligations it bestowed on each party, and the extent to which Māori could exercise their rights without provoking the Crown. While the choice between the Māori King and the British Queen was a major focus for the rūnanga, discussions also traversed other topics concerning the administration of Māori communities and lands. McLean chaired the rūnanga and guided discussion on these topics, introducing each by reading a statement from the Governor. Often, these debates were derailed by disagreements over the Taranaki War or the more general Crown–Māori relationship, but nonetheless Gore Browne and McLean made several significant promises.[379]

Gore Browne opened the rūnanga on 10 July, with a lengthy speech about the treaty relationship and the threat (as he perceived it) posed by the Kīngitanga and the Taranaki resistance. He presented the treaty as a protectorate arrangement, under which the Crown had agreed to provide Māori protection from both foreign and settler threats, and to provide other significant benefits, in return for their acceptance of the Crown's kāwanatanga. He asked that rangatira either commit to the Crown and continue to receive these benefits, or side with King Tāwhiao (the second Māori King, who succeeded his father Pōtatau Te Wherowhero after his death at the end of June 1860) and lose the Crown's support and protection.[380] The speech is notable, because this threatened Crown withdrawal from its treaty obligations (which we will return to later), and also for the Crown's explanations of the treaty's key terms.

(a) The Governor's comments on the treaty's key terms

The Governor began his speech by restating the terms of the treaty as the Crown understood them:

> **3.** On assuming the Sovereignty of New Zealand, Her Majesty extended to her Maori subjects her Royal protection, engaging to defend New Zealand and the Maori people from all aggressions by any foreign power, and imparting to them all the rights and privileges of British subjects; and she confirmed and guaranteed to the Chiefs and Tribes of New Zealand, and to the respective families and individuals thereof, the full, exclusive and undisturbed possession of their lands and estates, forests, fisheries, and other properties which they may collectively or individually possess, so long as it is their wish to retain the same in their possession.
>
> **4.** In return for these advantages the Chiefs who signed the Treaty of Waitangi ceded for themselves and their people to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which they collectively or individually passed or might be supposed to exercise or possess.[381]

McLean's translation, which he read after the Governor had delivered his address, was as follows:

> **3.** I te whakaaetanga a Te Kuini ki a ia te Kawanatanga o Niu Tirani ka whakatauwharetia mai tona maru kingi ki runga ki nga tangata Maori hei tiaki; ka whakaae hoki ia mana a Niu Tirani me nga Iwi Maori e tiaki kei tikina mai e

> tetahi hoa riri Iwi ke; ka whakawhiwhia hoki e ia nga tangata Maori ki nga tikanga katoa rite tahi ki o Ingarani tangata: a i whakaaetia, i tino whakapumautia hoki e ia ki nga Rangatira Maori me nga Iwi Maori ki nga hapu ki nga tangata hoki, ko o ratou oneone, me o ratou whenua, me o ratou ngaherehere, me o ratou wai mahinga ika, me o ratou taonga ake, o te iwi, o ia tangata o ia tangata: whakapumautia ana e ia ki a ratou hei noho mo ratou, hei mea mau rawa ki a ratou, kaua tetahi hei tango, hei whakaoho, hei aha, ara, i te painga ia o ratou kia waiho ki a ratou mau ai.
>
> 4. Na, he meatanga ano ta nga Rangatira Maori i tuhituhia nei o ratou ingoa ki taua Pukapuka ki te Kawenata o Waitangi, hei ritenga hoki ia mo enei pai i whakawhiwhia nei ratou; ko taua meatanga he meatanga mo ratou mo o ratou iwi hoki; tino tukua rawatia atu ana e ratou ki Te Kuini o Ingarani nga tikanga me nga mana Kawanatanga katoa i a ratou katoa, i tenei i tenei ranei o ratou, me nga pera katoa e meinga kei a ratou.[382]

As Dr Orange has observed, the Governor's speech reversed the treaty clauses, placing the guarantee of tino rangatiratanga first and Crown's power of kāwanatanga second – implying that kāwanatanga was of secondary importance.[383] McLean translated 'sovereignty' on first mention as 'Kawanatanga' and on second mention as 'nga tikanga me nga mana Kawanatanga katoa', a significant shift from just 'kawanatanga' as used in te Tiriti in 1840.[384]

Anthropologist Dr Merata Kawharu (now Professor) doubted that rangatira would have signed te Tiriti in 1840 if this translation had been used, on grounds that it could be interpreted as diminishing the mana of rangatira.[385] Orange, on the other hand, suggested that 'mana kawanatanga' referred to 'the authority and all the powers of governorship', and was consistent with the original treaty text, especially as Gore Browne and McLean had presented this power as granted in exchange for the Queen's protection ('te maru Kuini').[386]

Dr Orange noted that the speech had been through many drafts. In her view, the Crown obscured the meaning of 'sovereignty' under English law, just as it had in 1840, and instead presented the treaty as a protective arrangement which would win the chiefs' approval.[387] The use of 'te maru Kuini' is significant in this context. The term 'maru' refers to shelter or protection, and to power and authority – that is, it connotes protective authority. McLean used it as a translation of the phrase 'her [the Queen's] Royal Protection'. However, as we will see in section 7.4.2.4, sometimes when rangatira acknowledged the Queen's 'maru' during the rūnanga, Crown officials translated this as 'sovereignty', 'power', or 'rule'.

This, in our view, was misleading. As we explained in our stage 1 report, no straightforward explanation of sovereignty can avoid the term 'mana'; and he Whakaputanga used 'mana' together with 'kīngitanga' and 'rangatiratanga' to convey the highest authority to make and enforce law. We saw no evidence that the treaty's translators ever considered using the word 'maru' for 'sovereignty; nor did any of the linguists or other scholars whose evidence we considered.[388] The simple reason is that 'maru' does not equate to 'sovereignty', though it does equate to 'protection'. With respect to the rights of Māori, whereas the original Tiriti text guaranteed Māori tino rangatiratanga (full chieftainship) over their whenua, kāinga, and taonga katoa, McLean's translation omitted this guarantee, replacing it with his own wording:

> a i whakaaetia, i tino whakapumautia hoki e ia ki nga Rangatira Maori . . . ko o ratou oneone, me o ratou whenua, me o ratou ngaherehere, me o ratou wai mahinga ika, me o ratou taonga ake.[389]

This was much closer to the English text of article 2, and in effect confirmed ('whakapumautia') Māori in permanent possession of lands, territories (whenua), forests, fishing grounds, and all other possessions.[390] We regard this as a highly significant, and almost certainly deliberate, rephrasing that emphasised the property guarantees and omitted the authority guaranteed by the original article 2 guarantees of te Tiriti.

We note also that the full text of the treaty was read out later in the rūnanga, and that Pāora Tūhaere questioned whether rangatira who first signed te Tiriti at Waitangi had understood that they were consenting to the Queen's authority. If they had, Tūhaere said, they would not have turned against her soon afterwards. To this, McLean replied that the rangatira had understood – they had seen a need for protection from harm, and had therefore applied to the Queen to become a 'kai-tiaki mo ratou' (literally, a guardian or caretaker for them).[391]

(b) The Governor's ultimatum to Māori

Having set out his interpretation of the treaty's key terms, Gore Browne then referred to the Kīngitanga, which, he said, aimed to persuade the Māori tribes to 'throw off their allegiance to the Sovereign whose protection they have enjoyed for more than 20 years', set up a Māori King, and declare themselves to be an 'independent Nation':

> E kiia ana, ko nga whakaaro o nga kai hanga o taua tikanga he penei: ko nga Iwi Maori katoa o Niu Tirani kia honoa, ko to ratou piri ki Te Kuini i noho ai ratou i raro i tona maru ka rua tekau nei nga tau, kia mahue; a me whakatu tetahi Kingi Maori, me motuhake atu ratou hei Iwi ke.

Here, McLean translated 'allegiance' as 'piri' (literally, to cling or keep close), and 'the Sovereign' was translated literally as 'Te Kuini'.[392]

Uniting behind the King, Gore Browne said, would bring 'evils' (translated as 'hē': fault or blame) upon 'the whole Native Race'. Kīngitanga leaders had already proposed joining the war in Taranaki, and armed parties had gone there to support the Taranaki leader Wiremu Kīngi. In fact, the Governor claimed, these leaders planned to 'assume an authority' over all other tribes, using force if necessary:

> Tetahi tikanga hoki a aua tangata he whakatupu Rangatira ki runga ki era atu Iwi Maori o Niu Tirani. E mea ana hoki ko ratou hei runga whai tikanga ai ki aua Iwi ki te Kawanatanga hoki, a ko nga Iwi Maori ekore e pai ki a ratou hei Rangatira me pehi maori e ratou.[393]

Gore Browne then assured rangatira that the Crown had 'faithfully observed' its obligations to Māori. Successive Governors had been instructed 'to maintain the stipulations of this Treaty inviolate' (translated as: 'Ko te kupu a Te Kuini ki nga Kawana i haere mai i mua . . . kia tiakina paitia nga tikanga katoa o taua Kawenata o Waitangi kei taka tetahi'). Under the Queen's protection, there had been no foreign invasions; and Māori had kept their lands, unless they wished to sell, and had enjoyed their privileges as British subjects, including the rights to seek protection and redress through the courts. Through its 'kindness' ('atawhai'), the Crown had given them hospitals and schools, and supported their economic development.[394]

In Dr Orange's view, the use of 'kawenata' was significant: McLean was attempting to present the treaty as a covenant protected by tapu. Orange also observed that the Crown had not in fact honoured all of its treaty promises; in her view, rangatira would have understood Gore Browne's statements as a commitment that te Tiriti would at least be honoured in future.[395] While attempting to impress his audience with the Crown's humanitarian credentials, Gore Browne also commented:

> Your people have availed themselves of their privileges as British subjects, seeking and obtaining in the Courts of Law that protection and redress which they afford to all Her Majesty's subjects. But it is right you should know and understand that in return for these advantages you must prove yourselves to be loyal and faithful subjects, and that the establishment of a Maori king would be an act of disobedience and defiance to Her Majesty which cannot be tolerated.
>
> Ko o koutou Iwi kua whai mahi ki runga ki nga tikanga i whakawhiwhia nei ratou i te whakanohoanga ki roto ki to Ingarani Iwi. Kua tae ratou ki nga whare whakawa ki te rapu kai tiaki, ki te rapu kai whakaora mo ratou, a kua whiwhi,

kua kite i nga tikanga whakaora tangata e puare tonu nei ki o Te Kuini tamariki katoa. Otira, he mea tika tenei kia tino matau pu koutou, kia tino marama hoki ki tenei; ko koutou kua whakawhiwhia nei ki enei pai me whakakite koutou hei tamariki piri pono ki a Te Kuini. Ko tera ko te whakatu Kingi Maori, ehara tera, he tutu tera, he whakahihi marire ki a Te Kuini, a ekore rawa e whakaaetia.[396]

He continued:

I may frankly tell you that New Zealand is the only Colony where the Aborigines have been treated with unvarying kindness. It is the only colony where they have been invited to unite with the Colonists and to become one people under one law. In other colonies the people of the land have remained separate and distinct, from which many evil consequences have ensued. Quarrels have arisen; blood has been shed, and finally the aboriginal people of the country have been driven away or destroyed.

He kupu tenei me korero nui atu e au ki a koutou. Kia rongo mai koutou; ko Niu Tirani anake te whenua noho e te Pakeha i waiho tonu ai i te atawhai te tikanga ki nga tangata whenua. Ko Niu Tirani anake te whenua noho e te Pakeha i karangatia ai nga tangata whenua kia uru tahi ki te Pakeha hei iwi kotahi, hei noho tahi ki raro i te ture kotahi. Kei etahi whenua, waiho ana nga tangata whenua kia motuhake atu ana hei iwi ke. He tini nga he kua tupu i runga i tenei tikanga. Noho ana a, na te aha ra, kua ngangare, muri iho kua maringi te toto, a tona tukunga iho, ko nga tangata whenua kua pana, kua whakangaromia.[397]

Having learned from these conflicts, Gore Browne said, the Crown had taken a humanitarian approach to its colonisation of New Zealand, thereby saving Māori from the 'evils' ('he') that had befallen other indigenous people. Because Māori had become the Queen's subjects ('tamariki': literally, children), they could never be unjustly dispossessed of their lands ('whenua') and other property ('taonga': literally, treasures). All Māori were members of the British nation ('te Iwi o Ingarani') and were protected by the same laws as British subjects ('tangata o Ingarani'). The Queen regarded them as her people, and for that reason Governors had shown them peace and goodwill ('te rangimarie me te pai'). Gore Browne continued:

It is therefore the height of folly for the New Zealand tribes to allow themselves to be seduced into the commission of any act which, by violating their allegiance to the Queen, would render them liable to forfeit the rights and privileges which their position as British subjects confers upon them, and which must necessarily entailed [*sic*] upon them evils ending only in their ruin as a race.

No konei i meatia ai ko tona tino mahi poauau tenei kia tahuri nga Iwi o Niu Tirani ki te whakawai mo ratou, kia anga ki tetahi mahi e mutu ai to ratou piri ki a Te Kuini. Kei wehea hoki, na, kua kore nga tikanga e whakawhiwhia nei ratou inaianei i runga i te hononga ki te Iwi o Ingarani, tona tukunga iho hoki, ko nga tini kino ka tau ki runga ki te Iwi Maori, a, te ngaromanga e ngaro rawa ai.[398]

The Governor then asked the assembled rangatira to consider their options and advise him of their decision.[399] As Kawharu observed, the Crown's protection was, in effect, being made 'conditional upon Maori behaving in ways the Crown wanted them to behave, which included demonstrating their allegiance and support to the Crown'.[400] In Orange's view, 'the governor was threatening a withdrawal of Crown obligations under the treaty, by making that agreement conditional on a continuing Maori acceptance of government authority'. The inference, she said, was not lost on the rangatira present.[401] Having completed his speech, Gore Browne departed from the rūnanga, leaving McLean to guide proceedings.[402]

(5) *How did Te Raki rangatira respond to the Crown's stance?*

In essence, then, Gore Browne was offering the assembled rangatira a choice between alignment with Britain, with all the promised benefits, and alignment with King Tāwhiao, a course (he argued) that would result in the country being 'thrown into anarchy and confusion'.[403]

For Te Raki leaders, and especially for Ngāpuhi, this

Translations in *Te Karere Maori*

The Māori language newspaper *The Maori Messenger/Te Karere Maori* published a full record of the proceedings of Te Runanga o Nga Rangatira Maori, in Māori and English. *Te Karere Maori* was a government newspaper, published under the oversight of Native Secretary Donald McLean. Any translations of the speeches made by rangatira can therefore be regarded as official government translations and as part of a broader government effort to win Māori support and undermine the Kīngitanga. Except as otherwise noted, throughout section 7.4 we have reported the translations from *Te Karere Maori* while also noting alternative translations for important terms.

was not a difficult choice. Ngāpuhi and Waikato Māori had long had a tense relationship. Further, Ngāpuhi had already chosen to align themselves with the Crown on multiple occasions since 1820, and to enter into an equal relationship with it in 1840. Even after the rupture of the Northern War a few years later – when some rangatira challenged the Governor's authority, others supported the Governor, and many remained neutral – the rangatira had reaffirmed their commitment to the treaty relationship in 1858 when the flagstaff on Maiki Hill was restored.

As a result of the Northern War, they had acquired a deeper understanding of how British officials viewed kāwanatanga and had seen that the price of the Crown's protection was higher than treaty signatories had understood. Significantly, they had learned that the officials demanded expressions of peaceful intent and loyalty to the Queen – including the symbols of her mana. These were prices that Te Raki leaders were willing to pay in order to restore the economic partnership and prevent any future Crown invasions of their territories. Accordingly, in response to Gore Browne's requirement that they choose between the Queen and the King, Te Raki rangatira chose the Queen.

Tāmati Waka Nene was the first Ngāpuhi rangatira to speak in response to the Governor: 'Ara, ko taku whakaaro i a Kawana Hopihana ra ano kia tangohia tera Kawana hei tiaki i a tatou.' (He had accepted Governor Hobson in 1840, he said, 'in order that we might have his protection'.) The intentions of the United States and France were unknown, so Ngāpuhi had chosen Britain:

> na konei ahau i mea ai ko te Pakeha hei tiaki i a tatou. . . . ko te Kawana nei hei Kawana mo tatou – ko te Kuini hei Kuini mo tatou. Me tango ra tatou ki tenei Kawana mo tatou katoa. Kia ki atu au . . . kotahi nei toku Kawana. Hei Kingi tenei mo tatou. . . . Na te ture ra o te Atua i huihui mai ai tatou i tenei ra, ki te whare nei; na taua ture o te Atua, o te Pakeha hoki. Koia hoki ahau ka mea ai, ko taku Kingi tenei, ara ko te Kuini, ake, ake, ake. Kei te taha o te Pakeha ahau e haere ana.

Te Karere Maori translated this as:

> therefore, I say, let us have the English to protect us. . . . let this Governor be our Governor, and this Queen our Queen. Let us accept this Governor, as a Governor for the whole of us. Let me tell you . . . I have but one Governor. Let this Governor be a King to us. . . . it is through the teaching of [the Word of God] that we are able to meet together this day, under one roof. Therefore, I say, I know no Sovereign but the Queen, and I shall never know any other. I am walking by the side of the Pakeha.[404]

Here, Nene plainly accepted Gore Browne's terms: he would reject King Tāwhiao and continue to accept the Crown's protection as he had since 1840. The original treaty bargain remained unbroken. While the official translation used the term 'Sovereign', Nene's phrase 'ko taku Kingi tenei, ara ko te Kuini, ake, ake, ake' can literally be translated 'therefore I say that this is my King, my Queen forever'; that is, his king and protector was Victoria, not Tāwhiao. Nene spoke again on three other occasions, reiterating these main points. He urged others not to blame the Governor for the war in Taranaki, or to follow Tāwhiao and Te Rangitāke (Wiremu Kīngi) into war against the Crown and settlers.[405]

Nene also said Tāwhiao's father Te Wherowhero had been friendly towards settlers, but then had been taken away and made a king. Now that Te Wherowhero had died, 'taua mahi a Waikato' ('the work of Waikato') should end: 'Ko taku patu ra tenei i nga kino. Kia atawhai, kia atawhai ki te Pakeha, a taea noatia te mutunga; e atawhai ana hoki au ki aku Pakeha.' ('This is the way I propose to destroy evil, – by kindness, – kindness as to the pakehas, even to the end, even as I cherish my pakehas.') Māori retained their lands, Nene said, and had allocated only a portion for settlers.[406]

He returned to these themes in his final speech before leaving the rūnanga. Although other tribes might cry 'He Kingi! He Kingi!', he, Nene, would not consent. Without the Queen and Governor there would be no protection for Māori. Either another nation would come and take the land – as had occurred when France colonised Tahiti in the 1840s – or settlers would buy it all:

> Na konei hoki au i ki iho ai whakamutua tenei karanga Kingi, whakamutua. Ko taku tohe tenei, aua e whakahokia te ingoa o te Kuini i te whenua nei, ta te mea ko te whenua kua kuinitia, ko nga tangata kua kuinitia . . . Na te Kuini i ora ai o tatou whenua. Na te Kawana i ora ai tatou. . . . Mehemea kahore a Kawana i kumea mai ki uta, na kua riro te whenua nei i te Pakeha te hokohoko. . . . No te taenga mai o Kawana ka turea te whenua, ka waiho mana anake e hoko. . . . A, e kore tatou e matau ki nga iwi ke. Akuanei, ka puta te rongo o Niu Tirani, na, ka u ko te Wiwi, ka u ko te Merikana. Inahoki te mahi a te Wiwi ki a Pomare. Kua riro tana whenua i te Wiwi. Na, ki te karangatia tenei Kingi apopo, na kua he.
>
> Therefore I say again, Put an end to this clamour for a King – put an end to it. What I urge is this. Do not let the name (or protection) of the Queen be withdrawn from this country; inasmuch as the land, and the inhabitants also, have become the Queen's . . . We owe the protection of our lands to the Queen. We owe our protection to the Governor. . . . If the Governor had not been drawn ashore (the Queen's protection solicited) then our lands would have become the Pakehas by purchase. . . . But when the Governor came, the land was placed under the restrictions of the law, and it was enacted that he alone should purchase. . . . We don't know the mind of other nations . . . Look, for instance, at the conduct of the French towards Pomare (the Queen of Tahiti). The French have taken all her land. Should you persist in clamouring for a King hereafter, you will go wrong.[407]

THE MAORI MESSENGER.

TE KARERE MAORI.

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THE KOHIMARAMA CONFERENCE.

OUR readers will be glad of some information respecting the Conference of Native Chiefs now being held at Kohimarama. We shall, therefore, set aside all other matter in order to make room for a full report of the proceedings up to the date of our present issue.

We shall commence our account with a list of the Chiefs, with the names of their respective tribes, and their several places of abode. From this list it will appear that the principal sub-divisions of the Maori race in New Zealand are, on the whole, well represented in this Conference. One hundred and twelve Chiefs took their seat on the first day, and several more have arrived at intervals since. Others had been invited

TE HUI KI KOHIMARAMA.

TERA nga kai korero o te Nupepa nei te matenui ki te whakarongo korero mo te runanga o nga Rangatira Maori e noho nei i Kohimarama. Heoi, ka pana atu e matou nga korero noa o tenei takiwa, ka whakapuare nui i te Nupepa ki nga korero o tenei runanga, kia poto katoa ki roto taea noatia te ra o tenei perehitanga.

Hei timatanga tenei mo a matou korero, ko te tatau i nga rangatira; me whakaapiti hoki tona hapu, tona kainga, to tena rangatira to tena rangatira.

Ma konei ka kitea ai kua uru nui nga tino hapu katoa o Nui Tirani ki tenei runanga. Kotahi rau te kau ma rua nga rangatira i noho ki te runanga i te ra timatanga, na no muri nei kua tae mai ano etahi,

The Proceedings of the Kohimarama Rūnanga, published in English and te reo Māori in the Government sponsored newspaper *The Maori Messenger / Te Karere Maori*. This iteration of the Government's paper was published under the oversight of Native Secretary Donald McLean.

Other Ngāpuhi rangatira spoke briefly during the rūnanga, echoing Nene's main points. Wiremu Te Tete of

Waikare said that Pākehā had long since been accepted as mātua (parents) for New Zealand,[408] and furthermore: 'Kua whakakotahi tatou ki runga ki a te Kuini.' ('We have now become one people under the Queen.') Therefore, if the Governor asked him to go to Taranaki to fight against Wiremu Kīngi, he would go.[409] Wī Tana Pāpāhia also said the Queen had long ago been acknowledged 'hei matua pumau mo tatou' ('as an abiding parent for us').[410] Tango Hikuwai of Kerikeri said he would not support Te Rangitāke, and would unite with the Governor if asked, though he preferred to leave them to resolve their own quarrel.[411]

Honetana Te Kero, of the Bay of Islands, said Ngāpuhi had been the first Māori to receive Pākehā, missionaries, and the Governor; they had united under law and Christianity; and had raised the flag at Maiki Hill, acknowledging 'te mana o te Kuini' in so doing. In this way, Te Kero said: 'Ko te Kuini hei upoko ki au, ko ahau me oku rohe hei tinana ki te Kuini' ('the Queen is now my head; I and my boundaries (land) will constitute the body'). *Te Karere Maori* translated 'te mana o te Kuini' as 'The Queen's Sovereignty'.[412]

As we noted earlier, Orange observed that 'te mana o te Kuini' can also be understood as acknowledging that the Queen had her own mana, distinct from that of rangatira and consistent with the Queen's maru (shelter or protection) of Māori authority.[413] By raising the flag, Honetana was therefore restoring the Queen's mana in the Bay of Islands, but not necessarily diminishing his own. Dr O'Malley, similarly, has cautioned that 'northern Māori declarations of allegiance to Queen Victoria did not translate into ready acceptance of the applicability of English laws to their own affairs'.[414]

After some rangatira dismissed te Tiriti as a covenant for Ngāpuhi, or as being signed in error, Maihi Parāone responded: 'Ka mea ahau he tika taua Tiriti' ('I say that Treaty was right'). The rūnanga should therefore not condemn the treaty:

> Ko te he i he ai, kei te he a Heke raua ko Kawiti, koia na ko te whainga ki te Pakeha. E kapi ana ano te tuanui o taua whare, tikina ana e Heke raua ko Kawiti, hura ana nga toetoe o te Tiriti, akirikiritia ana, ka ua iho te ua puta ana te matao ki roto: ka tahi ka tikina ka hipokina e ahau: koia na te kara ki Maiki; ka wharikiria e ahau ki te whenua, hei matua mo te whakakotahitanga.

Te Karere Maori translated this as:

> That which was wrong was the error of Heke and Kawiti, that is, the fighting against the Europeans. But the roof of that house was yet perfect when Heke and Kawiti went and uncovered the thatching of the Treaty and threw it away. When the rain came it passed through and the cold was felt. I then went and covered it over: witness the flagstaff at Maiki. I spread out the land for it to rest upon, and as parent for our becoming one.[415]

Maihi Parāone's comments here must be seen in the context of the post-war Ngāpuhi view of the Northern War as having arisen from a mutual misunderstanding between Hōne Heke and Governor FitzRoy. Heke's error was to presume that the Governor intended to seize control of Ngāpuhi lands and assert authority over Ngāpuhi territories – hence his symbolic challenge against the flagstaff (or pou rāhui) on Maiki Hill – and FitzRoy's error was to respond with troops instead of dialogue. Therefore, Heke and Kawiti were not rejecting the alliance between Ngāpuhi and the Queen, but they were repudiating the Governor's claim to authority over Māori lands. Heke explained this version when he wrote to Queen Victoria in 1849, and throughout the rest of the century Ngāpuhi leaders continued to assert that they had remained loyal to the Queen even as they rejected the authority of the colonial Government (see chapters 5 and 11).[416]

Maihi Parāone told the rūnanga that the flagstaff had been restored in 1858 as a symbol of kotahitanga (unity) between Māori and Pākehā. More specifically, the flag had been restored as 'a symbol of union by which to acknowledge the Queen, and also of the union of Ngapuhi with other tribes, that we may together respect the Queen's name' ('hei whakakotahitanga tenei moku e tomo ai ki te Kuini, hei whakakotahitanga ano hoki mo Ngapuhi ki nga iwi ke, kia rite ai te whakapai ki te ingoa o te

Ngāti Whātua leader Pāora Tūhaere, who lived at Ōrākei and took an active role in the Kohimarama Rūnanga (1860), where he stated his support for both the Governor and the Queen. Tūhaere was critical of the Government's failure to continue the 'assembly of chiefs' after Kohimarama. When the Government still failed to respond in the 1870s, he convened his own Ōrākei Parliament in 1879, which focused particularly on the treaty. He urged northern rangatira to consider their 'many grievances' and to suggest how they might be redressed: 'Let us see whether the stipulations made in the Treaty of Waitangi are still in force or not.' By then, he was trying to maintain tribal ownership of the last Ōrākei land. At the 1881 hui at Waitangi, he supported calls for a separate Māori parliament, because the Wellington Parliament had broken the treaty. At a further Ōrākei Parliament in 1889, he accused the then government of acting 'treacherously' towards Māori. He was a leading member of Kotahitanga until his death in 1892.

Kuini').[417] Maihi Parāone used the phrase 'e tomo ai ki te Kuini', which *Te Karere Maori* translated as 'acknowledge the Queen', but is better understood as entering into a relationship with the Queen, literally in the nature of a marriage compact.[418]

Hōri Winiata, a Kaipara rangatira of Ngāpuhi descent, essentially repeated these points – te Tiriti was good and meant protection from foreign threat; and Ngāpuhi had been deceived into believing that the Crown intended to take their lands, so had felled the flagstaff, but the matter

had now been put right.[419] Hori Kingi Tahua also referred to the Northern War, saying the harm arising from those events had now been set right. Ngāpuhi had held meetings and decided to erect the flagstaff at Maiki 'and called it the Union of the two Nations . . . I say, let these two people, the Pakehas and the Maori, be united' ('ka huaina tona ingoa ko te Whakakotahitanga o nga iwi . . . e mea ana au, me whakakotahi enei iwi, te Pakeha te Maori').[420]

Patuone, who arrived late to the rūnanga, also emphasised the Queen's protection as the foundation of the treaty relationship:

> Naku ano te taha o tenei hui, naku a Kawana Hopihona i whakaae kia noho i uta. Mei kaua ia i noho ki uta kua he tenei motu, kua puta mai tetahi iwi ke ki te tango. . . . Koia tenei e nga iwi nei i piri ai au ki te Pakeha.
>
> I am the foundation of this Conference. I agreed to Governor Hobson's residing on this land. If he had not taken up his abode on this shore, then this island would have been in trouble. Another nation would have come and taken possession of it. . . . For this reason, then, Chiefs, I stick to the Pakehas.[421]

Patuone therefore counselled other rangatira to turn away from the fighting in Taranaki.[422] Like other Ngāpuhi leaders, he did not directly comment on the justice of the Governor's actions in Taranaki; rather, his concern was to assure the Governor of his friendly intent. In other contexts, Ngāpuhi leaders did express concern about the Government's actions, including fears that the Crown might again invade the north.[423]

Ngāpuhi leaders reinforced their sentiments about the Crown–Māori relationship in written responses to the Governor. Wiremu Te Tete of Waikare (of the Bay of Islands) wrote of his desire for peace among Māori and Pākehā; wrongs had been committed on both sides, he said, but they were of no more importance. The only remaining issue was the Kīngitanga: 'he kino tenei, na te mea e pehi ana i te maru o te Kuini'. *Te Karere Maori* translated this as: 'a bad affair as it seeks to do away with (put down) the Queen's sovereignty'.[424]

Tango Hikuwai (who submitted a written reply for Ngāpuhi) also rejected the Kīngitanga because it sought to put down 'te maru o te Kuini'. He understood the Governor's intentions as follows: 'E mea ana hoki koe kia tau te rangimarie ki runga ki te maru o te Kuini, kia noho tika, kia noho pai ki runga ki te maru kotahi.' *Te Karere Maori* translated this as: 'You wish peace to be maintained under the Queen's rule, and that we may all live in an orderly manner and in quietness under one protecting power.'[425] As noted earlier in this section, 'maru' more appropriately connotes shelter, protection, or protective authority. Hikuwai also expressed opposition to Wiremu Kīngi's actions in Taranaki: 'he mea kohuru tana tikanga' (translated as: 'His plan is to murder'). Ngāpuhi, by contrast, planned to remain at peace: 'ko te moe matou, ake ake. Amene.' ('we mean to sleep [remain quiet] forever and ever. Amen.')[426]

Te Parawhau leaders expressed similar views. Wiremu Pohe of Whāngārei, who spoke several times, asked the rūnanga to reject the King. He said the restoration of the flag on Maiki Hill represented Ngāpuhi identifying themselves with the interests of the Pākehā; 'this was our consenting forever and ever'. ('Ko te tapokoranga a matou ki te Pakeha, koia tena ko te aranga o te kara ki Maiki. Ko to matou whakaaetanga tenei, ake, ake, tonu atu.')[427] Pohe used several metaphors to describe the relationship between Te Raki Māori and the Crown. He spoke of the belt that the Governor had bound around the chiefs:

> Ko taku tenei i kite ai; na, ko tenei whitiki kua whitikiria nei e koe ki anei rangatira Maori. . . . E kore hoki tenei whitiki, e kore hoki tenei paere e motu; penei he whitiki pongi tenei ka oti nei te paere ki anei rangatira, e motu; tena ko tenei, he whitiki koura, ka mea ahau, e kore e motu.
>
> This belt or bond of union will not break. Had it been a pongi belt . . . it might break; but as it is a belt of gold, I say, it will not part.[428]

And he referred also to the Treaty of Waitangi '[which] has been brought forward, and I say, therefore, that the Ngapuhi have come under your wings like chickens.' ('I

whakatapokoria nga kupu o te Tiriti i Waitangi. Koia ahau ka mea nei kua uru tahi Ngapuhi ki raro ki ou pakau, kua pena me te heihei.')[429]

Te Manihera Te Iwitahi of Te Parawhau also urged the assembled rangatira to reject the King and abstain from fighting in Taranaki; these were the causes of tension:

> He takahi tenei i te atawhai o te Kuini ki nga Pakeha kua tupu nei ki Niu Tireni, me nga tangata Maori kua tupu ake nei i te maru atawhai o te Atua; tetahi, i te maru atawhai o te Kuini ki runga i nga tangata Maori i nga Pakeha o Nui Tireni.
>
> It is trampling upon the kindness of the Queen to the Pakehas who have prospered in New Zealand, and to the Maories who have grown up under the merciful care of God; and also upon the kind protection which the Queen has extended to both Pakehas and Maories in New Zealand.[430]

Te Hemara Tauhia of Ngāti Rango supported the Queen for different reasons. Before 1840, driven from their lands by the warring Ngāpuhi, Waikato, and Hauraki tribes, his people had become 'he iwi ngaro' ('a lost people'). Since the arrival of the gospel, he had returned to his chieftainship, and with the arrival of the first Governor, he had been able to 'breathe freely':

> Ko tenei iwi ko Ngatiwhatua he iwi ngaro. . . . Na nga ra o te Rongo-pai ka hoki ahau ki te rangatiratanga . . . tae noa ki nga ra i noho ai te Kawana tuatahi ki Niu Tirani ka tino puta taku ihu ki e ao.

That is, Ngāti Rango had returned to their ancestral lands and once again asserted their mana. Therefore, he would remain with the Queen ('Ka piri ahau ki te Kuini') forever.[431] Ngāti Whātua leaders, similarly, saw their relationship with the Queen as protection from their more powerful Māori neighbours.[432]

The Ngāti Whātua leader Pāora Tūhaere spoke on several occasions, expressing his support for the Governor and the Queen while dismissing te Tiriti as 'Ngapuhi's affair'.[433] Some at the rūnanga agreed with this view, or regarded te Tiriti as being no longer in force due to the Northern War and other Crown–Māori conflicts since. Others disagreed.[434]

On 26 July, about midway through the rūnanga, Tūhaere returned to this theme, arguing that Ngāpuhi had consented to te Tiriti due to ignorance, not fully understanding what it meant. Had they consented ('whakaae') to the Queen in 1840, they would not have subsequently fought against her. He said that Ngāti Whātua had also affixed their signatures because Henry Williams had brought them blankets:

> Koia tenei, e rangi tenei, ko te tino Tiriti tenei e iri ai te mana o te Kuini: ta te mea kua hui katoa ma inga rangatira o ia wahi o ia wahi, o tetahi motu atu hoki, ki konei, ki te rapurapu tikanga.

Te Karere Maori translated this as:

> But this [alluding to the conference] is more like it; this is the real treaty upon which the Sovereignty of the Queen will hang, because here are assembled chiefs from every quarter, and even from the other [South] Island, to discuss various questions and to seek out a path.[435]

For the Crown, which regarded the treaty as legitimising its claim of sovereignty, this was an untenable view. McLean asked why Tūhaere was raising unpleasant matters from the past, which reflected the acts of rebellious tamariki against their parents. Treaty signatories in 1840 had been wise, he said, and had foreseen the need for protection ('I whakaaro ano ratou ko etahi atu rangatira ki tetahi kai-tiaki mo ratou'); they had therefore applied to the King of England for this, and the result was te Tiriti o Waitangi. McLean agreed, however, that 'what is done here may be considered as a fuller ratification of that Treaty on your part'. ('He pono ano, ko nga mahi o tenei runanga, ka waiho ia hei tino whakapumau na koutou i taua Tiriti.')[436] In fact, as we found in stage 1 of our inquiry, the Crown's representatives had not explained to Te Raki Māori the full implications of the treaty's English text.[437]

(6) *What views did Te Raki rangatira express on the adoption of English law?*

As noted earlier in the chapter, Gore Browne and McLean had arrived at the rūnanga with several topics they wanted to discuss, all of which were aimed at encouraging Māori to move towards adoption of the colony's laws. McLean introduced each topic with a statement on behalf of the Governor, and then opened the floor for discussion.[438]

The first topic discussed concerned the application of English law to Māori communities. The former Chief Justice, Sir William Martin, had prepared a booklet, *Rules for the Proper Administration of Justice*. These rules were intended for use in any territory that lacked access to a resident magistrate and therefore did not apply to northern settlements such as the Bay of Islands.[439] However, Martin intended they would form the basis of a system of Māori law, operating under the Queen's authority, which could evolve from existing Māori experiments with English legal principles.[440]

The rules proposed a justice system under which tribal rūnanga would select a kaiwhakawā (Māori magistrate) and two assistants to administer justice in their territories to deal with civil disputes and with cases of assault and minor violence, theft, drinking spirits, preparing or eating rotten food, and adultery, while leaving homicide and other serious violence to the colony's courts. The magistrates were empowered to levy fines, which would go either to the Crown or the complainant, depending on the circumstances. The work of magistrates, the rules said, should be performed by rangatira ('Ko ta te Kai-whakarite mahi he tino mahi rangatira'). Nonetheless, kaiwhakawā should take no payments from their people; instead, the Crown would pay their salaries.[441]

Gore Browne saw these rules as a means of suppressing 'objectionable customs' ('ritenga kino') and as a step towards full integration of all Māori into the colony's legal system. In his message to the rūnanga, he explained that they were not put forth as law ('ture') but to provide guidance (translated as 'tikanga') for Māori magistrates and assessors in making their decisions. Some rangatira, he asserted, wanted 'but one law' ('kotahi tonu te ture'), but this was not possible while significant differences remained between Māori and Pākehā law; it was therefore necessary that Māori be gradually initiated into the English system. A translation of the paper was distributed, and Gore Browne (through McLean) invited rangatira to consider the proposals and offer suggestions for improvement.[442]

Given the traditional roles of rangatira in adjudicating disputes and administering justice within their hapū, Martin's system might not have seemed a radical departure, except that it integrated Māori decision-making into a Crown-sanctioned system. Many rangatira sought more time to consult their people before making any final commitments, though they gave some initial responses.[443] Te Manihera Te Iwitahi of Whāngārei was among several who objected to Martin's proposal that fines for adultery be paid to the Crown; if a man slept with another's wife and monetary utu was not paid, they explained, the man should instead be killed, in accordance with Māori law.[444]

According to the report in *Te Karere Maori*, Tango Hikuwai of Ngāpuhi accepted the broad principle that serious offences such as homicide could be tried in a Pākehā court, whereas lesser matters would be dealt with by local assessors. So, too, did Pāora Tūhaere of Ngāti Whātua.[445] Maihi Parāone Kawiti said he approved of a proposal by McLean for Pākehā magistrates to assist local rūnanga in settling disputes: 'Ko tenei ture hei oranga mo te tinana; ko te ture o te whakapono hei oranga mo te wairua.' ('Let us have this law to secure our temporal interests; and let us have the law of Christianity for the salvation of the soul.')[446]

Honetana Te Kero said the law should be like the church, through which all peoples could come together and unite their views.[447] Wiremu Pohe of Whāngārei said that Māori should give up the practice of muru:

> Ko nga taua mo nga tapatapa, he mana Maori tena. Ko nga taua mo nga wahitapu, he mana Maori tena. Mo nga wahine taea ka tauatia ano hoki tena, he ritenga Maori. Kua tae tatou ki tenei tikanga, kua paihereua ki te tatua koura o te Kuini, me whakaae katoa tatou kia whakarerea enei tikanga katoa.

Te Karere Maori translated this as:

> We have 'tauas' for curses. This is following up Maori custom. We have 'tauas' on account of the desecration of sacred places; this too is Maori custom. And on account of the violation of women we have 'tauas'. This is Maori custom. Now that we have entered this new order of things, and have been bound in this golden girdle of the Queen, we should all consent to abandon all of these customs.[448]

Several rangatira also argued that the Crown's existing payments to assessors were manifestly inadequate and barely covered costs.[449] Tango Hikuwai of Kerikeri, for example, said he was receiving £5 per year when £50 would be a fairer salary.[450] Later in the rūnanga, McLean proposed the establishment of mixed (half-Māori, half-settler) juries for trials with Māori defendants. The Crown on previous occasions had rejected the idea, believing that Māori would make decisions on the basis of tribal loyalty, but was now prepared to consider adopting this proposal. The proposal received a generally favourable response, including from Te Raki representatives.[451]

The most substantive Ngāpuhi contribution on these matters was from Maihi Parāone, who spoke of the difficulties of reconciling English and Māori law. He explained that, following the restoration of the flagstaff in 1858, Hori Kingi Tahua and other Ngāti Hine leaders had held a rūnanga at which they had resolved to abolish 'evil' Māori customs including adultery, hākari, exhuming the dead, and mākutu. ('No reira i puta ai te kupu a Hori Kingi a te runanga katoa kia whakakahoretia nga he Maori, te puremu, te hakari me te kahunga tupapaku me te makutu, kia kaua e whakamana.')[452] Maihi Parāone said that Ngāti Hine had agreed that cases of adultery should be tried by the Queen's law, but anyone practising mākutu or committing murder should be put to death.

After this rūnanga, Maihi Parāone's elder brother Te Wikiriwhi Te Ohu had died. A further rūnanga had concluded that his killer had been responsible for many previous deaths through mākutu. Maihi Parāone had consented that the man should be put to death, a sentence that, in his view, was consistent with both Māori law and the law of Moses. As a direct result, Maihi Parāone had lost his position as an assessor.[453]

Maihi Parāone went on to explain that such a case could not be brought to an English court because there was no blood, nor any witnesses; it was like a poison case in Pākehā terms. But mākutu could have many victims, and action had to be taken in such cases. He said that his people had joined with the Queen and were giving up the 'mahi kino' ('evil work') of the past.[454] McLean replied with a speech designed to downplay the importance of his offence. '[O]ur forefathers', he said, 'in like manner believed in witchcraft'. Many had been unjustly put to death as a result. The practice prevailed in many places, not just in England. And it was known that this belief continued still among Māori; it was an old one. The Governor thought Maihi Parāone had been punished sufficiently for his 'error', and the matter could now be put aside.[455]

As Dr O'Malley observed, Maihi Parāone's speech was not a repudiation of Māori law but a justification for its continued use, at least in circumstances that the colonial system could not adequately address.[456] Furthermore, this speech, and Pohe's promise to give up taua muru, was ample evidence that customary law endured in 1860, notwithstanding the presence of resident magistrates and in spite of the claims of Crown officials that the Northern War had imposed British sovereignty in the north.[457] The rūnanga ended without rangatira consenting to adopt Martin's proposals. None of the resolutions on the final day addressed them, and Gore Browne ended the rūnanga by asking rangatira to give further consideration to these questions after returning home.[458]

(7) *What views did Te Raki rangatira express on the administration of Māori land?*

Gore Browne's second message to the rūnanga concerned the administration of Māori land. He proposed means by which, in his view, Māori could resolve land disputes and determine ownership rights in a manner that would be recognised under the Crown's laws. The Governor saw this as a means by which Māori could be brought under the colony's laws and Māori lands opened up – but he also had other reasons for pursuing this course. In light of the

conflict in Taranaki, he and other officials were seeking to move away from the former land purchasing system under which Crown officials dealt directly with rangatira and therefore risked becoming caught up in their disputes.[459]

Gore Browne told the rūnanga that it was 'well known that nearly all the feuds and wars between different Tribes in New Zealand have originated in the uncertain tenure by which land is now held'. It was therefore 'very desirable that some general principles regulating the boundaries of land belonging to different Tribes should be generally received and adopted'. Those in clear possession of land, he suggested, could be granted secure title in accordance with English law. Where disputes arose, 'they might be referred to a committee of disinterested and influential Chiefs, selected at a Conference similar to the one now held'. Gore Browne also proposed that Māori adopt a mixed system of land tenure:

> The Governor earnestly desires to see the chiefs and people of New Zealand in secure possession of land which they can transmit to their children, and about which there could be no dispute. Some land might be held in common for tribal purposes; but he would like to see every Chief and every member of his tribe in possession of a Crown Grant for as much land as they could possibly desire to use.[460]

When a dispute arose, the owners 'need neither go to war, nor appeal to the Government', but could simply apply to a court for enforcement of their rights. The only obstacle to such a system was tribal jealousy, which prevented individuals from applying for grants, and would continue to do so 'until men grow wiser, and learn that the rights of an individual should be as carefully guarded as those of a community'. Gore Browne therefore asked the rangatira to return to their communities and consider these matters, while he promised to 'co-operate with them in carrying into effect any system that they can recommend'. McLean added some comments of his own, in essence blaming all disputes about Māori land on the failure of Māori customary land tenure and denying that any had arisen (in Taranaki or elsewhere) from the Crown's land purchasing practices.[461]

In their evidence before us, expert witnesses observed that these messages proposed significant changes in Māori land tenure that clearly intended to facilitate the alienation of Māori land while avoiding the difficulties that had arisen in Taranaki.[462] According to historians David Armstrong and Evald Subasic, the 'emphasis on securing Maori property rights and ensuring the peaceful retention of land for future generations was thus somewhat disingenuous'.[463]

These messages were clearly intended to appeal to rangatira, who likewise 'sought peace and order as a means of fully participating in the new European economy' and might also have sympathised with the idea of whānau possessing their own farms under Crown grant. As Armstrong and Subasic noted, the proposed system left Māori entirely in charge of decisions about tenure, and about the balance between tribal and whānau or individual possession.[464]

Nonetheless, the response was muted. Rangatira who spoke immediately after McLean questioned why he was changing the subject from questions over Taranaki and the Kīngitanga, and then proceeded to return the discussion to those topics.[465] Among those who spoke about land, most approved the principle of secure tenure and peaceful means of resolving disputes, while some declined to debate the Governor's proposals until they had received a printed copy and could discuss the matter with their people. None of the northern rangatira responded to the proposals.[466]

The following week, McLean attempted to revive the discussion about land, saying that the rūnanga was nearing an end, and this was 'the most important subject for discussion'. McLean also sought to justify the low prices the Crown was paying for Māori land, a subject that had aroused some comment during the rūnanga.[467] Again, there was little response from those assembled. As we see it, rangatira were reluctant to take the Government's lead on a matter that was of such vital importance, and certainly were not willing to make commitments without consulting their people. Pāora Tūhaere pointed out that existing tribal rūnanga were perfectly capable of managing land transactions; difficulties arose only if the Crown

chose to bypass these structures, as had occurred in Taranaki.[468] So far as we can determine, the only northern rangatira to comment on land was Maihi Parāone, who, towards the end of the rūnanga, mentioned briefly that he favoured some means of permanently resolving land issues ('kia whakatikaiai, kia pai ai, ake ake').[469]

Again, the rūnanga ended with no clear resolution. Even when promised substantial control over land title and dealings, rangatira were far from persuaded. Some consented to consider the proposals; others warned some communities would reject the proposals outright. As with questions of justice, Gore Browne and McLean asked the rangatira to consult their communities with a view to holding further discussions at the next rūnanga.[470]

(8) *What views did Te Raki rangatira express on the administration of Māori communities?*

On 6 August 1860, a few days before the end of the rūnanga, McLean introduced a new subject, the administration of Māori communities:

> I wish you to take under your notice the expediency of considering some regulations for the better management of your settlements. How would it answer if a Chief was appointed in each district to communicate with the Governor and to maintain order among his people?
>
> Ko taku tenei i whakaaro ai, kia ata hurihurihia e koutou etahi tikanga e kake haere ai te pai ki o koutou kainga. E kore ranei e pai kia whakaturia tetahi rangatira ki ia takiwa hei tumuaki, ara, hei whakapuaki korero ki a te Kawana, hei pehi hoki i nga kino o te iwi?[471]

McLean also invited rangatira to consider whether settler magistrates might assist local rūnanga in settling disputes. McLean did not intend this system to operate in territories that were close to British settlements, but rather only in 'remote places' that did not have access to the colony's courts.[472]

Again, the response was muted. Most of the rangatira who followed McLean's speech simply ignored his proposals. This included Patuone, who used his speech to appeal for unity between Māori and Pākehā, and oppose the Taranaki tribes that were at war with the Crown. A few rangatira said they would consider McLean's proposals or seek decisions from their communities. Among those communities, the settler magistrate was clearly regarded as an advisor or mediator, sent to explain English laws to Māori but not to enforce them.[473] Arama Karaka of Kaipara described the resident magistrate system as 'ko te tumuaki Pakeha, ko te tumuaki Maori' ('the European head (Magistrate) – and the Native head').[474] Again, Gore Browne asked the rangatira to consult their communities with a view to further discussion at the next national rūnanga.[475]

(9) *What were the rūnanga's final resolutions?*

The Kohimarama Rūnanga closed on 10 August with a series of resolutions, each one proposed by an individual rangatira and seconded by another, according to *Te Karere Maori*.[476] The resolutions 'were afterwards written out' so as '[t]o prevent any misunderstanding', and those rangatira who supported them were required to 'sign their names thereto'.[477] The first resolution concerned the treaty relationship:

> E whakaae ana tenei Runanga, i te tikanga o nga rangatira i noho ki roto; kua tino whakaae nei tetahi ki tetahi kia kaua rawa he pakanga ketanga i runga i te kupu kua whakapuakina nuitia mo te mana o te Kuini, mo te whakakotahitanga hoki o nga iwi e rua; a kua whakaae nei tetahi ki tetahi kia whakahengia nga mahi katoa mana e taka ai ta ratou kawenata tapu kua whakatakotoria ki konei.

Te Karere Maori translated this as:

> That this Conference takes cognizance of the fact that the several Chiefs, members thereof, are pledged to each other to do nothing inconsistent with their declared recognition of the Queen's sovereignty, and of the union of the two races; also

to discountenance all proceedings tending to a breach of the covenant here solemnly entered into by them.[478]

As discussed, the Queen's 'mana' was not necessarily sovereignty, but the mana she exercised as head of the British empire. Paikea of Kaipara moved this motion, and according to *Te Karere Maori*, it was passed unanimously. Other motions condemned the Māori King's work as 'he mahi he, he mahi wehe' ('a cause of strife and division') and blamed Wiremu Kīngi for the war in Taranaki. According to *Te Karere*, these motions caused 'a good deal of confusion', with many rangatira choosing not to raise their hands.[479] Witnesses subsequently reported that only one-third of rangatira supported the resolution about Taranaki, even after considerable prompting from McLean.[480]

The resolutions were later printed, and – again with prompting from Crown officials – some 107 rangatira affixed their signatures. From this district, the signatories included Tāmati Waka Nene, Maihi Parāone, Te Manihera Te Iwitahi, Wiremu Pohe, Honetana Te Kero, Hāre Pōmare, and Te Hemara Tauhia.[481] There is no evidence of dissent from any of the northern rangatira.[482] However, the Church Missionary Society secretary Robert Burrows (a former Waimate missionary), who had witnessed the rūnanga's proceedings, later repudiated reports that the chiefs had adopted all resolutions, protesting in the *Daily Southern Cross* that some rangatira had 'afterwards expressed ignorance of what they had signed'.[483]

In brief, then, the rūnanga at Kohimarama ended with rangatira expressing clear support for the treaty, for the Queen's protective relationship with Māori, and for unity between Māori and Pākehā. Rangatira from this district and elsewhere clearly did not want conflict with the Crown. However, support for the Crown's stance against the Kīngitanga and Taranaki iwi was muted at best; and the rūnanga ended without any clear expression of support for the Governor's proposals on the adoption of the colony's laws or the administration of Māori lands and communities.

(10) *What was the significance of the Governor's promise to reconvene the rūnanga?*

From the beginning of the rūnanga, Crown officials indicated to rangatira that it heralded a new step for the Crown–Māori partnership. For the first time, the Crown had called together Māori from throughout the country to advise on the colony's laws and policies – and this, in our view, was the Kohimarama Rūnanga's main significance. McLean deliberately cultivated the perception that the rūnanga would become a formal advisory body, analogous to the colony's Executive and Legislative Councils. He introduced Westminster formalities into proceedings,[484] and told the assembled rangatira:

> When an important matter comes before the Queen, she submits it to her Council, and requests them to take it under their consideration, and to give expression to their opinions. The Governor acts in like manner with his Council. Now I request that the same rule be observed here.
>
> Ka tae mai he korero nui ki a te Kuini, ka homai tonu e ia ki tana runanga, mana e ata hurihuri tona tikanga, a ka whakapuaki hoki i ana whakaaro. Ka penei ano hoki te Kawana ki tana runanga; a ko taku tenei i pai ai kia waiho ano ia hei tikanga mo tatou inaianei.[485]

As noted earlier, official minutes described the rūnanga as a 'council' or an 'assembly', terms that were also used for some of the colony's institutions of government. The impression was that Māori were being invited to influence the exercise of kāwanatanga, and more particularly to negotiate the nexus between kāwanatanga and their existing rangatiratanga.[486]

From early in the rūnanga, rangatira asked that it be repeated as an annual or at least regular event. Wiremu Pohe of Te Parawhau was the first to make this request, writing to the Governor on 16 July:

> Na, koia tena, kua timata koe ki te whakamarama i nga tikanga ki a matou, ki nga rangatira Maori, me penei tonu e

koe i roto i nga tau. Ki te mea ko tenei ra anake, i roto nei i te tau 1860, ko konei mutu ai te whakamarama i tenei kanara ka tiaho nei ki roto ki tenei whare pouri. E mea aua ahau e ohooho ranei, kahore ranei; koia ahau i mea ai, peneitia ano e koe i roto i nga tau. Kei wawara ke enei hipi kua whakamine nei ki ou pakau, ki o korua pakau ko te ture. Heoi ano tena kupu.

You have commenced to explain matters to us, to the Maori Chiefs. Continue to do so every year. If this is to be the only time – this day in the year 1860 – then the light that shines from the candle in this dark house, will cease at once. I ask, will it have any effect or not? I say, therefore, let this be done every year, lest these sheep which are now gathered under your wings and under the wings of the law should stray. Enough of that word.[487]

On 3 August, Tamihana Te Rauparaha of Ngāti Toa presented a petition asking for the rūnanga to become a permanent event:

E Kawana Paraone,—
Kua whakaae katoa nga rangatira o tenei runanga, e noho nei ki tetahi wahi o Akarana, ki Kohimarama, kia whakatuturutia mai e koe tenei runanga o nga rangatira Maori o te motu nei o Niu Tireni: hei tahi i nga kino o nga iwi e rua nei, o te Pakeha o te tangata Maori. Ma tenei runanga ka marama haere ai te motu nei, ka ora ai hoki.

Governor Browne,—
All the chiefs of this Conference, sitting at Kohimarama, near Auckland, have united in a request that this Conference of the Maori Chiefs of the Island of New Zealand should be established and made permanent by you, as a means of clearing away evils afflicting both Europeans and Natives. By such a Conference light, peace, and prosperity will be diffused throughout the Island.

Tamihana Te Rauparaha

The petition was signed by Te Rauparaha and 73 others, including (from this district) Maihi Parāone Kawiti, Te Manihera Te Iwitahi, Te Hemara Tauhia, and Patuone.[488]

In the days that followed, several rangatira repeated this call and debated over where future rūnanga should be held.[489]

On 2 August, McLean wrote a memorandum for the Governor recommending that the 'conference' become an annual event. The memorandum advised that, in light of tensions between Māori and the Crown, 'fresh measures' were needed through which Māori communities 'may be more effectually controlled and governed':

To attain this end it will be necessary to devise some general scheme which shall embrace the following objects: A proper organization of the various Native tribes; Adequate provision for the administration of justice; Securing on the side of the Government the influence possessed by the leading chiefs of the country; and establishing as a permanent institution periodical meetings of the Chiefs where questions affecting the interests of both races may be freely discussed.[490]

McLean said he would submit further advice on such a scheme. However, Pohe and other rangatira had asked for the rūnanga to be reconvened in subsequent years, and it was important that an answer be given 'before they separate':

A conference like the present affords the Natives a legitimate means of making known their wants, and of representing their grievances; it may be regarded as a safety valve to the country, and will prepare the way for their participation in more civilized institutions.[491]

For the Government, further meetings would also provide 'means of ascertaining the disposition of the various tribes' and of 'imbuing the Native mind with correct views' regarding the Government's actions, which relied on Māori cooperation for their success. McLean therefore recommended an annual meeting, held alternately in Auckland and Wellington. Such an event would cost at least £5,000 and may require the construction of additional accommodation.[492]

In another, undated, memorandum, McLean suggested that such a meeting be constituted as a '[c]ouncil of the

principal chiefs', which would allow Māori 'a legitimate means of having their wrongs redressed in a constitutional manner' and of 'participating in those institutions by which they must in the process of colonisation be governed'.[493] In yet another memorandum, on 6 August, McLean further advised:

> It is abundantly manifest that in the present state of the Colony the Natives can only be governed through themselves. A conference like the present would prove a powerful lever in the hands of the Government for effecting this object.
>
> It might also be made the means of removing many of the difficulties now surrounding the Land Question, and of simplifying the mode of acquiring territory for the purposes of Colonization.[494]

As McLean's memorandums make clear, although the Crown was preparing for a significant level of ongoing engagement with Māori, it was doing so for its own purposes – in essence, to control and govern Māori, and acquire lands for settlement. It hoped to achieve these objectives by drawing Māori into the machinery of government and establishing some form of indirect rule at a national level. Implicit in these messages was that the alternative method for asserting Crown authority – warfare – was costly and undesirable.

Governor Gore Browne, seeking funds for another rūnanga in 1861, passed Te Rauparaha's petition on to the House of Representatives.[495] As Dr O'Malley observed:

> The potential for such conferences to form a 'powerful lever' in the government's efforts at indirect rule were apparent even to the General Assembly, which approved Browne's request that funding be quickly confirmed.[496]

On the final day of the Kohimarama Rūnanga, 10 August, Gore Browne announced that it would reconvene the following year. In the meantime, he said, the General Assembly would assist him 'in devising measures of the establishment of order, and for the good of your race generally' ('a ka whakauru mai te Runanga Pakeha i runga i te mahi whakatakoto tikanga e tupu ai te pai ki a koutou').[497]

Acknowledging that most of the issues he had placed before the rūnanga remained unresolved, including those concerning land, the administration of justice, and the regulation of Māori communities, the Governor continued:

> In the interval between the present time and the next Conference, I trust you will carefully consider the subjects to which your attention has been directed, in order that you may come prepared to express matured opinions, and to recommend measures for giving practical effect to your wishes.
>
> Ko te takiwa e takoto mai nei i te aroaro tae noa ki tetahi Runanga me waiho hei takiwa hurihuri marire i nga korero maha kua whakaaturia nei hei kimihanga ma koutou, kia haere rawa mai ki tera Runanga, kua pakari nga whakaaro hei whakapuaki ma koutou, kua marama hoki he huarahi korero i runga i nga mea e hiahiatia e koutou.[498]

The rūnanga at Kohimarama had been a significant step in the Crown–Māori relationship – offering an unprecedented opportunity for the leaders of both treaty partners to meet and engage in dialogue about issues of common concern. Gore Browne's promise meant that this approach could continue into the future, providing a basis for ongoing dialogue between the rangatiratanga and kāwanatanga spheres as part of a functioning treaty partnership. Yet the Kohimarama Rūnanga also demonstrated the parties' divergent agendas: Māori continued to look for peace and prosperity in partnership with the Crown, while the Crown looked for means of extending its authority over hitherto autonomous Māori communities.

(11) *What was the significance of Gore Browne's northern tour in February 1861?*

In the aftermath of the rūnanga, many Te Raki Māori leaders embraced the opportunity to strengthen their relationship with the Crown and expressed willingness to experiment with the new forms of government Gore Browne and McLean had proposed.[499] Rangatira returning to the Bay of Islands from Kohimarama distributed copies of Gore Browne's speech and William Martin's

legal guidelines, and local rūnanga met to 'discuss the new tikanga . . . with much interest'.[500] In Mahurangi, Te Hemara Tauhia assembled his tribal rūnanga and forwarded their names to Gore Browne for confirmation, in accordance with Martin's proposed rules.[501] In Hokianga, Hipio Te Whareoneone of Utakura wrote to the Governor professing his aroha for 'the Gospel of God and the law of the Queen'.[502] And Te Tītaha of Ngāti Manu wrote to the Governor in January 1861:

> You have heard the words of the Ngapuhi. They desire to come under the shadow of the Queen. And this is our thought. I seek information from you who point out the way of life and death in the world. This is another word. We wish to enter the house of the Queen, and of the Governor – the house of life.

Ngāpuhi, he continued, 'are orphans, we have no parents, and hence I say, let us embrace the Queen and Governor as our parents'.[503] As Armstrong and Subasic observed, these expressions of support reflected the desire of Ngāpuhi leaders for a closer relationship with the Crown and settlers, but 'should not be interpreted as a wholesale acceptance of Crown authority at the expense of rangatiratanga and tribal authority'.[504] On the contrary, rangatira continued to treat resident magistrates as informal advisors and mediators who could be called on at their discretion, and the magistrates struggled to exert any influence except with the consent of the rangatira.[505] As an example of Ngāpuhi attitudes, the senior Whangaroa leader Hāre Hongi Hika wrote to the Governor saying he would attend the next rūnanga; 'Kia whawhai ki a koe mo nga Ture' ('I would fight you for the laws'). As on other occasions, Ngāpuhi leaders were not seeking to accept government authority, but to restore the treaty alliance as they had understood it – as a mutually beneficial partnership between Māori and the Queen.[506]

Te Raki Māori responses were undoubtedly coloured by the conflict in Taranaki and the Crown's hostility to the Kīngitanga, which was a constant theme at Kohimarama. Ngāpuhi had only recently begun to restore their relationship with the Crown in the wake of the Northern War, and continued to experience considerable anxiety about the Crown's intentions. Early in 1861, rumours began to circulate that the Crown intended to launch 'a general war' against Māori once it had dispensed with Taranaki.[507] This concerned Gore Browne, who regarded Ngāpuhi as the 'most loyal of Her Majesty's [Māori] subjects'.[508] In a hastily arranged trip to the north in February 1861, he offered reassurance that the Crown was not intending to begin such a war against Māori, and northern leaders in turn assured him that they were 'all living in peace and quietness'.[509]

In the hope of demonstrating the Crown's good faith toward Ngāpuhi, Gore Browne attended two hui, one at Te Tii Waitangi and another at Mangonui. Rangatira had called the Waitangi hui to discuss new laws controlling firearms (which were important for hunting) and control of liquor. The Governor said these matters could be discussed at the next national rūnanga. The kaumātua Hōhaia Waikato, who had travelled to London with Hōngi Hika in 1820, asked that the rūnanga be held at Te Tii, reflecting the special place of Waitangi in the Crown–Māori relationship. Waikato said: 'It was I that brought you from England – I and Hongi – therefore it is right that you should come to us.' However, the Governor made no commitment.[510]

Both hui were overshadowed by the Taranaki War and by general questions about the nature of the Crown–Māori partnership. At Waitangi, rangatira were particularly anxious about the conflict in Taranaki and asked the Governor to make peace as quickly as possible. Some, demonstrating their commitment to the Crown–Māori alliance, and their acknowledgement of its price, offered their assistance in the conflict. Gore Browne, in turn, promised to consult Ngāpuhi, as an 'impartial tribe', on the terms of peace. As he had at Kohimarama, he presented the Crown's protection as being conditional on Māori support for the Crown, and held out the prospect of local self-government as an incentive for those who demonstrated that support.[511]

According to Ngāti Hine tradition, it was during this tour that Gore Browne delivered 'an ivory seal, Rongomau,

in the shape of Queen Victoria's hand', to Maihi Parāone. Ngāti Hine claimants described this 'as a token of unity and lasting peace between Maori and Pakeha.'[512]

(12) *Why was the rūnanga never reconvened?*

At the Kohimarama Rūnanga, Gore Browne and McLean had proposed that Māori play significant roles in local dispute resolution and adjudication of land interests, and in the administration of local affairs. They had asked rangatira to discuss these proposals with their communities and report back to another national rūnanga in 1861. Gore Browne, in the meantime, had returned to Auckland and sought advice from Ministers and officials about proposals for governing Māori. Various options were put forward for self-government at local and district levels, and for involving Māori in the machinery of state at a national level.

By September of 1860, the Governor had resolved to establish rūnanga in the country's native districts. They would be able to recommend local bylaws and determine tribal rights in land. One or more rangatira from each district would be appointed to communicate with the Government. Gore Browne also proposed to trial a native land court as well as expand the Native Department and native schools system,[513] and considered establishing a national committee, comprising senior rangatira, to advise on Māori affairs. He proposed to seek Māori consent for these new institutions at the 1861 national rūnanga.[514]

As explained in section 7.3, Gore Browne and his advisers hoped that the proposed new institutions would function as a system of indirect rule, allowing the Crown to manage and control Māori affairs through the agency of rangatira. But this agenda required Māori cooperation, which in turn required extensive consultation and persuasion.[515] During his northern tour early in 1861, Gore Browne also proposed to trial his system at Mangonui.[516] In the event, he did not hold office long enough to see his proposals through. In July 1861, a few months after his northern tour, he learned that he would not be reappointed and that George Grey would succeed him.[517] Grey arrived in September 1861, with instructions to resolve matters in Waikato and establish a system for the peaceful administration of Māori affairs. Whereas Gore Browne had proposed to test his system and then consult rangatira at the next rūnanga, Grey resolved to move quickly and unilaterally.[518] He adopted and modified the system that Gore Browne and other officials had already been discussing, under which the Crown would work with the informal rūnanga that already operated in most Māori communities, integrating them into the colony's legal system and granting them substantial powers to administer local and district affairs, resolve disputes, and determine ownership of land. By this means, Grey hoped to soothe Māori grievances, bring Māori into the colony's system of law and authority, and isolate the Kīngitanga, pressuring it to submit to the Crown.[519]

Whereas Grey supported some degree of Māori decision-making as a means of indirect rule at a local level, he opposed establishing national institutions under the circumstances the colony was then facing and therefore decided not to go ahead with the 1861 national rūnanga. In a memorandum to the Secretary of State, Grey gave several reasons. On a pragmatic level, given the divided state of the colony, he believed it would be impossible to persuade all tribes to send representatives. In particular, the Kīngitanga and its sympathisers would stay away – partly because they had been offended by some of the comments made at the previous rūnanga, but mainly because they regarded the rūnanga as an instrument of the Governor and thus incompatible with their ongoing independence. Under those circumstances, Grey reasoned, 'any measures for the introduction of law and order which had been devised by such a Conference' would have been rejected by many Māori 'simply because they had proceeded from such a Conference.'[520]

But Grey also rejected a second rūnanga for what he described as 'policy' reasons, asking 'whether it would be wise to call a number of semi-barbarous Natives together to frame a Constitution for themselves'. In his view:

> before so many tribes with diverse interests could agree upon such a subject, even if the Governor had proposed a form of

> Constitution to them, it would, in order to suit the prejudices of many ignorant persons, become so altered before it was adopted as to be comparatively useless.[521]

It was therefore 'better for the Governor to frame the measure himself, and then, if he can, get them to adopt it as a boon conferred upon them'. Grey instead resolved to establish a system in which Māori would be governed through local and district rūnanga, as we will discuss in section 7.5. As he explained, his preference was to

> break the native population up into small portions, instead of teaching them to look to one powerful Native Parliament as a means of legislating for the whole Native population of this island – a proceeding and machinery which might hereafter produce most embarrassing results.[522]

In the view of Dr Loveridge, who gave historical evidence for the Crown, Grey was 'rejecting the idea of consulting with the Maori leadership, as any kind of corporate entity, as to the development of policy in Maori affairs'. The absence of any plan to provide for Māori representation in the General Assembly or provincial councils was 'conspicuous'. Grey 'obviously thought that the short-term benefits' of his approach 'outweighed the long-term consequences of depriving the chiefs of a peaceful and public mechanism for influencing government actions and policies'. In Dr Loveridge's assessment, it was 'difficult to agree' with the Governor, and the costs of consultation would have been far less than the costs of the wars and confiscations that followed.[523]

Armstrong and Subasic noted that Native Secretary McLean had viewed national conferences as an important means of keeping 'loyal' rangatira on side and was disappointed with Grey's decision. Many years later, he told the House of Representatives that the Kohimarama Rūnanga had allayed Māori concerns and had maintained peace in the North Island, 'and he was only sorry that the country did not continue for a number of years that system which permitted the chiefs to meet together and debate their affairs in a chamber of their own'. Had the rūnanga continued, McLean asserted, the colony would not have found itself at war throughout much of the 1860s.[524]

7.4.3 Conclusion and treaty findings

What, then, was the precise nature of the 'kawenata' that arose from the Kohimarama Rūnanga? Because Gore Browne and McLean were genuinely seeking rangatira input into questions of policy, because the treaty was discussed, and because the final resolution referred to unity between Māori and the Crown, the rūnanga has come to be seen as a 'fuller ratification' of te Tiriti and as providing the basis for a treaty-compliant partnership between Māori and the Crown. In support of this view, Dr Orange has observed that 'the covenant of Kohimarama' later became a point of reference for Māori political movements such as Te Kotahitanga, whose leaders saw Kohimarama as part of a continuum of Crown–Māori agreements that also included he Whakaputanga and te Tiriti.[525]

Historian Dr (now Professor) Lachy Paterson has cautioned against interpreting the rūnanga's significance 'purely through a Treaty lens', noting that te Tiriti was specifically mentioned in only 26 of 371 speeches by rangatira, and none of the resolutions.[526] The Crown was mainly concerned with gaining support for its war against Taranaki and its campaign against the Kīngitanga, and initiated discussions about the treaty in order to offer Māori a choice between protection and war. According to Paterson, the purpose of any 'affirmation' of the treaty by the Crown was to secure Māori submission to the Crown's authority. The Crown was not offering genuine power-sharing or partnership, under which Māori would be incorporated into 'the top tier of government'; rather, he commented, 'as the government's own rhetoric and subsequent events make clear, any kind of autonomy that might devolve to Māori would be restricted and under Crown control'.[527] Furthermore, in Paterson's view, the Crown saw the substance of the rūnanga as less important than the impression it created. As the extensive coverage in *Te Karere Maori* demonstrated, it was at heart 'an

immense propaganda exercise' aimed at calming settlers and showing Taranaki and Kīngitanga Māori that they were isolated.[528]

In this inquiry, all parties argued that Kohimarama was a valuable step forward.[529] Yet, their interpretations diverged more or less along the lines that Paterson identified; that is, Māori saw the rūnanga (in Paterson's words) 'as a proto-Treaty-compliant partnership' and the Crown viewed it as 'evidence of Māori submission to Crown sovereignty', a position that, in his view, 'privilege[d] fragments of the bare textual record' over 'a fuller and more contextualized reading of the event'.[530]

In submissions to our inquiry, the claimants presented the Kohimarama Rūnanga as 'a reaffirmation of te Tiriti/the treaty relationship' in which the Crown promised that Māori would be involved in their own governance through the annual rūnanga, and Māori saw this 'as a means of establishing political equality, which te Tiriti/the Treaty had promised'.[531] Crown counsel submitted that the rūnanga left 'absolutely no doubt' about the views of Te Raki rangatira: they 'expressed their contentment with residing under the Queen's mana, their desire to be united with settlers and that English law should continue to be extended to them', all in a manner that 'sat squarely within the wider sovereignty of the Crown and its administration of the country'.[532]

This did not mean that Māori were surrendering their rangatiratanga, Crown counsel submitted:

> Rather . . . the Kohimarama Conference was an unprecedented and significant event whereby the Crown, in the exercise of its kāwanatanga, engaged directly with rangatira (including Northland rangatira), in the exercise of their rangatiratanga.

Crown counsel accepted that Māori were not subordinating themselves and wanted to be involved in the process of shaping laws and institutions of government. But, in Crown counsel's submission, Northland Māori 'reaffirmed their relationship with the Queen and the Governor' and accepted that 'the Queen and her Governor had authority [which] related to them'.[533]

We do not accept the Crown's argument that Te Raki Māori were accepting of the Crown's sovereignty. We agree with Paterson that the Crown's position depends on English language translations of the rūnanga proceedings – translations that were made by Crown officials and that purported to show rangatira accepting the Crown's sovereignty when they were in fact acknowledging their long-standing alliance with the Queen and her empire.[534] When rangatira acknowledged the Queen's mana, this was a sign of respect for her status and considerable power – a power with which Te Raki rangatira had consciously chosen to align, in preference to other foreign powers, since 1820. When rangatira acknowledged the Queen's maru, they were acknowledging that she (and her forebears) had made commitments to protect Māori from the threats posed by foreigners and settlers. When they used terms such as 'piri' (cling to) and 'tomo' (marry), they were not expressing submission or pledging allegiance, but acknowledging their partnership with the Queen.

It is also clear that they were anxious to profess their commitment to the Queen and their willingness to work with the Governor. This was consistent with their view of the treaty as providing for a protective alliance and with their ongoing desire to secure a closer relationship with the Crown, under which the promised benefits of settlement would at last come to fruition. It was also consistent with their desire to maintain peaceful relations with the Governor and settlers at a time of considerable volatility in the colony.

The Governor had presented rangatira with a stark choice: align with the Queen and retain her protection or align with the King and lose that protection. Te Raki leaders took that threat seriously, and some subsequently feared a Crown invasion of their district. Under those circumstances, they chose to align with the Queen, as Te Raki leaders now had for 40 years. This does not mean that the rangatira had submitted to the colony's laws or were expressing their willingness to do so. The practical limits

of the Crown's authority are clear from the Governor's proposals, in which he sought to find some means of drawing Māori into systems of law, governance, and land tenure that they had not already adopted. Rangatira undertook to discuss these matters with their hapū.

While rangatira were seeking progress in the treaty relationship, the Crown was also courting rangatira. Having started a war in Taranaki, and with conflict looming in Waikato, Gore Browne could scarcely afford to open new fronts against Ngāpuhi, Ngāti Toa, or other iwi represented at the rūnanga. In order to secure future peaceful relationships with Māori, Gore Browne was prepared to make significant concessions in the direction of Māori self-government and Māori involvement in the colony's system of government. For that reason also, Gore Browne and McLean carefully downplayed the Crown's claim to possess sovereignty over Māori, presenting the treaty not as a cession but as an instrument of protection, repeating the concealment of intentions that had characterised the original Tiriti debates in 1840 in so doing.

If the rangatira at Kohimarama did not affirm the Crown's sovereignty, did the rūnanga conversely affirm a treaty partnership under which the Crown and Māori were equals; and did it provide a forum where they could meet to negotiate matters in which the rangatiratanga and kāwanatanga spheres of influence intersected? On this, the evidence is perhaps more ambiguous. Certainly, the rūnanga provided a means by which rangatira could express their wishes and grievances to the Crown, and thereby influence government policy.

Gore Browne promised that this vehicle would be available every year or two, providing Māori with opportunities for input into the colony's laws. Gore Browne and McLean cultivated the impression that the rūnanga would evolve into a formal advisory body and pave the way for direct Māori representation in the General Assembly. They also made other significant promises: they affirmed the Crown's commitment to protecting Māori from foreign threats and lawless settlers; they promised a considerable degree of Māori control over matters such as local self-government, land titling, and dispute resolution; and they promised further discussion at a national level to determine paths forward on these matters.

But, regardless of the sincerity of these offers, they must be seen in historical context as attempts by the Crown to begin the process of extending its authority into new territories and areas of Māori life. Had these offers been accepted and adopted, and genuine negotiations subsequently occurred to determine the appropriate institutional arrangements for Māori self-government, something approximating a functioning treaty partnership might have emerged.

Such a partnership could not have fully accorded with the original treaty guarantees unless the Crown was prepared to fully recognise and respect the rangatiratanga sphere of authority, which it was not. A new, national advisory body would have been a very important step in the treaty relationship: it would have brought the kāwanatanga and rangatiratanga spheres together in regular dialogue, and would have offered significant opportunities for Māori input into the colony's laws at a time when settler influence was growing, and the Crown was increasingly determined to extend its sovereign authority into territories still dominated by Māori. Gore Browne suggested that the rūnanga might become a permanent institution as part of the colony's machinery of government, and might ultimately play some formal role in the colony's law-making. But it nonetheless was to be an advisory body. While Gore Browne and other officials recognised the practical limitations of the Crown's authority in 1860 in this district and elsewhere, they always saw final authority as resting with the Crown.

From a Te Raki Māori perspective, the rūnanga provided a rare opportunity to engage with the Crown, to affirm their commitment to a treaty relationship in which the Queen would offer protection, and to engage in dialogue about a treaty partnership in which authority might be shared, and peace and prosperity finally secured. But it is notable that Te Raki leaders did not express great enthusiasm for the Crown's various proposals for land,

criminal law, and administration of Māori communities. Nor did Te Raki Māori leaders return from the rūnanga feeling entirely secure about the Crown's intentions; on the contrary, as we have seen, very soon afterwards rumours were spreading in the north that the Crown intended a general war against Māori. Gore Browne was concerned about Ngāpuhi resistance and visited the north to ease these concerns.

We agree with the many scholars who have seen Kohimarama as an unprecedented opportunity for dialogue between the treaty partners and therefore as a potential step towards meaningful treaty partnership.[535] But it was no more than a step. It took on greater significance to Māori in subsequent decades because it was not repeated, and because the Crown subsequently abandoned any pretence that it was willing to accept that rangatira could participate in government at a national level on anything approaching equal terms. The initial promise of Kohimarama remained unfulfilled.

Grey's unilateral decision to abandon all future national rūnanga reflected his ideas of British racial and cultural superiority, his determination to discourage Māori nationalism, and his unwillingness to share power. By making this decision, the Governor forestalled any opportunity for further negotiation between Māori and the Crown over matters such as land and local government. As the Tribunal found in the *He Maunga Rongo* report, this was a critical lost opportunity to build a forum for Crown–Māori dialogue and consensus building. At Kohimarama, the Crown came closer to recognising a Māori 'parliament' than at any other time, and then deliberately rejected this opportunity 'on very inadequate grounds'.[536]

As we will see in section 7.5, after this the Crown made its own decisions about the governance of Māori, with (for the most part) little input from Māori communities.

Accordingly, we find that:

- By calling the Kohimarama Rūnanga only after war had already broken out, the Crown ensured the rūnanga focused primarily on its own agenda, that is on seeking Māori approval for the war and on its own proposals for administration of Māori affairs rather than responding to the priorities of Māori leaders. This was inconsistent with the Crown's duty of good faith, in breach of te mātāpono o te houruatanga / the principle of partnership.
- Governor Grey's decision to cancel the planned 1861 national rūnanga and all future national rūnanga was inconsistent with the Crown's obligation of good faith. The decision was a critical missed opportunity to build a forum for regular dialogue between the rangatiratanga and kāwanatanga spheres. It denied Māori (including Te Raki Māori) opportunities for ongoing input into government policy on matters of fundamental importance to them, including questions of land titling and administration, local government, and justice. By denying this opportunity, the Crown was in breach of te mātāpono o te houruatanga / the principle of partnership.

7.5 To What Extent Did Governor Grey's 'New Institutions' Adequately Provide for the Exercise of Tino Rangatiratanga by Te Raki Māori?

7.5.1 Introduction

After his return to New Zealand in 1861, Governor Grey acted swiftly to establish new institutions for governing Māori communities. Whereas Gore Browne had intended to consult further on these 'new institutions' and then trial them before implementing them across the country, Grey forged ahead with his own plans. The model he adopted recognised local and district rūnanga, granting them significant powers of local self-government, including rights to propose regulations, manage public works, oversee health and education, determine land ownership and boundaries, and oversee settlement. The existing resident magistrate system would continue with an enhanced role for Māori assessors.[537] Grey's system, developed with input from Ministers in the colonial Government, provided no formal means by which Māori could influence law or

policy at a national level – there would be no national rūnanga or advisory council, and nor did Grey give any priority to Māori representation in the General Assembly. As Dr O'Malley concluded, Grey's 'preferred method of indirect rule' was through local influence.[538]

New Zealand's first district rūnanga met in the Bay of Islands in March 1862, followed by the Mangonui rūnanga, in late July – early August. Provision for the establishment of native rūnanga under legislation was not made until March 1862.[539] Other rūnanga were progressively adopted elsewhere in the country (though not in Mahurangi or Kaipara).[540] Grey had promised Te Raki Māori that the system would be permanent and would allow them to achieve their ambitions for settlement and economic development, including the establishment of a long-awaited township.[541] But the district and local rūnanga operated for fewer than four years before a change of Government led to the withdrawal of funding and official support – a policy change that coincided with increased emphasis on individualisation of Māori land titles through the Native Land Court, as discussed in chapter 9.[542]

Claimants told us that rūnanga had existed throughout the north since pre-treaty times, and that Grey's ambition was to co-opt this pre-existing system of government while introducing 'a heavy overlay of Crown control'. Nonetheless, claimants said, the system provided for Māori to exercise 'a significant role in the administration of their district'. The Crown withdrew support because, in the wake of the Waikato War, it decided 'to reduce or disestablish any manifestation of Māori political autonomy or "special treatment"'.[543] By withdrawing funds and effectively disestablishing the rūnanga, claimants said, the Crown broke its promises and committed a serious breach of te Tiriti.[544]

The Crown submitted that, through the rūnanga, it had 'actively supported Northland Māori in self-government' in a manner consistent with treaty guarantees:

> [The] breadth of jurisdiction that runanga enjoyed was broadly similar to that held by provincial government at the time, though runanga had a criminal jurisdiction that provincial governments lacked.

The Crown denied that it had abolished rūnanga. Crown counsel submitted that rūnanga were affected by government-wide funding cuts but nonetheless continued to operate beyond 1865. The Crown did not say when or why rūnanga ultimately ceased to operate.[545]

7.5.2 The Tribunal's analysis

(1) *Prior to Grey's 'new institutions', how had Governors attempted to govern Māori communities?*

Grey's decision to establish the 'new institutions' must be seen in the context of previous attempts to introduce English law into Māori districts. This was an issue that had exercised Crown officials since the time of the treaty: Governor Hobson had been instructed to tolerate Māori customary law while gradually leading Māori towards accepting the British legal system; successive Governors had since tried several legal and institutional models involving varying degrees of acknowledgement of existing chiefly authority and Māori law.

As discussed in chapter 4, the Native Exemption Act 1844 provided some recognition of the principle of utu in cases of 'theft',[546] and provided that, outside of townships, Māori could be arrested only by rangatira. This was replaced by Governor Grey's Resident Magistrates Courts Act 1846, which established a district court system for minor civil and criminal matters and provided for the appointment of Māori assessors. Usually rangatira of senior rank, they were empowered to determine civil cases involving only Māori. Magistrates could issue arrest warrants for Māori, but the payment of utu for theft and assault was retained.[547]

In our view, both these ordinances were intended to assimilate Māori into the colony's legal system, and recognised Māori customary law and authority solely because colonial officials knew they could only achieve their objectives with cooperation from rangatira. According to Professor Robert Joseph, the resident magistrate system achieved some degree of acceptance from Māori communities for this reason, and because, in effect, it allowed them to determine which laws would apply to them.[548]

After its introduction, the resident magistrate and assessor system provided 'the basis of official administration

and law enforcement in Maori districts for the next fifty years'.[549] The system did not draw Māori into the colony's legal system as rapidly as Grey had hoped but did provide Māori communities with an alternative and sometimes useful method of dispute resolution. In this district, resident magistrates were appointed from 1846, but Māori continued for the most part to enforce law among themselves, typically rejecting Crown attempts to interfere in their affairs or acquiescing only after magistrates appealed to senior rangatira.[550]

Subsequent nineteenth-century efforts to extend English law into Māori districts all retained and built on this basic magistrate-and-assessor model. The Native Circuit Courts Act 1858 expanded the influence of assessors and enabled them to hear some civil cases alone. Magistrates and assessors were also charged with enforcing local regulations on matters such as public health, animal control, and the suppression of 'injurious' Māori customs.[551] The Native Districts Regulation Act 1858 empowered the Governor to make these regulations and apply them to territories that remained in customary ownership.[552]

Māori were not consulted on either of these Acts, although section 6 of the Native Districts Regulation Act provided that any regulations must 'as far as possible be made with the general assent of the Native population affected thereby'. At the time, local rūnanga were expected to play that role.[553] The objective, according to Native Minister Richmond, was to introduce to Māori communities 'Institutions, English in their spirit, if not absolutely in their form'.[554] Early in 1859, the Mangonui district was proclaimed under both Acts but not brought into practical effect. William Bertram White had arrived in the district in 1848, and a few years later was appointed resident magistrate. He continued in the role under the new system, and we have seen no evidence of new assessors being appointed or rūnanga being established.[555] (In chapter 6, we referred to another William White, an early Wesleyan missionary who made several claims for pre-1840 land purchases.)

By 1860, with the colony at war in Taranaki, Crown officials sought options that undermined the Kīngitanga and more generally deterred the spread of Māori nationalist sentiment. To this end, they sought to recognise some form of Māori self-government while still supporting longer-term assimilation. Ultimately, they turned to a model first suggested by the official Francis Dart Fenton, under which local rūnanga would regulate their own affairs. This system was tried in Waikato from 1857, with mixed success.[556]

Nonetheless, in 1860 McLean proposed the establishment of a national system of tribal rūnanga, along with the appointment of 'head chiefs' on the Crown payroll, who would manage affairs in their territories. By drawing existing Māori leaders into the rubric of the colonial state, McLean hoped to secure their loyalty and assert the Crown's authority by indirect means.[557]

Richmond then proposed to use the Native Districts Regulation Act to make this system operational by dividing the country into native districts and appointing a single rangatira from each to assist the resident magistrate and propose bylaws for managing his people.[558] This is essentially the system that Gore Browne adopted in September 1860, though (as discussed in section 7.3.2) he also intended to continue with regular national rūnanga.[559]

(2) *Why did Grey establish the 'new institutions'?*

As we have noted, Grey arrived in September 1861 during a highly volatile period for the colony.[560] The first Taranaki War had only recently ended, and the Crown was preparing for war in Waikato. The first Stafford ministry had fallen in July, replaced by a new Government under William Fox.[561]

The Colonial Office tasked Grey with achieving four related objectives: first, to secure peace in the colony in a manner that would demonstrate the Crown's strength and discourage any further outbreaks of resistance; secondly, if it was safe to do so and 'acceptable to the colonists', to transfer responsibility for Māori affairs to the Executive Council; thirdly, to establish 'some institutions of Civil Government, and some rudiments of law and order' in native districts that had 'hitherto been subjects of the Queen in little more than in name'; and lastly, to create a tribunal to resolve disputes and determine title to Māori land.[562]

George Grey, who served two terms as Governor of New Zealand. During his first term in office from 1845 to 1853, Grey sought to bring Māori under the colonial system of law and government. In the Northern War, he sought a decisive victory over Hōne Heke and Te Ruki Kawiti but instead accepted an unconditional peace after the battle of Ruapekapeka. Following the war, Grey obtained a deferral of the Constitution Act 1846 while the Crown's authority was not secure in parts of the colony. Over the following years, he developed purchasing policies to extend the Crown's authority over Māori by extinguishing customary title over entire districts and confining hapū to small reserves for their subsistence. Prior to the passage of the Constitution Act 1852, Grey assured the House of Commons that Māori had formed a 'harmonious union' with the settlers. When he returned to the Governorship in 1861 after the outbreak of war in Taranaki, Grey adopted 'new institutions', which brought existing rūnanga under a Crown controlled system and limited Māori influence at a national level. Grey's relations with the Colonial Office became strained during his second term of office, and he was lucky to escape censure; his term ended in 1868. He later served as Premier of New Zealand from 1877 to 1879.

The Secretary of State (Newcastle) encouraged Grey to consider the establishment of native districts under section 71 of the New Zealand Constitution Act 1852, and to pay salaries to rangatira who could be 'attached to the Government' and assist resident magistrates to administer their districts. He encouraged Grey to use diplomacy as far as possible with the Kīngitanga, rather than treating the movement as a threat merely because it used the term 'King'. Nonetheless, Newcastle also promised to assist Grey with troops if needed, providing that, so long as the troops remained in New Zealand, the Governor would retain power of veto over any policies affecting Māori.[563]

Newcastle also encouraged Grey to establish a court or tribunal to determine Māori land title, with a view to allowing direct land dealings between Māori and settlers.[564] Newcastle acknowledged that this policy would be a departure from the treaty, a document that the instructions otherwise did not mention, but he saw the new approach as prudent given that the Taranaki War had arisen from a disputed Government purchase at Waitara. This policy led to the introduction of the Native Land Court, which we discuss in chapter 9.[565]

Grey's arrival was a significant step in the colony's transition to responsible government, and Ministers certainly influenced Grey's plans. At the time of Grey's appointment, the views of colonial Ministers were in any case broadly in line with those of the Governor and the Colonial Office. Premier Fox and his colleagues advised the Governor that tensions between Māori and the Crown could be resolved only through a 'large and liberal policy' that would 'go to the root of the disease' (that is, the reality of Māori autonomy) instead of seeking merely to repress it. This, in Fox's view, could be achieved through 'the creation of permanent civil institutions which may include the Native race and bring both races under one uniform system of government'. Fox advised that the colonial Parliament had already legislated (through the Native Districts Regulation Act 1858) to introduce such a system, but no progress had been made.[566]

In October 1861, just weeks after his arrival, Grey had outlined a 'Plan of Native Government', setting out the framework for his new institutions. Under the plan, the 'native portions' of the North Island would be divided into 20 districts, each divided into five or six 'hundreds'. Each hundred would be administered by a local rūnanga. Two members of each rūnanga would be appointed as assessors or 'native magistrates'. For law enforcement, each hundred would have a Pākehā police officer and five Māori constables, who would be nominated by the rūnanga. The assessors, police officer, and constables would all be on the Crown payroll. All appointments would be subject to the Governor's approval.[567]

The plan also provided for the establishment of district rūnanga, comprising the assessors from the hundreds under the oversight of a Pākehā civil commissioner. District rūnanga were tasked with building and maintaining public works, overseeing schools and hospitals, hearing land disputes, and making recommendations to the civil commissioner for Crown grants to iwi, hapū, and individuals. Rūnanga would also have a say over settlement within their districts by vetting any prospective buyers and proposing conditions of any sale or lease. Each district would have the services of three Māori clergymen and schoolmasters. Whereas Gore Browne had proposed to trial local institutions in Mangonui, at a cost of £140 per year, Grey's scheme proposed some 60 Pākehā and 1,040 Māori on the colony's payroll, at an annual cost of £49,000 plus another £6,000 for buildings. All decisions made by district rūnanga would be subject to confirmation by the Governor in Council.[568]

Grey explained that his objective in proposing this system was to enable all subjects to 'participate in the benefits of law and order, be maintained in the undisturbed possession of their lands, and enjoy a perfect security for life and property'. To achieve these ends, it was desirable that:

> [Māori] should, in as far as practicable, themselves frame and enforce regulations suited to their various requirements, and take an active share in the administration of the government of their own country.[569]

Although the plan was presented under the Governor's name, it was heavily influenced by executive councillors William Fox and Henry Sewell, and also by Fenton.

Certainly, the existing Native Circuit Courts Act and Native Districts Regulation Act provided sufficient legislative authority.[570] Grey's biographer, James Rutherford, saw the plan as a merger of Grey's resident magistrate scheme and Fenton's 1857 rūnanga scheme, which was briefly trialled in Waikato.[571] When responding formally to the plan on Ministers' behalf, Fox particularly objected to Grey's 'rigid' restrictions on the acquisition of Māori land. Grey had proposed, among other things, that district rūnanga control the selling and leasing of Māori land once title to it had been ascertained. But Fox countered that Māori should be free to lease or sell their lands as they chose.[572] Grey conceded on this point, and it was reflected in the finalised plan.[573] Grey reassured Ministers that all he sought was the rūnanga's agreement to intended sales and that 'no one should be allowed to grasp more land than he can use'.[574]

Grey's new institutions must be seen in the context of his rejection of a second Kohimarama Rūnanga or any other means by which Māori could have input into colonial policy at a national level. As discussed in section 7.4, Grey preferred to 'break the Native population up into small portions' instead of creating a national focus for Māori influence. In other words, Māori could be more effectively controlled and governed (to use McLean's phrasing) if their influence was confined to local districts. Some newspaper commentators saw in the scheme a revival of Grey's earlier 'flour and sugar' policy.[575]

Professor Ward considered the new institutions as part of a tradition of attempts by colonial officials to 'outbid the King movement' by granting the day-to-day authority of Māori leaders while incorporating them into the colony's legal framework. An 'ulterior' purpose was to encourage Māori leaders to subdivide their lands and individualise title. While there was 'much talk of encouraging the Maoris in self-government', the ultimate purposes were to 'undermine the King movement and . . . encourage alienation of land'.[576] The reality, as colonial officials acknowledged, was that rūnanga were already operating throughout much of the North Island and exercised far greater everyday control over Māori communities than the Crown could hope to. Harnessing their energy was the only realistic means by which the Crown could hope to extend its systems of law, government, and land tenure into districts where Māori remained the majority.[577]

Dr O'Malley's view was that the new institutions 'appeared to offer self-government' even as they 'aimed at the extension of English law'.[578] The rūnanga were a 'carrot' Grey intended to use to secure allegiance from Ngāpuhi and other tribes, 'before dealing with the looming Waikato crisis head on'.[579] Dr Orange expressed a similar view. Grey's clear objective, she said, was 'to bring Maori within the compass of British authority' in order to secure 'undisputed control over the whole country'. Grey therefore established rūnanga in some territories – promising autonomy while intending the institutions as a 'training ground' for eventual Māori amalgamation into the colony's system of law and government. While he pursued peace in some districts, he prepared for war in others. 'By persuasion or by force,' Dr Orange concluded, 'Maori were to be brought to submission. It was to be a war of sovereignty on two fronts – political and military.'[580]

We agree with these historians about Grey's underlying motives. The Colonial Office, Ministers, and the Governor were all in agreement during the early 1860s that Māori – who remained practically autonomous in many parts of the North Island – must be guided towards adoption of the colony's laws, and that this could most effectively be achieved by establishing institutions that promised some degree of self-government within a framework of Crown oversight. This was an assimilationist policy, but also one that aimed to prevent or at least contain war – and one, as we will see, that Māori were capable of adapting to meet their own objectives in a manner that created potential for partnership between the rangatiratanga and kāwanatanga spheres at a local level.

(3) *What did Grey promise Te Raki Māori in return for their adoption of the 'new institutions'?*

Grey did not consult Māori leaders while he was developing his plans for the new institutions. As Dr Kawharu observed, the plan was 'proposed not by Maori but by the Crown for Maori'.[581] Grey did, however, recognise that the new institutions could succeed only if Māori embraced

them. To that end, he visited Northland in November 1861 to explain his proposals and advocate for their adoption.

William B White and James Clendon, resident magistrates of Mangonui and the Bay of Islands respectively, had advised Grey that northern Māori generally opposed the King movement and were amenable to a new system of local government. Māori in these districts,[582] who continued to outnumber settlers by a considerable margin (5,000 Māori to 600 settlers in the Bay of Islands in 1861), were favourably disposed towards settlers and had shown some willingness to experiment with Pākehā customs when they saw benefits to doing so.[583] Furthermore, from Grey's point of view, Ngāpuhi support or at least neutrality was essential in the event that war did break out in Waikato.[584]

(a) Grey's visit to the north

Grey attended a series of hui in the Bay of Islands and Hokianga, presenting his proposed system of government as the means by which Māori might make laws, share in government, and secure the economic prosperity that had been withheld from them since the Northern War.[585] At Kororāreka, he told rangatira that 'a change must take place in their government and customs'. He said that the north had many rūnanga 'set up in this place and in that place, all making various laws' and that the time had come to 'make use of all these existing institutions but to put them into a new and better condition'.[586]

Grey proposed a two-tier system under which each settlement would have its own rūnanga and would also be represented on a district rūnanga. The district rūnanga would make laws 'for many things', including 'all questions about the boundaries and ownership of lands', as well as other matters such as fencing and cattle trespass. The Government would assent to these laws, which would then be enforced by Māori constables.[587] With respect to legal disputes or breaches of peace, Māori assessors would hear minor cases, and judges would visit from time to time to hear serious cases.[588]

Grey added that all Māori officials and constables would be well paid[589] and that, as well as making laws, the district rūnanga would make decisions about public works and development; for example, the rūnanga would decide where to build roads, hospitals, jails, and other works, and it would also decide what medical and other services were needed. In short, it would be his 'eyes and ears' in the district, since he could not make decisions about the north while he was based in Auckland.[590]

Grey informed those present that George Clarke senior, whom he intended to appoint as civil commissioner, would visit all kāinga to explain further details and determine 'who were to be the people to carry these plans into effect'.[591] This raised questions about whether rūnanga would be truly autonomous, and led rangatira to insist that they would make their own appointments; Grey advised them to speak with Clarke about the matter.[592]

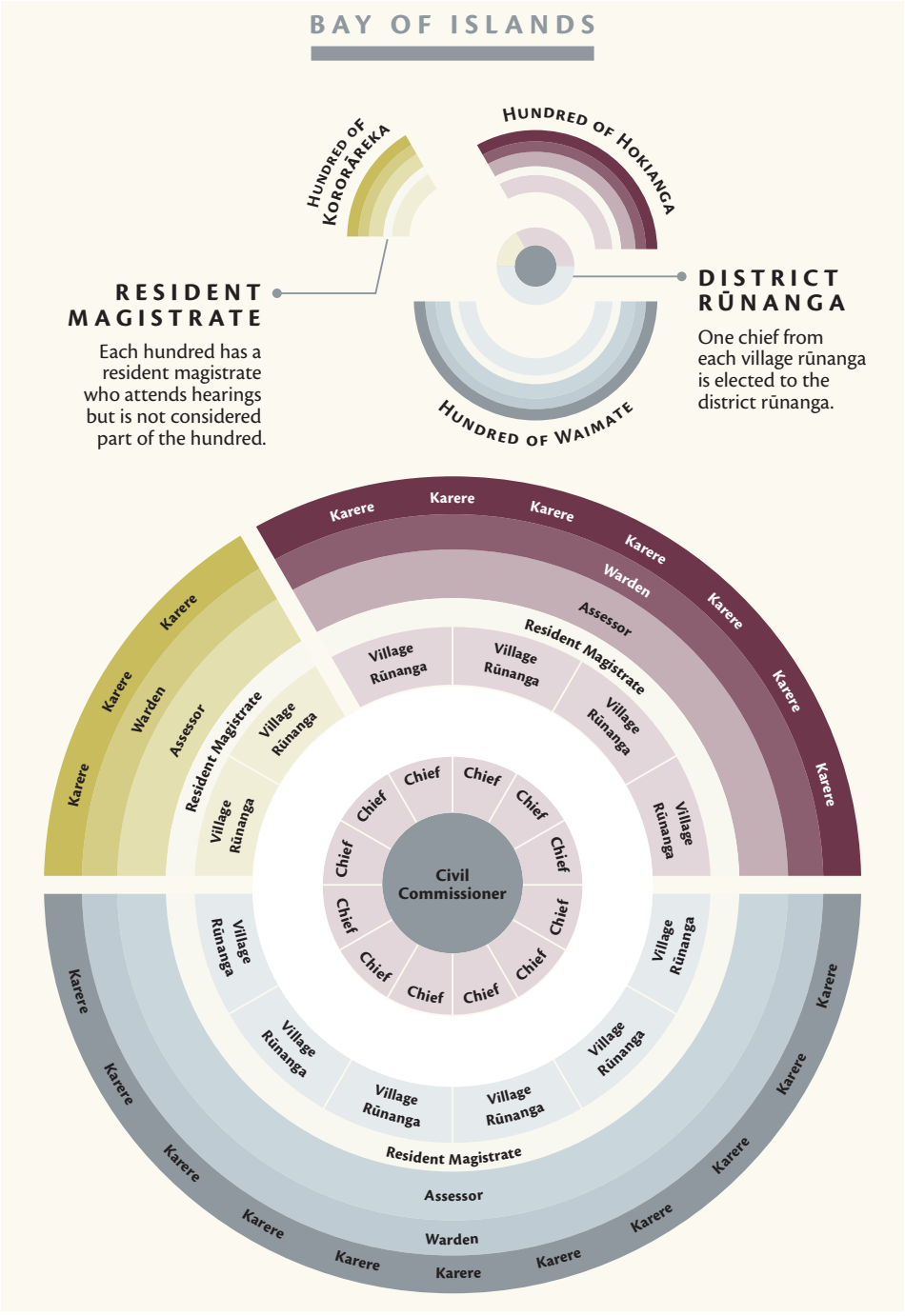
Some rangatira expressed concerns about how workable the system might be, questioning, for example, whether 'it would be found possible to execute the law in case a great chief were the offending party'. Grey's response was that any constable who failed to carry out his duty would lose his salary. Someone asked: 'Suppose a chief should kill a policeman?' Grey responded:

> all his brother-policemen would come to his assistance, the men from constantly acting together would become a hapū and would help each other fast enough. All the police in the country would be sent to help them.[593]

Many rangatira asked questions about the provisions for paying native officers, and some observed that 'Maori assessors were not so well paid as European magistrates'. Grey responded that 'they had not had so much work to do, but that for the future they would have more work and be better paid'.[594] While Grey sought agreement from Te Raki leaders to implement his scheme, they were more concerned with reviving Māori economic fortunes, and they therefore asked about the Crown's failure to establish a township at Kerikeri as Governor Gore Browne had promised in 1858 (see chapter 4).[595]

Tāmati Pukututu told the Governor:

> Ka tono atu ahau ki a koe ko nga tono o mua. Homai he Pakeha ki au kia tini me etahi Apiha ano hoki. I tukua atu ai e



The structure of Governor George Grey's rūnanga system or 'new institutions'. The diagram is based on a government report into the proposed operation for the Bay of Islands district rūnanga; in practice, the institutions did not necessarily operate in accordance with the proposed structure. The first district rūnanga was established in January 1862 in the Bay of Islands and Mangonui, but the rūnanga system was short-lived, operating for fewer than four years before a change of Government saw the withdrawal of funding and support.

> ahau te Kawakawa, he mea kia nohoia e te Pakeha. Tukua mai etahi Pakeha hei hoa moku. Ka mea atu nei ahau ki a koe; ko to aroha tenei ki au, ko etahi Pakeha, tukua mai e koe ki au: hohorotia mai kei wha mate ahau, kia kite ai ahau i o Pakeha. E hoa, e Kawana Kerei, homai e koe he Pakeha maku.
>
> I will ask you for the things which I have asked you for before. Give me plenty of Pakehas, and also some officers. I gave the Kawakawa in order that it should be occupied by Europeans. Send me some Pakehas to be my friends. I now say to you, shew your love for me by giving me Pakehas, and do so quickly before I die, that I may see your Pakehas. Friend, Governor Grey, give me Pakehas.[596]

This, then, became the lever that Grey would use to persuade Māori to accept his scheme. In response to requests for settlement, a township, and increased commerce, Grey promised to make arrangements for their introduction. He insisted that land titles must be determined first – but had promised that district rūnanga could take care of that.[597] At Kerikeri the following day, rangatira presented Grey with two letters concerning the promise to establish a township. The first, from 'Nga rangatira o Ngapuhi', read:

> Manaakitia e koe nga kupu a tou hoa a Kawana Paraone; mau e whakamana aianei pu ano. Kaua, e pa e Kawana, e waiho kia roa, kia whakanohoia e koe he Taone ki konei. Kua oti te ruri nga pihi whenua e takoto nei; heoi, he tatari kau atu ta matou ki te kupu. Homai he Pakeha, homai he taonga, homai he mahi; ara, ma te Ture atawhai o te Kuini e whakakotahi nga Iwi e rua.
>
> Respect the word of your friend Governor Browne, and carry it out now at once. Do not delay O Governor to establish a town here: the land has been surveyed, and we are only waiting for the word. Give us Pakehas; give us wealth; give us employment, and let the kind law of the Queen unite the two races.[598]

Another letter from Te Hikuwai and other rangatira also asked Grey to keep his predecessor's promise, and Wiremu Hau told the Governor directly: 'Kua he pea, no te mea, ko ta matou kua oti, ko tana kihai i te oti.' *Te Karere Maori* translated this as: 'there is perhaps some error, for we have performed our promise, whereas his [Gore Browne's] is not yet performed.'[599]

Grey did not respond directly. Instead, he turned the discussion back to his proposals, insisting that economic development had been retarded in the north because there was no authority to make and enforce laws. Grey continued:

> We Europeans are richer than you, because we have laws or regulations made and enforced by ourselves. We set apart one class of men to make the laws, and another to enforce them.[600]

The rūnanga, he said, would provide for towns, roads, schools, hospitals, and 'Europeans to live with you'.[601] In short, whatever Māori were seeking, 'The runanga would provide for all these wants.'[602] As Dr O'Malley observed, this was Grey's way of 'dodging responsibility' for the Crown's failure to keep its earlier promise of a Kerikeri township:

> Essentially, Grey placed the onus back onto northern Māori to subscribe to and actively support his proposals for indirect rule through state-sanctioned rūnanga as the cost of gaining the townships so desperately desired by the tribes. Yet as Wi Hau had noted, Māori had already fulfilled their part of the bargain by agreeing to provide lands for the proposed settlements. Grey, at his slippery best, had shifted the goalposts significantly.[603]

Grey furthermore insisted that rūnanga would become a permanent safeguard for Māori rights, as they could not be set aside at the whim of the Governor or Government. According to the official record,

> Sir George Grey said that he would be putting up for them a shelter and refuge for all times. It was far better that they should make laws for themselves, than that he should do it for them by his own will. If Europeans came to settle in their

> country then they would be in their runangas too and they would consult together. Laws would be made with the consent of both Governor and runanga. Thus a strange Governor could by no possibility make laws in his ignorance that would injure them, for a law once made could only be altered by the consent of both. A new Governor could not break down their laws, but they would remain a safeguard for them and for their children forever.[604]

As Armstrong and Subasic noted, Grey's comments held out the prospect 'that the Runanga would, as settlement developed, administer the affairs of both races working together in some kind of social and political partnership with the settlers':

> [This] highly desired process of settlement would, as Grey had confirmed at Kororareka on the previous day, not only be encouraged by the establishment of the Runanga but would be directly facilitated by the Crown.[605]

Again, rangatira expressed concern about how the rūnanga would be appointed. Grey left his answer for a hui the following day at Waimate. There, he said that hapū would be 'consulted' on the appointment of assessors, and that only 'good and deserving men' would be appointed.[606]

At his final hui at Herd's Point (Rawene), Grey went into more detail about the role of district rūnanga in resolving land disputes. He asserted that the rūnanga would have the final say on all disputes, including those between Māori and settlers, and between Māori and the Crown:

> If any dispute about land should hereafter arise between the Government and the natives, the Governor would put himself into the same position as a Maori chief, and would leave the matter to be decided by the runanga and consider himself bound by that decision whether favourable or not. Thus there would be one law for all persons whether native or European.[607]

Grey also revealed that the district rūnanga would be appointed from among the assessors and would have a European (the civil commissioner) as president; these details had not been explained in the Bay of Islands hui. Once rūnanga were operating, he said, there would no longer be 'any fear of wrongs and disputes between natives and Europeans', and the Government would 'therefore no longer keep Europeans out of the Hokianga district but would encourage settlement . . . [a]s soon as the boundaries were fixed'. Grey also assured those present that 'a town would necessarily spring up in the Hokianga district' once the new institutions were established. Every member of the rūnanga would have a house in the Hokianga, and there would also be a doctor and a schoolmaster, all creating demand that would attract European merchants to the district. The tensions in Waikato would not in any way delay the establishment of a town, Grey said.[608]

Māori at the hui were reportedly supportive of his proposed institutions, but even more pleased with his promise that towns would be created.[609] As Dr O'Malley observed,

> By effectively linking support for the rūnanga scheme with the establishment of townships the governor thus managed to secure the agreement he sought for his proposals. He had done so, however, only at the cost of greatly heightening expectations among northern Māori as to the benefits the scheme might be expected to bring them.[610]

The promises Grey made to northern rangatira were in our view highly significant. The Governor proposed a new system of local government in partnership with the Crown, which explicitly built on the district's existing network of local rūnanga. If Māori adopted his proposals, he said, they would benefit from settlement (including a township), as well as schools, hospitals, and medical services. The business of making and enforcing laws, governing the district, and guiding public works and economic development would be delegated to them. Pākehā, including the Governor himself, would be subject to district rūnanga and their laws. Furthermore, the proposed new system would be established permanently. For Te Raki Māori, the Governor seemed to be promising the partnership they had been seeking for many years. The test would be in what the Crown delivered.

(b) Grey's circular letter to northern rangatira

In December, Grey reported to the Secretary of State for the Colonies that his visit had been successful and that he hoped to establish the new institutions for all territories north of Auckland within two months. He hoped also that the example set by the north would influence other Māori to adopt the new institutions.[611]

Grey took some initial steps to keep his promises, transferring large tracts of Crown land in the north to the Auckland Provincial Council so it could be opened for settlement, and preparing a plan for the establishment of townships on Crown lands, with schools, hospitals, administrative centres, and allotments for the principal rangatira. He also considered the possibility of assisting immigrants on condition that they settle in these townships. Although Grey's plans were ambitious and potentially costly, he regarded this as a temporary issue: as economic development occurred, he believed, Māori and settlers alike could pay land and income taxes to defray the costs of local government and public works.[612]

To help explain his scheme, Grey issued a circular, printed in Māori and English, to be distributed in the north and elsewhere (see the sidebar on pages 832–833). We have a copy of the English text only, from which we draw the quotation following. In this circular, Grey explained his intention that all subjects, Māori and non-Māori, 'should have the benefits of law and order', including protection from harm, and secure enjoyment of lands and possessions. Again, Grey drew an explicit link between English law and prosperity:

> The Europeans in New Zealand, with the help of the Governor, make laws for themselves, and have their own Magistrates; and, because they obey those laws, they are rich, they have large houses, great ships, horses, sheep, cattle, corn, and all other good things for the body. They have also Ministers of Religion, Teachers of Schools, Lawyers, to teach the law; Surveyors, to measure every man's land; Doctors, to heal the sick; Carpenters, Blacksmiths, and all those other persons who make good things for the body, and teach good things for the souls and minds of the Europeans. It is because they have made wise and good laws, and because they look up to the Queen as the one head over all the Magistrates, and over all the several bodies of which the English people consists.[613]

Grey's desire was that Māori 'should do for themselves as the Europeans do'. He had therefore determined to assist Māori in establishing a system of law within their districts, which the Crown would fund 'till such time as the Maories shall have become rich, and be able to pay all the expenses themselves'. We have already set out the structure of Grey's new institutions, including the functions of district and local rūnanga, and the roles of civil commissioners, assessors, and other officers. Grey's circular provided some elaboration. It clarified that the Governor would have the final say over the appointment of assessors and over any bylaws passed by district rūnanga.[614]

In fact, the Governor already had oversight of all regulations being produced by rūnanga or otherwise. The Native Districts Regulation Act 1858 did not provide for rūnanga to make regulations for native districts but provided for the Governor in Council (that is, the Governor acting as part of the colony's Executive Council) to make those regulations, so long as the Governor was satisfied that the regulations had the 'general assent' of the affected Māori.[615] Grey's circular observed that the Governor also approved all laws passed by the General Assembly. For provincial councils, the power of assent was delegated to the provincial superintendent, although the Governor could disallow the Bill within three months of it passing.[616]

Regarding land, the circular said that rūnanga would 'decide all disputes' and should establish a register of ownership. Grey had promised that the Crown would be subject to rūnanga decisions on land, but this was not made explicit.[617] The *Daily Southern Cross* noted some ambiguities in the plan. In particular, in the newspaper's view, it was not clear whether the proposed land register would record individual or collective interests; nor was it clear what role the rūnanga would play in administering land transactions between Māori and settlers. The newspaper also expressed concern that there was no national assembly to ensure consistency across the country in terms of rulings about land.[618]

The Structure and Functions of Grey's New Institutions

This is the English language text of Governor Grey's circular letter to Māori leaders explaining his 'new institutions':

1. The parts of the Island inhabited by Maories will be marked off into several districts, according to tribes or divisions of tribes, and the convenience of the natural features of the country. To every one of these districts the Governor will send a learned and good European to assist the Maories in the work of making laws and enforcing them; he will be called the Civil Commissioner. There will be a Runanga for that district, which will consist of a certain number of men who will be chosen from the Assessors. The Civil Commissioner will be the President of that Runanga to guide its deliberations, and if the votes are equal on any matter, he will have a casting vote to decide. This Runanga will propose the laws for that district, about the trespass of cattle, about cattle pounds, about fences, about branding cattle, about thistles and weeds, about dogs, about spirits and drunkenness, about putting down bad customs of the old Maori law, like the *Taua*, and about the various things which specially concern the people living in that district. They will also make regulations about schools, about roads, if they wish for them, and about other matters which may promote the public good of that district. And all these laws which the district Runangas may propose will be laid before the Governor, and he will say if they are good or not. If he says they are good, they will become law for all men in that district to which they relate. If he says they are not good, then the Runanga must make some other law which will be better. This is the way with the laws which the Europeans make in their Runangas, both in New Zealand and in the great Runanga of the Queen in England.

2. Every district will be subdivided into Hundreds, and in each of these there will be Assessors appointed. The men of that district will choose who shall be Assessors, only the Governor will have the word to decide whether the choice is good or not. The Magistrate, with these Assessors, will hold Courts for disputes about debts of money, about cattle trespass, about all breaches of the law in that district. They will decide in all these cases.

3. In every Hundred there will be Policemen, and one Chief Policeman, who will be under the Assessors. These Policemen shall summon all persons against whom there are complaints before the Court of the Assessors, and when the Assessors shall have decided, the Policeman will see that the orders of the Assessors are carried out. All fines which shall be paid shall be applied to some public uses. The Commissioner or Magistrate will keep this money till it is required.

4. The Runangas will also be assisted in establishing and maintaining Schools and Teachers; sometimes Europeans, sometimes Maories, will be appointed. The Maories ought to pay part of the salary of the School Teacher, the Governor will pay the rest.

5. Where the Runangas wish to have [a] European Doctor to live among them, the Governor will endeavour to procure one to reside there, and will pay him so much salary as may make him willing to go to that work. The Doctor will give medicine to the Maories when they are sick, and will teach them what things are good for the rearing of their children, to make them strong and healthy, and how to prolong the lives of all the Maories by eating good food, by keeping their houses clean, by having proper clothes and other things relating to their health. This will be the business of the Doctor. But all those who require the services of the Doctor will pay for them, except such as the Runanga may decide to be too poor to do so.

6. About the lands of the Maories. It will be for the Runangas to decide all disputes about the lands. It will be good that each Runanga should make a Register, in which should be written a statement of all the lands within the district of that Runanga, so that everybody may know, and that there may be no more disputings about land.

> This, then, is what the Governor intends to do, to assist the Maori in the good work of establishing law and order. These are the first things:—the Runangas, the Assessors, the Policeman, the Schools, the Doctors, the Civil Commissioners to assist the Maories to govern themselves, to make good laws, and to protect the weak against the strong. There will be many more things to be planned and to be decided, but about such things the Runangas and the Commissioners will consult.[1]

Grey's circular presented the establishment and development of this new system of government as a long-term project. It would be 'a work of time, like the growing of a large tree', beginning with seeds, then the trunk, then branches, then leaves and fruit. The growth of a tree was slow, 'and so will it be with the good laws of the Runanga'. The Governor was planting a seed by recognising the rūnanga and appointing commissioners and assessors, and Māori must then tend and cultivate it. By this work, he promised, peace would be brought to the country and

> the children of the Maori . . . will grow to be a rich, wise and prosperous people, like the English and those other Nations which long ago began the work of making good laws, and obeying them.[619]

The success of the new institutions and, by extension, Te Raki Māori faith in their partnership with the Crown would depend to a significant degree on whether these promised benefits came to fruition.[620]

(4) *How did the new institutions operate in practice?*

(a) Establishment of the districts, 1861–62

Following his tour of the north, Grey acted swiftly to bring his scheme into operation. On 7 December 1861, he issued a proclamation establishing the Bay of Islands native district under the Native Circuit Courts Act 1858 and the Native Districts Regulation Act 1858. George Clarke senior was confirmed as civil commissioner.[621]

In February 1862, after some protest from the resident magistrate, William B White, the Governor established a separate Mangonui district with him as civil commissioner. White had argued that, due to his long experience and personal influence in the district, it would be in the best interests of Māori and the Government if he retained independent management of Mangonui rather than serving under Clarke, who was unknown in the area.[622]

Hence, the Mangonui district comprised all territories north of a line from Herekino to Maungataniwha to the southern heads of Whangaroa Harbour. The Bay of Islands district comprised all territories from there south to a line between Maunganui Bluff and Tutukaka (near Ngunguru, just north of Whāngārei). In turn, the Bay of Islands district was divided into three 'hundreds': Kororāreka, with Robert Barstow as resident magistrate, encompassed the east coast from Tutukaka to Ōkiato; Hokianga, with James Clendon as resident magistrate, encompassed territories from Maunganui Bluff to Herekino and inland to Maungataniwha and the head of the Waimā River; Waimate encompassed the remaining territories, and Edward Williams was the resident magistrate.[623] Although Te Hemara Tauhia had already selected his rūnanga, Mahurangi was not established as a native district, presumably on the basis that much of its land had already been sold to the Crown.[624]

Dissatisfaction with the district boundaries was expressed by some Hokianga and Bay of Islands rangatira, including Wī Tana Pāpāhia on behalf of Te Rarawa at Hokianga, among whom he was the principal rangatira, not least because members of Te Rarawa were included in the Bay of Islands district, and some Whangaroa Ngāpuhi were included in Mangonui.[625]

(b) The first Bay of Islands rūnanga meeting, 1862

During December, while boundaries were being finalised, Clarke visited settlements throughout the Bay of Islands district, and White visited those in Mangonui. Williams also travelled throughout the Waimate hundred, and

Barstow visited coastal territories at Te Rāwhiti and Waikare. All reported that they encouraged Māori to select the rangatira of greatest authority and influence for the district rūnanga, and that the rangatira they approached insisted on consulting their people before accepting nomination.[626] But the officials also sought to shape membership to suit the Crown's purposes and therefore wanted leaders they considered 'useful'.[627] Barstow claimed that no chief in the Te Rāwhiti or Waikare hapū possessed 'sufficient authority to exercise any effectual control', so 'broken' were these hapū; they therefore put forward no names.[628]

The Bay of Islands rūnanga held its first meeting at Waimate from 25 to 28 March 1862, with about 500 Māori in attendance. *Te Karere Maori* acknowledged this as the country's first rūnanga and described it as a 'Maori Parliament'.[629] Clarke and Williams went to considerable lengths to ensure the hui would be conducted in the manner of an English council. They held the meeting inside, despite the large number in attendance, and schooled the rangatira in formal English meeting procedures – in writing out, moving, and seconding motions; printing meeting papers; recording minutes; and following standing orders. Clarke reported that the meeting had been held indoors because 'the Chiefs . . . had been given to understand that their assembly was to be after the model of English councils'; and

> moreover, had the meeting been held outside, we could have had no control over the Chiefs, who would (whether members or not) have made their speeches as they pleased; and would have been as disorderly as they usually are at their own meetings; as it was, we had order and regularity, and a precedent for future Runangas.[630]

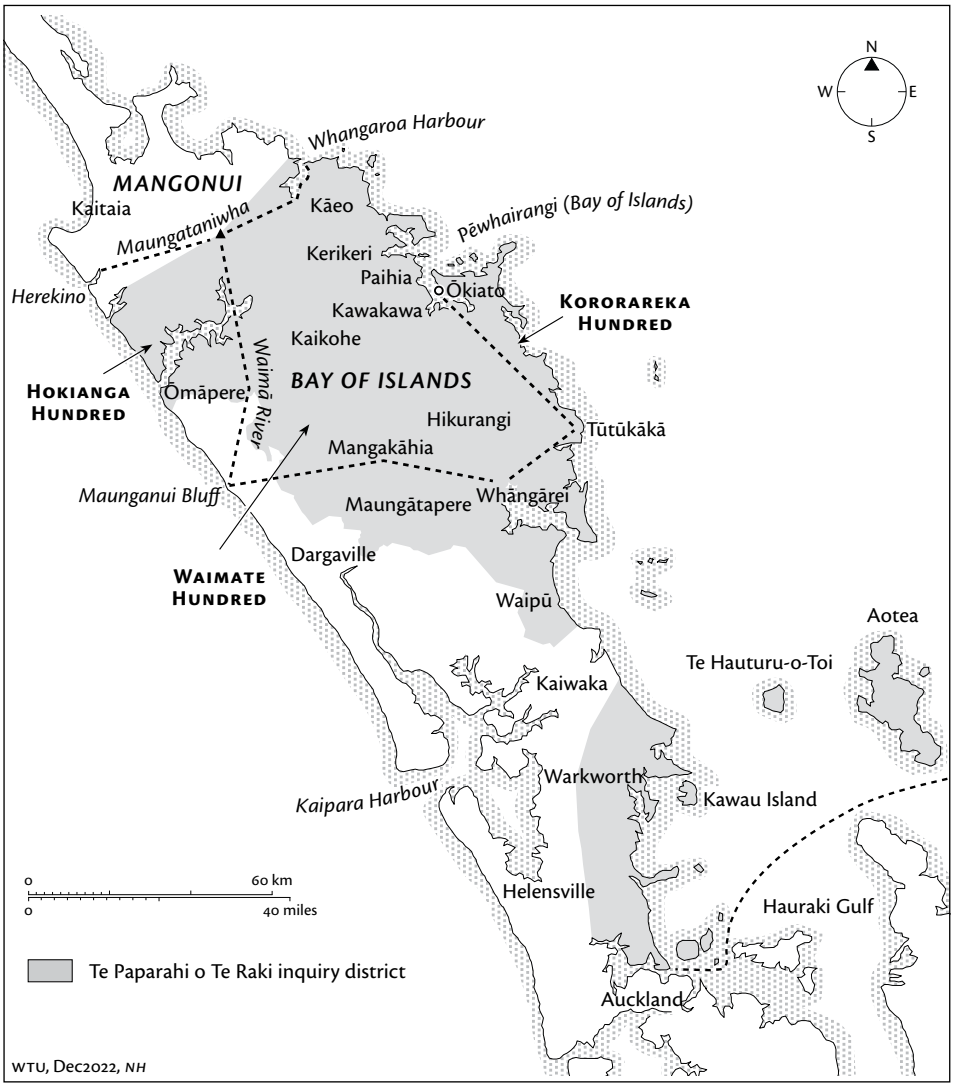
Another important feature was the exclusion of women from the proceedings. Hanson Turton, then resident magistrate, noted of rūnanga that 'members of the Runanga are chosen . . . by a few leading men, very similar to the selection of our own Committees; and thus has risen up in every village a kind of little oligarchy'.[631] Certainly, the exclusion of women from rūnanga had been part of the vision of the Governor and Ministers for the new institutions from the start. Responding to Grey's proposed plan on behalf of Ministers, Fox noted:

> The Runanga as at present constituted appears to be little else than a gathering of the people of a particular village or hapu. Let it continue so, with the limitation only imposed that none but adult males take part in its deliberations.[632]

This suggestion, Grey affirmed, was 'quite in accordance with my views'.[633] Dr O'Malley suggested that, subsequently, Māori women would be excluded from the rūnanga on an ongoing basis as Māori observed 'the Pakeha practice of the time whereby women were not eligible to vote for or sit on local bodies or the General Assembly'.[634]

In February 1862, Clarke opened the Bay of Islands rūnanga with a long speech, in essence repeating Grey's previous promises that peace, prosperity, and unity between Māori and settlers would be natural consequences of Māori adopting this new system of law. He also determined the agenda, which for this first meeting mainly concerned administrative matters such as the membership, salaries, selection of wardens and constables, and construction of a whare rūnanga.[635] Members of the rūnanga appear to have been willing to experiment with the new system, in the hope that it would bring the promised benefits. With Williams' assistance, they drafted and approved a series of motions proposing to resolve any future disputes through assessors and magistrates in accordance with the 'English law' that they were now charged with framing.[636]

While this general principle was easily disposed of, representation was a major topic of discussion. Prior to the meeting, the Governor had approved 10 members: Nene (Ngāti Hao), Arama Karaka Pī (Te Māhurehure), Āperahama Taonui (Te Pōpoto), Rangatira Moetara (Ngāti Korokoro), Wiremu Hau (Ngāi Te Whiu), Hēmi Marupō (Ngāti Kawa), Hira Te Awa (Ngāti Tautahi), Kingi Wiremu Tāreha (Ngāti Rēhia), Maihi Parāone Kawiti (Ngāti Hine), and Hāre Hongi Hika (Ngāti Uru of Whangaroa). While these were undoubtedly rangatira of considerable mana,



Map 7.1: The Mangonui and Bay of Islands native districts.

most of them were from territories around Kaikohe, inner Hokianga, and the Bay of Islands.[637]

Conspicuous by their absence were representatives from northern Hokianga and eastern coastal territories. Members considered the rūnanga 'far too small' to be representative and asked that their number be doubled. In particular, Maihi Parāone raised concerns that Kororāreka was entirely unrepresented. Clarke had power to appoint only two more members, but the rūnanga nominated three and asked for several more. Clarke regarded only one of the nominees, Wī Tana Pāpāhia of Te Rarawa, as worthy of inclusion, and he brought some northern Hokianga representation to the table.[638]

Clarke did not regard the others, Ruhe of Pukenui

and Piripi Korongohi of Tautoro, as sufficiently 'useful and influential' to warrant inclusion – but after some initial reluctance, he approved these two as well, because they had been nominated by Nene and Maihi Parāone respectively, and the Crown could not afford to upset either (Nene had threatened to resign if Ruhe was not accepted).[639] Clarke's official report acknowledged that representation would continue to be a source of 'great difficulty and dissatisfaction' if not resolved. He therefore recommended that the Governor increase the size of the rūnanga to at least 15 and allow rangatira to make further 'honorary' appointments at their own cost.[640]

His concerns proved prescient, as other complaints soon emerged and continued throughout 1862 and 1863. Whāngāpē Māori had no assessors, so resolved to exercise their collective authority without reference to the rūnanga. Clendon raised concerns about other Hokianga communities that lacked representation, but his superiors made no concessions.[641] Maihi Parāone continued to raise concerns about Kororāreka throughout 1862, writing to Fox on 22 July:

> Friend, you supposed probably that the Ngapuhi was one tribe and therefore should have but one Runanga. It is true that the Ngapuhi are united in favour of the Queen's law, but the laws of our fathers still remain, hence the saying of the Ngapuhi 'Ngapuhi kowhao rua'[.] Ngapuhi of [one] hundred taniwhas one chief lowers and another rises. The letters that I sent to the Governor and you were on this subject. I proposed that the Ngapuhi (District) should be divided into two, the Kawakawa, Kororareka, Waiomio, Te Karetu, Waikare and Whangaruru forming one division, thence on to the Whananaki, Tutukata [*sic*], Ngunguru, Pataua, Taiharuru. [W]hat I said was that I should stand among my own people. If the Governor and you say there is to be but one, well and good . . .[642]

He ultimately held his own hui to address the issue, nominating six rangatira; Barstow approved none and instead drew up his own nominations, threatening to resign if the Government did not accept his authority over Maihi Parāone's. One of the rangatira he recommended, Mangonui Kerei, was appointed and then quickly dismissed due to alleged Kīngitanga sympathies (his sister Matire Toha was married to Kati, brother of the first Māori King Te Wherowhero).[643]

Another difficulty that quickly arose was inequality in the salaries offered to members of the rūnanga. Nene, mistakenly assumed by the Crown to have authority throughout Ngāpuhi territories, was offered £22 10s a year, more than double that of any other member. Members agreed that all salaries should be set at £20, with some flexibility for those who worked particularly hard.[644]

After four days, much of it concerned with administrative matters, the rūnanga ended. Clarke reported that he had considerably more business planned, but the rangatira 'began to show symptoms of uneasiness, and I found it would be impossible to keep them in good humour for business much longer'. Clarke hoped that this initial meeting had at least introduced the rangatira to the duties they would be carrying out, though it was 'only a beginning'.[645]

In Dr O'Malley's view, this was 'not a good start' for the new system. While it 'purported to offer northern Māori extensive powers in the management of their own affairs', Crown officials retained the final say.[646] Dr Kawharu also noted the extent of Crown control over matters such as membership and meeting procedures.[647] Many elements of the latter were 'not sourced in tikanga or traditional leadership principles', including the Crown's role in selecting and approving members of the rūnanga, the payment of salaries, fixed-term appointments, and the processes for conducting meetings and approving regulations. Most importantly, she noted, the rūnanga created a level of decision-making that was outside the direct control of hapū.[648] In her view, the rūnanga were established 'essentially to be tools of the Crown', not of Māori.[649] Nonetheless, just as the Crown sought to mould the rūnanga to its own purposes, so too did rangatira, who 'saw runanga holistically, supporting the operation of customary authority in several areas – education, health, justice and land'.[650]

Some Māori groups observed the rūnanga as chiefly an instrument of the Crown, intended to impose British law,

and took it upon themselves to set up mirror institutions. At Kororāreka, an alternative rūnanga was established in 1863 by Turau, one of Nene's relatives. According to Barstow, this new rūnanga 'entirely repudiates the Government runanga at Waimate'.[651] He dismissed this as the work of a disaffected chief of poor character. A similar alternative rūnanga was set up in Mangonui, which we discuss later. In the view of Armstrong and Subasic, these alternative rūnanga were:

> manifestations of a desire of some sections of Maori in those places to maintain a degree of control over their affairs, and resist any trammelling or substitution of their own authority by that of the Magistrates.[652]

(c) The roles of resident magistrates

Questions of membership and salaries were not the only issues to beset the fledgling system. Magistrates found that Māori were not as amenable to British legal values as they had hoped. Clarke therefore urged the magistrates to oversee the assessors' courts; to use advice, influence, and training to 'secure the objects of the Government Policy' and 'prevent incorrect or unjust decisions of your Native Assessors who from ignorance and partiality, are continually erring and presuming upon powers quite beyond their Jurisdictions'. He also encouraged the magistrates wherever possible to avoid court hearings on matters that did not conform to British ideas of justice, such as mākutu and breaches of tapu, and instead act as neutral peacemakers and mediators outside of court. If such cases came to court and it refused to rule, he warned, magistrates would lose all influence, and Māori would take matters into their own hands.[653]

In October 1862, Barstow acknowledged that he had held very few formal court hearings in the Kororāreka hundred, in essence because Māori were not interested. He had visited communities and on occasion been able to advise or mediate in disputes, but any attempt to impose his own decision would be futile since he had no means of enforcing it and would 'render it a mockery and myself ridiculous'.[654] As Armstrong and Subasic observed, the magistrates 'understood the limits of their authority and influence, and their need to work through existing tribal structures'.[655]

Clarke also understood that treaty obligations were involved, advising:

> any Native custom not immoral or excessive in its demands should be entertained by the Bench as being in accordance with the Treaty of Waitangi, which guarantees to the Natives such customs.[656]

Clarke's hope was that the magistrates' influence would gradually increase, leading to eventual Māori adoption of the colony's legal system.[657] His admission that the treaty protected the exercise of customary law is significant in our view. It demonstrates that at least one senior Crown official was aware that article 2 rights extended well beyond mere possession of land and was advocating for those rights to be acknowledged in the colony's common law.

Clarke was less tolerant of informal rūnanga, which had existed before the new institutions were adopted but now, he believed, threatened the Crown's scheme. Informal rūnanga, he said, should be controlled or suppressed, lest they become 'a complete nuisance' operating in opposition to the assessors' and magistrates' courts. He therefore instructed magistrates to remind Māori communities '[t]hat self constituted Runangas claiming any Judicial or executive functions are illegal', and '[t]hat there can be no legal Runanga such as is constituted by the Government'. If they could not be suppressed altogether, he continued, they should be co-opted into the official system and so 'brought under regulations which will render them useful as well as harmless'.[658]

Clarke sent another letter to magistrates in December, instructing them that assessors' courts should be established at Waimate and in the other hundreds, in the same locations as village rūnanga. These were aimed at putting an end to all 'irregular and inconvenient' methods of settling disputes among Māori and 'giving the Native a

respect for Law and order'. This object could be achieved only through the agency of rangatira: 'theirs must be the working, yours the guiding and directing hand'.[659] The same month, Williams wrote to the Waimate rūnanga, saying it was their duty to keep peace,

> teach the people to respect the law . . . induce them to send their children to school, teach them habits of industry, and endeavour to find out a road by which the property of the people may be advanced according to Pakeha custom.

Rūnanga could play a key role by encouraging Māori to adopt Pākehā habits; for example, fencing their properties, building houses in the Pākehā style, and furnishing those houses with 'tables, chairs, tea cups, plates, knives and forks'.[660] As Armstrong and Subasic observed, this left little doubt that Crown officials saw the rūnanga as agents of assimilation.[661]

(d) The first and second Mangonui meetings, 1862–63

The Mangonui district rūnanga held its first meeting in late July and early August 1862, with about 400 to 500 Māori present. The rūnanga had seven members, including Pāora Ururoa of Whangaroa. As with the Bay of Islands rūnanga, this inaugural meeting was mainly concerned with administrative matters, though it did address several questions of substance. It resolved to discourage taua muru and encourage the new legal system to be adopted. Under White's influence, the rūnanga also resolved to encourage people to settle in villages, where services could more easily be delivered. Other resolutions concerned cattle trespass and fencing, a triennial census, schools, and health.[662]

The Mangonui rūnanga also considered two land disputes: one over a boundary, and the other concerning the allocation of payment from a northern Whangaroa block sold to the Government. The latter resulted in considerable debate about the relative interests of Ngāpuhi and Te Rarawa hapū, but was nonetheless resolved amicably.[663] White reported that he had sought to involve all rangatira in the decision-making process, not only those who had been formally appointed. This ensured that the decision had broad support, while the senior rangatira had 'little real power' when acting separately from their people.[664] Settler newspapers were less sanguine: reporting on the fencing issue, the *Aucklander* newspaper 'declared with dread' that 'it only wants the Governor's approval to subject Europeans settled in that district to Maori law administered by Maoris'.[665]

These comments highlight the essential tensions at the heart of the rūnanga system. Whereas the Crown intended it to lead Māori towards adopting English law, Māori understood it as providing for the exercise of Māori law under the sanction of the Crown. The system was workable so long as Crown officials limited their roles to guidance and mediation, but began to crack whenever the Crown became more assertive.[666]

These tensions were evident in several land disputes resolved by Hokianga assessors during 1862 and 1863. One such dispute, in May 1862, threatened to erupt in armed conflict until the conflicting parties agreed to place their dispute before the Hokianga rūnanga. A successful outcome ensued, largely because the magistrate (Clendon) left it to the assessors to resolve themselves.[667]

However, another dispute, concerning lands between Mawhe and Kaikohe, was harder to resolve owing to the influence of Crown agents. The essence of this dispute was that Wiremu Hau attempted to sell lands that were contested by Ngāti Rangi, in breach of an agreement brokered by the assessors. The Bay of Islands rūnanga considered the case and achieved a temporary resolution, but tensions erupted again soon afterwards. Ngāti Rangi blamed the Crown's land purchase agent, Henry Tacy Kemp, who in their view was encouraging Hau to persist with the sale. Clarke, recognising that Māori confidence in the Crown was at stake, instructed Kemp to desist until the matter had been resolved in the Native Land Court, which was soon to be established in the district under the Native Lands Act 1862. Thus, the Crown's own officials undermined rulings already made by assessors and rūnanga. Armstrong and Subasic identified other occasions in which Kemp's activities usurped assessors' authority.[668]

The second Mangonui district rūnanga was held at Ōruru in January 1863. This resolved several land disputes and considered a range of other matters, including the provision of schools and roads. Rangatira expressed concern that the Crown had made no attempt to build roads in the district and offered to point out possible routes and make lands available. The *Daily Southern Cross* observed that this would become a major complaint if not addressed.[669]

(e) The second Bay of Islands meeting, 1863

The second Bay of Islands district rūnanga was held soon afterwards, in March 1863. It settled on fines to be imposed against Māori taking part in taua muru, and prohibited polygamous marriages, payment for marriage to widows, and marriage without the full consent of both partners. The rūnanga also resolved that all debts owed by Māori to Pākehā should be paid promptly, and decided upon rules for the fencing of property and branding of cattle. Additionally, it determined to hold a district census, prohibited sales of liquor, and agreed to seek more Crown funding for the completion of a whare rūnanga.[670]

The Waimate resident magistrate Edward Williams chaired the meeting, and his hand can be seen in some of these resolutions. Williams had been pushing for a census for some time, whereas Bay of Islands Māori were far from enthusiastic. Williams was also an ardent opponent of liquor consumption.[671] The rūnanga once again debated the question of representation, resolving that more appointments were needed so that all hapū could be fully represented, and also resolving to admit eight settlers to their number – four selected by the Government and four by the rūnanga itself: the missionaries Henry Williams, Richard Davis, and John King, and the Kohukohu trader John (J J) Webster.[672]

The Government, by then embroiled in its preparations for invading Waikato, did not respond to Williams' report on the rūnanga until August. As might be expected, Te Raki leaders were 'considerably annoyed' that events elsewhere had taken precedence over their affairs.[673] Of the several resolutions passed, the Native Secretary subsequently advised that just one – the prohibition on liquor – had been brought into effect by Order in Council. According to Armstrong and Subasic, this was the only resolution by either of the northern rūnanga that the Crown ever adopted. Without the Governor's approval, none of the rūnanga resolutions had any legal force.[674]

Some Māori had begun to fence their lands in anticipation of the resolutions about fencing and stock control being instituted.[675] But the Government rejected those resolutions on grounds that they did not apply to settlers and were therefore unworkable. Whereas Grey had told Te Raki Māori that the rūnanga would make regulations for all who lived in their territories, the Native Districts Regulation Act 1858 applied only to Māori customary lands. The Crown had since enacted the Native Districts Regulation Amendment Act 1862, providing that the Native Districts Regulation Act could be applied to settlers if a majority gave their consent at a public meeting, and though the Native Secretary advised Clarke to call such a meeting, there is no record of him doing so.[676]

The Native Secretary also rejected the resolution to appoint more Māori to the rūnanga, while supporting the resolution to appoint settlers. According to Armstrong and Subasic, there is no evidence that Clarke or other Crown officials ever took steps to bring this to fruition:

> Nevertheless, that the proposal was made by the Runanga provides strong evidence, as noted above, of an ongoing desire among Maori to embark on a form of partnership with local settler communities, and in a manner which reflected their views expressed at the Kohimarama Conference in 1860.[677]

The resolutions at the March rūnanga indicate that Māori were prepared to modify or abandon some of their customs, especially when advised that this would smooth their relationships with settlers and the Crown. But, according to Armstrong and Subasic, reports from magistrates 'confirm that . . . Maori had certainly not abandoned their tikanga or customary practices wholesale'. Instead, they 'appear to have attempted to incorporate the new judicial structures into their own system of values and

customary law'.[678] We see this as another missed opportunity for the Crown: it could have recognised the compromises that Te Raki Māori were willing to make through the rūnanga system by shoring up that system further and affording rūnanga the space to conduct matters as was appropriate. Rūnanga could have exercised real leadership in and for local communities, using tikanga and English law alike.

Having said this, officials of the time noted a somewhat mixed response to rūnanga among those Māori who participated in their processes. Williams reported in February 1863 that Māori who brought disputes to his court generally accepted his decisions, though very often this was because he left the matter to assessors. He 'would not venture to assert that the Natives have been led to acknowledge the supremacy of the law', especially as the system had not been tested by any case that required imprisonment or other significant enforcement action.[679] Some Māori openly defied the rūnanga and assessors, reasoning that they had their own means of law enforcement; others took actions that were contrary to the colony's system of property rights – for example, Armstrong and Subasic noted, many Māori 'believed . . . that they were at liberty to dig gum on any unenclosed land, Government or European-owned', and did not necessarily stop when magistrates warned them.[680]

By mid-1863, Bay of Islands and Hokianga Māori were also expressing frustration that the Crown had not yet taken action to build schools and roads in the district, as Grey had promised in 1861. Ongoing hostilities in Taranaki continued to cast a shadow over the relationship between the Crown and Te Raki Māori as well. Some Māori expressed a willingness to fight on the side of the Crown, apparently in the hope that expressions of support would encourage the Crown to keep its promises, or at least prevent it from invading this district. After hostilities had broken out in Waikato, Grey responded by assuring northern leaders that he had 'no intention of interfering with the Ngapuhi or Rarawa tribes either by taking their land or their arms so long as they remain in peace and quietness'.[681] It is not clear whether this was meant as reassurance or a threat.

(f) The final rūnanga meetings, 1864–65

A third Mangonui district rūnanga was held at the newly built courthouse in Ōruru in early February 1864, with a large number of Māori in attendance. The rūnanga passed a resolution calling for the establishment of law and order; other resolutions expressed 'sympathy' for the Governor over the Waikato conflict and undertook to send 10 rangatira to satisfy themselves that the Crown was winning the war.[682] The outbreak of war in Waikato had hardened settler attitudes towards any form of differential treatment for Māori, and White increasingly shared these views. In 1864, his assessors granted utu of four horses in a pūremu (adultery) dispute. Reversing his previous, more flexible approach, White overruled the assessors and prevented the payment from going ahead. He further insisted that any fine should be paid directly to the Crown and could only be released if the aggrieved party could demonstrate good character.

This assertion of British legal values over those of Māori angered the Mangonui rangatira. One member was sacked from the district rūnanga after saying he would no longer uphold English law. One of the assessors involved in the pūremu case was also sacked and the other suspended, and White admonished other assessors for failing to administer British justice in the district.[683] Some Māori responded by operating alternative 'Runanga Kei Waho' (outside rūnanga), in essence returning to something similar to the system of decision-making that had existed before the 'new institutions'. White reported that this rūnanga 'means a desire to return to the old Maori Law'. Māori, he added, with undisguised racism, were 'habitual breakers of the law' and so 'do not like the restraints of the European Law'.[684]

By 1865, for reasons which we discuss in the next section, the Government was withdrawing support from the new institutions and was instead pursuing policies aimed at encouraging Māori acceptance of the colony's

system of law and government. The Bay of Islands District Runanga held its third and last meeting in March 1865. The *New Zealand Herald* reported that it was 'numerously attended' and Māori remained 'loyal and peaceable', but the newspaper gave no details about the agenda or business conducted.[685] The Mangonui District Runanga also held its last official meeting in March 1865; again, there are few surviving details of the business conducted. White reported that he was discouraging Māori from passing their own laws and encouraging them to adopt English laws instead. Therefore, he 'did not consider it necessary to invite the Runanga to pass resolutions as to the government of the district'. White also reported that he had admonished some assessors for 'irregularities' in their decisions, and for lack of energy in enforcing decisions from the magistrates' courts.[686]

(5) *How and why did the Crown withdraw support from the rūnanga from 1865?*

By early 1863, rūnanga had been established in almost all North Island territories except Taranaki. They operated 'more or less as intended' in most regions except Waikato, where their operation was hampered by the outbreak of war in mid-1863.[687] Their establishment led to significant growth in government spending on 'native purposes' – from a little over £17,000 in the 1860-to-1861 fiscal year to over £60,000 in the period 1864 to 1865.[688] A significant portion of this expense arose from paying salaries to the various officials (settlers and Māori) employed by the new institutions, though some costs were also associated with the establishment of the Native Land Courts from 1864, as we discuss in this section and again in chapter 9.[689] While settlers and colonial politicians certainly regarded these costs as significant, we note that the colony's total budget in the 1864-to-1865 fiscal year exceeded £936,000.[690]

From the beginning of the new institutions, some settlers had opposed the provision of separate institutions for Māori or had expressed unhappiness over the payments to rangatira, arguing that the Crown was in essence paying Māori for their loyalty.[691] Successive colonial Governments had nonetheless supported the new institutions and had voted in the General Assembly to meet the necessary costs.[692] But political sentiment was changing by 1864 for several reasons, including the renewal of Crown–Māori warfare, the transition to responsible government (see section 7.3), changes in the colony's political leadership, settler demand for land, and the settler backlash against Māori institutions.[693]

From the end of 1864, the colonial Government began to move away from the provision of separate institutions for Māori towards a course that was aimed at encouraging or pressuring Māori to accept the colony's laws and institutions of government – including the Native Land Court, which we discuss in chapter 9. Accordingly, from 1865, the Government withdrew funding and support from the new institutions.

(a) Changes in the general policy towards Māori

When the Weld Government took office in November 1864, it committed not only to assume responsibility for the colony's defences under its 'self-reliant' policy but also to pursue new means of bringing Māori into the colony's system of law and government. Weld announced, soon after taking office, that 'attempts to force political institutions upon the Natives have been, and will be, a failure'. Furthermore, he was opposed to 'any system which may be called bribery to induce them to accept those institutions'.[694] According to Dr Loveridge, Weld's Government briefly considered the establishment of self-governing Māori districts under section 71 of the New Zealand Constitution Act 1852 (discussed in section 7.3), but ultimately it pursued a different and much more determinedly assimilationist course.[695]

The Weld Government's first step was to accelerate the process of individualising Māori land titles. To this end, it passed the Native Lands Act 1865 and established the Native Land Court as a national court of record. It also increased the number of judges and assessors, and began to prepare for the introduction of free trade in Māori land. We discuss these events in detail in chapter 9, but mention

them here because of their relevance to the Government's withdrawal of support for the new institutions.[696] Two courts had already been established in Kaipara in 1864, operating (according to Armstrong and Subasic) in an informal manner that was 'largely driven by iwi and hapū themselves'.[697]

Whereas local Māori assessors played key decision-making roles in the Court at Kaipara, the system brought into operation from January 1865 effectively placed legal power in the hands of Pākehā judges;[698] and whereas the Native Lands Act 1862 provided for the Court to respond to applications from, and award title to Māori communities, the 1865 Act provided for title to be awarded to named individuals. Weld and his colleagues saw these changes as means of breaking down tribal 'communism', instead turning Māori into individual landowners with title that could easily be sold or leased.[699] As we will see in chapters 9 and 10, the Native Land Court was to have a huge impact on Te Raki Māori, opening the way for the alienation of nearly 300,000 acres during the mid-1870s alone.[700]

The Weld Government also introduced three other reforms of significance to Māori during 1865. As discussed in section 7.3, the Native Commission Act 1865 provided for the establishment of a temporary commission to advise on the best means of providing for Māori representation in Parliament;[701] the Native Rights Act 1865 deemed that the law would treat all Māori as British subjects, and that the courts would therefore have the same jurisdiction over Māori as other subjects;[702] and the Outlying Districts Police Act empowered the Crown to confiscate lands from Māori communities in some circumstances, using the proceeds to fund the district's police force.[703] Unlike the Native Lands Act, these Acts had limited effect: the commission was never set up,[704] and the Outlying Districts Police Act 1865 was little used nationally and not at all in this inquiry district.[705]

Nonetheless, the policy direction was clear, and would remain so for the rest of the century and beyond. In essence, these reforms marked a transition away from limited Māori self-government towards government of Māori by the colonial bureaucracy. The ultimate aim, in Dr Claudia Orange's words, was 'to subjugate the Maori'.[706]

(b) Funding and support is withdrawn from the rūnanga

There was little room, in this new policy environment, for self-governing Māori institutions or for employment of Māori to administer local affairs. Accordingly, from 1865, the colonial Government began to rapidly withdraw funding and support for the rūnanga, while their responsibilities were transferred to other institutions under Pākehā control: land titling responsibilities to the Native Land Court, and dispute resolution to resident magistrates and constables.[707]

During August and September 1865, the Government instructed civil commissioners and resident magistrates to minimise spending on Māori affairs, and told them it would not be making any new appointments of Māori officials or filling any vacancies. Then in late September, Native Minister FitzGerald told the House of Representatives that he planned to reduce spending on Māori officials, who in his view were of 'little or no use' in the enforcement of English law, and were principally paid for their loyalty and usefulness in 'maintaining British influence'.[708]

The following month, FitzGerald asked the Native Department to gather information about the performance of all Māori assessors, wardens, and police officers, as well as reports on the utility of the district rūnanga and on how spending could be reduced. Very soon afterwards, the Government told civil commissioners and magistrates to cease all spending unless required to keep peace and enforce the law. Commissioners were told that assessors provided no real service – a statement that was certainly false in our inquiry district – and that the number of paid assessors would be reduced to about two per district, though some unpaid assessors might also be retained.[709]

FitzGerald told officials that a major reorganisation of Māori policy was pending and that he hoped to eventually persuade Māori to fund the future administration of native districts by gifting land to the Government.[710] For territories with little or no Pākehā settlement (particularly

Historian David Armstrong presents evidence on Ngāti Hau land alienation in hearing week 12 at Akerama Marae, Whāngārei, in 2015. Armstrong and fellow historian Evald Subasic had been commissioned by the Crown Forestry Rental Trust to carry out research on northern land and politics.

Te Rohe Pōtae, the East Coast, and parts of the Bay of Plenty), FitzGerald wanted to explore the establishment of self-funding native provinces. But this proposal was roundly condemned by other parliamentarians, and his proposed enabling legislation (the Native Provinces Bill 1865) was heavily defeated.[711]

The Government's plans for cost reduction aroused considerable opposition among both Te Raki Māori and the Crown's officials in the north. In November 1865, Penetana Papahurihia wrote to George Clarke pointing out that Māori had not asked for the new institutions or for paid positions, but had nonetheless willingly taken part when invited by the Governor. Although rangatira had kept the peace in their districts for the preceding four years, the Government was now planning to withdraw from the scheme. If that occurred, Papahurihia indicated, northern Māori would return to their 'former condition', resolving disputes among themselves in accordance with tikanga.[712]

White, Barstow, and Williams all confirmed that they were hearing similar views from other Māori in the district. All emphasised the important roles that rūnanga and Māori assessors had played in keeping peace in the north during a time of considerable turbulence for the colony, and all warned that Māori would see any retrenchment as a significant breach of faith on the part of the Crown, especially in light of Grey's promises that the system was established with the intention of giving Māori permanent authority over their territories.[713] White wrote to the Native Minister:

> I cannot think it would be just or wise, when the whole Native expenditure [in Mangonui] is confined to the paltry sum of fourteen hundred pounds per annum, inclusive of European officers, to advise any reduction, which would most certainly create great feeling of ill will towards the Government amongst the governing class of Natives, who would have some right to think themselves ill treated, and might perhaps allow some of the worst disposed characters to commit them to direct opposition to the Government.[714]

Williams, similarly, warned that Māori were likely to lose faith in the Crown and become suspicious of its motives. The magistrates also pointed out that Māori paid significant sums in customs duties, and as taxpayers were entitled to receive some of that back in the form of expenditure in their local districts.[715]

In October 1865, the Weld Government resigned, and a new ministry was sworn in under Premier Edward Stafford.[716] This spelled the end of the district rūnanga system. The newly appointed Native Minister, Colonel Andrew Russell, announced that his Government's Māori

policy would be carried out 'in accordance, as strictly as possible, with English law'.[717] In practice, according to Dr Loveridge, this meant the Government 'did not require the involvement of runanga at any level of government, in any capacity'. Nor would it require the payment of significant numbers of Māori officials.[718]

Accordingly, the Government instructed local officials to further reduce the number of Māori on the Crown payroll. In Hokianga, the number of assessors was reduced from 12 to eight, and the number of wardens from nine to four. The office of Bay of Islands civil commissioner was abolished in December 1865, and the salaries of the resident magistrates were also reduced.[719] While cutting the number of Māori law enforcement officials, Russell was determined to abolish Māori law-making altogether. According to the Native Department Under-Secretary William Rolleston:

> Colonel Russell's opinion [is] that as a rule it has utterly failed and that what the Natives appear to desire and respect is a calm but determined enforcement of English law, this they can understand and believe in, but they could not understand and did not believe in the decisions of their own Runangas.[720]

Russell furthermore considered the object of the law was therefore 'to identify the Natives with ourselves, to become one people, and to realise their expressed desire for, one law, one Queen, and one Gospel'.[721]

Russell's view of rūnanga was coloured by his own experiences: during a term as Hawke's Bay civil commissioner, he had struggled to establish the rūnanga system among a Māori population that was indifferent to the colonial Government.[722] Accordingly, the course of government policy turned decisively towards the assimilation and subjection of Māori to the colony's system of law. In December 1865, the Native Secretary told Mangonui civil commissioner William B White that 'all exceptional law should gradually cease and the Natives be encouraged to conform to that of the European'.[723] We note, here, the significant contrast between this instruction and George Clarke senior's August 1862 instruction that resident magistrates should accept Māori customs as they were protected under the treaty.[724]

During 1866, in most districts throughout New Zealand, the role of civil commissioner was disestablished, leaving resident magistrates to resolve disputes in accordance with the colony's laws and to oversee law enforcement. The number of resident magistrates was also reduced.[725] Of the 450 Māori officials (assessors, kārere, constables) employed throughout the country, according to Professor Alan Ward, some 300 'had their salaries stopped or heavily cut'.[726] In the north, the Government cancelled all road works.[727] Colonel Russell told the House of Representatives in July 1866 that he hoped to trim expenditure on Māori by about £25,000, or nearly 50 per cent.[728] According to Dr Loveridge,

> The overall effect . . . was to turn the clock back to 1856 (or even to 1846) as far as the provision of law and government to Maori communities was concerned. In Russell's wake the system was reduced to a network of Resident Magistrates, who often acted as the principal representative of the Crown in their districts, assisted by a limited number of Assessors, policemen and Kareres, with provision also being made for medical care and education.[729]

This 'basic structure remained in place for another quarter-century', subject to periodic expansion or contraction depending on the views of the Native Minister at the time.[730]

In this inquiry, the Crown submitted that it had not abolished rūnanga in 1865 but had merely subjected them to funding cuts that were also affecting all areas of the public service. It submitted that there was 'evidence of Runanga in Northland operating during 1866–67', and that it was 'unclear then quite when the Runanga ceased to operate'.[731] Yet none of the expert witnesses provided evidence of any meetings of 'official' rūnanga (supported and funded by the Crown) meeting after March 1865.[732]

Armstrong and Subasic wrote that the rūnanga were 'starved of funds', 'strangled', and 'finally terminated in 1865'.[733] Dr Loveridge's view was that the new institutions

were 'virtually eradicated', and that the Government's policy was 'one which did not require the involvement of runanga at any level of government, in any capacity'.[734] Vincent O'Malley, in a doctoral thesis about Māori self-government, wrote that the 'last vestiges of the official rūnanga system . . . were formally abolished [in 1865]', though some positions were incorporated into the resident magistrate system.[735]

Indeed, between 1865 and 1867 the total number of Māori assessors in the Bay of Islands and Mangonui was reduced from 52 to five, and everyone else was dismissed.[736] In July 1866, White informed his superiors that he intended to keep the Mangonui District Runanga going on an informal basis, but there is no evidence that this occurred.[737] It appears that the Orders in Council establishing the Bay of Islands and Mangonui native districts remained in force, but this was presumably because they were necessary to support the continued operation of the resident magistrate system. Under cross-examination by Crown counsel, David Armstrong noted that, while rūnanga were 'officially terminated' in 1865, elements of the system operated after this period: there were assessors still employed in Mangonui and Hokianga up to 1867 under the Native Districts Regulation Act 1862. However, the rūnanga themselves received no funding after 1865, and (Armstrong said) it was not clear what role these few remaining assessors had in this inquiry district after the rūnanga system was disestablished.[738]

In any event, Māori no longer had any formal role in recommending local laws, and their role in law enforcement was also much reduced. The Liberal Government formally abolished the system in 1891 by repealing the Native Districts Regulation Act and the Native Circuit Courts Act.[739] In submitting that rūnanga operated beyond 1865, the Crown appears to have conflated the official rūnanga established under the Native Districts Regulation Act with unofficial rūnanga that operated in the north before, during, and after the 'new institutions'.[740] The Crown also appears to have conflated the employment of assessors, which continued beyond 1865, with the operation of official rūnanga, which ended in 1865.[741]

(c) Why did the Government withdraw the funding and support?

The Crown submitted that spending on the rūnanga was reduced as part of an overall reduction in Government spending, due to recession and the high costs of pursuing North Island wars.[742] Cost-cutting was certainly a factor, but as Dr Loveridge observed, this 'economy drive' was also specifically aimed at Māori institutions and officials.[743] Even as the rūnanga ceased operations and the number of Māori assessors was significantly reduced, the Native Land Court 'grew into a major institution'. This, according to Dr Loveridge, 'was one of the few areas where Maori expenditures remained the same, or increased' under the Stafford Government.[744] Soon after taking office, Colonel Russell determined that appointing more judges to the Court was his highest priority, and that 'no unnecessary delay should take place in bringing the Courts into operation' in any district where Māori could be persuaded to take part.[745] The Court operated in Kaipara from 1864 and the Bay of Islands from 1866.[746]

All technical witnesses in this inquiry agreed that the Crown disestablished the rūnanga system for essentially political reasons. The rūnanga had served their purpose by pacifying most North Island Māori while the Crown fought its wars in Taranaki, Waikato, and other districts. With the wars at a close, the rūnanga were no longer necessary for the colonial Government's broader goal, which was to assert its authority over Māori communities. According to Dr Loveridge,

> Pleading economy, but pursuing an ideological agenda at the same time, the new Native Minister more or less returned the country to the Resident Magistrate system set up by Grey twenty years earlier. Local government for and by Maori, under the authority and with the sanction of the Crown, was all but eliminated in the name of 'one law for all'.[747]

In the view of Armstrong and Subasic, the withdrawal of funding from the rūnanga could not fairly be attributed to 'a lack of funds, or the need to pay for the Waikato war',[748] but rather a change in government priorities:

> It is difficult to escape the conclusion that once the immediate military crisis in the Waikato had passed the Government was content to simply dispense with the 'new institutions' experiment, and quickly moved to reduce or eliminate autonomous Maori agencies such as the northern Runanga. In short, it was no longer necessary to shore up a northern front, or provide a counterpoint or alternative to the Kingitanga.[749]

From this point, successive governments turned their back on institutions of Māori self-government, in favour of rapidly assimilating Māori into the colony's system of government. To this end, as well as dismantling the rūnanga system and slashing the number of assessors, the Stafford Government abandoned the proposal for a Māori commission, supported legislation to grant Māori a limited place in the House of Representatives, and pressed ahead at pace with the establishment of the Native Land Court. Ministers justified these policies on the basis that Māori and settlers deserved equal treatment. But, as Dr Loveridge observed, equal treatment in practice meant 'one set of laws made by the General Assembly, which after 1865 gave short shrift to the idea of separate forms of government for Maori, at any level'. Without effective local self-government, Māori communities had little prospect of 'exercising any significant control' over matters such as title determination and the administration of their lands.[750] Armstrong and Subasic expressed similar views, observing that 'equal treatment' was in fact 'a shorthand way of saying that the Crown's authority would be fully established and maintained':

> 'Equality in all respects', as interpreted by Pakeha politicians and officials, left no room for Maori autonomy or the exercise of tribal rangatiratanga.
>
> This 'equality' was achieved first by strangling the Runanga and other forms of local Maori administration, and a cessation of public works, medical and other services through 'retrenchment', and then by introducing new measures aimed at the destruction of tribal authority and more rapid assimilation. We refer here to the Native Land Court as it was later constituted.[751]

Ward saw assimilationist policies as a reaction by settlers against

> the control of Maori affairs by the Governor, against the provision of special machinery for Maori affairs in the form of an elaborate Native Department, and against such centres of residual Maori authority as the Runanga.[752]

In his view, Colonel Russell and other Crown decision makers 'weight[ed] the evidence to suit their case' and made decisions with no consideration for 'the promising efforts of the chiefs and magistrates in Northland and the Chatham Islands who were co-operating in local self-government through the official Runanga'.[753]

Orange's view was that the Government essentially replaced the rūnanga with the Native Land Court. From a settler perspective, the main purpose of the rūnanga was to grant title to Māori and open lands for settlement. When this did not occur – because title was awarded to communities which, in general, did not want to alienate their lands – settlers denounced tribal 'communism' and demanded a new system.[754] Settler pressure led to the changes of government and policy (as discussed earlier in this section), culminating in land confiscations in Waikato and Taranaki, and in the Native Lands Act 1865 which 'effectively severed the threads of Crown protection and nullified the treaty's second article'.[755]

In O'Malley's view, the Crown withdrew support because the rūnanga had not brought Māori under the control of the colonial Government as rapidly as settler politicians wanted; nor had the rūnanga opened up Māori lands for sale as rapidly as settlers desired. The Crown had never intended the rūnanga to operate as 'a state-sanctioned instrument of genuine self-government'; rather, its objective throughout had been to use rangatira as instruments of indirect rule and assimilation. In many parts of the country, O'Malley said, Māori were unwilling or reluctant to engage. In this district, rangatira were willing 'to work through the runanga system in partnership with Crown officials to maintain order within their communities and as an interface between themselves and the Pakeha state'. As a result, the system was implemented

more fully here than anywhere else. Yet, Te Raki rangatira were not willing to be 'duped into enforcing English laws against themselves'. On the contrary, they co-opted and subverted the system to their own ends, thereby frustrating the Crown's objectives.[756]

(6) *How did Te Raki Māori respond to the Crown's withdrawal of support for the rūnanga?*

Settler responses to the demise of rūnanga were more or less uniformly positive, reflecting the fact that the power of the Crown was by this time in settlers' hands. The *Daily Southern Cross* opined that the Crown's quarter-century experience of pursuing the 'idea of a model colonization, a model civilization, and a model Christianity, implanted among a race of model savages' was now at an end. The imperial government should know 'that in handing over the colony to the entire control of the colonists she hands it over entirely untrammelled by the rules and precedents she had set up for her own guidance'. The colonial Government would not pursue the 'pampering spoilt-child policy' in which the Crown had previously indulged, and would instead place their own interests first. As British troops withdrew, the 'reign of philanthropy' would be over and that of 'stern justice' would begin. Māori who were peaceable would find the colonists also peaceable; as for Māori who did not keep the peace, 'then they will find out the distinction'.[757]

Te Raki Māori expressed considerable dissatisfaction with the Crown's decision to withdraw support from the rūnanga and cut funding to assessors. Coverage in the *Daily Southern Cross* indicated that the loss of salaries was not their principal concern; rather, they were concerned with questions of rangatiratanga, land, and the treaty partnership. Whereas contact with missionaries and other settlers had tended to undermine the authority of rangatira, appointment to rūnanga had tended to 'support their authority in the tribes', since that authority for the most part was exercised for good:

> By the threatened deprivation of their salaries, the chiefs see the last sign of their rank passing away, and their connection with the Government, which has been of service in past times of trouble, completely destroyed. Thus it is, that throughout the north, from Kaipara to Mongonui, the chiefs are the most discontented . . .[758]

The newspaper also reported that Ngāpuhi leaders had written to Governor Grey 'inform[ing] him . . . that if he withheld their pay they would not have his laws'.[759] Mahurangi and Kaipara leaders held a series of hui where they likewise objected to the Crown's actions. In the view of Te Hemara Tauhia, the dismissal of rangatira caused 'a spot' on their mana and made them objects of ridicule. He could scarcely believe that the Governor had taken such an action – and, what was more, that Grey had not been transparent about his reasons. Te Hemara said he did not care about the salary 'and would sooner lose it than the respect of my tribe'. Arama Karaka Haututu of Ngāti Whātua said the Governor had 'made me kiss the book, and take an oath that I would remain faithful to him'. Then, 'after having me thus bound by a sacred tie, he says, "you are of no use to me, return to your ignorance"'.[760]

The demise of the district rūnanga left with it a legacy of broken promises to Te Raki Māori. In 1860, Governor Gore Browne had promised another national conference where institutions for local self-government would be discussed, but Grey had cancelled that.[761] As we set out earlier, during Grey's 1861 northern tour, he had promised that the rūnanga would have extensive powers of self-government, including powers to determine boundaries and land ownership, without interference from the Crown. In any dispute between the Crown and Māori over land, the rūnanga would have the final say.[762] Rūnanga would also have extensive powers to make local regulations and to administer local affairs. While any local regulations would require the Governor's consent, Grey gave no indication that consent would routinely be withheld; rather, he told rangatira that laws would be made by rūnanga, assented by the Governor, and enforced by Māori officials.[763] Māori assessors would be empowered to adjudicate in minor cases, without a magistrate being present.[764] The rūnanga would furthermore provide for the development of towns, roads, schools, and hospitals, all of which would attract settlers to live in the north, in accordance with the wishes

of Māori communities.[765] Māori officials would be well paid.[766] Finally, the system would become a permanent safeguard for Māori rights, a 'shelter and refuge for all times'. Future Governors would not be able to amend the laws of rūnanga without its consent.[767]

By 1866, all these promises had been broken. Decisions about land ownership and boundaries were in the hands of a settler-controlled court. The extensive powers of self-government had proved to be a mirage, initially because the Governor in Council declined most of the recommended Mangonui and Bay of Islands bylaws, and then because the rūnanga were disestablished. Assessors were unable to make decisions in the absence of a magistrate. The promised towns, schools, hospitals, roads, and settlers had not come to fruition. And Māori officials had either been sacked or had their pay slashed. Māori responded by turning back to their own institutions, and by developing new ones including hapū and tribal rūnanga, and eventually regional and national parliaments.[768] We will discuss those in chapter 11.

7.5.3 Conclusion and treaty findings

The guarantee in te Tiriti of tino rangatiratanga encompasses the right of Māori to exercise collective authority over their own affairs at hapū, iwi, and national levels in accordance with tikanga. Rangatiratanga encompassed leadership in many areas of life, including the control, management, and use of lands and resources; economic leadership, which in early colonial times included the management of trade and commerce; political leadership, including the coordination of hapū decision-making; the resolution of disputes within hapū; and the representation of hapū in relationships with others (including peacemaking, alliance-building, diplomacy, and warfare). This leadership was not the exclusive preserve of men: rangatira status was conferred through whakapapa and could be possessed by men and women alike. As colonial instutitions and structures took hold, Māori had a right to develop institutions of their choosing, at local, regional, and national levels in accordance with traditional customs.

Governor Grey's 'new institutions' did not so much establish new political and judicial structures as add a layer of British legal authority to existing structures. Local rūnanga already made decisions about matters affecting hapū, and rangatira already mediated in disputes. In recognising these structures, the Crown was not aiming to provide for the exercise of tino rangatiratanga but rather pursuing its own ends. It sought to divert Māori communities from following the independent course pursued by the Kīngitanga, and instead draw them into a system that was under the Crown's control.

Under the relevant statutes and policies, the new institutions were to exercise authority over a broad range of local activities, including the determination of land ownership and boundaries and the regulation of public health, animal control, and dispute resolution. But, in reality, they operated under a heavy layer of Crown control and met very infrequently – only when the resident magistrates called meetings. The Governor in Council determined who could be appointed to the rūnanga and which regulations could be adopted, and the Crown's local officials exercised formal authority over administrative and judicial matters. The structure and procedures of the rūnanga themselves separated rangatira from their hapū and excluded women. Furthermore, the institutions had authority over only Māori customary lands (barely, for the most part), and over only Māori.

Despite these limitations, rangatira in this inquiry district embraced the rūnanga scheme. We think they saw it less as a system of self-government, which they already possessed, and more as a means of advancing their partnership with the Crown and so attracting settlers. In order to achieve these benefits, they were willing to experiment with new decision-making structures and legal norms. But they were not willing to give up their own autonomy or abandon Māori law in cases that were internal to Māori communities. Because Te Raki rangatira responded as they did, and because local officials initially took a flexible approach to influencing rūnanga and assessor decisions, these institutions had the potential to operate as effective institutions for self-government.

In practice, this potential was not realised. The rūnanga, as established, were not representative of all hapū and territories. On occasions, the rūnanga and assessors were

able to successfully resolve issues, including land disputes, in a manner that was consistent with Māori values. But on other occasions local officials interfered with or (in the case of land purchasing) undermined the decisions of Māori officials. The rūnanga were not empowered under the Government's system to make and enforce local laws, because the Governor in Council did not recognise their decisions; in the north, only one resolution, made by the Bay of Islands District Runanga was ever brought into force. In practice, Māori therefore could not exercise the powers of local self-government that Grey had promised them. We are not convinced by the Crown's argument that rūnanga exercised considerable decision-making power, akin to that of provincial governments. We note also that Dr Loveridge pointed out that Grey's institutions were not really new, in that the administrative model had been laid down in 1858 by C W Richmond – which in his view raised an important question: '[W]hy did he not also adopt the companion idea of a national conference of chiefs, or some comparable mechanism for consultation?' This, he said, was Grey's 'principal departure from Fox's plans, and might well be considered the principal flaw in his own'.[769]

Further, the scheme operated for only four years before the Crown unilaterally decided to withdraw funding and close the rūnanga. This was an act of serious bad faith. Crown counsel submitted that the rūnanga were victims of nationwide budget cuts, but the evidence does not support this: it suggests that rūnanga were abandoned because the Crown took an ideological decision to withdraw support from Māori institutions and instead accelerate the process of Māori submission to the colony's systems of law and authority. This was reflected in the rapid establishment of the Native Land Court under the Native Lands Act 1865 after the closure of the rūnanga (we discuss and make findings on the Native Land Court system in chapter 9).

Grey had promised that the rūnanga would endure forever and would protect Māori from capricious government decisions. This promise was broken. Grey had promised that district rūnanga would make decisions about boundaries and ownership, and that the Crown itself would be subject to rūnanga decisions about land. This promise was broken. Grey had promoted the idea that rūnanga would be key decision-making bodies for the social good, and an important force in the revitalisation of the North and its economic and social development. With the creation of rūnanga, he had promised, townships, roads, schools, and hospitals would be established in the north. That promise was broken, too.

Accordingly, we find that:

- By promising Māori that rūnanga would exercise substantial powers to make and enforce local regulations, determine land ownership, and guide development in their districts, and then failing to give effect to rūnanga decisions, the Crown acted inconsistently with its obligation of good faith, and breached te mātāpono o te houruatanga me te mātāpono o te whakaaronui tētahi ki tētahi/the principles of partnership and of mutual recognition and respect.
- By first reducing the powers that rūnanga could exercise and then unilaterally withdrawing support for them after promising Māori that the scheme would endure forever, allow Māori to make law for their districts, determine land ownership and boundaries, control the pace of settlement, and bring benefits, including the development of services and infrastructure leading to greater prosperity, the Crown acted inconsistently with its obligation of good faith, and therefore breached te mātāpono o te houruatanga/the principle of partnership.
- By failing to deliver on its 1858 promise that a township would be established at Kerikeri, and its 1861 promise that a township would naturally follow the establishment of district rūnanga, the Crown acted inconsistently with its obligation of good faith conduct, and therefore breached te mātāpono o te houruatanga/the principle of partnership.

7.6 Whakarāpopototanga o ngā Whakataunga/Summary of Findings

In respect of the Crown's transfer of responsibility for Māori affairs to settler authorities, we find that:

- The Crown failed to recognise, respect, and give effect to Māori political rights when it enacted a

constitution that provided for provincial and national representative assemblies in 1852 without negotiating with Te Raki Māori, without ensuring that Te Raki Māori were able to exercise a right to vote alongside settlers, and without providing safeguards that would secure ongoing Te Raki Māori autonomy and tino rangatiratanga. These Crown actions and omissions, which came at a crucial juncture in New Zealand history, breached te mātāpono o te tino rangatiratanga. These actions also breached te mātāpono o te houruatanga me te mātāpono o te whakaaronui tētahi ki tētahi/the principles of partnership and of mutual recognition and respect.

- By providing for responsible government by colonial ministries from 1856, and ultimately allowing those ministries to assume responsibility for the Crown–Māori relationship, the Crown fundamentally undermined the treaty relationship. The Crown did not negotiate with Te Raki Māori, or provide safeguards to ensure that Māori could continue to exercise autonomy and tino rangatiratanga. This breached te mātāpono o te tino rangatiratanga. It also breached te mātāpono o te houruatanga me te mātāpono o te whakaaronui tētahi ki tētahi/the principles of partnership and of mutual recognition and respect.
- By failing to declare self-governing Māori districts under section 71 of the Constitution Act 1852, and thus to ensure provision was made for Māori autonomy within its own kāwanatanga framework, the Crown breached te mātāpono o te houruatanga/the principle of partnership.
- By effectively denying the great majority of Māori representation in the General Assembly prior to 1867, the Crown breached te mātāpono o te mana taurite/the principle of equity. The Crown also breached this principle by failing to ensure that Māori were represented in the Legislative Council and in provincial assemblies (the Auckland Provincial Council in the case of Te Raki Māori).

In respect of the significance of the Kohimarama Rūnanga, we find that:

- By calling the Kohimarama Rūnanga only after war had already broken out, the Crown ensured the rūnanga focused primarily on its own agenda, that is on seeking Māori approval for the war and on its own proposals for administration of Māori affairs rather than responding to the priorities of Māori leaders. This was inconsistent with the Crown's duty of good faith, in breach of te mātāpono o te houruatanga/the principle of partnership.
- Governor Grey's decision to cancel the planned 1861 national rūnanga and all future national rūnanga was inconsistent with the Crown's obligation of good faith. The decision was a critical missed opportunity to build a forum for regular dialogue between the rangatiratanga and kāwanatanga spheres. It denied Māori (including Te Raki Māori) opportunities for ongoing input into government policy on matters of fundamental importance to them, including questions of land titling and administration, local government, and justice. By denying this opportunity, the Crown was in breach of te mātāpono o te houruatanga/the principle of partnership.

In respect of Grey's 'new institutions', we find that:

- By promising Māori that rūnanga would exercise substantial powers to make and enforce local regulations, determine land ownership, and guide development in their districts, and then failing to give effect to rūnanga decisions, the Crown acted inconsistently with its obligation of good faith, and breached te mātāpono o te houruatanga me te mātāpono o te whakaaronui tētahi ki tētahi/the principles of partnership and of mutual recognition and respect.
- By first reducing the powers that rūnanga could exercise and then unilaterally withdrawing support for them after promising Māori that the scheme would endure forever, allow Māori to make law for their districts, determine land ownership and boundaries, control the pace of settlement, and bring benefits, including the development of services and infrastructure leading to greater prosperity, the Crown acted inconsistently with its obligation of good faith, and therefore breached te mātāpono o te houruatanga/the principle of partnership.

- By failing to deliver on its 1858 promise that a township would be established at Kerikeri, and its 1861 promise that a township would naturally follow the establishment of district rūnanga, the Crown acted inconsistently with its obligation of good faith conduct, and therefore breached te mātāpono o te houruatanga/the principle of partnership.

7.7 Kōrero Whakatepe/Concluding Remarks

When Te Raki rangatira signed te Tiriti in February 1840, they granted kāwanatanga to the Queen of England ('ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu – te Kawanatanga katoa'). In turn, it was the Queen who guaranteed their tino rangatiratanga, offered to protect them, and granted them all the rights of British subjects.

Before 1840, and again during the treaty debates, British representatives deliberately cultivated the impression that Māori had a personal relationship with the monarch. In 1834, James Busby arrived as British Resident with a personal message from King William IV, and he later emphasised the King's personal interest in Māori well-being and his personal commitment to protecting Māori. Likewise, Hobson and other British representatives emphasised this personal relationship in the texts of the treaty and in their treaty explanations.[770]

The first few years after the signing of te Tiriti had, for a number of Ngāpuhi rangatira, raised questions about the role of governors who spoke and acted in the name of the Queen. During the period after the Northern War, northern leaders engaged with the Crown in the hope that their relationship might be restored, but by the mid-1860s had become disenchanted. Their expectations of the Kerikeri township had been disappointed; and they had participated with enthusiasm in the Kohimarama Rūnanga of 1860 as a rare opportunity to engage with the Crown and affirm their commitment to the treaty relationship, only to find that Governor Gore Browne's promise to reconvene the meeting annually, and his vision of its becoming a permanent body, part of the machinery of government, were overturned by his successor. In the meantime, they had adopted Governor Grey's scheme for district rūnanga, which he pledged would be lasting institutions through which Māori could run the affairs of their district and manage their lands, only to find that the Government cut funding for the rūnanga and withdrew its support within just a few years.

Above all, major changes in the arrangements for governing New Zealand were taking place. At first Te Raki leaders, and Māori generally, were probably unaware of the significance of the new Constitution of 1852. We have seen no evidence that the Crown informed Te Raki Māori or Māori generally about this important constitutional development, let alone sought Māori agreement. In 1840 the Crown had called meetings in many parts of the country to discuss te Tiriti, but it did not call similar meetings to discuss the New Zealand Constitution Act and its significance. The Act was not translated into Māori, nor was it circulated amongst Māori communities. It is not clear how aware Te Raki Māori were of the establishment of the colonial Parliament and provincial governments. What they did become aware of during the latter part of this period was the growing presence and influence of settler politicians. This followed the grant of responsible government by the British authorities to a generation of settlers who were determined to secure rights of self-government.

In Dr Orange's view, these changes 'confronted Maori with a new authority representing interests that they increasingly perceived to be opposed to their own', and led to a 'growth of Maori unease' in many districts during these years. Their personal relationship with the Queen seemed less important, even though the Queen herself still evidently cherished it. In 1863, she would receive a delegation of Māori and become godmother to Albert Victor Pōmare, the newly born son of Hāre Pōmare (the son of Pōmare II, and nephew of Te Hemara Tauhia) and his wife Hariata at his christening. Arapeta Hamilton described the birth of Albert Victor Pōmare and his christening as Queen Victoria's godson as the fulfilment of 'te Kawenata tuatoru' between Ngāti Manu and the Crown.[771]

British constitutional change was to highlight the tensions between its establishment of empire in countries with large indigenous populations, and its encouragement of settlement – in the case of New Zealand, organised

British settlement from 1840 which was augmented greatly by the unorganised arrival of great numbers of gold miners in the 1860s. The British government's view that it would be able to accommodate its obligations both to Māori (who it considered had rights to land and to exercise their own customs), and to settlers would soon come under scrutiny.

Governor Gore Browne, who held office when responsible government was granted, decided that the only way of resolving the tension and protecting Māori from the new settler Governments and their constituencies was to reserve Māori matters to the imperial government (practically, to himself). Whether this was the right decision is open to question. The Colonial Office at the time had considerable doubts about whether it was practical to separate the administration of Māori affairs from that of other internal issues; but because they too were worried about a settler Government, and whether it could avoid conflict with Māori, gave the Governor unreserved support. But Gore Browne's move aroused strong resentment within the settler Government, and attempts to undermine his decision began at once. Arguably, he also laid the basis for some years of conflict between the imperial and the colonial Governments, since the Colonial Office regarded responsibility for self defence as a logical corollary to settler self-government. As war spread across the central North Island from 1860, the struggle between London and Wellington for control of Māori affairs became little more than a struggle over who should pay for the British troops engaged in quelling Māori resistance. It was an inauspicious beginning for Māori–settler relations in a new constitutional era.

Hāre and Hariata Pōmare, with their son, Albert Victor.

One voice raised against the policies of the Government by 1864 was that of politician Henry Sewell, regarded as a 'moderate'. In an open letter he criticised the Whitaker–Fox ministry's punitive legislation passed during the Waikato war (the Suppression of Rebellion Act 1863 which permitted trial by court-martial and the suspension of *habeas corpus*) and the New Zealand Settlements Act 1863 (the confiscation legislation). Sewell 'aimed to embarrass the New Zealand government and to prod the English political and moral conscience' in Orange's words. In the crisis of the 1860s, he 'perceived that New Zealand stood at the crossroads'.[772] In his view, the essential question to be resolved was 'what are the respective rights and obligations of two races placed in political relation to each other'. His answer was that certainly the treaty reserved to Māori their 'full territorial rights', and they also 'must have understood that they would retain "the right of self-government over their internal affairs"'. The Crown had limited rights of authority over Māori, and might not

The Māori group with whom Hāre and Hariata Pōmare initially travelled to England in May 1863. They were escorted by William Jenkins, a former Wesleyan lay preacher, who organised the tour and was their interpreter. The party was received with great interest in London, Bristol, and Birmingham and was invited to many society functions. *From left:* Takerei Ngawaka, Hirini Pakia, Tere Pakia (Hariata Te Iringa), Horomona Te Atua and Hapimana Ngapiko (both standing), Hāre Pōmare (reclining), Hariata Pōmare, Kamariera Te Hautakiri Wharepapa, Huria Ngahuia, Kihirini Te Tuahu, Reihana Te Taukawau, and Paratene Te Manu.

confiscate their lands. In his view the sovereign power rested with the imperial executive, not the New Zealand Government. Yet, when he considered the Crown's treaty duty, he assumed that it lay in gradually extending British law over Māori, and that Māori self-government would be temporary. This was, as Orange said, 'the humanitarian, gradualist approach to relations with Māori to whom the Crown stood as guardian'.[773] But the imperial government view of its guardianship role was by now limited. Certainly it was alarmed by the extent of the New Zealand Government's confiscation, and New Zealand politicians did respond, in Professor Ward's view, by including Māori 'more meaningfully in mainstream institutions and give them rights promised under the Treaty'.[774] But Dalton concluded that by 1868, the imperial government was worn out by the attempts of Grey and his Government

to retain the last British troops in New Zealand, and 'no longer had any policy except that of disentangling itself completely from the colony's internal affairs'.[775]

Professor Dalton has suggested that the real question that arose when the imperial government granted the settlers of New Zealand self-government was 'how best could the British Government assist the Māori people under responsible government?' Would maintaining personal control by the Governor really promise Māori 'substantially greater practical benefits than any alternative arrangement?' In fact, he suggested, given 'the undoubted disadvantages of personal control' it did not seem that Māori would on balance be advantaged.[776] Claudia Orange, likewise, pointed to the 'distrust and antagonism' between the British and colonial Governments that developed during the following years; in her view, 'the losers in this struggle were the Maori'.

She suggested one answer to Dalton's question: the Crown might have made a formal transfer of treaty obligations to the colonial Government. It did not; nor was this even considered.[777] As mentioned earlier, the Wesleyan Missionary Society argued that the colonial Government should be legally required to act in accordance with the treaty, but the imperial authorities took no action on this issue.[778] Neither the New Zealand Constitution Act 1852 nor any subsequent constitutional instrument provided meaningful safeguards for treaty rights. Section 71 of the Constitution Act provided for self-governing Māori districts but contained no requirement that these be established or recognised. Section 7 enfranchised males aged 21 or over, subject to a property test which effectively excluded almost all Māori.

It is true that the Colonial Office in February 1863 instructed Governor Grey to refuse assent for any legislation that harmed Māori or breached the treaty, and this is the closest the imperial government came to providing a safeguard – but it was short-lived. Subsequent instructions did not repeat this requirement. After Grey's departure, the Royal Instructions appointing his successors did not make any specific provision for the protection of Māori treaty rights.[779] Yet this was well within the powers of the Colonial Office.

We add that the injunctions to Governor Grey may be thought to highlight the problems of relying on a Governor as the last line of defence of the treaty. Grey's instructions, for instance, allowed him some latitude in relation to his dealings with the Kīngitanga, which the Secretary of State suggested might be recognised; but his own views were very different, and his invasion of the Waikato followed by large scale land confiscations put paid to any negotiation with King Tāwhiao.

As we will see in chapter 11, throughout the nineteenth century (and indeed beyond), Te Raki Māori continued to view the treaty relationship as a personal one between rangatira and the Queen. They drew a clear distinction between the Queen (who they were bound to through the sacred covenant of the treaty) and her colonial Government. As Tā Himi Henare told the Tribunal in 1987, 'the direct link with the Maori people with the Queen is still very strong. But the link with Governments I don't think is'.[780] Yet, the Queen, as we explain in chapter 11, was in practice represented by an imperial government that no longer regarded itself as being responsible for the treaty.

7.8 Ngā Whakahāweatanga / Prejudice

The period under consideration in this chapter was one of momentous change in the Māori–Crown and Māori–settler relationships. At the beginning of this period, Māori were a significant majority of New Zealand's population, and the Crown's practical authority was established in only a few coastal towns. At the beginning of the Northern War, Governor FitzRoy and other officials had genuinely feared that the Crown might be forced to abandon New Zealand. Two decades later, Māori in this and several other North Island districts continued to exercise considerable day-to-day autonomy, but the tide of Crown and settler influence was rising rapidly, and the Crown's approach to the treaty relationship had fundamentally changed in significant ways, to the long-term prejudice of Te Raki Māori.

First, the relationship was no longer between rangatira and Queen, or even between rangatira and Governor. The Crown had transferred responsibility for the Crown–Māori relationship to the colonial Government,

and had done so without providing any mechanism by which Māori could enforce their treaty rights or have any meaningful influence over the colony's policies and laws. The constitution transferring this responsibility was formulated in London as a purely imperial act, with no input from Māori. It did not build at all upon the relationship Te Raki Māori had established with the Crown barely a decade before. As contact with Crown officials and settlers grew, Māori were increasingly forced to manage relationships in ways that took account of those policies and laws.

The prejudicial effects were significant. Growing settler political influence caused considerable unease among Māori about the Crown's intentions, and it coincided with a marked shift in the Government's policies away from tolerating Māori laws and customs towards a more determinedly assimilationist course. At a political level, as the settler population grew and colonial institutions asserted their authority, Māori were left without any means of exercising effective influence on the colony's laws. Māori would not be given representation in the General Assembly until 1867 (we discuss the Maori Representation Act 1867 in chapter 11), and would be offered few opportunities to influence government policy following Grey's decision to not reconvene the Kohimarama Rūnanga.[781]

From the 1860s onwards, leaders in this district and elsewhere frequently protested against laws that infringed their treaty rights. However, the imperial government had not taken steps to ensure that the colonial Government would uphold the Crown's treaty obligations. When the British Parliament did try to intervene in Māori affairs with the introduction of the New Zealand Bill 1860 to the House of Lords, the settler Parliament responded with its own Bill to establish 'Responsible advisers' in the administration of Māori affairs. This sent a clear message to London that such interventions were not welcome.[782] Furthermore, having transferred authority for Māori affairs to the colonial Government, the imperial government no longer accepted responsibility for the Crown's treaty obligations (a point we will return to in chapter 11).

The constitutional transition that began in 1852 also had significant demographic effects. The combination of settler self-government and assisted immigration (which was funded by provincial councils and often provided in the form of free land) made New Zealand an increasingly attractive destination for British migrants, whose number exploded from 1852 and surpassed those of Māori by the late 1850s. The rapid growth in the settler population continued, driven by the gold rushes of the 1860s, created pressure for sale of Māori lands and ultimately swamped Māori populations.[783] As the influx of settlers continued during the 1860s, the Crown had reinforced its willingness to assert its authority by using force. Te Raki leaders already had direct experience of this in the Northern War and were determined to avoid any repeat. The Crown's invasions of Taranaki and Waikato reinforced the potential threat, and reduced the options available to Māori as they responded to growing Crown and settler influence.

By 1865, the Crown had largely abandoned any genuine interest in Māori autonomy and self-determination. The Crown had always assumed that Māori would ultimately submit to its authority, but until 1860 it had generally tolerated Māori self-government so long as there was no direct threat to its own presumed sovereignty or to settler interests. Section 71 of the Constitution Act 1852 exemplified this tolerance, providing for the creation of native districts in which Māori could continue, albeit under Crown legislation, to exercise authority according to their own laws and customs. This was a promising provision that could have given effect to Māori autonomy within the treaty framework, by giving legal force to tikanga at the local level. If native districts had been established in Te Raki, this may have led to laws or regulations passed by the district rūnanga being gazetted, thus becoming part of New Zealand law and strengthening the partnership between Te Raki Māori and the Crown. However, section 71 was never used. Instead, Māori–Crown tensions increased as the population balance tilted in the late 1850s, and the newly empowered settlers sought to assert their authority over Māori.

In the early 1860s, the Crown needed Māori on its side and was therefore willing to make some concessions to Te Raki Māori in the form of limited self-government. While the Crown was not prepared to fully recognise and respect the rangatiratanga sphere of authority at the Kohimarama

Rūnanga, the promise of a new national advisory body was viewed by Te Raki Māori as a rare opportunity to engage with the Crown in dialogue about a treaty partnership in which authority might be shared, and peace and prosperity finally secured. Though not affording the degree of autonomy envisaged under section 71, Grey's rūnanga, in particular, were institutions that might – with ongoing good will – have secured that partnership for future generations, had the Crown not quickly terminated them. However, the Crown failed to uphold its promises and continue the policy of consultation and listening to Māori that it had signalled at the Kohimarama Rūnanga. The disappointment of this failure was made worse by the withdrawal of funding for the district rūnanga. As Armstrong and Subasic put it, the Crown's 'sudden and heavy retrenchment represented a schism in their relationship with the Crown and settlers'.[784] This series of disappointments and broken promises, beginning with the failure to implement section 71, significantly undermined Te Raki Māori trust in the Crown and seriously compromised the treaty relationship for at least a generation.

As we have seen throughout this chapter, the Crown's unilateral transfer of authority was to have profound effects on Māori in this inquiry district and elsewhere over many decades. By the time the wars in the central North Island concluded, the balance of power had shifted, through a combination of military victory, land confiscation, and continued population growth, in favour of the Crown. Furthermore, by that time the Government was under the effective control of settlers, who showed no tolerance for Māori self-determination or Māori law. Instead, from 1865, the Crown sought to extend its authority into Māori communities as quickly as possible and to support settler desire for Māori lands and resources. A direct line can be drawn from this transfer of power to the Crown's subsequent abandonment of attempts to provide for Māori self-government through district rūnanga; its establishment of the Native Land Court and individualisation of Māori land title, which together inflicted immense damage on Te Raki Māori communities; its acceleration of land purchasing during the 1870s; and its failure to urge the colonial Parliament to take all its treaty responsibilities more seriously and to ensure that it did. This was an assimilationist course, not one that considered Māori as equals or made any place for the exercise of tino rangatiratanga.

Notes

1. 'Proceedings of the Kohimarama Conference', 27 July 1860, *Maori Messenger/Te Karere Maori*, vol 7, no 15, pp 41–42; David Armstrong and Evald Subasic, 'Northern Land and Politics, 1860–1910', report commissioned by the Crown Forestry Rental Trust, 2007 (doc A12), pp 178–179.
2. Claimant closing submissions (#3.3.228), pp 9–10, 33, 269–270.
3. Ibid, pp 217–218, 275–276.
4. Ibid, p 17; Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, Wai 1200, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 1, p 242.
5. Waitangi Tribunal, *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*, Wai 1040 (Wellington: Legislation Direct, 2014), pp 519–520.
6. Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims*, Wai 898, 6 vols (Lower Hutt: Legislation Direct, 2023), vol 1, pp 175–176; Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1), pp 166, 173–174.
7. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, Wai 9, 2nd ed (Wellington: Brooker and Friend Ltd, 1991), pp 35–38.
8. Ibid, pp 36–37.
9. Ibid, pp 37–38.
10. Ibid, p 38.
11. Ibid.
12. Ibid.
13. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wai 22, 2nd ed (Wellington: Government Printing Office, 1989), p xv.
14. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wai 143 (Wellington: Legislation Direct, 1996), pp 42, 308–309; see also Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, 3 vols (Wellington: GP Publications, 1991), vol 2, pp 250–251, 270–272; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, Wai 785, 3 vols (Wellington: Legislation Direct, 2008), vol 1, pp 308–309, 374.
15. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 207.
16. Waitangi Tribunal, *The Taranaki Report*, Wai 143, p 20; Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 172, 403.
17. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 191, 207; see also Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, vol 1, pp 205–206.
18. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 176.
19. Ibid.

20. Ibid, p 177.
21. Ibid.
22. Ibid.
23. Ibid.
24. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, Wai 814, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 60.
25. Ibid, p 62.
26. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 227–228, 241, 337; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, vol 2, pp 713–714, 740–742.
27. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 228–229, 232.
28. The Tribunal found that Grey's reasons were racist and illogical: ibid, pp 231–232.
29. Ibid, p 384.
30. Ibid, pp 178, 232.
31. Ibid, p 180.
32. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, vol 1, pp 467–469.
33. Ibid, pp 481–482.
34. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 242.
35. Claimant closing submissions (#3.3.228), p 10.
36. Ibid, pp 9, 33, 211; claimant closing submissions (#3.3.221), pp 89–91; closing submissions for Wai 2071 (#3.3.375), p 2.
37. Claimant closing submissions (#3.3.228), pp 268–270.
38. Specific closing submissions for Wai 1477, Wai 1522, Wai 1531, Wai 1716, Wai 1957, Wai 1968, Wai 2061, Wai 2063, Wai 2377, Wai 2382, and Wai 2394 (#3.3.338(a)), pp 3–4.
39. Claimant closing submissions (#3.3.228), pp 268–270.
40. Ibid, p 269.
41. Ibid, pp 217–218.
42. Ibid, p 271.
43. Ibid, pp 270–271.
44. Ibid, pp 275–276, 278; claimant closing submissions (#3.3.221), pp 106–107.
45. Claimant closing submissions (#3.3.228), p 17.
46. Ibid, pp 270–271.
47. Ibid, pp 9, 259, 278–279.
48. Ibid, pp 9–10, 64–65, 180; Te Runanga a Iwi o Ngapuhi, amended statement of claim, October 1995 (Wai 549 ROI, claim 1.1.66(a)), p 15.
49. Claimant closing submissions (#3.3.228), p 8.
50. Ibid, pp 10, 218.
51. Claimant closing submissions (#3.3.221), p 68.
52. Ibid, pp 68–69.
53. Crown closing submissions (#3.3.402), p 59.
54. Ibid, pp 6–7, 59.
55. Ibid, pp 91–92, 111.
56. Ibid, p 111.
57. Ibid, pp 75–76.
58. Ibid, pp 91–92.
59. Ibid, pp 92, 111.
60. Raewyn Dalziel, 'The Politics of Settlement', in *The Oxford History of New Zealand*, ed Geoffrey W Rice, 2nd ed (Oxford: Oxford University Press, 1992), p 88; Philip Joseph, *Joseph on Constitutional and Administrative Law*, 5th ed (Wellington: Thomson Reuters New Zealand Ltd, 2021), pp 149–150. Following this, Grey enacted the Provincial Councils Ordinance 1848 which divided New Zealand into two provinces, New Ulster and New Munster, and provided for provincial legislatures to be composed of a mixture of officials and nominees. However, neither provincial government established regular operations as a means for settler self-government: Bruce Stirling, 'Eating Away at the Land, Eating Away at the People: Local Government, Rates and Maori in Northland', report commissioned by the Crown Forestry Rental Trust, 2008 (doc A15), p 62.
61. New Zealand Constitution Act 1852, ss 2–3; Stirling, 'Eating Away at the Land' (doc A15), p 65.
62. Dalziel, 'The Politics of Settlement', p 93.
63. Claimant submissions in reply (#3.3.450), p 171.
64. Claimant closing submissions (#3.3.221), p 68.
65. Marama Waddell (doc AA30), p 7; claimant closing submissions (#3.3.221), p 68.
66. Claimant submissions in reply (#3.3.450), pp 175–176; claimant closing submissions (#3.3.221), p 68.
67. Claimant closing submissions (#3.3.228), pp 268–269.
68. Crown closing submissions (#3.3.402), pp 112–115.
69. Ibid, pp 92–97.
70. Joseph, *Joseph on Constitutional and Administrative Law*, p 149; Dalziel, 'The Politics of Settlement', p 91.
71. Government of New Zealand Act 1846; Joseph, *Joseph on Constitutional and Administrative Law*, p 149.
72. Earl Grey transmitted the Act to Governor Grey in a dispatch of 23 December 1846, enclosing a copy of the statute, as well as a Royal Charter based on the statute, also dated 28 December 1846, accompanied by the Queen's Instructions under the Royal Sign Manual, a document that detailed how the new system of government was to work: IUP/BPP, vol 5, pp 520–543.
73. New Zealand Government Act 1846, s 10; Dr Donald Loveridge, 'The Development and Introduction of Institutions for the Governance of Maori, 1852–1865', report commissioned by the Crown Law Office, 2007 (doc E38), pp 10–12; Ian Wards, *The Shadow of the Land: A Study in British Policy and Racial Conflict in New Zealand, 1832–1852* (Wellington: Historical Publications Branch, Department of Internal Affairs, 1968), pp 287–288.
74. New Zealand Government Act 1846, s 10 (cited in Dr Donald M Loveridge, 'The Development and Introduction of Institutions for the Governance of Maori, 1852–1865', report commissioned by the Crown Law Office, 2007 (doc E38), pp 11–12).
75. Ibid.
76. New Zealand Charter, enclosure in Grey to Grey, 23 December 1846, IUP/BPP, vol 5, p 543.
77. Alexander Hare McLintock, *Crown Colony Government in New Zealand* (Wellington: R E Owen, 1958), p 287.

78. Loveridge, 'Development and Introduction' (doc E38), p 12; Grey to Grey, 23 December 1846, IUP/BPP, vol 5, p 527.
79. New Zealand Government Act 1846, s 10.
80. Wards, *The Shadow of the Land*, pp 387–388; McLintock, *Crown Colony Government*, pp 287–288; Steve Watters, 'War in Wellington: Last Battles', Ministry for Culture and Heritage, https://nzhistory.govt.nz/war/wellington-war/last-battles, last modified 19 October 2021; 'Steve Watters, 'War in Whanganui: The Siege of Whanganui', Ministry for Culture and Heritage, https://nzhistory.govt.nz/war/wanganui-war/siege-of-wanganui, last modified 20 October 2021.
81. Governor Grey to Earl Grey, 3 May 1847 (cited in Henry Hanson Turton, *An Epitome of Official Documents Relative to Native Affairs and Land Purchases in the North Island of New Zealand* (Wellington: George Didsbury, 1883), p 45); Stirling, 'Eating Away at the Land' (doc A15), pp 61–62.
82. Grey, memorandum, 29 November 1848 (cited in Loveridge, 'Development and Introduction' (doc E38), p 13).
83. Ibid (pp 12–13).
84. Stirling, 'Eating Away at the Land' (doc A15), pp 61–62; Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (Auckland: Auckland University Press, 1995), pp 85–91.
85. Norman Foden, *The Constitutional Development of New Zealand in the First Decade: 1839–1849* (Wellington: L T Watkins, 1938), p 167; Stirling, 'Eating Away at the Land' (doc A15), p 61.
86. Loveridge, 'Development and Introduction' (doc E38), pp 14–15, 19.
87. Provincial Councils Ordinance 1848.
88. Dalziel, 'The Politics of Settlement', p 92; McLintock, *Crown Colony Government*, pp 244–245.
89. Dalziel, 'The Politics of Settlement', pp 91–92; Stirling, 'Eating Away at the Land', p 62.
90. Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen & Unwin, 1987), pp 138–139.
91. Founded in England in 1837 in the aftermath of the abolition of slavery, the Aborigines' Protection Society was highly influential in shaping the policy of the British Empire with regard to indigenous people. Not only did it question the dependence on indigenous labour in the colonies, it encouraged settler populations to represent themselves and form elected assemblies: Jared McDonald, review of *The Aborigines' Protection Society* by James Heartfield, *Settler Colonial Studies*, vol 3, no 2 (2013), p 248.
92. Orange, *The Treaty of Waitangi*, p 138.
93. Wesleyan Missionary Committee, *Correspondence between the Wesleyan Missionary Committee and Sir James Pakington* (London: PP Thomas, 1852) (cited in Orange, *The Treaty of Waitangi*, p 138).
94. Orange, *The Treaty of Waitangi*, p 138.
95. Ralph Johnson, 'The Northern War 1844–1846', report commissioned by the Crown Forestry Rental Trust, 2006 (doc A5), pp 402–403.
96. New Zealand Constitution Act 1852, ss 32–33, 40–42.
97. Ibid, ss 2–3. The provinces were Auckland, New Plymouth, Wellington, Nelson, Canterbury, and Otago.
98. Ibid, s 7; Loveridge, 'Development and Introduction' (doc E38), p 15.
99. New Zealand Constitution Act 1852, s 53.
100. Ibid, ss 56–58.
101. Loveridge, 'Development and Introduction' (doc E38), p 13; Vincent O'Malley, 'Northland Crown Purchases, 1840–1865', report commissioned by the Crown Forestry Rental Trust, 2006 (doc A6), pp 48–49.
102. Loveridge, 'Development and Introduction' (doc E38), pp 11–12, 16.
103. Ibid, pp 16–17.
104. William Swainson, *New Zealand and its Colonization* (London: Smith, Elder and Co, 1859), pp 287–288.
105. Loveridge, 'Development and Introduction' (doc E38), p 17.
106. McLintock, *Crown Colony Government*, p 335.
107. Sir John Pakington, *House of Commons Debate*, 3 May 1852, vol 121, col 137 (cited in McLintock, *Crown Colony Government*, p 336).
108. Brian James Dalton, *War and Politics in New Zealand, 1855–1870* (Sydney: Sydney University Press, 1967), p 9.
109. Ibid, pp 12–13.
110. Chichester Fortescue, *House of Commons Debate*, 11 April 1861, vol 162, cols 481–488 (cited in Loveridge, 'Development and Introduction' (doc E38), p 17). According to Dr Merata Kawharu, these words were first used in a petition to the British government from Auckland settlers: Kawharu, 'Te Tiriti and its Northern Context', report commissioned by the Crown Forestry Rental Trust, 2008 (doc A20), p 166.
111. Loveridge, 'Development and Introduction' (doc E38), pp 17–18; Stirling, 'Eating Away at the Land' (doc A15), p 64; see also enclosure 2, AJHR, 1860, E-6(b), pp 5–6.
112. McLintock, *Crown Colony Government*, p 373.
113. For election results, see 'House of Representatives', *Daily Southern Cross*, 26 August 1853, p 3; 'The Elections', *Daily Southern Cross*, 26 August 1853, p 3. For boundaries, see Alan McRobie, *Electoral Atlas of New Zealand* (Wellington: GP Books, 1989), pp 28–29.
114. Joseph, *Joseph on Constitutional and Administrative Law*, p 152.
115. Dalziel, 'The Politics of Settlement', p 94.
116. George Grey to Wynyard, 8 December 1854, IUP/BPP, vol 10, pp 125–126.
117. Alison Quentin-Baxter and Janet McLean, *This Realm of New Zealand: The Sovereign, The Governor-General, the Crown* (Auckland: Auckland University Press, 2017), pp 18–19.
118. Gore Browne to Grey, 12 March 1856 (cited in Quentin-Baxter and McLean, *This Realm of New Zealand*, p 19); see also F Whitaker, H Sewell, C W Richmond, and J Logan Campbell, memorandum, 22 August 1856, AJHR, 1858, E-5, pp 2–3 (Loveridge, 'Development and Introduction' (doc E38), p 18); Joseph, *Joseph on Constitutional and Administrative Law*, pp 154–161; see also AJHR, 1860, E-6(b), p 6, encl 2. Other issues affecting the prerogative and imperial matters were international trade and foreign affairs, and various Bills reserved for the Queen's assent (in accordance with the Governor's instructions).

119. Quentin-Baxter and McLean, *This Realm of New Zealand*, p 19; Dalton, *War and Politics*, p 30. It should be remembered that in this period there were no political parties as such; ministries were formed only indirectly on the basis of elections. Rather, they were the result of parliamentarians coming together behind a leader; their hold on office was unpredictable: Dalziel, 'The Politics of Settlement', p 98.
120. Orange, *The Treaty of Waitangi*, pp 139–140; encl 2, AJHR, 1860, E-6(b), p 6.
121. Orange, *The Treaty of Waitangi*, pp 139–140.
122. Gore Browne to Sewell, 13 June 1859 (cited in Janet McLean, 'Crown, Empire and Redressing the Historical Wrongs of Colonisation in New Zealand', *New Zealand Law Review*, no 2 (2015), p 200).
123. William Fox, minute, 8 October 1861, AJHR, 1862, E-2, p 9.
124. Dalton, *War and Politics*, pp 35–37.
125. Whitaker, Sewell, Richmond, and Campbell, 22 August 1856, AJHR, 1858, E-5, p 3; T Gore Browne, 28 August 1856, AJHR, 1858, E-5, p 4; see also Dalton, *War and Politics*, pp 31–32, 38–39; McLean, 'Crown, Empire and Redressing the Historical Wrongs', p 200; Dr John E Martin, 'Refusal of Assent – A Hidden Element of Constitutional History in New Zealand', *Victoria University of Wellington Law Review*, vol 41, no 1 (2010), p 59.
126. Dalton, *War and Politics*, pp 40–41.
127. Ibid, p 45.
128. Orange, *The Treaty of Waitangi*, p 140; Loveridge, 'Development and Introduction' (doc E38), p 18.
129. 'The Visit of His Excellency Governor Gore Browne to the Bay of Islands and the North', *Maori Messenger/Te Karere Maori*, 1 February 1858, p 4; O'Malley, 'Northland Crown Purchases' (doc A6), pp 121–122.
130. Orange, *The Treaty of Waitangi*, p 140; Dr Manuka Henare, Dr Hazel Petrie, and Dr Adrienne Puckey, '"He Whenua Rangatira": Northern Tribal Landscape Overview (Hokianga, Whangaroa, Bay of Islands, Whāngārei, Mahurangi and Gulf Islands)', report commissioned by the Crown Forestry Rental Trust, 2009 (doc A37), p 481; Loveridge, 'Development and Introduction' (doc E38), pp 18, 111.
131. Loveridge, 'Development and Introduction' (doc E38), p 42. Richmond's full name was Christopher William Richmond. During his lifetime he was known in public life as C W Richmond.
132. Orange, *The Treaty of Waitangi*, p 140.
133. The Acts were the Native Territorial Rights Act, Native Schools Act, Native Reserves Amendment Act, Native Districts Regulation Act and Native Circuit Courts Act; see Loveridge, 'Development and Introduction' (doc E38), pp 69–70; Martin, 'Refusal of Assent', p 59.
134. See, for instance, the Native Districts Regulation Act 1858, the Native Circuit Courts Act 1858, and the Native Territorial Rights Act 1858: Martin, 'Refusal of Assent', pp 59–60; Loveridge, 'Development and Introduction' (doc E38), pp 65, 70–71.
135. Martin, 'Refusal of Assent', p 59.
136. Loveridge, 'Development and Introduction' (doc E38), pp 68–70.
137. Loveridge, 'Development and Introduction' (doc E38), pp 65, 70–71; Gore Browne to Bulwer Lytton, 14 October 1858, AJHR, 1860, E-1, p 1. Britain could block legislation, Martin stated, either by disallowance of enacted legislation to which the Governor had assented or by not giving assent to reserved Bills. Refusing assent was less severe than disallowance but was used rarely: Martin, 'Refusal of Assent', p 55.
138. Gore Browne to Bulwer Lytton, 14 October 1858, AJHR, 1860, E-1, pp 1–2. In support of his views, Gore Browne said he had 38 letters from people in close contact with Māori, 36 of whom agreed that any transfer of responsibility would be imprudent and unjust. Gore Browne reinforced his points by enclosing a letter from the Archdeacon of Waitemata, George Kissling, who wrote on behalf of the Bishop of New Zealand urging that Māori would not understand that the Governor's powers were to be limited under the new legislation by his having to act 'with the consent of and by the advice of the Executive Council'. The Māori, he wrote, regarded the Queen as a mother, and the Governor as 'Her Representative and their friend', whereas they paid '[n]o special respect . . . to a changeable Ministry elected by the European population'. The Governor should not be left in a position where he had to decide between the opinion of an Executive Council with little knowledge of Native Affairs, and that of the knowledgeable Native Secretary: Kissling to Gore Browne, 23 July 1858, AJHR, 1860, E-1, p 3.
139. Browne to Lytton, 14 October 1858, AJHR, 1860, E-1, pp 1–2.
140. Ibid.
141. Ibid.
142. Ibid; Orange, *The Treaty of Waitangi*, pp 140–142.
143. Waitangi Tribunal, *The Taranaki Report*, Wai 143, pp 8–9.
144. Ibid; James Belich, *The New Zealand Wars, and the Victorian Interpretation of Racial Conflict* (Auckland: Auckland University Press, 1986), pp 77–78; Atholl Anderson, Judith Binney, and Aroha Harris, *Tangata Whenua: A History* (Wellington: Bridget Williams Books, 2015), pp 256–257; see also Dalton, *War and Politics*, sec 4.4.
145. Gore Browne to Secretary of Newcastle, 20 September 1859, IUP/BPP, vol 11, pp 93–99.
146. See 'Minutes of the Proceedings of the Kohimarama Conference of Native Chiefs', AJHR, 1860, E-9, pp 4–5.
147. O'Malley, 'Northland Crown Purchases' (doc A6), pp 152–158.
148. New Zealand Bill 1860, AJHR, 1860, E-6(b), pp 3–5.
149. Loveridge, 'Development and Introduction' (doc E38), p 114.
150. 'Relating to the Conduct of Native Affairs in New Zealand, as affected by a Bill now before Parliament', 30 July 1860, pp 17–18 (cited in Loveridge, 'Development and Introduction' (doc E38), p 114).
151. Dalton, *War and Politics*, pp 119–120; Donald Loveridge, 'The Origins of the Native Lands Acts and Native Land Court in New Zealand,' report commissioned by the Crown Law Office, 2000 (doc E26), pp 116–117.
152. Loveridge, 'Development and Introduction' (doc E38), pp 114–116; Native Council Act 1860.
153. Gore Browne to Duke of Newcastle, 26 November 1860, AJHR, 1861, E-3, p 6.
154. Ibid.
155. Ibid.
156. Ibid.
157. Ibid.

158. Loveridge, 'Development and Introduction' (doc E38), pp 114–116; Martin, 'Refusal of Assent', p 55.
159. Newcastle to Grey, 5 June 1861, AJHR, 1862, E-1, pp [92]–[93].
160. Governor to Native Secretary, 13 April 1861, AJHR, 1862, E-1, pp 18–19; Belich, *The New Zealand Wars*, p 119; Dalton, *War and Politics*, pp 127–131.
161. Newcastle to Grey, 5 June 1861, AJHR, 1862, E-1, pp [92]–[93]; Loveridge, 'Development and Introduction' (doc E38), pp 146–147; Dalton, *War and Politics*, p 142.
162. Newcastle to Grey, 5 June 1861, AJHR, 1862, E-1, pp [92]–[93]; Loveridge, 'Development and Introduction' (doc E38), pp 146–147.
163. Fox, minute, 8 October 1861, AJHR, 1862, E-2, p 9.
164. Fox himself, however, was a critic of the Waitara purchase – though it has been suggested that he and others who were dubbed 'philo-Maori' were 'no more sympathetic towards Maori society, society or goals than were their opponents': Keith Sinclair and Raewyn Dalziel, 'William Fox', in *Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, https://teara.govt.nz/en/biographies/1f15/fox-william, accessed 24 March 2022.
165. Fox, minute, 8 October 1861, AJHR, 1862, E-2, p 9.
166. Grey to Newcastle, 30 November 1861, AJHR, 1862, E-1, p 35.
167. Dalton, *War and Politics*, p 146.
168. Sewell, journal, December 1861 (cited in Orange, *The Treaty of Waitangi*, p 161).
169. Newcastle to Grey, 5 June 1861, AJHR, 1862, E-1, sec 3, pp 3–4, 5–6; Loveridge, 'Development and Introduction' (doc E38), pp 140, 146–147.
170. Newcastle to Grey, 26 May 1862, AJHR, 1862, E-1, pp [102]–[103].
171. 'Native Affairs', 25 July 1862, NZPD, vol D, pp 436–437; Dalton, *War and Politics*, p 146; Orange, *The Treaty of Waitangi*, pp 161–162.
172. 'Native Affairs', 8 August 1862, NZPD, vol D, pp 518, 568.
173. Ibid, p 515.
174. 'Native Affairs', 19 August 1862, NZPD, vol D, pp 573–574; 'Native Affairs', 19 August 1862, Journal of the House of Representatives, pp 79–80.
175. Newcastle to Grey, 26 February 1863, AJHR, 1863, E-7, pp 2–5.
176. Ibid, p 4.
177. Ibid, pp 5–7.
178. This was a reference to the Civil List of £7,000 provided for in the Constitution Act for 'Native purposes'.
179. Newcastle to Grey, 26 February 1863, AJHR, 1863, E-7, p 5.
180. Ibid, p 4.
181. Ibid, p 7; see also Quentin-Baxter and McLean, *This Realm of New Zealand*, pp 20–22.
182. Newcastle to Grey, 26 February 1863, AJHR, 1863, E-7, p 7.
183. Ibid.
184. Quentin-Baxter and McLean, *This Realm of New Zealand*, p 21.
185. Newcastle to Grey, 26 February 1863, AJHR, 1863, E-7, p 7.
186. See Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, vol 1, pp 472–474; Belich, *The New Zealand Wars*, pp 119–125.
187. Cardwell to Grey, 26 November 1864, AJHR, 1865, A-6, p 7.
188. Jeanine Graham, 'Frederick Aloysius Weld', in *Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, https://teara.govt.nz/en/biographies/1w10/weld-frederick-aloysius, accessed 24 March 2022; Loveridge, 'Development and Introduction' (doc E38), p 221.
189. Jeanine Graham, *Frederick Weld* (Auckland: Auckland University Press, 1983), p 77.
190. Dalton, *War and Politics*, p 209.
191. That is '£40 per head per annum, as opposed to the rate of £5 per head which had been set in 1862': Loveridge, 'Development and Introduction' (doc E38), p 21.
192. 'Native Affairs', NZPD, 1864–1866, vol D, pp 47–48.
193. Graham, *Frederick Weld*, p 76.
194. Ministers to Governor Grey, 30 December 1864, AJHR, 1865, A-1, p 1; see also Loveridge, 'Development and Introduction' (doc E38), pp 18, 20–21, 22–23; Martin, 'Refusal of Assent', pp 60–61, 63–64, 66–67.
195. Secretary of State for the Colonies to Governor Grey, 27 February 1865, AJHR, 1865, A-6, p 15; see also Duke of Buckingham (Secretary of State for the Colonies) to Governor Bowen, 1 December 1868, AJHR, 1869, A-1A, p 10.
196. Ministerial memorandum for the imperial government, 30 December 1864, AJHR, 1865, A-1, pp 1–3 (cited in Loveridge, 'Development and Introduction' (doc E38), p 221).
197. Secretary of State for the Colonies to Governor Grey, 27 February 1865, AJHR, 1865, A-6, p 15; see also Duke of Buckingham to Governor Bowen, 1 December 1868, AJHR, 1869, A-1A, p 10.
198. Orange, *The Treaty of Waitangi*, p 160.
199. Ibid.
200. Frederic Morris (Jock) Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland: Auckland University Press, 2006), ch 5, pp 126–127.
201. New Zealand Constitution Act 1852, s 71.
202. Claimant closing submissions (#3.3.228), pp 268–270; see also closing submissions for Wai 1477, Wai 1522, Wai 1531, Wai 1716, Wai 1957, Wai 1968, Wai 2061, Wai 2063, Wai 2377, Wai 2382, and Wai 2394 (#3.3.338(a)), pp 3–4.
203. Crown closing submissions (#3.3.402), p 111.
204. Loveridge, 'Development and Introduction' (doc E38), pp 11–12.
205. Ward, *A Show of Justice*, pp 85–86; Loveridge, 'Development and Introduction' (doc E38), pp 11–12.
206. Ward, *A Show of Justice*, pp 85–86.
207. Grey to Earl Grey, 15 December 1847 (cited in Ward, *A Show of Justice*, p 86).
208. Ward, *A Show of Justice*, pp 85–86; McLintock, *Crown Colony Government*, pp 394–395.
209. McLintock, *Crown Colony Government*, p 395.
210. Loveridge, 'Development and Introduction' (doc E38), pp 14–15.
211. Ward, *A Show of Justice*, p 86.
212. Loveridge, 'Development and Introduction' (doc E38), p 14; O'Malley, 'Northland Crown Purchases' (doc A6), p 48. In practice,

Māori in this district resolved most internal disputes among themselves until the 1870s, as we discuss in chapter 11.

213. Loveridge, 'Development and Introduction' (doc E38), p 14; see also Ward, *A Show of Justice*, p 90.

214. Loveridge, 'Development and Introduction' (doc E38), p 19; Ward, *A Show of Justice*, p 90.

215. New Zealand Constitution Act 1852, s 71.

216. Loveridge, 'Development and Introduction' (doc E38), p 16.

217. Earl Grey, 23 February 1852 (cited in Loveridge, 'Development and Introduction' (doc E38), p 16).

218. Pakington to George Grey, 16 July 1852 (cited in Kawharu, 'Te Tiriti and its Northern Context' (doc A20), pp 164–165).

219. Loveridge, 'Development and Introduction' (doc E38), p 16.

220. Ibid, p 16 fn 29.

221. Ward, *A Show of Justice*, p 90.

222. Ibid, pp 90–91.

223. Ibid, p 86.

224. Browne to Duke of Newcastle, 3 November 1860, AJHR, 1861, E-3, p 4.

225. Mark Hickford, 'Looking Back in Anxiety: Reflecting on Colonial New Zealand's Historical–Political Constitution and Laws' Histories in the Mid-Nineteenth Century', NZJH, vol 48, no 1 (April 2014), p 11.

226. Memorandum by responsible advisers, 29 September 1858 (cited in Loveridge, 'The Origins' (doc E26), p 35).

227. Gore Browne to Labouchere, 9 May 1857, AJHR, 1860, F-3, p 111; Loveridge, 'Development and Introduction' (doc E38), p 42.

228. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 227.

229. Gore Browne to Duke of Newcastle, 3 November 1860, AJHR, 1861, E-3, p 4; Loveridge, 'Development and Introduction' (doc E38), p 42.

230. 'Native Affairs', 11 August 1856, NZPD, vol B, p 351 (cited in Loveridge, 'Development and Introduction' (doc E38), p 32).

231. Loveridge described these events in detail: Loveridge, 'Development and Introduction' (doc E38), pp 32–89. For the Government's motivations, see in particular pp 34, 37–38, 40–43, 63–64.

232. Loveridge, 'Development and Introduction' (doc E38), pp 69–70; Hickford, 'Looking Back in Anxiety', p 11; Ward, *A Show of Justice*, p 107; see also Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 227–228.

233. Phil Parkinson, '"Strangers in the House": The Maori Language in Government and the Maori Language in Parliament, 1865–1900', *Victoria University of Wellington Law Review*, vol 32, no 3 (2001), pp 4–5.

234. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 227–228.

235. Loveridge, 'Development and Introduction' (doc E38), pp 65, 70–71.

236. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 228.

237. Loveridge, 'Development and Introduction' (doc E38), pp 65, 70–71.

238. Ibid, pp 101–103; Gore Browne to Newcastle, 20 September 1859, IUP/BPP, vol 11, pp 93–99.

239. Loveridge, 'Institutions for the Governance of Maori (doc E38), pp 103–105.

240. That is, the Native Districts Regulation Act 1858, which provided for the proclamation of native districts for which the Governor in Council could, with consent of the inhabitants, make regulations having the force of law; the intention was that rūnanga would take the initiative in the scheme. Also the Native Circuit Courts Act 1858, which provided for circuit magistrates to deal with offences under the first Act; magistrates were to be assisted by Māori juries and Māori assessors.

241. Loveridge, 'Development and Introduction' (doc E38), pp 106–112.

242. 'New Zealand Bill 1860', AJHR, 1860, E-6(b), p 4; Loveridge, 'Development and Introduction' (doc E38), p 113.

243. Loveridge, 'Development and Introduction' (doc E38), pp 113–116; Martin, 'Refusal of Assent', p 61.

244. Loveridge, 'Development and Introduction' (doc E38), pp 108–110.

245. William Richmond, 10 August 1860 (cited in Loveridge, 'Development and Introduction' (doc E38), p 109).

246. Loveridge, 'Development and Introduction' (doc E38), pp 113–116; Martin, 'Refusal of Assent', p 61.

247. Gore Browne to Duke of Newcastle, 26 November 1860, AJHR, 1861, E-3, p 7.

248. Newcastle to Grey, 5 June 1861 (cited in Loveridge, 'Development and Introduction' (doc E38), pp 146–147); Newcastle to Grey, 5 June 1861, AJHR, 1862, E-1, p 4.

249. Newcastle to Grey, 5 June 1861 (cited in Loveridge, 'Development and Introduction' (doc E38), pp 146–147); Newcastle to Grey, 5 June 1861, AJHR, 1862, E-1, p 4.

250. Newcastle to Grey, 14 March 1862, AJHR, 1862, E-1, p 8.

251. Loveridge, 'Development and Introduction' (doc E38), pp 281–282, 297–298; Ward, *A Show of Justice*, pp 196–197; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 264. Regarding Newcastle's approval, see Newcastle to Grey, 26 February 1862, AJHR, 1862, E-1, p 7.

252. Outlying Districts Police Act 1865, ss 2–4, 6; Loveridge, 'Development and Introduction' (doc E38), pp 247, 262–263. The Act was little used nationally, and not at all in our inquiry district; it was repealed in 1891: Hazel Riseborough, 'Background Papers for the Taranaki Raupatu Claim', 1989 (Wai 143 R01, doc A2), p 39.

253. Maurice Peter Keith Sorrenson, 'Giving Better Effect to the Treaty: Some Thoughts for 1990', NZJH, vol 24, no 2 (October 1990), pp 137–138.

254. Henare, Petrie, and Puckey, '"He Whenua Rangatira"' (doc A37), pp 571–573.

255. Loveridge, 'Development and Introduction' (doc E38), p 65.

256. Parkinson, 'Strangers in the House', p 4; Martin, 'Refusal of Assent', p 73.

257. Hōne Heke Ngāpua, 10 September 1894, NZPD, vol 85, p 553.

258. Hickford, 'Looking Back in Anxiety', p 11; Brookfield, *Waitangi and Indigenous Rights*, pp 116–118. In Hickford's view, although section 71 'was never explicitly activated or engaged, so-called "native districts" were recognized to exist, albeit with some complexity on occasion and some deliberate administrative elision on others'. From 1852, colonial officials chose to define such districts as areas 'over which Native title has not been extinguished'.
259. Hickford, 'Looking Back in Anxiety', p 11; Ward, *A Show of Justice*, pp 107–108; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 253.
260. The Acts applied only to lands that remained under Māori customary title: Brookfield, *Waitangi and Indigenous Rights*, p 118.
261. Taiwhanga, 14 June 1888, NZPD, vol 61, p 82; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1075.
262. According to Professor Brookfield, in 1875 and 1878 the Crown briefly considered applying section 71 to Waikato–King Country lands that remained under Māori control: Brookfield, *Waitangi and Indigenous Rights*, p 118.
263. The Act provided that the property interests must have been held for at least six months: Constitution Act 1852, s 7.
264. Dalziel, 'The Politics of Settlement', p 93; see also Neill Atkinson, 'Parliament and the People: Towards Universal Male Suffrage in 19th Century New Zealand', *New Zealand Journal of Public and International Law*, vol 3, no 1 (June 2005), p 167.
265. Waitangi Tribunal, *Maori Electoral Option Report*, Wai 413 (Wellington: Brooker's Ltd, 1994), pp 4–5; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 579.
266. Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, Wai 215, 2 vols (Wellington: Legislation Direct, 2010), vol 1, p 381.
267. David Williams, 'Indigenous Customary Rights and the Constitution of Aotearoa New Zealand', *Waikato Law Review*, vol 14 (2006), pp 123–124.
268. Loveridge, 'Development and Introduction' (doc E38), pp 10–11.
269. Merivale, 12 July 1849 (cited in Loveridge, 'Development and Introduction' (doc E38), p 10).
270. Earl Grey, dispatch, 23 February 1852 (cited in Loveridge, 'Development and Introduction' (doc E38), p 15).
271. Henare, Petrie, and Puckey, '"He Whenua Rangatira"' (doc A37), pp 479–480. This view was acknowledged in parliamentary debates: see, for example, Colonel Russell, 13 August 1867, NZPD, vol 1, pt 1, p 414.
272. Waikato leaders derisively labelled the colonial Parliament 'the English Committee' and refused to engage with it: Vincent O'Malley, 'Te Rohe Potae Political Engagement, 1840–1863', report commissioned by the Waitangi Tribunal, 2010 (Wai 898 R01, doc A23), p 142; see also Vincent O'Malley, 'Runanga and the Komiti: Maori Institutions of Self-Government in the Nineteenth Century' (doctoral thesis, Victoria University of Wellington, 2004) (doc E31), p 25.
273. Wakefield to Reynolds, Cargill, and Macandrew, 13 May 1853, *Otago Witness*, 25 June 1853, p 2.
274. Ibid. The New Zealand Native Reserves Act 1856 provided for the establishment of native reserves; that is, 'Lands set apart for the benefit of the Aboriginal Inhabitants of New Zealand'. Reserves could be either set aside during sale or, in the case of customary lands, established with the owners' consent (sections 14, 17). All reserves were managed by a commissioner on the owners' behalf (section 6).
275. Wakefield, 13 May 1853, *Otago Witness*, 25 June 1853, p 2.
276. Anderson, Binney, and Harris, *Tangata Whenua*, pp 250–253; Maurice Peter Keith Sorrenson, 'A History of Maori Representation in Parliament', in Royal Commission on the Electoral System, *Report of the Royal Commission on the Electoral System: 'Towards a Better Democracy'* (Wellington: Government Printer, 1986), pp B15–B16. An 1855 letter from Te Rangikaheke to other Ngāti Whakaue rangatira is often cited as representative of Māori views at this time. He wrote that the constitution provided for 'no recognition of the authority of the native people, no uniting of the two authorities': Wiremu Maihi Te Rangikaheke to Te Arawa, 3 December 1855 (cited in Anderson, Binney, and Harris, *Tangata Whenua*, p 251). For examples of Māori seeking representation, see 'Letters from Native Chiefs to Mr Fitzgerald MHR', AJHR, 1864, E-15; Major Heaphy, 14 August 1867, NZPD, vol 1, pt 1, p 459; John Williamson, 14 August 1867, NZPD, vol 1, pt 1, pp 461–462; Pāora Tūhaere quoted in 'Maori Representation – The Meeting at Kaipara', *Daily Southern Cross*, 10 March 1868, p 2.
277. For examples, see Wakefield to Reynolds, Cargill, and Macandrew, 13 May 1853, *Otago Witness*, 25 June 1853, p 2; 'Correspondence Relative to the Registration of Native Voters', AJHR, 1858, E-2, pp 2–3.
278. 'Papers Relative to the Right of Aboriginal Natives to the Electoral Franchise', AJHR, 1860, E-7, pp 5–6, 8.
279. The Bay of Islands member Hugh Francis Carleton told the House of Representatives in 1858 that Māori 'have a natural right not to vote, *but to be well governed*' (emphasis in original): 'Papers Relative to the Right of Aboriginal Natives to the Electoral Franchise', AJHR, 1860, E-7, pp 5–6.
280. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 579, 611.
281. Sorrenson, 'A History of Maori Representation', pp B18–B19; Paul Moon, 'A Proud Thing to Have Recorded: The Origins and Commencement of National Indigenous Political Representation in New Zealand through the 1867 Maori Representation Act', *Journal of New Zealand Studies*, no 16 (2013), pp 58–60; see also 'Representation Bill', 26 September 1865, NZPD, vol E, 1864–66, p 599.
282. James Fitzgerald, 6 August 1862, NZPD, vol D, pp 489–490.
283. Loveridge, 'Development and Introduction' (doc E38), p 221.
284. The discussion of the Maori Electoral Bill that follows relies on Loveridge, 'Development and Introduction' (doc E38), pp 239–241.
285. Dr Loveridge noted that this proposal was not entirely news in terms of New Zealand electoral practice. He pointed to the Miners Representation Act 1862 which had moved away from a Crown-grant-based franchise by giving the vote to men who held a valid 'Miner's Right' under the Gold Fields Acts. He added that the proposal was

similar to one made by Grey much earlier: Loveridge, 'Development and Introduction' (doc E38), p 241.
286. Sorrenson, 'A History of Maori Representation', pp B18–B19.
287. Maori Representation Act 1867, ss 2–6, 12.
288. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 528, 529.
289. Ibid, ch 6.
290. Dr Grant Phillipson, 'Bay of Islands Maori and the Crown, 1793–1853', report commissioned by the Crown Forestry Rental Trust, 2005 (doc A1), pp 205–206; Orange, *The Treaty of Waitangi*, p 46; Brookfield, *Waitangi and Indigenous Rights*, ch 5.
291. We described these events in our stage 1 report, *He Whakaputanga me te Tiriti*, Wai 1040, chs 3–5. For briefer summaries, see Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), ch 5 (esp pp 206–207); Henare, Petrie, and Puckey, '"He Whenua Rangatira"' (doc A37), ch 6.
292. Janet McLean, 'The Many Faces of the Crown and the Implications for the Future of the New Zealand Constitution', *Commonwealth Journal of International Affairs*, vol 107, no 4 (2018), p 478.
293. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 207–208.
294. Ibid.
295. Brookfield, *Waitangi and Indigenous Rights*, pp 119–120; McLean, 'Crown, Empire and Redressing the Historical Wrongs', p 199.
296. McLean, 'Crown, Empire and Redressing the Historical Wrongs', pp 188–189. Professor McLean has written several articles about the various meanings of 'Crown' in New Zealand's constitutional history; see also Frederic Morris (Jock) Brookfield, 'The Monarchy and the Constitution Today: A New Zealand Perspective', [1992] NZLJ 438, 439–440.
297. McLean, 'Crown, Empire and Redressing the Historical Wrongs', pp 188–189.
298. For discussion about these developments in a New Zealand context, see Janet McLean, 'Crown Him with Many Crowns: The Crown and the Treaty of Waitangi', *New Zealand Journal of Public and International Law*, vol 6, no 1 (June 2008), pp 44, 49–50, 54–55; McLean, 'Crown, Empire and Redressing the Historical Wrongs', pp 195–197, 209–210; see also David V Williams, 'Genealogies of the Modern Crown: From St Edward to Queen Elizabeth II', in *The Shapeshifting Crown: Locating the State in Postcolonial New Zealand, Australia, Canada and the UK*, ed Cris Shore and David V Williams (Cambridge: Cambridge University Press, 2019), pp 32, 36, 38.
299. Quentin-Baxter and McLean, *This Realm of New Zealand*, p 18; Williams, 'Genealogies of the Modern Crown', p 45.
300. Orange, *The Treaty of Waitangi*, pp 140–141.
301. Ibid.
302. Newcastle to Grey, 26 February 1863, AJHR, 1863, E-7, p 4.
303. Orange, *The Treaty of Waitangi*, pp 139–140.
304. Ibid.
305. Henare, Petrie, and Puckey, '"He Whenua Rangatira"' (doc A37), p 479.
306. Brookfield, *Waitangi and Indigenous Rights*, pp 119–120; see also Brookfield, 'The Monarchy and the Constitution Today', p 239.
307. Orange, *The Treaty of Waitangi*, pp 139, 141–142.
308. Ibid, p 160.
309. Wesleyan Missionary Committee, *Correspondence between the Wesleyan Missionary Committee and Sir James Pakington* (London: P P Thomas, 1852) (cited in Orange, *The Treaty of Waitangi*, p 138).
310. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, vol 1, pp 210, 213–214; Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 191. In our stage 1 report, we found more generally that the practical details of any Crown–Māori relationship required negotiation between the parties: Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 527, 528, 529.
311. Orange, *The Treaty of Waitangi*, p 145; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 102–103; see also O'Malley, 'Northland Crown Purchases' (doc A6), pp 144–152; Loveridge, 'Development and Introduction' (doc E38), pp 91–96; Claudia Orange, 'The Covenant of Kohimarama: A Ratification of the Treaty of Waitangi', NZJH, vol 14, no 1 (April 1980), pp 63–64; Lachy Paterson, 'The Kohimārama Conference: A Contextual Reading', *Journal of New Zealand Studies*, no 12 (2011), pp 29–30, 32–33.
312. After the Northern War, Governor Grey visited the district in 1849 and Governor Gore Browne in 1858. Otherwise, the Government was conspicuously absent from Te Raki: O'Malley, 'Northland Crown Purchases' (doc A6), p 121; Johnson, 'The Northern War' (doc A5), p 404.
313. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 103–104; O'Malley, 'Northland Crown Purchases' (doc A6), p 151.
314. Claimant closing submissions (#3.3.228), pp 166–167, 217–218.
315. Crown closing submissions (#3.3.402), pp 89–92.
316. O'Malley, 'Northland Crown Purchases' (doc A6), pp 107–110; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 305, 360–361. With respect to the Crown's inability to enforce its laws in the north, see doc A6, pp 88–95.
317. Johnson, 'The Northern War' (doc A5), pp 397–401.
318. Erima Henare, transcript 4.1.4, Te Rito Marae, Kawiti, p 122; see also 'The Governor's Visit to the North', *Daily Southern Cross*, 6 May 1848, p 2; *New Zealander*, 3 May 1848, p 2.
319. O'Malley, 'Northland Crown Purchases' (doc A6), pp 87–88, 108–110, 134–135; see also Nicholas Bayley, 'Aspects of Maori Economic Development and Capability in the Te Paparahi o Te Raki Inquiry Region (Wai 1040) from 1840 to c 2000', report commissioned by the Waitangi Tribunal, 2013 (doc E41), pp 51–55; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 361.
320. O'Malley, 'Northland Crown Purchases' (doc A6), p 115; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 255–260; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), pp 202–203, 222–223.

321. Tawhai to Governor, 31 July 1857 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 115).
322. 'The Visit of His Excellency Governor Gore Browne to the Bay of Islands and the North', *Maori Messenger/Te Karere Maori*, 1 February 1858, p 2; O'Malley, 'Northland Crown Purchases' (doc A6), pp 121–122.
323. Johnson, 'The Northern War' (doc A5), p 404.
324. Specifically, FitzRoy emphasised the Queen's protection during the major hui at Waimate in September 1844, and Grey conveyed the same message at Kororāreka in November 1845: Johnson, 'The Northern War' (doc A5), pp 119–121, 126–127, 140, 345.
325. 'The Visit of His Excellency Governor Gore Browne to the Bay of Islands and the North', *Maori Messenger/Te Karere Maori*, 1 February 1858, pp 4–5.
326. O'Malley, 'Northland Crown Purchases' (doc A6), p 123. It is clear that the establishment of a township at Kawakawa was uppermost in Maihi Parāone's mind, at a time when Ngāpuhi rangatira were all anxious to see a township (or townships) bring settlers and economic development. The Crown was also anxious to acquire land in Kawakawa at this time. Officials were aware of Maihi Parāone's wish to gift land, and the Governor was initially interested in accepting the gift. Kemp, the local purchase agent, estimated the land to be 700 acres, but he was opposed to accepting it as a gift, recommending that it be incorporated into the 10,000-acre Ruapekapeka block for which he was negotiating. But, by April 1859, Kemp had surveyed three blocks (Kawakawa, Pukekohe, and Ruapekapeka – blocks on both sides of the Kawakawa River), an estimated 50,000 acres. Maihi Parāone opposed this and the price offered; Kemp secured only the Kawakawa block in 1859, and it was 1864 before he secured agreement to the purchase of the Ruapekapeka block. The terms of these transactions remained a source of unhappiness to Maihi Paraone for the rest of his life: ibid, pp 348–352, 500–505.
327. Ibid, p 115.
328. 'The Visit of His Excellency Governor Gore Browne to the Bay of Islands and the North', *Maori Messenger/Te Karere Maori*, 1 February 1858, p 5 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 123).
329. Ibid, pp 5–7 (p 124).
330. O'Malley, 'Northland Crown Purchases' (doc A6), p 124.
331. 'The Visit of His Excellency Governor Gore Browne to the Bay of Islands and the North', *Maori Messenger/Te Karere Maori*, 1 February 1858, pp 5–7; O'Malley, 'Northland Crown Purchases' (doc A6), pp 124–125.
332. 'The Visit of His Excellency Governor Gore Browne to the Bay of Islands and Hokianga', *New Zealander*, 27 January 1858, p 3; O'Malley, 'Northland Crown Purchases' (doc A6), p 125.
333. O'Malley, 'Northland Crown Purchases' (doc A6), pp 125–127.
334. William Baker recorded on 16 January, when he was at Mangakāhia, that there were few people there, as most had gone to meet the Governor and assist in the erection of the flagstaff. Gore Browne, writing privately to McLean, recorded Ngāti Hine's reaction to his decision not to attend: 'Kawiti's people were much disgusted at my not landing a second time to share in the hoisting of the Flag there'. See O'Malley, 'Northland Crown Purchases' (doc A6), pp 118–119; Baker to McLean, 21 January 1858, (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 120); 'His Excellency's Visit to the Bay of Islands', *Daily Southern Cross*, 22 January 1858 (O'Malley, supporting documents (doc A6(a)), vol 18, p 6328); Gore Browne to McLean, circa 8 February 1858 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 119); 'The Visit of his Excellency Governor Gore Browne to the Bay of Islands and the North', *Maori Messenger/Te Karere Maori*, 15 January 1858; 'Kororareka', *Maori Messenger/Te Karere Maori*, 15 May 1858.
335. Ngāti Hine, 'Te Wahanga Tuatahi – Rangatiratanga' (doc M24(b)), p 112.
336. Erima Henare, transcript 4.1.4, Te Whitiora Marae, Te Tii Mangonui, pp 122–124.
337. O'Malley, 'Northland Crown Purchases' (doc A6), p 118. The Native Minister, C W Richmond, had initially objected when the local official requested a flag for the flagstaff, in case one was also requested for the flagstaff at Kororāreka. This, he feared, would 'constitute the new Flagstaff there Crown property', which should be avoided at all costs. T H Smith, the Assistant Native Secretary, pointed out that it had always been Crown policy to provide flags when requested unless there were special grounds for refusal. The Mangonui request might be met therefore; but the case at the Bay of Islands was different: ibid, p 117.
338. Gore Browne to McLean, circa 30 January 1858 (cited in O'Malley, Northland Crown Purchases, 1840–1865' (doc A6), doc A6, p 119). The Governor had been strongly advised to stay away by T H Smith, the Assistant Native Secretary, and by Clendon, a settler of long standing. Smith warned that the erection of the flagstaff was intended as 'an acknowledgement of past error & an attempt to repair it' and therefore the Crown should not assist or cooperate: T H Smith, marginal note on White to Colonial Treasurer, 25 January 1858 (O'Malley, supporting papers (doc A6(a)), vol 3, p 922).
339. O'Malley, 'Northland Crown Purchases' (doc A6), p 120.
340. Erima Henare (doc D14(b)), 4 October 2010,), p 22; Erima Henare, transcript 4.1.4, Te Whitiora Marae, Te Tii Mangonui, pp 123–124.
341. Erima Henare, transcript 4.1.4, Te Whitiora Marae, Te Tii Mangonui, p 124.
342. O'Malley, 'Northland Crown Purchases' (doc A6), p 110.
343. Ibid, pp 131–132.
344. Ibid, p 136.
345. Ibid, pp 132, 135.
346. Ibid, p 132.
347. C W Richmond, 11 June 1858, NZPD, vol B, pp 515–516 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 132). The Bay of Islands member, Hugh Carleton, regarded settlement of the north as a question of military strategy. In the event of conflict breaking out, Auckland must not be left 'between two fires', those of Ngāpuhi and Waikato: Carleton, 11 June 1858, NZPD, vol B, p 519 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 134).

348. Richmond, memorandum, 29 September 1858 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 136).
349. O'Malley, 'Northland Crown Purchases' (doc A6), pp 138–141.
350. Anderson, Binney, and Harris, *Tangata Whenua*, pp 248–253.
351. McLean, 16 November 1857, AJHR, 1860, F-3, p 97 (cited in Loveridge, 'Development and Introduction' (doc E38), p 93); see also O'Malley, 'Northland Crown Purchases' (doc A6), p 151.
352. Gore Browne to Gairdner, 28 April 1860 (cited in Loveridge, 'Development and Introduction' (doc E38), p 93).
353. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 102; Loveridge, 'Development and Introduction' (doc E38), p 94.
354. Orange, 'The Covenant of Kohimarama', p 64; Orange, *The Treaty of Waitangi*, p 145; Paterson, 'The Kohimārama Conference', pp 31–32, 33, 35. Paterson listed numerous other sources for this interpretation. The Governor told the House of Representatives that he had called the conference in direct response to the situations in Taranaki and Waikato: Paterson, 'The Kohimārama Conference', pp 31–32; 'Governor's Speech', 30 July 1860, NZPD, vol C, pp 165–166.
355. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 370; Paterson, 'The Kohimārama Conference', p 32.
356. Paterson, 'The Kohimārama Conference', pp 29, 32–33.
357. Orange, 'The Covenant of Kohimarama', pp 73–74.
358. Paterson, 'The Kohimārama Conference', pp 32–33.
359. Ward, *A Show of Justice*, p 118; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 134.
360. O'Malley, 'Northland Crown Purchases' (doc A6), p 143; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), pp 220–221.
361. 'Minutes of Proceedings of the Kohimarama Conference of Native Chiefs', 10 August 1860, AJHR, 1860, E-9, pp 3, 24.
362. All translations of speeches come from *Te Karere* unless otherwise stated.
363. Native Department to the Reverend James Duncan, 24 April 1860 (cited in Loveridge, 'Development and Introduction' (doc E38), p 94).
364. Loveridge, 'Development and Introduction' (doc E38), pp 93–94.
365. William Martin, *The Taranaki Question*, 3rd ed (London: WH Dalton, 1861), pp 125–126; Orange, 'The Covenant of Kohimarama', p 64; see also Paterson, 'The Kohimārama Conference', p 39.
366. *Maori Messenger/Te Karere Maori*, 14 July 1860, p 2.
367. 'Kohimarama Conference', 11 August 1860, AJHR, 1860, E-9, p 25.
368. *Maori Messenger/Te Karere Maori*, 14 July 1860, p 2; Paterson, 'The Kohimārama Conference', p 39.
369. Orange, 'The Covenant of Kohimarama', p 64.
370. Gore Browne to Newcastle, 6 July 1860 (cited in Orange, 'The Covenant of Kohimarama', p 64).
371. 'Kohimarama Conference: Chiefs Present/Chiefs Invited and Not Present' (O'Malley, supporting documents (doc A6(a)), vol 6, p 1935).
372. 'Kohimarama Conference', AJHR, 1860, E-9, pp 3, 25; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 104–105; see also *Maori Messenger/Te Karere Maori*, 10 August 1860, pp 7–9 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, pp 101–102). Armstrong and Subasic drew their information from an unpublished record, 'Kohimarama Conference: Chiefs Present/Chiefs Invited and Not Present' (O'Malley, supporting documents (doc A6(a)), vol 6, pp 1934–1936). The minutes recorded Patuone as Eruera Maihi Parāone, and contained other variations in spelling. The unpublished schedule also recorded Mangonui Kerei as attending.
373. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 104; O'Malley, supporting documents (doc A6(a)), vol 6, p 1934.
374. 'Kohimarama Conference', 11 August 1860, AJHR, 1860, E-9, p 25; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 104.
375. O'Malley, supporting documents (doc A6(a)), vol 6, p 1936. The other Kaipara leaders were: Te Ōtene Kikokiko, Pakihi Tania, Taurau, Wiremu Tīpene, Pairama, Ihikiera Te Tirarau, Nōpera, Tamati Rēwiti, and Matitikua.
376. 'Kohimarama Conference', AJHR, 1860, E-9, pp 3, 25; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 104.
377. 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, p 4.
378. 'Kohimarama Conference', AJHR, 1860, E-9, p 3.
379. Ibid, pp 9, 10, 16, 21–22.
380. Gore Browne, AJHR, 1860, E-9, pp 4–5; see also Orange, 'The Covenant of Kohimarama', p 65; Anderson, Binney and Harris, *Tangata Whenua*, p 227.
381. Gore Browne, AJHR, 1860, E-9, pp 4–5.
382. 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, p 6.
383. Orange, 'The Covenant of Kohimarama', p 74.
384. 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, pp 5–6.
385. Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 226.
386. Orange, 'The Covenant of Kohimarama', pp 74–75.
387. Ibid, p 74.
388. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 514, 521.
389. 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, pp 5–6.
390. Ibid; Orange, 'The Covenant of Kohimarama', p 73; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 227.
391. 'Proceedings of the Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 3 August 1860, pp 35–36. The phrase 'kai-tiaki mo ratou' was not translated directly.
392. Gore Browne, AJHR, 1860, E-9, pp 4–5; 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, pp 7–8.
393. Gore Browne, AJHR, 1860, E-9, pp 4–5; 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, pp 7–8.
394. Gore Browne, AJHR, 1860, E-9, pp 4–5.
395. Orange, 'The Covenant of Kohimarama', pp 65–66.
396. Gore Browne, AJHR, 1860, E-9, p 5; 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, pp 9–10.
397. Gore Browne, AJHR, 1860, E-9, p 5; 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, pp 9–10.
398. Gore Browne, AJHR, 1860, E-9, pp 4–5; 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, p 10.

399. Gore Browne, AJHR, 1860, E-9, p 5.
400. Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 228.
401. Orange, 'The Covenant of Kohimarama', p 65.
402. Gore Browne, AJHR, 1860, E-9, p 5; Paterson, 'The Kohimārama Conference', p 40.
403. Gore Browne, AJHR, 1860, E-9, p 5; see also Paterson, 'The Kohimārama Conference', p 41.
404. 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, p 15 (Armstrong and Subasic, supporting documents (doc A12(a))), vol 1, p 8).
405. *Maori Messenger/Te Karere Maori*, 31 July 1860, p 53 (Armstrong and Subasic, supporting documents (doc A12(a))), vol 1, p 52).
406. Ibid.
407. 'Proceedings of the Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 3 August 1860, pp 16–17 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 66).
408. 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, p 19 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 10).
409. *Maori Messenger/Te Karere Maori*, 31 July 1860, p 20 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 36).
410. *Maori Messenger/Te Karere Maori*, 3 August 1860, p 54 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 85).
411. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 107.
412. 'Proceedings of the Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 3 August 1860, p 41 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 78).
413. Orange, 'The Covenant of Kohimarama', pp 73–76. Orange noted that, earlier in 1860, *Te Karere Maori* had concluded that the Queen's 'mana' in New Zealand was nothing more 'than a right to protect' ('he mana tiaki'), and furthermore that the Queen's mana did not exist to the exclusion of Māori mana over their lands: *Maori Messenger/Te Karere Maori*, 15 March 1860, p 7 (Orange, 'The Covenant of Kohimarama', p 75 n).
414. Vincent O'Malley, 'English Law and the Māori Response: A Case Study from the Runanga System in Northland, 1861–65', *Journal of the Polynesian Society*, vol 116, no 1 (2007), p 15.
415. 'Proceedings of the Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 3 August 1860, p 71 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 93).
416. Heke to Queen Victoria, 10 July 1849 (Ralph Johnson, supporting documents (doc W48), pp 346–347). For examples of 1880s and 1890s Ngāpuhi interpretations of the war, see 'Petition from Maoris to the Queen', AJHR, 1883, A-6, p 1; and Hone Heke Ngāpua, 1897, NZPD, vol 97, pp 55–56.
417. 'Proceedings of the Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 3 August 1860, pp 71–72 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, pp 93–94).
418. Ibid, p 71 (p 93).
419. *Maori Messenger/Te Karere Maori*, 1 September 1860, p 23 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 116).
420. 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, pp 18–19 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 10).
421. *Maori Messenger/Te Karere Maori*, 1 September 1860, p 6 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 108).
422. Ibid, p 20 (p 115).
423. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 161–164, 502.
424. 'Proceedings of the Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 30 November 1860, p 8 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 128).
425. Ibid, p 9 (p 128).
426. Ibid (ppp 128–129).
427. 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, p 19 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 10).
428. 'Reply from Parawhau, No 1', *Maori Messenger/Te Karere Maori*, 30 November 1860, p 10 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 1:129); *Maori Messenger/Te Karere Maori*, 31 July 1860, p 26 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 39).
429. 'Reply from Parawhau, No 1', *Maori Messenger/Te Karere Maori*, 30 November 1860, pp 10–11 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 129).
430. *Maori Messenger/Te Karere Maori*, 30 November 1860, p 11 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 129).
431. *Maori Messenger/Te Karere Maori*, 3 August 1860, p 52 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 84).
432. For example, see 'Proceedings of the Kohimarama Conference' *Maori Messenger/Te Karere Maori*, 3 August 1860, p 51 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 83).
433. 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, p 15 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 8); Orange, 'The Covenant of Kohimarama', p 67. Tūhaere also disputed Gore Browne's claim to have left Māori in possession of all of their lands.
434. Orange, 'The Covenant of Kohimarama', p 67.
435. *Maori Messenger/Te Karere Maori*, 3 August 1860, p 35 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 75).
436. Ibid, p 36 (p 76).
437. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 528.
438. 'Minutes of Proceedings of the Kohimarama Conference of the Native Chiefs, July–August 1860', AJHR, 1860, E-9, pp 9, 10, 16, 21–22.

439. 'The Kohimarama Conference'16 July 1860, AJHR, 1860, E-9, p 9; *Maori Messenger/ Te Karere Maori*, 31 July 1860, pp 3, 8 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, pp 27, 30).
440. Loveridge, 'Development and Introduction' (doc E38), p 96.
441. *Maori Messenger/ Te Karere Maori*, 31 July 1860, pp 3–8 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, pp 27–30).
442. AJHR, 1860, E-9, p 9.
443. Loveridge, 'Development and Introduction' (doc E38), p 96.
444. *Maori Messenger/ Te Karere Maori*, 31 July 1860, pp 9, 17–18 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, pp 30, 34–35).
445. Ibid, pp 3, 11 (pp 23, 31).
446. *Maori Messenger/ Te Karere Maori*, 1 September 1860, pp 12–13 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 111); AJHR, 1860, E-9, p 9.
447. *Maori Messenger/ Te Karere Maori*, 3 August 1860, p 41 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 78).
448. Ibid, pp 25–26 (pp 38–39).
449. *Maori Messenger/ Te Karere Maori*, 31 July 1860, pp 9, 11 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, pp 30–31).
450. Ibid, p 11 (p 31).
451. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 128–129. The mixed jury system had been used since the 1700s in Britain for trials involving foreigners, in which the jury would comprise six citizens and six aliens. A message to the hui from Native Minister C W Richmond acknowledged that Māori were 'virtually, though not technically, Foreigners' under the colony's legal system: AJHR, 1860, E-9, pp 16–17.
452. *Maori Messenger/ Te Karere Maori*, 3 August 1860, pp 71–72 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, pp 93–94); see also *Maori Messenger/ Te Karere Maori*, 1 September 1860, pp 12–13 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 111).
453. *Maori Messenger/ Te Karere Maori*, 31 July 1860, p 72 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 94); see also *Maori Messenger/ Te Karere Maori*, 1 September 1860, pp 12–13 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 111).
454. *Maori Messenger/ Te Karere Maori*, 31 July 1860, p 72 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 94); see also *Maori Messenger/ Te Karere Maori*, 1 September 1860, pp 12–13 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 111).
455. *Maori Messenger/ Te Karere Maori*, 31 July 1860, p 72 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 94).
456. O'Malley, 'Northland Crown Purchases' (doc A6), p 147.
457. Ibid, p 145.
458. *Maori Messenger/ Te Karere Maori*, 15 August 1860, pp 11–13 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, pp 103–104).
459. Gore Browne, 18 July 1860, AJHR, 1860, E-9, p 10.
460. Ibid.
461. Ibid, pp 8–10.
462. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 118–120; Loveridge, 'Development and Introduction' (doc E38), p 128.
463. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 118, see also p 120.
464. Ibid, p 120.
465. *Maori Messenger/ Te Karere Maori*, 31 July 1860, p 33 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 42).
466. Ibid, pp 33, 35, 38–40 (pp 42, 44, 47–49).
467. *Maori Messenger/ Te Karere Maori*, 3 August 1860, pp 1–2 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, pp 58–59).
468. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 124.
469. *Maori Messenger/ Te Karere Maori*, 1 September 1860, p 13 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 111). In full, Maihi Parāone said: 'E whakapai ana ahau ki nga whenua kia whakatikaia, kia pai ai, ake ake.' *Te Karere Maori* translated this as: 'I approve of the plan proposed for arranging the land, that it may be free from difficulty for ever and ever.' But his words did not refer to any specific plan, only to his approval of lands being made correct and good for the future.
470. *Maori Messenger/ Te Karere Maori*, 15 August 1860, pp 11–13 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, pp 103–104); *Maori Messenger/ Te Karere Maori*, 1 September 1860, pp 4–6 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, pp 107–108).
471. *Maori Messenger/ Te Karere Maori*, 1 September 1860, p 4 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 107).
472. Ibid.
473. Ibid, pp 6–7, 15–16 (pp 108, 112). Regarding Patuone, see also Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 115. Dr Loveridge concluded that the response was 'generally favourable' on this point, citing two who undertook to consider the matter while many more gave no response: Loveridge, 'Development and Introduction' (doc E38), p 96.
474. *Maori Messenger/ Te Karere Maori*, 1 September 1860, p 15 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 112).
475. *Maori Messenger/ Te Karere Maori*, 15 August 1860, pp 11–13 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, pp 103–104).

476. The rangatira were identified as Paikea of Kaipara, Wiremu Nero Te Awaitaia, Winiata Pekamu Tohi Te Ururangi, Wiremu Tamihana, Tamihana Te Rauparaha, Wiremu Patene Whitirangi, and Makarini Te Uhiniko: *Maori Messenger/Te Karere Maori*, 15 August 1860, pp 6–7 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 101).
477. Ibid, p 8 (p 102).
478. Ibid, p 6 (p 101).
479. Ibid, pp 6–7 (p 101).
480. Paterson, 'The Kohimārama Conference', pp 37–38. One of the witnesses was the Church Missionary Society secretary Robert Burrows, a former Bay of Islands missionary; another was Hugh Carleton, editor of the *Daily Southern Cross* and son-in-law of the missionary Henry Williams.
481. Paterson, 'The Kohimārama Conference', p 39; *Maori Messenger/Te Karere Maori*, 15 August 1860, pp 7–9 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, pp 101–102).
482. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 133.
483. *Daily Southern Cross*, 24 August 1860, p 3 (cited in Paterson, 'The Kohimārama Conference', p 38).
484. 'The Kohimarama Conference' July 1860, AJHR, 1860, E-9, pp 9, 23. Among other things, McLean asked those assembled to stand when they heard messages from the Governor and to give written notices of their proposals.
485. *Maori Messenger/Te Karere Maori*, 14 July 1860, p 37 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 20).
486. Ibid, p 45 (p 24).
487. 'Reply from Parawhau, No 1', 16 July 1860, *Maori Messenger/Te Karere Maori*, 30 November 1860, p 10 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 129).
488. *Maori Messenger/Te Karere Maori*, 3 August 1860, pp 67–68 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, pp 91–92).
489. *Maori Messenger/Te Karere Maori*, 31 July 1860, pp 56–57, 60 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, pp 54, 56); *Maori Messenger/Te Karere Maori*, 3 August 1860, pp 7, 70, 77 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, pp 61, 93, 96).
490. McLean to Browne, 2 August 1860 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 3, pp 987–988).
491. McLean to Browne, 2 August 1860 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 3, pp 989–990).
492. Ibid (pp 990–991); see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 126–127.
493. McLean memorandum (Armstrong and Subasic, supporting documents (doc A12), p 127).
494. McLean, 6 August 1860 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 152).
495. *Maori Messenger/Te Karere Maori*, 1 September 1860, p 29 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 119).
496. O'Malley, 'Northland Crown Purchases' (doc A6), p 152.
497. *Maori Messenger/Te Karere Maori*, 15 August 1860, pp 12–13 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 104).
498. Ibid, p 13 (p 104).
499. For examples from this district, see Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 139.
500. Kemp to Native Secretary, 10 October 1860 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 139).
501. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 139.
502. *Maori Messenger/Te Karere Maori*, 15 December 1860 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 140).
503. *Te Manuhiri Tuarangi/Maori Intelligencer*, 15 July 1861, pp 12–13 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 164); Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 141.
504. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 141.
505. Ibid, p 142; see also Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 90, 93, 373.
506. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 141; *Maori Messenger/Te Karere Maori*, 15 January 1861, pp 2–3 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 153).
507. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 143–144; O'Malley, 'Northland Crown Purchases' (doc A6), p 153.
508. Browne to Pratt, 22 January 1861 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 153).
509. 'Bay of Islands', *Daily Southern Cross*, 1 March 1861, p 4.
510. Ibid; 'The Governor's Visit to the North', *New Zealander*, 2 March 1861, p 5; O'Malley, 'Northland Crown Purchases' (doc A6), pp 154–156.
511. O'Malley, 'Northland Crown Purchases' (doc A6), pp 155–156; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 143–147. According to the *Daily Southern Cross*, Gore Browne told the rangatira at Waitangi: 'In affording you all, as a people, the advantages of English protection, I reasonably expect submission to English law and authority.' We do not know how this was translated into Māori: 'Bay of Islands', *Daily Southern Cross*, 1 March 1861, p 4.
512. Ngāti Hine, 'Te Wahanga Tuatahi – Rangatiratanga' (doc M24(b)), p 49.
513. Loveridge, 'Development and Introduction' (doc E38), pp 126–128.
514. Ibid, pp 120–121, 127; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 148–151; Native Secretary to Governor, 31 January 1861, AJHR, 1862, E-1, sec 1, pp 12–13.
515. O'Malley, 'Northland Crown Purchases' (doc A6), p 152.

516. Ibid, pp 156–158. Bishop Selwyn and FitzGerald advocated for the establishment of Māori provinces: Donald Loveridge, 'Institutions for the Governance of Maori', summary (doc E38(b)), p 30.
517. O'Malley, 'Northland Crown Purchases' (doc A6), pp 158–160.
518. Grey to Duke of Newcastle, 30 November 1861, AJHR, 1862, E-1, sec 2, p 34.
519. Ibid.
520. Ibid.
521. Ibid.
522. Ibid.
523. Loveridge, 'Development and Introduction' (doc E38), pp 159–160.
524. McLean, 7 October 1875, NZPD, vol 19, pp 319–320; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 165.
525. Orange, 'The Covenant of Kohimarama', pp 76–77.
526. Paterson, 'The Kohimārama Conference', p 41 (see also pp 30–32).
527. Ibid, pp 30–31.
528. Ibid, pp 31–32.
529. Claimant closing submissions (#3.3.228), pp 166–167, 217–218; Crown closing submissions (#3.3.402), pp 89–92.
530. Paterson, 'The Kohimārama Conference', p 41.
531. Claimant closing submissions (#3.3.228), pp 166–167, 237, see also pp 217–218.
532. Crown closing submissions (#3.3.402), p 90.
533. Ibid, pp 89–92.
534. Paterson, 'The Kohimārama Conference', p 41.
535. O'Malley, 'Northland Crown Purchases' (doc A6), p 151; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), pp 244–246; Orange, 'The Covenant of Kohimarama', pp 76–77, 80.
536. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 232.
537. Loveridge, 'Development and Introduction' (doc E38), pp 152–153.
538. O'Malley, 'Northland Crown Purchases' (doc A6), p 152; see also Orange, *The Treaty of Waitangi*, pp 161–162.
539. Provision for the constitution of rūnanga was made by Order in Council of 7 March 1862 under the Native Districts Regulation Act 1858. It recited that the Governor in Council might make regulations under the Act 'as far as possible with the general assent of the Native population affected thereby'; under section 2, it was left to the Governor to decide how to ascertain Māori assent. Further, the Governor in Council might constitute within any district appointed under the Act a native rūnanga for the purpose of ascertaining assent under section 6. Accordingly, the Governor in Council by regulation, specified that native rūnanga might be constituted within any district under the Act, composed of native chiefs appointed by the Governor, and laying out processes for the rūnanga to ascertain local Māori consent to any regulation it proposed. Loveridge said that new institutions were trialled in the Bay of Islands and Mangonui from 1859. A native district was declared in 1859 for 'Monganui' (*sic*) (north of Herekino and Whangaroa Harbours) under the Native Circuit Courts Act 1858 and the Native Districts Regulation Act 1858, but we have seen no evidence of a rūnanga operating prior to 1862, though a Native Circuit Court was operating there by the end of 1860: Loveridge, 'Development and Introduction' (doc E38), pp 79–80; 'Orders in Council Issued under the Native Districts Regulation Act, 1858, and the Native Circuit Courts Act, 1858', AJHR, 1862, E-6, pp 3–4, 12–13; O'Malley, 'Northland Crown Purchases' (doc A6), pp 167–168.
540. O'Malley, 'Runanga and the Komiti' (doc E31), pp 47–48; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 188. The districts established were Bay of Islands, Mangonui, Upper Waikato, Waiuku, Tokomaru, Waiapu, Lower Waikato, Waihou, Manawatu, Ahuriri, Bay of Plenty, and Taupo: 'Orders in Council issued under the Native Districts Regulation Act, 1858, and the Native Circuit Courts Act, 1858', AJHR, 1862, E-6.
541. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 174–175.
542. O'Malley asserted that the rūnanga were 'formally abolished'. But this does not appear to have been the case. They were *effectively* abolished (their funding was cut, most assessors were sacked, and they no longer met after 1865) but the Orders in Council remained in force, apparently to provide legitimacy for the resident magistrate system: O'Malley, 'Runanga and the Komiti' (doc E31), p 56; Loveridge, 'Development and Introduction' (doc E38), pp 297–298; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 233–235, 236–264.
543. Claimant closing submissions: (#3.3.228), p 171.
544. Ibid, pp 172–173.
545. Crown closing submissions (#3.3.402), p 92.
546. Colonial officials routinely used the term 'theft' to describe the Māori law enforcement practice taua muru.
547. Alan Ward, 'Law and Law-enforcement on the New Zealand Frontier, 1840–1893', NZJH, vol 5, no 2 (October 1971), pp 132–134. According to Professor Shaunnagh Dorsett, the Resident Magistrate Courts Ordinance was an amalgam of the Native Exemption Ordinance 1844 with South Australia's Resident Magistrates Court Ordinance 1846. Grey had been Governor of South Australia from 1841 to 1846: Shaunnagh Dorsett, 'How Do Things get Started? Legal Transplants and Domestication: An Example from Colonial New Zealand', *New Zealand Journal of Public and International Law*, vol 12, no 1 (September 2014), p 108.
548. Robert Joseph, 'Re-Creating Legal Space for the First Law of Aotearoa–New Zealand', *Waikato Law Review*, vol 17, 2009, p 78; O'Malley, 'Northland Crown Purchases' (doc A6), p 49.
549. Ward, 'Law and Law-enforcement', p 134; see also Loveridge, 'Development and Introduction' (doc E38), p 155.
550. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 90–93, 373; O'Malley, 'Northland Crown Purchases' (doc A6), pp 93–98; Ward, 'Law and Law-enforcement', p 135; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 142. As one example, Tāmati Waka Nene in the late 1840s refused to allow magistrates to investigate killings arising from adultery and mākutu: Ward, 'Law and Law-enforcement', p 131. James Clendon appears to have become resident magistrate in March 1847. William White was appointed Mangonui resident magistrate in 1848. Others were appointed

including Major James Patience in Kororāreka and Robert St Aubyn in Hokianga. Clendon and St Aubyn had served as police magistrates.
551. Loveridge, 'Development and Introduction' (doc E38), p 62; Ward, 'Law and Law-enforcement', pp 137–138.
552. Loveridge, 'Development and Introduction' (doc E38), p 62; Ward, 'Law and Law-enforcement', pp 137–138.
553. Loveridge, 'Development and Introduction' (doc E38), p 62; Ward, 'Law and Law-enforcement, pp 137–138.
554. Richmond, 29 September 1858, AJHR, 1860, E-1, p 6; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 253.
555. 'Orders in Council', AJHR, 1862, E-6, p 3; Loveridge, 'Development and Introduction' (doc E38), pp 79–80. Regarding White, see 'Mangonui: Farewell to Mr White, RM', *New Zealand Herald*, 5 April 1878, p 3.
556. Loveridge, 'Development and Introduction' (doc E38), pp 73–74, 119.
557. McLean, MS-papers-0032–43, ATL (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 127); Loveridge, 'Development and Introduction' (doc E38), pp 98–99.
558. Loveridge, 'Development and Introduction' (doc E38), pp 98–99. McLean, William White, and others argued that appointing one rangatira from an entire district would only inspire conflict: Loveridge, 'Development and Introduction' (doc E38), pp 119–120.
559. Loveridge, 'Development and Introduction' (doc E38), pp 126–128.
560. O'Malley, 'Northland Crown Purchases' (doc A6), pp 158–160.
561. Loveridge, 'Development and Introduction' (doc E38), pp 140, 146–147.
562. Newcastle to Grey, 5 June 1861, AJHR, 1862, E-1, pp 3–4; Loveridge, 'Development and Introduction' (doc E38), pp 140, 146–147.
563. Newcastle to Grey, 5 June 1861, AJHR, 1862, E-1, pp 3–4, 5–6; Loveridge, 'Development and Introduction' (doc E38), pp 140, 146–147.
564. Newcastle to Grey, 5 June 1861, AJHR, 1862, E-1, pp [95]–[96]; Loveridge, 'Development and Introduction' (doc E38), pp 146–147.
565. Newcastle to Grey, 5 June 1861, AJHR, 1862, E-1, pp [95]–[96]; Loveridge, 'Development and Introduction' (doc E38), pp 146–147.
566. Fox, 8 October 1861, AJHR, 1862, E-1, p 4; Grey, October 1861, AJHR, 1862, E-2, pp 10–12; Loveridge, 'Development and Introduction' (doc E38), pp 149–150.
567. Loveridge, 'Development and Introduction' (doc E38), pp 150–151.
568. Ibid, pp 150–152, 156; O'Malley, 'Northland Crown Purchases' (doc A6), p 159.
569. Grey, October 1861, AJHR, 1862, E-2, p 10.
570. Loveridge, 'Development and Introduction' (doc E38), pp 152–155; see also Orange, *The Treaty of Waitangi*, pp 161–162. The Ministers later claimed that Grey provided a bare outline and they filled in the details; Grey made the same claim in reverse: Grey to Duke of Newcastle, AJHR, 1862, E-1, sec 2, pp 15–16.
571. Loveridge, 'Development and Introduction' (doc E38), pp 155–156. Loveridge was citing James Rutherford, *Sir George Grey*, pp 457, 461.
572. Fox, 31 October 1861, AJHR, 1862, E-2, p 15; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 169.
573. Fox, 31 October 1861, AJHR, 1862, E-2, pp 15–16; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 169.
574. Fox, 31 October 1861, AJHR, 1862, E-2, p 16.
575. Loveridge, 'Development and Introduction' (doc E38), p 164. Nene had been receiving a £100 annuity since 1847 as a reward for his role in the Northern War: O'Malley, supporting documents (doc A6(a)), vol 17, p 5648.
576. Ward, 'Law and Law-enforcement', pp 137–139.
577. O'Malley, 'English Law and the Māori Response', p 7; O'Malley, 'Northland Crown Purchases' (doc A6), p 160.
578. O'Malley, 'English Law and the Māori Response', p 7.
579. O'Malley, 'Northland Crown Purchases' (doc A6), p 159.
580. Orange, *The Treaty of Waitangi*, p 161.
581. Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 250.
582. J R Clendon to Native Secretary, 2 October 1861, AJHR, 1862, E-7, pp 17–20.
583. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 162–163; 'Reports on the State of the Natives, AJHR, 1862, E-7, pp 14–20, 22–24.
584. O'Malley, 'Northland Crown Purchases' (doc A6), p 159.
585. Ibid, pp 160–165.
586. Grey, 6 November 1861 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), pp 160–161).
587. Ibid.
588. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 171.
589. Ibid.
590. Ibid, pp 172, 174.
591. Grey, 6 November 1861 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 172).
592. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 173.
593. Grey, 6 November 1861 (O'Malley, supporting documents (doc A6(a)), vol 6, p 1888). As Armstrong and Subasic noted, this was not a particularly satisfactory answer given that 'the "police hapū" might well find itself engaged in a civil war with the hapū of the offending chief': Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 173.
594. Grey, 6 November 1861 (O'Malley, supporting documents (doc A6(a)), vol 6, p 1886).
595. O'Malley, 'Northland Crown Purchases' (doc A6), pp 162–165.
596. 'Speeches of the Ngapuhi Chiefs to Governor Grey at the Meeting at Kororareka', *Maori Messenger/Te Karere Maori*, 15 January 1862, p 11; O'Malley, 'Northland Crown Purchases' (doc A6), pp 162–163.
597. O'Malley, 'Northland Crown Purchases' (doc A6), pp 162–163; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 172.
598. 'Speeches of the Ngapuhi Chiefs to Governor Grey at the Meeting at Kerikeri', *Maori Messenger/Te Karere Maori*, 15 January 1862, p 16; O'Malley, 'Northland Crown Purchases' (doc A6), p 163.
599. 'Speeches of the Ngapuhi Chiefs to Governor Grey at the Meeting at Kerikeri', *Maori Messenger/Te Karere Maori*, 15 January 1862, p 18; O'Malley, 'Northland Crown Purchases' (doc A6), pp 163–164.

600. Sir George Grey, 6 November 1861 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 174).
601. Ibid.
602. 'Memorandum of a Conversation between Sir George Grey and the Maori Chiefs Assembled at Kerikeri', 7 November 1861 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 174).
603. O'Malley, 'Northland Crown Purchases' (doc A6), p 165.
604. 'Memorandum of a Conversation between Sir George Grey and the Maori Chiefs Assembled at Kerikeri', 7 November 1861 (O'Malley, supporting documents (doc A6(a)), vol 6, pp 1890–1891); Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 174–175.
605. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 175.
606. Grey, 8 November 1861 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 176).
607. Grey, 12 November 1861 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 177).
608. Grey, 12 November 1861 (O'Malley, supporting documents (doc A6(a)), vol 6, pp 1896–1897); Loveridge, 'Development and Introduction' (doc E38), pp 165–166; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 177–178.
609. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 178.
610. O'Malley, 'Northland Crown Purchases' (doc A6), p 166.
611. Ibid, p 167.
612. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 181.
613. 'Native Policy', *Daily Southern Cross*, 13 December 1861, p 3.
614. Ibid; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 183–185.
615. Native Districts Regulation Act 1858, ss 2, 6.
616. New Zealand Constitution Act 1852, ss 28–30.
617. 'Native Policy', *Daily Southern Cross*, 13 December 1861, p 3; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 183–185.
618. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 187.
619. 'Native Policy', *Daily Southern Cross*, 13 December 1861, p 3; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 183–185.
620. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 179–180.
621. Ibid, pp 188–190; Loveridge, 'Development and Introduction' (doc E38), pp 165–166.
622. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 188–190.
623. Ibid, pp 188, 190; 'Orders in Council', AJHR, 1862, E-6, orders 19–23.
624. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 188. The preambles to both the Native Districts Regulation Act 1858 and the Native Circuit Courts Act 1858 specified that the respective Acts would apply in Districts 'over which the Native Title has not been extinguished'.
625. O'Malley, 'Northland Crown Purchases' (doc A6), p 168.
626. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 193, 197, 199–200.
627. 'The First Maori Parliament or District Runanga', *Maori Messenger/Te Karere Maori*, 23 May 1862, p 14.
628. Barstow to Attorney-General, 15 March 1862, AJHR, 1862, E-4, p 3; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 193, 194, 200.
629. 'The First Maori Parliament or District Runanga', *Maori Messenger/Te Karere Maori*, 23 May 1862, p 13; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 196.
630. 'The First Maori Parliament or District Runanga', *Maori Messenger/Te Karere Maori*, 23 May 1862, p 14; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 197.
631. Turton to Native Secretary, 14 October 1861, AJHR, 1862, E-7, p 9.
632. Fox, 31 October 1861, AJHR, 1862, E-2, p 13.
633. Ibid, p 16.
634. O'Malley, 'Runanga and Komiti' (doc E31), p 294.
635. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 197–198, 201.
636. 'The First Maori Parliament or District Runanga', *Maori Messenger/Te Karere Maori*, 23 May 1862, pp 18–19; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 201.
637. 'The First Maori Parliament or District Runanga', *Maori Messenger/Te Karere Maori*, 23 May 1862, pp 13, 18; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 197.
638. 'The First Maori Parliament or District Runanga', *Maori Messenger/Te Karere Maori*, 23 May 1862, pp 14–15.
639. Ibid; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 197–198.
640. 'The First Maori Parliament or District Runanga', *Maori Messenger/Te Karere Maori*, 23 May 1862, pp 14–15.
641. O'Malley, 'Northland Crown Purchases' (doc A6), p 168; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 202–203.
642. Maihi Parāone Kawiti to Fox, 22 July 1862 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 203).
643. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 203–204.
644. Ibid, pp 197, 200; 'The First Maori Parliament or District Runanga', *Maori Messenger/Te Karere Maori*, 23 May 1862, p 19.
645. 'The First Maori Parliament or District Runanga', *Maori Messenger/Te Karere Maori*, 23 May 1862, pp 14–15.
646. O'Malley, 'Northland Crown Purchases' (doc A6), p 169; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 202.
647. Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 254.
648. Ibid, pp 257–259.
649. Ibid, p 254.
650. Ibid, p 253.

651. Barstow to Civil Civil Commissioner, 5 January 1863 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 232).
652. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 233.
653. Clarke to Williams, 1 August 1862 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 204–207).
654. Barstow to Attorney-General, 13 October 1862 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 193).
655. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 193–194.
656. Clarke to Williams, 1 August 1862 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 207).
657. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 206–207.
658. Clarke to Williams, 1 August 1862 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 207–208).
659. Clarke to Magistrates, December 1862 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 209–210).
660. Edward Williams to Waimate rūnanga, 1 August 1862, 'Letters', *Maori Messenger / Te Karere Maori*, 16 December 1862, p 16; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 210–211.
661. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 210.
662. Ibid, pp 211–214.
663. Ibid, pp 211–214.
664. White to Native Minister, 12 August 1862 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 215).
665. *Aucklander*, 7 October 1862 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 214).
666. O'Malley, 'English Law and the Māori Response', pp 7–8.
667. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 216.
668. Ibid, pp 217–219. The Native Land Court Act 1862 had provided for the establishment of the Court. The Court was established in December 1864, as the rūnanga scheme was being wound down.
669. Ibid, pp 220–221.
670. Ibid, pp 221–222.
671. Ibid.
672. Ibid, pp 222–223.
673. Ibid, p 224.
674. Ibid, pp 214, 224; Loveridge, 'Institutions of Government for Maori' (doc E18), p 173. The Native Districts Regulation Act 1858 empowered the Governor to make regulations for Māori districts, while an Order in Council on 7 March 1862 provided for the establishment of district and village rūnanga and set out a process by which they might consent to resolutions and a process by which the Governor could refer resolutions back for amendment, but neither instrument specifically empowered district rūnanga to make bylaws.
675. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 228.
676. Ibid, pp 224–225.
677. Ibid, p 225.
678. Ibid.
679. Williams to Civil Commissioner, 17 February 1863 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 226).
680. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 227–228.
681. Native Secretary to Resident Magistrate, 19 August 1863 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 229–231). When Clarke was first appointed, he had recommended that steps be taken to establish an education system in the district, without any apparent result: Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 194–195.
682. 'Waimate', *Daily Southern Cross*, 8 April 1864, p 3 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 231).
683. O'Malley, 'Runanga and Komiti' (doc E31), pp 55–56.
684. White to Native Secretary, 2 May 1864 (cited in O'Malley, 'Runanga and Komiti' (doc E31), p 55); see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 231–232.
685. 'Russell', *New Zealand Herald*, 15 March 1865, p 6.
686. White to Native Minister, 5 May 1865 (cited in O'Malley, 'Runanga and Komiti' (doc E31), p 56).
687. Loveridge, 'Development and Introduction' (doc E38), p 217.
688. The spending in the 1860 to 1861 period comprised £7,909 3s 4d (Civil List); £6,254 15s 7d (Native Schools); and £2,934 19s 10d (appropriations). The spending in 1864 to 1865 was allocated as £7,000 (Civil List); £2,508 5s (Native Schools); and £51,044 2s (appropriations): J Woodward, Assistant Treasurer, 6 July 1868, 'Expenditure on Native Purposes', AJHR, 1868, A-1, p 85.
689. Stafford to Governor, 4 July 1868, AJHR, 1868, A-1, p 85; Loveridge, 'Development and Introduction' (doc E38), p 172. The figures did not include native schools or the civil list. Otherwise, spending on 'Native affairs' was not itemised.
690. This comprised £810,553 in ordinary expenditure and a further £126,157 in unauthorised expenditure: 'Financial Statement by the Hon The Colonial Treasurer', AJHR, 1865, B-1A, p 13.
691. Loveridge, 'Development and Introduction' (doc E38), pp 172, 218.
692. Ibid, pp 150–151; O'Malley, 'Northland Crown Purchases' (doc A6), pp 159–160.
693. Orange, *The Treaty of Waitangi*, pp 171–172, 175–176; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 235, 264.
694. Weld, 28 November 1864, NZPD, vol E, p 16; Loveridge, 'Development and Introduction' (doc E38), p 219.
695. Loveridge, 'Development and Introduction' (doc E38), p 219.
696. Ibid, pp 223–224, 227.
697. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 19.
698. Ward, *A Show of Justice*, pp 180–181. Under the original plan, the Court would have operated as an extension of the existing rūnanga and resident magistrate system, and to that end George Clarke (Bay of Islands), William White (Mangonui), and John Rogan (Kaipara) were all appointed judges in December 1864. A month later, a new system was introduced under which judges were part of a national

court and could not simultaneously hold government appointments. Accordingly, Clarke and White resigned as judges so they could continue with their work as civil commissioners, and Rogan resigned as Kaipara resident magistrate.

699. Loveridge, 'Development and Introduction' (doc E38), pp 223–224.

700. Dr Barry Rigby, 'Validation Review of the Crown's Tabulated Data on Land Titling and Alienation for the Te Paparahi o Te Raki Inquiry Region: Crown Purchases, 1866–1900', report commissioned by the Waitangi Tribunal, 2016 (doc A56), p 4.

701. The commission could also advise on other matters affecting Māori welfare, if the Governor requested. The Act provided that the commission would cease to exist on 31 December 1866 at the latest: Native Commission Act 1865, ss 5, 9. See also Loveridge, 'Development and Introduction' (doc E38), pp 256–259.

702. Loveridge, 'Development and Introduction' (doc E38), pp 259–260.

703. Outlying Districts Police Act 1865, ss 2–4, 6.

704. John Wilson, 'The Origins of the Māori Seats', pp 7–8, New Zealand Parliament, https://www.parliament.nz/mi/pb/research-papers/document/00PLLawRP03141/origins-of-the-m%C4%81ori-seats, last modified 31 May 2009.

705. Hazel Riseborough, 'Background Papers for the Taranaki Raupatu Claim', 1989 (Wai 143 R01, doc A2), p 39.

706. Orange, *The Treaty of Waitangi*, p 175.

707. Armstrong and Subasic described these events in 'Northern Land and Politics' (doc A12), pp 236–264, see also pp 14, 17.

708. FitzGerald, 21 September 1865, NZPD, vol E, pp 576–581; Loveridge, 'Development and Introduction' (doc E38), p 267.

709. Loveridge, 'Development and Introduction' (doc E38), pp 268–269.

710. Ibid; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 239–242.

711. Loveridge, 'Development and Introduction' (doc E38), pp 274–276.

712. Penehane Papahurahura [*sic*] to Clarke, 11 November 1865 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 249).

713. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 242–246.

714. White to Native Minister, 30 October 1865 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 243–244).

715. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 246.

716. Loveridge, 'Development and Introduction' (doc E38), p 279.

717. Russell, 19 October 1865, NZPD, vol E, p 682; Loveridge, 'Development and Introduction' (doc E38), p 279.

718. Loveridge, 'Development and Introduction' (doc E38), p 279.

719. Ibid, pp 280–281; Ward, *A Show of Justice*, pp 196–197.

720. Rolleston to Civil Commissioner, 19 February 1866 (cited in Loveridge, 'Development and Introduction' (doc E38), p 281).

721. Ibid.

722. Loveridge, 'Development and Introduction' (doc E38), pp 280–281.

723. Native Secretary to White, 8 December 1865 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 235).

724. Clarke to Williams, 1 August 1862 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 207).

725. Loveridge, 'Development and Introduction' (doc E38), pp 281–282.

726. Ward, *A Show of Justice*, p 198; O'Malley, 'Runanga and Komiti' (doc E31), p 56.

727. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 237.

728. Loveridge, 'Development and Introduction' (doc E38), pp 281–282. As noted earlier, the native purposes budget was £51,044 in the 1864–1865 fiscal year: enclosure to Stafford to Governor, 4 July 1868, AJHR, 1868, A-1, p 85. According to Alan Ward, the Native Department budget (estimates) was reduced from £53,000 to £33,000 over two years: Ward, *A Show of Justice*, pp 195–196.

729. Loveridge, 'Development and Introduction' (doc E38), p 282.

730. Ibid.

731. Crown closing submissions (#3.3.402), pp 110–111.

732. O'Malley, 'English Law and the Māori Response', pp 29–30; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 235.

733. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 14, 19. Armstrong and Subasic gave evidence that the March 1865 meetings were the last in the district. Other technical witnesses did not specify that those were the final meetings but did give evidence of rūnanga being abandoned after that date.

734. Loveridge, 'Development and Introduction', summary (doc E38(b)), p 34; Loveridge, 'Development and Introduction' (doc E38), pp 279, 297.

735. O'Malley, 'Northland Crown Purchases' (doc A6), p 177. We note that the Order in Council of 7 March 1862, which provided by regulation for the constitution of native rūnanga under the Native Districts Regulation Act 1858, stated 'every such Runanga shall continue during the Governor's pleasure': 'Orders in Council Issued under the Native Districts Regulation Act 1858, and the Native Circuit Courts Act 1858', AJHR, 1862, E-6, pp 12–13.

736. Armstrong, transcript 4.1.8, Kerikeri, pp 722–723.

737. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 235.

738. Armstrong, transcript 4.1.8, Kerikeri, p 713.

739. Loveridge, 'Development and Introduction' (doc E38), p 282.

740. For O'Malley's description of the operation of these 'unofficial' (that is, indigenous) rūnanga, see O'Malley, 'English Law and the Māori Response', pp 7, 15–19, 25–29.

741. As evidence that rūnanga continued to operate in 1865 and 1866, the Crown referred to an 1866 Kaipara hui in which leaders of that district threatened to resign their positions as assessors: Crown closing submissions (#3.3.402), pp 110–111; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 251–252.

742. Crown closing submissions (#3.3.402), p 92.

743. Loveridge, 'Development and Introduction' (doc E38), pp 267–268, 282–283.
744. Ibid, p 282.
745. Russell, quoted in Rolleston to Fenton, 18 November 1865 (Loveridge, 'Development and Introduction' (doc E38), pp 282–283).
746. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 298, 341.
747. Loveridge, 'Development and Introduction' (doc E38), p 297.
748. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 258.
749. Ibid, p 235.
750. Loveridge, 'Development and Introduction' (doc E38), pp 284–285.
751. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 236.
752. Ward, *A Show of Justice*, p 183; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 235–236.
753. Ward, *A Show of Justice*, p 196; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 237.
754. Orange, *The Treaty of Waitangi*, p 161.
755. Ibid, p 179.
756. O'Malley, 'Runanga and Komiti' (doc E31), pp 56–57; see also O'Malley, 'English Law and the Māori Response', pp 7–8, 25, 26–27.
757. Editorial, *Daily Southern Cross*, 18 October 1865, p 4; Loveridge, 'Development and Introduction' (doc E38), p 284.
758. 'The Agitation Amongst the Natives in the North', *Daily Southern Cross*, 20 October 1866, p 5; see also Loveridge, 'Development and Introduction' (doc E38), p 284.
759. 'The Kaipara Natives', *Daily Southern Cross*, 18 October 1866, p 4; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 251.
760. 'Native Meeting at Kaipara', *New Zealand Herald*, 20 October 1866 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 253).
761. Regarding specific proposals, see *Maori Messenger/Te Karere Maori*, 31 July 1860, pp 3–8; *Maori Messenger/Te Karere Maori*, 1 September 1860, p 4. Regarding Gore Browne's promise to reconvene the conference, see *Maori Messenger/Te Karere Maori*, 15 August 1860, pp 12–13. Regarding Grey's decision to cancel the 1861 conference, see Grey to Duke of Newcastle, 30 November 1861, AJHR, 1862, E-1, sec 2, p 34.
762. O'Malley, 'Northland Crown Purchases' (doc A6), pp 160–161; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 176, 183–185.
763. O'Malley, 'Northland Crown Purchases' (doc A6), pp 160–161.
764. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 171; Loveridge, 'Development and Introduction' (doc E38), p 62.
765. 'Memorandum of a Conversation between Sir George Grey and the Maori Chiefs Assembled at Kerikeri', 7 November 1861 (Loveridge, 'Development and Introduction' (doc E38), pp 164–165).
766. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 171.
767. 'Memorandum of a Conversation between Sir George Grey and the Maori Chiefs Assembled at Kerikeri', 7 November 1861 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 175).
768. Orange, *The Treaty of Waitangi*, p 190.
769. Loveridge, 'Development and Introduction' (doc E38), pp 294–295.
770. Regarding the period prior to 1840, see Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 129–130; see also Kawharu, 'Te Tiriti and its Northern Context' (doc A20), pp 36–38, 43. Regarding the treaty debates, see Orange, *The Treaty of Waitangi*, p 56; McLean, 'Crown, Empire and Redressing the Historical Wrongs', pp 198–199.
771. Arapeta Hamilton (doc K7(b)), p 16; Arapeta Hamilton (doc F23), pp [2]–[3].
772. Sewell's open letter 'The New Zealand Native Rebellion' (1864) was addressed to his patron, Lord Lyttleton: Orange, *The Treaty of Waitangi*, p 168.
773. Orange, *The Treaty of Waitangi*, p 168.
774. Ward, *An Unsettled History*, p 135.
775. Dalton, *War and Politics*, p 261.
776. Ibid, p 43.
777. Orange, *The Treaty of Waitangi*, p 160.
778. Wesleyan Missionary Committee, *Correspondence between the Wesleyan Missionary Committee and Sir James Pakington* (London: PP Thomas, 1852) (cited in Orange, *The Treaty of Waitangi*, p 138).
779. For example, see Secretary of State for the Colonies to Governor Grey, 27 February 1865, AJHR, 1865, A-6, p 15; Duke of Buckingham (Secretary of State for the Colonies) to Governor Bowen, 1 December 1868, AJHR, 1869, A-1A, p 10.
780. Tā Himi Henare (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 207).
781. Loveridge, 'Development and Introduction' (doc E38), pp 159–160.
782. Ibid, pp 114–116; Native Council Act 1860.
783. Henare, Petrie, and Puckey, '"He Whenua Rangatira"' (doc A37), pp 479–480; 'British & Irish Immigration, 1840–1914', Ministry for Culture and Heritage, https://nzhistory.govt.nz/culture/immigration/home-away-from-home/summary, last updated 8 December 2014; 'Encouragement of Immigration', *Te Ara – The Encyclopedia of New Zealand*, https://www.teara.govt.nz/en/1966/immigration/page-4, accessed 24 March 2022.
784. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 256.

Page 760: New Zealand's Early Constitutional Arrangements

1. In this inquiry, the Crown stated that British sovereignty extended to New Zealand in a series of jurisdictional steps. The laws of New South Wales applied from the time when New Zealand became a part of that colony, 'probably' from 21 May 1840, and 'at the latest' from 16 June 1840: Crown closing submissions (#3.3.402), p 4. An ordinance of New South Wales declared that the laws and ordinances of New South

Wales applied to New Zealand as from 16 June 1840: Raewyn Dalziel, 'The Politics of Settlement', in *The Oxford History of New Zealand*, ed Geoffrey W Rice, 2nd ed (Oxford: Oxford University Press, 1992), p 88.
2. Dalziel, 'The Politics of Settlement', p 88.
3. Ibid.
4. Ibid.
5. Waitangi Tribunal, *He Whakaputanga me te Tiriti / The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*, Wai 1040 (Wellington: Legislation Direct, 2014), p 328.
6. New Zealand Constitution Act 1846, s 10 (UK); Alexander Hare McLintock, *Crown Colony Government in New Zealand* (Wellington: R E Owen, 1958), pp 256–257.
7. Neill Atkinson, *Adventures in Democracy: A History of the Vote in New Zealand* (Dunedin: Otago University Press, 2003), p 18; Philip Joseph, *Joseph on Constitutional and Administrative Law*, 5th ed (Wellington: Thomson Reuters New Zealand Ltd, 2021), p 149.
8. Joseph, *Joseph on Constitutional and Administrative Law*, pp 149–150; James Rutherford, *Sir George Grey KCB, 1812–1888: A Study in Colonial Government* (London: Cassell, 1961), pp 142–143; William Lee Rees and Lily Rees, *The Life and Times of Sir George Grey, KCB*, 2 vols (Auckland: H Brett, 1892), vol 1, p 144.
9. Joseph, *Joseph on Constitutional and Administrative Law*, p 150.
10. Ibid, p 153.
11. New Zealand Constitution Act 1852, s 33.
12. Atkinson, *Adventures in Democracy*, pp 23–24; Dalziel, 'The Politics of Settlement', p 93.
13. Atkinson, *Adventures in Democracy*, pp 23–24.
14. New Zealand Constitution Act 1852, s 53.
15. Ibid, s 71.
16. Ibid, ss 18–19.
17. Joseph, *Joseph on Constitutional and Administrative Law*, p 152.
18. David Hamer, *Can Responsible Government Survive in Australia?*, rev ed (Canberra: Department of the Senate, 2004), p 12.
19. Ibid, p 14.
20. Joseph, *Joseph on Constitutional and Administrative Law*, p 153; Earl Grey to Wynyard, 8 December 1854, IUP / BPP, vol 10, p 40.
21. Joseph, *Joseph on Constitutional and Administrative Law*, pp 153–154; W David McIntyre, ed, *The Journal of Henry Sewell 1853–7*, 2 vols (Christchurch: Whitcoulls, 1980), vol 1, p 69.
22. Joseph, *Joseph on Constitutional and Administrative Law*, pp 154–155; Dalziel, 'The Politics of Settlement', pp 101–102.
23. Rutherford, *Sir George Grey*, p 516. It took until 1865 for agreement to be reached that the colonial Government would take full responsibility for Māori affairs and the imperial armed forces would be gradually withdrawn; the Governor would retain control of those forces in the meantime. Yet, Governor Grey and his successor continued to exercise some personal control over Māori policy and defence. In effect, it would not be until 1870, when the last imperial troops were withdrawn from the colony, that the full transfer of responsibility was completed: Joseph, *Joseph on Constitutional and Administrative Law*, p 155.

Page 777: Colonial Government Responsibility for Māori Affairs: A Timeline

1. The General Assembly passed the Native Districts Regulation Act 1858, the Native Commission Act 1858, and the Native Schools Act 1858. The Assembly also passed the Native Territorial Rights Bill 1858, but the Governor reserved this, and the imperial government refused assent: John E Martin, 'Refusal of Assent': Assent – A Hidden Element of Constitutional History in New Zealand', *Victoria University of Wellington Law Review*, vol 41, no 1 (2010), pp 59–60.
2. Frederic Morris (Jock) Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland: Auckland University Press, 2006), ch 5; Frederic Morris (Jock) Brookfield, 'The Monarchy and the Constitution Today: A New Zealand Perspective' [1992] NZLJ 438; Martin, 'Refusal of Assent'; David V Williams, 'Genealogies of the Modern Crown: From St Edward to Queen Elizabeth II', in *The Shapeshifting Crown: Locating the State in Postcolonial New Zealand, Australia, Canada and the UK*, ed Cris Shore and David V Williams (Cambridge: Cambridge University Press, 2019); W David McIntyre, 'Self-Government and Independence', *Te Ara – Encyclopedia of New Zealand*, accessed 24 February 2022; John Wilson, 'New Zealand Sovereignty: 1857, 1907, 1947, or 1987?', Parliamentary Research Paper, Wellington, 2007.

Page 792: The Kohimarama Rūnanga

1. 'Te Hui ki Kohimarama', *Te Karere Maori*, 14 July 1860, p 1.
2. See 'Minutes of the Proceedings of the Kohimarama Conference of Native Chiefs', AJHR, 1860, E-9.

Page 832: The Structure and Functions of Grey's New Institutions

1. Governor Grey, 'These are some of the thoughts of the Governor, of Sir George Grey, towards the Maories at this time', circular, December 1861, printed by W C Chisholm; English text extract reproduced in 'Native Policy', *Daily Southern Cross*, 13 December 1861, p 3.

CHAPTER 8

NGĀ HOKONGA WHENUA A TE KARAUNA, 1840–65

EARLY CROWN PURCHASING, 1840–65

> We write to you to let you know that we are not willing to have the chain dragged over the living and the dead. For this place belonged to our ancestors, descended to our fathers and has come down even to us who now live upon it.
>
> —Parore Te Āwha, Te Tirarau Kūkupa, Hori Kingi Tahua, and Hamiora Marupiopio to Governor Gore Browne, 4 April 1861[1]

8.1 Hei Tīmatanga Kōrero / Introduction

In chapter 6, we considered pre-treaty land transactions between Māori and settlers in the inquiry district. Here, we turn our attention to the significant programme of land purchasing the Crown undertook in Te Paparahi o Te Raki between 1840 and 1865, when the Native Land Court came fully into operation. Over this period, the Crown exercised the exclusive right of pre-emption it claimed to have secured under article 2 of the treaty, except between March 1844 and June 1846, when the Crown implemented a scheme enabling a restricted form of direct private purchase from Māori (we discussed the Crown's pre-emption waiver system in chapter 6; see section 6.6).[2]

In our stage 1 report, we considered past debates over whether pre-emption in the English text of the Treaty referred to an exclusive right of purchase, or rather a right of first refusal.[3] Certainly, the instruction issued by the Secretary of State for War and the Colonies, Lord Normanby, to soon-to-be Governor William Hobson had been to obtain agreement that Māori would sell land only to the Crown. We stated there that the English text largely fulfilled this requirement.[4] We questioned, however, whether the term had been properly explained to Te Raki Māori in 1840 and, if it had been, whether they would have consented. As we noted in previous chapters, rangatira agreed to entering land transactions with the Crown, but not exclusively. In chapter 4 of this (stage 2) report, we found that the Crown misrepresented the terms of the treaty.

Early in this period, the Crown entered into its first major land transaction in Te Raki in Mahurangi and Omaha in 1841. The purported purchase of the Mahurangi and Omaha block occurred before the Crown had developed clear processes and a sufficient organisational structure for its purchasing programme. No further land would be purchased by the Crown in Te Raki during the 1840s. Yet, during this period, as they 'gradually came to grips with the reality that Māori laid claim to all of New Zealand and the attendant

Taiwhenua	Total area of taiwhenua (acres)	Crown purchases (acres)	Proportion of taiwhenua purchased by Crown (percentage)
Takutai Moana and Te Waimate Taiāmai	420,053	95,305.05	23
Whangaroa	212,484	32,682	15
Hokianga	283,450	0	0
Whāngārei and Mangakāhia	684,884	205,276	30
Mahurangi and Gulf Islands	522,277	148,852.44	28
Total	2,132,148	482,115.49	23

Table 8.1: The Crown's estimation of purchasing in Te Raki, 1840–65. All figures are approximate.

complications this involved [for the British]',[5] Crown officials engaged in important debates over the nature of Māori rights in land (see chapter 4).

The policy established in 1848 under the governorship of Sir George Grey (1845 to 1853) attempted to resolve the tension between recognition of Māori ownership and the pressure from colonists to open up land for settlement, and provided the basis for the large-scale purchasing programme that followed. After Grey's departure, his policy was continued by the Native Land Purchase Department (established in 1854) under the direction of Donald McLean. During this period, from 1840 to 1865, the Crown purchased over 482,000 acres, or approximately 23 per cent of the land within the inquiry district.[6] Overall, as shown in table 8.1, the taiwhenua affected most significantly by Crown purchasing in this period were Whāngārei, Mangakāhia, Mahurangi, and the Gulf Islands; only Hokianga was exempt, largely because the Crown had already acquired extensive scrip lands there (see chapter 6).

8.1.1 Purpose of this chapter

The Crown's purchasing of Māori lands between 1840 and 1865 resulted in a large transfer of estate and resources from Te Raki Māori to the new colonial Government. As noted, the conclusion we reached in stage 1 of our inquiry was that Te Raki Māori did not cede their sovereignty, that the treaty agreement guaranteed the settlement of the district would be conducted through their new partnership with the Crown, and that 'some kind of relationship would be established between the British and the rangatira' to negotiate land transactions.[7] In this chapter, we consider how that relationship developed and whether the Crown's efforts to purchase Māori land in the inquiry district complied with its treaty obligations.

As we have discussed in previous chapters, rangatira retained substantial authority in the district over both Māori and settlers in the years after signing the treaty. In chapter 6, we concluded that the tikanga of tuku whenua governed relationships with local settlers, including agreements about land, and that in 1840, Te Raki Māori had no reason to consider that the treaty would do anything but strengthen their ability to enforce their understandings. As Crown purchasing activities increased during the 1850s, these expectations would be challenged, and we discuss whether Māori understandings of the nature of their land transactions changed as a result.

The Crown, for its part, viewed land transactions differently. Its officials considered that permanent alienations and the extinguishment of Māori title over large areas of

land was necessary to support the settlement of the colony. However, they were also aware of their obligations to Māori, and at various times throughout this period reiterated their commitment to protect their interests and recognise their rights in land.

This chapter examines the political origins, legislative framework, and the actual mechanics of Crown purchase in the inquiry district following 1840, and the effect of purchasing on iwi and hapū of Te Raki. In doing so, it highlights a range of claims, chosen to illustrate circumstances, dynamics, and methods reflecting the broader system of Crown purchasing and land alienation across the inquiry district.

8.1.2 How this chapter is structured

We begin by establishing the issues for determination. To arrive at these questions we have drawn on the parties' submissions in stage two of our inquiry, the evidence before us, and the Tribunal's previous consideration of the Crown's treaty obligations in respect of land purchasing. These obligations are summarised in the section following. The first issue we consider is whether, in developing its purchasing policy during the 1840s, the Crown recognised Te Raki Māori's tino rangatiratanga (section 8.3). We discuss the implementation of that policy during the 1850s, and whether it was treaty compliant (section 8.4). We finally consider the practices of the Crown's purchase agents on the ground, and whether they complied with the Crown's treaty obligations (section 8.5). The chapter concludes with a summary of our findings, including our findings on prejudice (sections 8.6 and 8.7).

8.2 Ngā Kaupapa / Issues

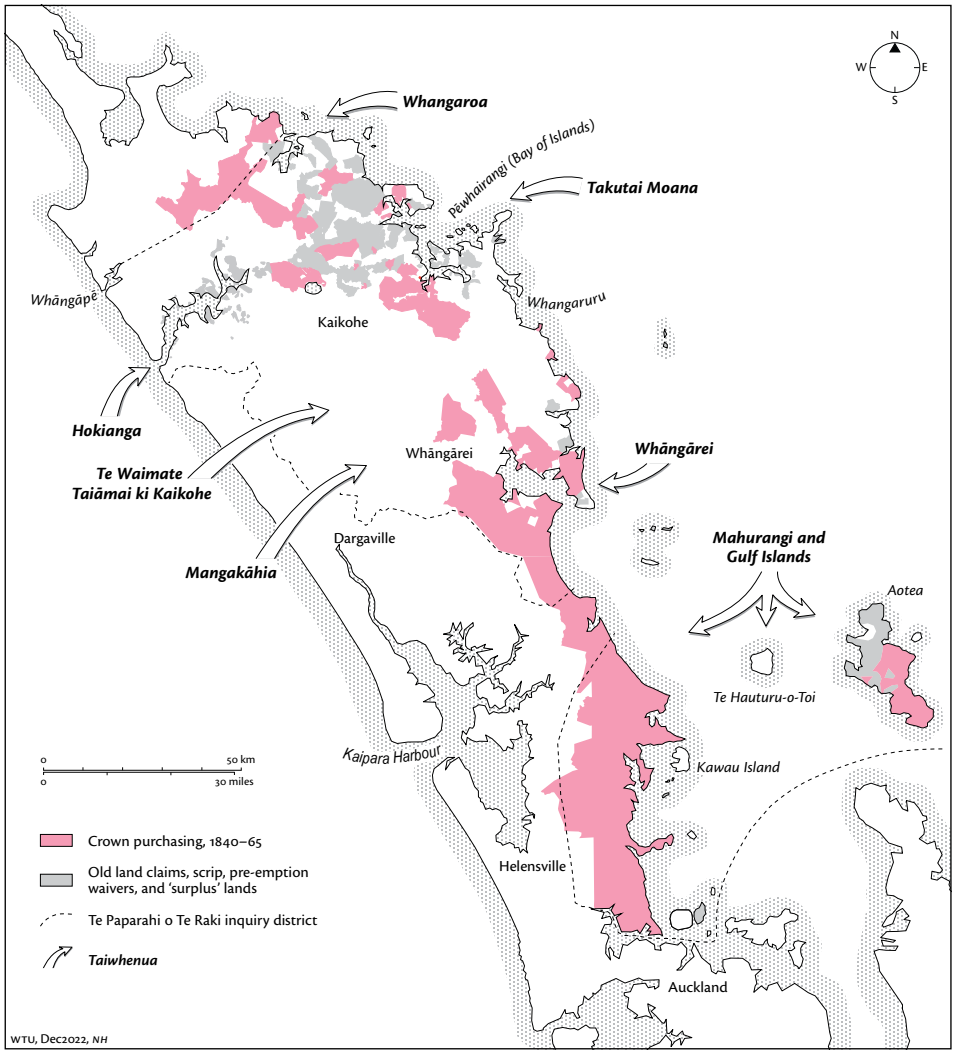
8.2.1 What previous Tribunal reports have said

The Tribunal has considered Crown purchasing of Māori land and its related policies and practices during the period between the signing of te Tiriti and the enactment of the Native Lands Act 1865 over many inquiries, including the Ōrākei, Ngāi Tahu, Muriwhenua Land, Mohaka ki Ahuriri, Te Tau Ihu, Wairarapa ki Tararua, Whanganui, and Te Rohe Pōtae inquiries. In these reports, the Tribunal has reached consistent conclusions on the Crown's obligations when purchasing Māori land. The general requirements the Tribunal has identified for Crown purchases that are consistent with the treaty principles can be summarised as follows:

- all groups of customary owners and their respective interests must be identified;
- all disputes over ownership must be resolved before the start of Crown negotiations for purchase;
- the hapū should be involved in negotiations, not just individuals;
- the area of land being negotiated must be clearly defined;
- the nature of the transaction, whether permanent or not, must be well understood by all the customary owners;
- the price must be fair;
- all customary owners must give their free and informed consent to the purchase, or have the ability to remove their interests; and
- the purchase must leave sufficient community land for the current and future use of the hapū and for their well-being and their economic development.[8]

The Tribunal has broadly concluded that the Crown's assertion of control over land transactions through its pre-emption policy created additional obligations to protect Māori interests when purchasing land. In the *Report of the Waitangi Tribunal on the Orakei Claim* (1987), the Tribunal described pre-emption as a 'valuable monopoly right . . . which enabled the Crown, to the exclusion of all others, to purchase Maori land'.[9] As a result, pre-emption conferred reciprocal obligations on the Crown, including to ensure that Māori wished to sell the lands purchased, and that 'they were left with sufficient land for their maintenance and support or livelihood'.[10]

The Tribunal has also observed across a number of reports that the Crown had clear contemporary guidance regarding standards for land purchasing, as set out in Secretary of State Lord Normanby's 1839 instructions to Hobson.[11] In *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims* (2008), the Tribunal considered that throughout the 1840s, various Secretaries of



Map 8.1: Crown purchasing in Te Raki, 1840–65.

State and Governors acknowledged the importance of dealing with Māori customary rights in accordance with their own law and customs.[12] However, Tribunal reports have also shown that there was a range of opinions among Crown officials on the nature of Māori land rights during this period. Some were influenced by the assumption that indigenous people had no law to recognise and the 'waste land' theory that they only owned the land upon which they lived and cultivated. In the opinion of the Tribunal in *Te Tau Ihu o Te Waka a Maui*, while this 'did not become accepted theory in New Zealand', it was nonetheless influential.[13]

In *The Ngai Tahu Report* (1991), the Tribunal emphasised that a sufficient endowment of lands should have been provided for both the present and future needs of Māori.[14] The Tribunal stated three criteria that the Crown

should have met to make certain that it upheld its treaty duty of ensuring that Māori retained sufficient reserve lands:

- that kāinga and cultivations were retained;
- that sufficient agricultural quality land was retained to develop alongside the settler economy; and
- that appropriate areas were retained to provide access to traditional resources.[15]

In that inquiry, the Tribunal found that the reserves set aside for Ngāi Tahu provided an average of 12.5 acres per individual, and that this was 'so grossly insufficient as to be no more than nominal in character'.[16] In the *Muriwhenua Land Report* (1997), the Tribunal found that Crown officials did not formulate or implement a clear policy to ensure that Māori retained sufficient lands, or 'where those reserves should be located, or how they should be constituted, managed, or retained in Maori control'.[17] The Tribunal observed that most of the reserves in the district were never formally gazetted, despite this being required by law, and most were either subsequently purchased by the Crown, or titled through the Native Land Court.[18] Both *The Wairarapa ki Tararua Report* (2010) and *He Whiritaunoka: The Whanganui Land Report* (2015) considered that the Crown's purchasing policy from 1846 under Governor George Grey increasingly sought to confine Māori reserves to the lands they 'occupied', rather than providing for their future needs.[19]

Beyond the protective intent that was supposed to inform Crown pre-emption, previous jurisprudence has also noted the connection between the Crown's exclusive right of purchase and its 'land fund' model for the colonisation of New Zealand. Under this system, the Crown funded immigration and the development of the colony, including infrastructure and the administration of the colonial Government, by using the profits earned from selling land acquired cheaply from Māori to settlers at an increased price.[20] As a result, Crown officials considered it necessary to purchase extensive lands well ahead of demand from settlers before Māori came to appreciate their monetary value, and the Tribunal has often found that the tension between this imperative and the Crown's protective responsibilities resulted in prejudicial outcomes for Māori. The *Muriwhenua Land Report* described the Government's policy in practice under McLean's Native Land Purchase Department was 'to relieve Maori of as much land as possible, as quickly as practicable, and for the least cost'.[21] The Tribunal went on to state that the Crown purchased 'with a distant future in mind, ahead of demand. One result was that market forces did not determine the sale price for Maori [land].'[22] Likewise, in *The Mohaka ki Ahuriri Report* (2004) the Tribunal underlined that Governor Grey employed the Crown's pre-emptive monopoly to acquire Māori land for 'little more than a pittance'.[23] Similarly, *The Hauraki Report* (2006) found that 'the historical record shows that the Crown, as a matter of general policy, did try to obtain Maori land as cheaply as possible'.[24] The Tribunal observed that this policy 'was clearly established by Normanby's 1839 instructions and sustained by Governor Grey'.[25]

In *The Wairarapa ki Tararua Report*, the Tribunal acknowledged that the Crown, if it was to assume an active role in promoting settlement, had to acquire some land for resale at a profit. However, that left unanswered questions about how much land the Crown needed to acquire and how much profit it needed to make. The Crown's determination to pay Māori as little as possible left them without the capital they needed to develop their remaining lands.[26] This report also noted the difficulties encountered in establishing the prices paid per acre: among them, overlapping purchases, survey deficiencies, and

> the ambiguous distinction between deeds and receipts that arose from the Crown's practice of retaining portions of the total price to give disputing parties a chance of joining in later with those selling.

The Tribunal did not find any indication that the Crown was at all concerned to offset its monopoly position by ensuring that Māori were paid fair value.[27]

The Wairarapa Tribunal found that from 1853, the Crown's approach to purchasing changed dramatically as the pressure to acquire land intensified; with the rising inflow of migrants, it 'pursued more expedient means

of securing agreement to its purchases'.[28] From this point, deeds were transacted with fewer rangatira, survey plans were not prepared, purchases overlapped, boundaries were disputed, and, increasingly, lands reserved or excluded from earlier purchases were bought. The Tribunal also discussed Grey's policy of creating a 'five per cents fund', whereby 5 per cent of the on-sale value of specific Crown purchase blocks would be set aside as an endowment for the benefit of the former Māori owners.[29] The Tribunal considered that this policy was based on 'sound principle' to the extent that Grey wanted to ensure that Māori would receive benefits from land sales 'that were not confined to money'. However, it found obvious flaws in policy which created 'an endowment that would decline rather than grow', and the Tribunal questioned 'whether the Crown's intention was principled at all'.[30] Grey's promise of general benefits persuaded Wairarapa Māori to agree to large Crown purchases, and low prices. When the Crown failed to deliver on those promises, the Tribunal concluded, 'the Crown gained Māori consent to the sale of their land under false pretences'.[31] In that inquiry, the Tribunal also found that Māori lodged complaints, in particular about lands that had been purchased without the consent of all those who had customary rights, boundaries that had been inadequately defined, lands that should have been excluded from sale but were purchased, payments that had not been received, reserves that had not been set aside, and promises of 'koha' or 5 per cents that had not been kept.[32]

Previous reports have discussed the importance of 'collateral' benefits that Māori were promised would accompany sales to the Crown through the development of their remaining lands and increased settlement within their rohe. In *The Whanganui River Report* (1999), the Tribunal reached the conclusion that '"[f]uture benefits"' were viewed by Māori as constituting a 'contractual undertaking'.[33] In the subsequent *He Whiritaunoka*, the Tribunal considered that Whanganui Māori were promised collateral benefits and that they accepted and relied on such assurances. The Tribunal noted that these promises often went unrecorded, but concluded that it was 'very likely that Whanganui Māori were assured that a range of collateral benefits would accompany the sale of the Whanganui block', and that they accepted these assurances as in the nature of a contractual undertaking.[34] *The Wairarapa ki Tararua Report* also discussed the promises that were made about the 'future benefits Māori would enjoy if they agreed to sell their lands to the Crown'. These 'future benefits' included explicit promises from government officials on the provision of health services, roads, schools, and bridges.[35] The *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (2020) recorded that iwi and hapū in that district offered land to the Crown because they sought 'to bring settlers and capital to their areas and so access the benefits of Pākehā settlement'.[36]

Tribunal reports have also identified fundamental differences between Māori expectations and understandings of land transactions, and the full alienations sought by Crown purchasers. Instead of final and permanent sales conferring exclusive rights, Māori broadly expected to continue to use resources on their lands as they had prior to the Crown purchases.[37] *The Ngai Tahu Report* found that at the time of the Crown's early South Island purchases, Ngāi Tahu 'would have had little real understanding of the finality and irrevocability of the sale of their land or of their consequential permanent alienation from it and its resources'. The Tribunal noted that throughout the 1850s 'Ngai Tahu cultivated or grazed stock beyond the reserves and continued to hunt and forage much as previously'.[38] In the *Muriwhenua Land Report*, the Tribunal found even after 1840 'there was no 'contractual mutuality' between Māori and Crown purchase agents; while Māori entered transactions to ensure 'a continuing social contract', the Crown sought 'an unencumbered property transfer'.[39] In that report, the Tribunal highlighted that Māori broadly did not understand English land law and continued to be unaware of the consequences of the transactions into which they entered.[40]

Subsequent Tribunal inquiries have reached similar conclusions. In *He Whiritaunoka*, the Tribunal concluded

that the alienation of the Whanganui block in 1848 was, in the eyes of Māori, neither fully a sale, a cession, or a tuku; rather, 'the transfer of land to Pākehā established a relationship with them through which Māori would benefit materially, and maintain connections with them and with the land'.[41] In the Wairarapa ki Tararua inquiry, the Tribunal found that it was not reasonable to expect that early land purchases during the 1850s would 'instantly transform' the experience and understandings of Wairarapa Māori. The Tribunal concluded that when Wairarapa Māori spoke of land transactions, 'they still spoke of the whole community coming to a decision first', and understood Grey and McLean's statements through the lens of their own cultural context, where a rangatira 'would be expected to act in a way that would be for the betterment of all, and not for his own personal advantage'.[42] Koha and utu provided the lens through which purchase payments would be understood, and this gave rise to an 'expectation that they would be paid as long as Pākehā remained on the land'.[43] In *Te Mana Whatu Ahuru*, the Tribunal observed that the delays in the settlement or development of some of the areas the Crown purchased in Te Rohe Pōtae during this period 'may have further encouraged Māori misunderstandings about the nature of the transactions'.[44]

8.2.2 Crown concessions

The Crown made several concessions in our inquiry relating to its land purchasing policy and practice between 1840 and 1865, which we set out in full:

> The Crown concedes that in purchasing the extensive area called 'Mahurangi and Omaha' in 1841 it breached Te Tiriti o Waitangi/the Treaty of Waitangi and its principles by failing to conduct any investigation of customary rights when it purchased these lands. The Crown acquired these lands without the knowledge and consent of all Māori owners and failed to provide adequate compensation and reserves for the future use of and benefit of all Māori owners when it later learned of their interests in the purchase area. . . .
>
> The Crown concedes that where it failed to carry out an adequate inquiry into the nature and extent of customary rights in lands it purchased in the Te Paparahi o Te Raki district between 1840 and 1865 it breached Te Tiriti o Waitangi/the Treaty of Waitangi.
>
> The Crown concedes that where it did not reserve sufficient land for the present and future needs of the iwi and hapu of Te Paparahi o Te Raki when purchasing land from them before 1865, it failed to uphold its duty under Te Tiriti/the Treaty of Waitangi and its principles to actively protect the interests of the iwi and hapu of Te Paparahi o Te Raki from whom it purchased land.[45]

The Crown had also initially conceded that:

> iwi in the Mahurangi and Gulf Islands region were virtually landless by 1865 and the Crown's failure to ensure they retained sufficient land for their present and future needs was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.[46]

This concession was based on the Crown's initial estimate that it had acquired 83 per cent of the Mahurangi and Gulf Islands district, 433,852 acres, before 1865.[47] However, the Crown resiled from that position based on revised figures showing that the Crown acquired 148,852 acres by purchase from Māori before 1865, and that 59.8 per cent of Mahurangi and Gulf Islands taiwhenua had not been alienated by that date.[48] In closing submissions, Crown counsel submitted that '[g]iven the revised figures noted above, the facts underpinning that concession appear wrong'.[49] Over 312,511 acres of land remained under Māori ownership in the Mahurangi and Gulf Islands taiwhenua in 1865.[50] The Crown's revised position was that all Te Raki Māori 'did retain a sufficiency of land at 1865 for their then and future needs'.[51] The Crown stated that sufficiency, in this context, means 'at least 50 acres per head'. This definition was based on the requirement in the Native Land Act 1873 that reserves 'be set aside of at least 50 acres of land per Māori individual in a given district'.[52]

We note that the Crown made a more general concession that Mahurangi and Gulf Islands Māori are today virtually landless, and 'the Crown's failure to ensure they retained sufficient lands for their present and future needs was a breach of the treaty'.[53] Similarly, the Crown conceded

> that iwi living in the Whangarei and Whangaroa subregions of the Te Paparahi o Te Raki Tribunal inquiry are now virtually landless and the Crown's failure to ensure that they retained sufficient land for their present and future needs was a breach of Te Tiriti o Waitangi / the Treaty of Waitangi and its principles.[54]

Crown counsel distinguished between these broader concessions regarding the position of Mahurangi and Gulf Islands, Whāngārei, and Whangaroa hapū today, and the position of those hapū in 1865.

8.2.3 The claimants' submissions

In their generic closing submissions, the claimants argued that through the treaty, the Crown gained the right of pre-emption, and in return acquired something akin to a fiduciary obligation to protect Māori and their interests.[55] The claimants argued that the so-called 'land-fund model' of colonial development was never explained to their tūpuna, nor was their consent to its implementation sought or given.[56] Nevertheless, they argued, once implemented, 'pre-emption had an immediate effect' of imposing a Crown monopoly on purchasing and the attendant obligations that came with it.[57]

Closing submissions for Ngāti Uru and Te Tahawai, Te Uri o Hua and Ngāti Torehina hapū, and Te Hokingamai e te iwi o Mahurangi stressed that by 1840, through both the treaty and other declarations and undertakings made by its officials, the Crown had laid out a number of standards against which its purchasing policies and practices should be judged.[58] They noted that, in his instructions to Hobson, Lord Normanby stated that the Crown should only seek to purchase lands that Māori could afford to alienate 'without distress or serious inconvenience to themselves'.[59] Thus, Māori land rights and the Crown's respect and protection of them were key – and relatively defined – pillars of the Crown–Māori relationship.

Despite these standards, the claimants alleged that the Crown's measures intended to protect Māori 'were ineffective, and did not live up to Māori expectations'.[60] They argued that underlying the lack of protection for Te Raki Māori was the Crown's adherence to the land fund model of colonisation, by which it sought to acquire as much Māori land as cheaply as possible and on-sell it to settlers, using the profit to fund the colony's development.[61] Claimants from Te Taumata o Te Parawhau and from the Mangakāhia and Whangaroa taiwhenua, told us that the Crown's protective duty was incompatible with the land fund model of colonisation it was pursuing.[62] For example, the claimants argued that the role of the Chief Protector of Aborigines (discussed in chapter 4) was 'undermined by [his] being saddled with the twin role of protector and commissioner for the purchase of lands'.[63]

Many claimant groups, including the descendants of Hone Karahina and members of the hapū of Te Uri o Hua and Ngāti Torehina; Ngāti Uru and Te Tahawai hapū; Ngāti Hineira, Te Uri Taniwha, Te Whānau Whero, and Ngāti Korohue hapū; Whānau Pani, Tahawai, and Kaitangata hapū; Te Patukeha ki Te Rāwhiti and Ngāti Kuta ki Te Rāwhiti hapū; Ngāti Kawa and Ngāti Manu; and Te Hokingamai e te iwi o Mahurangi, Ngā Wahapu o Mahurangi – Ngapuhi, and Te Tāōū hapū of Makawe, located the Crown's land purchasing programme within a broader strategy of undermining Te Raki Māori tino rangatiratanga 'in preparation for assimilation and the abolition of Māori tribalism'.[64] Claimants acknowledged that the Crown had generally rejected the 'waste lands' theory of indigenous land ownership (that is, that Māori were only considered to have recognisable property rights once land had been occupied, used, and improved by them) and instead recognised Māori proprietary rights to all lands to which they laid claim. Nonetheless, the waste lands theory, requiring Māori to show that they 'exploited' the land in order to prove their ownership, continued to influence Crown policy towards Māori land rights from 1840 into the twentieth century.[65]

Claimants alleged that a failure to carry out adequate inquiries into land ownership was a 'hallmark' of Crown purchases in the inquiry district during this period. Claimant counsel noted: 'it would not have been uncommon for numerous hapu to hold customary rights within the same area of land'.[66] Consequently, an 'adequate inquiry' would have required the Crown to identify all those who held rights in the relevant land and notify them of the proposed purchase. But Crown agents instead followed a policy of negotiating 'with the first individual, or group, that they came across who claimed to be entitled to transact the land', with the intention that any other owners could be dealt with at some later point.[67] Claimants further contended that it is not appropriate for the Crown to now rely on the presence or absence of complaints by Māori as a measure of the adequacy of its past assessments of customary interests. In the claimants' submission, the Crown's argument (see section 8.2.4) would 'place the onus for remedying its own prejudicial process on Māori'.[68]

With regard to other Crown purchasing practices in this period, claimant counsel alleged that transactions in the north followed a pattern of 'unclear boundaries and the absence of any survey or plan'.[69] Claimant counsel noted the Crown did not require surveys prior to the completion of its purchases before 1856.[70] While the claimants recognised that the Crown did make some efforts to improve surveys, they stated that its purchase officers could make their own unilateral decisions regarding survey, and there was a gap between policy and practice.[71] They argued that without adequate surveys, purchasers relied on guesswork, and 'Māori, and even purchasers, could not be clear of the area that was being transacted'.[72] In addition, the prices the Crown paid Māori in pre-1865 transactions were inadequate, even allowing 'for reduced payments in lieu of future benefits' that largely failed to materialise. But the Crown's imposition of a pre-emptive right left Māori with no other option for sale or lease.[73] These flaws in Crown practice, claimants said, were compounded by the Crown's 'grossly inadequate' efforts to properly document the land transactions in which it engaged. Deficient or absent legal documentation, the claimants alleged, prejudiced Māori by presenting opportunities for fraud in land transactions, as well as leaving Māori unable to prove fraud where it may have occurred.[74]

The claimants further argued that the Crown failed to set aside sufficient reserves for Te Raki Māori during its purchasing in this period.[75] Only 2.49 per cent of Te Raki land purchased before 1865 was reserved for Maōri, which the claimants submitted was grossly insufficient. The claimants challenged the Crown's contention that 'sufficiency' equated to 50 acres per head,[76] arguing that such a figure is arbitrary, is unduly focused on the individual at the expense of Māori collectives, refers only to the quantity rather than quality of retained lands, and deals strictly with economic sufficiency while ignoring the cultural sense of the term.[77] Claimants also contended that the fact that nearly 80 per cent of Northland Crown purchase deeds contained no provision for reserves demonstrates that the Crown 'was not interested' in ensuring Māori retained an adequate land base. Even where reserves were set aside, they usually had no official status and were open to future purchasing efforts.[78] Furthermore, claimants said, while the Crown may have instructed its purchase agents to ensure Māori retained sufficient land, it failed to ensure these directions were acted upon.[79]

In reply submissions, the claimants 'strongly disputed' the Crown's revised position on the status of Te Raki Māori landholding by 1865 and the landlessness of Mahurangi hapū. The claimants submitted: 'In taking back the concession the Crown fails to take into account the quality of the land in assessing whether the land is enough for present and future needs.'[80] They further submitted that, by 1865, the ability for Māori to live individually or collectively was 'undermined'.[81] Ngāti Maraeariki, Ngāti Manu, Ngāti Rongo, Te Uri Karaka, Te Uri o Raewera, Ngāpuhi ki Taumārere, and Te Hokingamai e te iwi o Mahurangi claimants maintained that they had been left virtually landless as a result of the Crown's purchasing practices and policies.[82]

In relation to Māori understandings of what transactions entailed, claimants submitted that '[t]he custom surrounding land was that of tuku whenua, and permanent


EXIT

Some of the claimants (and the claimant groups they are representing) who presented evidence on early Crown purchasing of land in the Te Raki district during Waitangi Tribunal hearings. *Clockwise from top left:* Dr Guy Gudex (Patuharakeke), John Rameka Alexander (ngā hapū o te Waimate Taiāmai ki Kaikohe), Marina Fletcher (Te Parawhau), Paraire Pirihi (Patuharakeke), Titewhai Harawira (Ngāti Hau me ngā hapū o Ngāpuhi nui tonu), Rowan Tautari (Te Whakapiko), and Pereri Mahanga (Te Waiariki, Ngāti Korora).

alienations were not possible.' In their view, this was the case in the period of the old land claims, and there is no evidence to suggest this had changed between 1840 and 1865.[83] Claimant counsel argued that the Crown was aware that Māori conceived of land sales in this manner but 'pushed on in the hope that in the future their purchases could be confirmed by way of force'. As such, counsel concluded, these transactions cannot be considered legitimate.[84] Counsel maintained that Māori believed that even following 'sales', they still retained ongoing rights to access and occupy their lands because they had 'entered into reciprocal transactions on the basis of an ongoing relationship'. In some cases, settlers did not move onto the land or clear the bush for decades after it was purchased. The claimants cited historian Dr Vincent O'Malley who stated that before 1865,

> nominal purchases had no real meaning or discernible consequences on the ground . . . local Māori continued to utilise such lands for gum digging, mahinga kai and other purposes.[85]

In terms of Te Raki Māori expectations relating to the advantages of land transactions, claimants contended that Māori anticipated 'immediate financial gain' as well as ancillary benefits like public works and development; however, these promised benefits did not appear.[86] They also expected higher payments from the Crown than they generally received, yet had no avenue to complain because '[p]re-emption ensured that the Crown's show was the only one in town'.[87] Moreover, Māori may have accepted low prices on the assumption that they would gain the benefits in the future that the Crown had promised them.[88] However, the claimants submitted that in order to receive any benefit from future settlement and development, they had to retain sufficient lands. They contended the Crown failed to ensure that Te Raki Māori received those benefits.[89]

8.2.4 The Crown's submissions

Crown counsel stated that of the 88 blocks the Crown acquired in Te Raki between 1840 and 1865, the 'vast majority' were purchased after 1854.[90] The Crown submitted that it entered into at least 27 purchase agreements in the Bay of Islands between 1855 and 1865, with only one occurring before 1855, for a total gain of 95,306 acres. Hapū and iwi involved in transacting land there included Ngāti Kahu, Ngātiwai, Ngāti Rangi, Ngāpuhi, Te Waiariki, Ngāti Hine, Ngāti Rēhia, Te Uri o Ngongo, Ngāi Te Wake, Ngāti Maru, Te Urikapana, Te Hikutū, and Ngāi Te Whiu.[91] Finally, the Crown submitted that it was unaware of any Crown purchasing occurring in Hokianga between 1840 and 1865, yet recognised that the Crown acquired land during this period under the scrip and surplus land policies relating to pre-treaty transactions.[92]

Crown counsel agreed with the claimants' assertion that Crown purchasing in the inquiry district between 1840 and 1865 was carried out under the land fund model. They agreed the Crown had bought land from Māori and on-sold it to settlers, putting the profit towards the development of the colony; as a consequence, it sought to buy land for low prices. The Crown submitted that '[u]nder this model a contribution to the future development of the colony was built in to every purchase of land by the Crown and every sale of Crown land'.[93] The Crown contended that Māori were expected to 'benefit from the associated infrastructure and economic development' that accompanied European settlement so long as they retained enough land to do so.[94] It further submitted that there is insufficient evidence to quantify 'the real or perceived benefits there may or may not have been' for Te Raki Māori in this inquiry.[95]

The Crown also argued that from 1846, Governor Grey 'pursued a policy whereby the Crown would purchase land not actually occupied or needed by Māori'.[96] Counsel referred to *The Kaipara Report* (2006) which recorded that in 1848, Grey set out the Crown's approach to purchasing, and thus adopted the following principles:

- The interests Māori had in all of their lands (even the so-called 'waste lands' which they were not occupying or cultivating) would be recognised.
- Māori title to very large tracts of land could be extinguished through purchase for merely 'nominal' payment.

In this way, sufficient land would become available before it was required for Pākehā settlement.

- Areas of land sufficient to meet the future needs of Māori would be reserved from such purchases.
- The real payment to Māori for their land would come not from the initial purchase price but rather from the security that Crown title provided to their reserves, the increased value of their remaining land resulting from Pākehā settlement, and the economic benefits of trade with settlers.[97]

The Crown submitted that the tenets of Grey's policy continued to underpin the Crown's purchasing policy during this period.[98]

The Crown recognised that 'there is no evidence that its instructions to land purchase officers to ensure Māori retained a sufficiency of land were systematically acted upon between 1840 and 1865'.[99] However, a large proportion of the Native Department's records from this period were lost in the 1907 Parliament Buildings fire. Crown counsel submitted that this meant that the Tribunal could not conclude with certainty that the Crown's records were inadequate before the fire, because of the possibility that they were destroyed. It argued that the absence of documents did not mean that the Crown did not take steps to ensure Te Raki Māori retained sufficient land. The Crown additionally submitted that it does not accept that 'a failure to retain adequate records of all its purchases is itself a breach of any treaty duty'.[100] The Crown accepted that in assessing whether hapū retained sufficient lands, issues such as the quality of land retained and retention of wāhi tapu were relevant considerations.[101] However, as we noted earlier, the Crown's position was that Te Raki Māori 'did retain a sufficiency of land at 1865 for their then and future needs'.[102]

The Crown acknowledged that it had a duty to pay a 'fair' or reasonable price for land, and that an independent valuation system was not established until after 1865. However, it submitted that there was little specific evidence from the inquiry district showing that it purchased blocks at an unreasonably low price.[103] The Crown referred to the example of the Mokau block where, in its submission, the price paid was 'low but fair' and 'was comparable to other forested blocks'.[104] Crown counsel further submitted that it is inherently difficult for the Tribunal to take into account the value of collateral benefits associated with land sales when assessing the price paid for land.[105] In the Crown's view, the failure of several negotiations over the question of price was a clear indication that Māori retained control over the sale process, and, with particular reference to the Kaurihohore block, it rejected claims that the Crown profited from land acquired from its customary owners.[106]

As we have already noted, the Crown conceded that where it did not conduct an adequate inquiry into customary interests in the lands it purchased in Te Raki during this period, it failed to uphold its duty to actively protect the interests of Te Raki Māori.[107] Nevertheless, the only instance where the Crown conceded that it did not make adequate inquiries into customary rights in the land it purchased was in the extensive 1841 Mahurangi and Omaha purchase.[108] Crown counsel noted that it began purchasing land in the Mahurangi and Gulf Islands district from as early as 1841, but:

> It was only in the early 1850s that the Crown began to investigate customary rights in the district and it then entered into further agreements with Māori it found had rights in the area.[109]

The Crown argued that by 1855 'it was much more skilled at, and committed to, identifying all owners of land it sought to purchase'.[110]

Other than in the Mahurangi and Omaha purchase, the Crown submitted that further instances where it failed to carry out adequate inquiries into the nature and extent of customary rights in the lands it purchased were relatively rare. The Crown referred to Dr O'Malley's evidence that after 1865 there were few formal petitions or complaints made regarding Te Raki pre-Native Land Court Crown purchases, with the exception of the Mokau block. Counsel submitted that the evidence available did not indicate widespread Māori dissatisfaction with the Crown's investigations.[111] The Crown's submissions referred to the Mokau block as a significant case in this inquiry. Māori

had petitioned Parliament about its purchase, stating that their interests had been sold without their consent; the Crown argued that this case was investigated by a Royal Commission of Inquiry (the Myers commission) during the 1940s which found that the owners had been identified and had consented, and that 'there was nothing untoward with the sale'. The Crown submitted that 'there is no basis for this Tribunal to reach findings that are different to the finding of the Myers Commission.'[112]

With regard to Crown purchasing practices between 1846 and 1865, counsel argued that there is little evidence as to the extent to which the Native Land Purchase Ordinance 1846, which reinstated Crown pre-emption in law (following Governor Robert FitzRoy's pre-emption waiver proclamations of 1844; see chapter 6, section 6.6) and prohibited private leasing of Māori land, was implemented in Te Raki. The Crown noted that there was evidence of private leasing occurring between Māori and settlers despite the 1846 ordinance, and that it was unaware of any cases where the prohibition against leasing was enforced in Northland.[113] In relation to the adequacy of surveys, counsel said that from 1856 onwards 'there does not appear to have been a general failure to ensure surveys were completed before a deed was signed' and since the majority of the Te Raki purchases took place after that date, counsel was unaware of specific cases of prejudice to Te Raki Māori resulting from failures in surveying.[114]

Counsel contended that the Crown's duty to ensure Te Raki Māori retained sufficient land did not mean that it had to ensure a reserve was created in every block purchased. Counsel stated that the Crown created 50 reserves comprising 13,940 acres from its pre-1865 purchases, in addition to lands that Māori withheld from sale altogether. Furthermore, in counsel's submission, the scarcity of available documents shedding light on how Crown purchase agents ensured Māori retained sufficient lands does not mean that purchase agents did not take such steps.[115]

In relation to Te Raki Māori understandings of the nature and effect of land sales, Crown counsel submitted that Māori intended their 1840-to-1865 transactions with the Crown to be permanent sales. Most of the Crown's pre-1865 purchases were made after 1854, by which time Te Raki Māori would have understood the notion of final and permanent alienation – in fact, counsel argued, this understanding was probably widespread by 1839. Crown counsel submitted that the Māori texts of purchase deeds from 1840 to 1865 also reflect this understanding.[116]

8.2.5 Issues for determination

We have identified three issues that we need to address relating to Crown purchasing activities in the Te Raki inquiry district between 1840 and 1865:

- In developing its purchasing policy, did the Crown recognise Te Raki Māori tino rangatiratanga?
- Was the Crown's implementation of its purchasing policy consistent with its treaty obligations?
- Were the Crown's on-the-ground purchasing practices consistent with its treaty obligations?

8.3 In Developing its Purchasing Policy, Did the Crown Recognise Te Raki Māori Tino Rangatiratanga?

8.3.1 Introduction

Following the signing of the treaty, the settlement of land was a matter of great importance to both the Crown and Māori, and an area where their interests overlapped. In chapter 4 of this report, we discussed the Crown's policy for the recognition of Māori land and resource rights (see section 4.3.2(3)(b)). We set out how, through the doctrine of radical title, the Crown asserted paramount title to the land of New Zealand and placed Māori land rights in a contemporary, foreign, legal paradigm of 'aboriginal title' that made them vulnerable to alienation.[117] While Māori customary rights were recognised as surviving proclamations of sovereignty over New Zealand, questions remained as to how extensive those rights were and how they would be defined.

We also discussed how the Crown expected to exercise its right of pre-emption in order to control the development and settlement of the colony. Contrary to its expectations, however, the Crown was confronted with the

reality that Te Raki rangatira exercised substantial authority within the district over the enforcement of laws and breaches of tikanga, which continued even after the end of the Northern War in 1846. In the first years after the signing of the treaty, the colonial Government's resources were spread thinly across a number of significant policy challenges, including how to provide certainty and awards to settlers for the transactions they had entered into during the pre-treaty period (discussed in chapter 6). The New Zealand Company's claim to have purchased vast tracts of land in central New Zealand and the arrival of company colonists to found their settlements north and south of Cook Strait was a related problem that demanded the attention of officials in both New Zealand and London.[118]

During this period, the Crown struggled to establish its land purchasing programme and only made one purchase in Te Raki, in the Mahurangi and Omaha block (1841), which we discuss later. After that, purchasing in Te Raki came to a halt until the 1850s (with the exception of the ongoing payments made by the Crown to resolve outstanding claims to the Mahurangi–Omaha block). For observers in London and New Zealand, the results of the model of colonisation outlined in Lord Normanby's 1839 instructions, as historian Dr Donald Loveridge observed, 'was a house of cards which was in imminent danger of collapse'.[119] In 1844, Governor FitzRoy instituted a pre-emption waiver policy that provided for settlers to directly purchase lands from Māori provided certain conditions were met (we discuss this policy in chapters 4 and 6). This policy was terminated after FitzRoy was recalled as Governor and George Grey arrived as his replacement in 1845. Grey's Government would be substantially better funded than those of the previous Governors;[120] however, as noted above, the Crown would not seek to purchase any further lands in the district until the 1850s.[121]

From 1840, Te Raki Māori expected that their alliance with the Crown and the new colonial Government would bring further economic opportunities into the district, and they were open to making allowances to the small settler community for that reason. It would be reasonable to expect that Te Raki Māori, who had entered into numerous pre-treaty land arrangements with missionaries and settlers, would have been involved in decisions about the way in which their lands would be transacted, and their rights protected into the future. The Taranaki Tribunal made this point many years ago in *The Taranaki Report: Kaupapa Tuatahi* (1996), noting the expectation of the rangatira Wiremu Kīngi that the process of deciding on land transactions 'had to be settled on both sides'.[122] The interaction between the two spheres of authority (Māori tino rangatiratanga and British kāwanatanga) on this issue ought to have been the subject of negotiations between rangatira and Crown representatives, and the policies the Crown established for purchasing land should have accounted for the concerns and priorities of Māori leaders and their hapū.[123]

Instead, discussions in official circles during this period focused on whether Māori owned lands beyond those they actively occupied. Despite the Crown's recognition of Māori land rights in the treaty, the 1840s were marked by substantial debate over their extent. A central question was whether the treaty had affirmed Māori rights to all lands in New Zealand. Prior to the signing of the treaty, Normanby's 1839 instructions to Hobson acknowledged that this was the case. However, as we discussed in chapter 4 (see section 4.3.2(3)(b)), subsequent Crown officials did not all share this view. Over this period, colonialists (including the New Zealand Company) and prominent officials and members of the imperial government (including the 1844 House of Commons Select Committee on New Zealand) promoted the 'waste lands' theory that indigenous peoples were only guaranteed rights in the lands upon which they physically lived or they cultivated. While these ideas were resisted by some officials, such as the Permanent Under-Secretary to the Colonial Office, James Stephen, they remained influential. We return to these debates in this chapter in which we focus on a period when the 'waste lands' theory would become increasingly prominent in the Colonial Office with the appointment of Earl Grey as Secretary of State for War and the Colonies in 1846. Following his assumption of the governorship in 1845, George Grey would also move quickly to reinstate

Crown pre-emption, but he waited until 1848 to formulate a new approach to land purchasing. Grey's 1848 policy set the terms upon which the large-scale purchasing of the 1850s and 1860s would proceed.

In this section, we consider the treaty compliance of the purchasing policies and guidelines the Crown established for itself between 1840 and 1848. The parties in this inquiry all agreed that the Crown's policy during this period was based on the land fund model of colonisation.[124] However, the parties disagreed about the efficacy of the protections this model provided for Te Raki Māori as the Crown asserted its sole right of pre-emption. In their submissions, the claimants argued that the primary motivation for the Crown asserting pre-emption in the colony was its 'fear that it would lose revenue by being deprived of control over the trade in land'.[125] As a result, few protections were established, and those that were, such as the role of Chief Protector of Aborigines, 'were strikingly unsuccessful'.[126]

Crown counsel argued that under the land fund model, 'a contribution to the future development of the colony was built into every purchase of land by the Crown and every sale of Crown land'. That is to say, Māori contributed to the colony's development through the difference between the price the Crown paid them and the sum they might have received for their land on the open market. Similarly, British settlers contributed the difference between what they might have paid for land on an open market and the price they actually paid to the Crown. Māori were also expected to benefit from the associated infrastructure and economic development that would flow from land sales – although Crown counsel allowed that this 'relied on those developments occurring while Māori retained enough land to benefit from them'.[127] To illustrate the intention of Crown officials to protect Māori landholdings, the Crown drew attention to Lord Normanby's instructions to Hobson and stressed that, contrary to Earl Grey's later opinion that all non-occupied lands were to be considered 'waste lands' and thus Crown demesne, Governor Grey instead pursued a policy of recognising Māori interests in all their lands and of purchasing land not 'occupied or needed by Māori'.[128]

8.3.2 The Tribunal's analysis

(1) *Lord Normanby's instructions to Governor Hobson*

In our stage 1 report, we characterised the August 1839 instructions of Secretary of State Lord Normanby 'as the key statement of British intentions in New Zealand prior to the signing of te Tiriti'.[129] As we further discussed in chapter 4 (see section 4.3.2(3)(b)), Normanby's instructions set out succinctly the principles for the operation of the land fund model of colonisation. Hobson's first task in establishing the land fund was to proclaim upon his arrival in New Zealand that the Crown would not recognise any title to land that was not derived or confirmed by a Crown grant.[130] In accordance with Normanby's instructions, the Governor of New South Wales, George Gipps, issued a proclamation to this effect on 14 January 1840, and Hobson issued a further proclamation upon his arrival in the Bay of Islands.[131]

While Normanby's instructions recognised that all land was under Māori customary ownership, which extended to unoccupied and occupied land alike, he stated further, that much Māori land was unused and 'possesses scarcely any exchangeable value'. Contemplating the growth of the colony, he envisaged that the value of land would progressively increase through 'the introduction of capital and of settlers from this country', and Māori would 'gradually participate' in the ensuing benefits.[132] Hobson's duty was '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'.[133] By preventing private interests from purchasing large tracts of land, Normanby envisaged that the resale of the Crown's purchases would provide the funds necessary for future acquisitions, as well as infrastructure and colonial administration. The price to be paid to Māori was to 'bear an exceedingly small proportion to the price for which the same lands will be re-sold by the Government to the settlers'.[134]

Crown pre-emption was also intended to protect Māori from what Normanby described as the 'dangers to which they may be exposed by the residence amongst them of settlers amenable to no laws or tribunals of their own'.[135] Normanby instructed that the Crown's dealings with

Māori – by Hobson himself and by all Crown officials – were to be:

> conducted on the same principles of sincerity, justice, and good faith, as must govern [the Crown's] transactions with them for the recognition of Her Majesty's Sovereignty in the Islands.[136]

Officials were not to permit Māori to enter into any contracts 'in which they might be the ignorant and unintentional authors of injuries to themselves', including by selling land the retention of which 'would be essential, or highly conducive, to their own comfort, safety or subsistence'.[137] Normanby instructed officials to ensure land purchases were confined to districts in which Māori could alienate land 'without distress or serious inconvenience to themselves'. To ensure compliance, he envisaged that all contracts would be made by the Governor 'through the intervention of an officer expressly appointed to watch over the interests of the aborigines as their protector'. As a consequence, the Chief Protector of Aborigines would have a dual role: to oversee the Crown's purchasing of land; and to ensure Māori were not disadvantaged by loss of land.[138] Taken at face value, Normanby's instructions to Hobson set general standards of conduct that required Crown agents to follow principles of fairness and good faith when engaging with Māori and securing purchases of land; Crown purchases were also not to leave Māori with insufficient lands and should not be injurious to Māori interests.

In his report on Crown purchasing during this period, Dr O'Malley gave evidence that Crown pre-emption was ostensibly intended to:

> provide both a protective mechanism for Māori interests in their lands, and at the same time allow the government to fund further colonisation by means of its monopoly position as buyer and seller of land.[139]

These features of the Crown's plans for settlement were not revealed to Te Raki Māori until after the signing of te Tiriti. Prior to its signing, rangatira were not told of the Crown's intention to assert an exclusive right of purchase. Nor were they given to understand that Crown purchasing of Māori land would fund colonisation.[140] These were significant shortcomings in the Crown's negotiation of consent. The Crown's assertion of pre-emption introduced substantial limits on the options available to Māori for utilising their lands in the new economy and imposed reciprocal obligations on the Crown, including to ensure that Māori wished to sell the lands purchased, and that they retained sufficient lands for their future well-being.[141] In the absence of any negotiation over pre-emption, it was more incumbent on the Crown to recognise and protect Te Raki Māori tino rangatiratanga.

We agree (as Tribunals in other inquiry districts have) that there is a clear tension in Normanby's instructions between the Crown's protective intent and his direction to Hobson to acquire the lands required for settlement from Māori at nominally low prices. As the Crown acknowledged, this land fund model could only work if Māori were promptly delivered tangible economic benefits from settlement in exchange for parting with their lands.[142] Despite this inherent tension, Lord Normanby's instructions set out the key standards Crown officials should observe when seeking to purchase land. Nonetheless, those standards of conduct were fundamentally and uncomfortably bound to the Crown's commitment to systematic and progressive colonisation.

In the next section, we consider the purchasing guidelines developed by Crown officials following the signing of the treaty, intended to give effect to Normanby's instructions.

(2) *The Crown's purchasing guidelines established under the Chief Protector of the Aborigines*

In accordance with Normanby's instructions, George Clarke, a lay member of the Church Missionary Society (CMS), was appointed Chief Protector of Aborigines in April 1840.[143] Nominated by the missionary Henry Williams, Clarke was endorsed by Hobson as someone who had resided in New Zealand for many years and was considered to be well acquainted with Māori language and custom.[144] Following his appointment, Clarke quickly

began to consider the practical challenges presented by negotiating purchases with Māori. While Normanby had outlined the standards that Crown purchasers should meet, as Dr Loveridge observed, his 'instructions provided little guidance, as far as methods and procedures were concerned, and New South Wales provided no institutional model to draw upon'.[145] Loveridge concluded:

> During the life of the Protectorate (1840–46) there were few, if any radical innovations in land purchase methods relative to what had gone before, even though the introduction of a Crown monopoly on purchase radically altered the environment in which purchasing took place.[146]

Instead, it appears that in his first year as Crown purchase agent, Clarke relied on the practices established by the CMS. In a July 1840 report to the British Colonial Office, Clarke outlined a number of suggested practices for purchasing Māori land in order 'to prevent any embarrassment in this duty'. He observed that it was desirable that 'the most eligible situations' be purchased first, as he believed Māori in every district appeared interested in selling land. Clarke also suggested that it might be desirable to establish reserves for Māori where purchases exceeded 20,000 acres in order to secure an estate 'to carry out the philanthropic views of the Government towards the aborigines'.[147] In carrying out purchases, he believed Crown agents should define the area of land involved, specify the district in which the land was located, and establish the maximum price per acre. Further to this, 'some pains should be taken to ascertain the boundary line[s]' and to set out the proportion of the lands involved that would be reserved for Māori.[148] Clarke acknowledged that lands possessed in common were 'exceedingly difficult to purchase'.[149]

Clarke's first purchases, made between 1840 and 1842, were largely confined to the far north and Tāmaki Makaurau (Auckland). Among them, the April 1841 purchase of the Mahurangi and Omaha block was the only acquisition within our inquiry district and is discussed in the following section. Loveridge noted that the per-acre prices Clarke negotiated during this period were in line with Lord Normanby's assumption that 'waste lands' had virtually no value. Moreover, the first resales in 1841, in Auckland, where Hobson had decided to establish the capital of the colonial Government, 'were made at prices which were even higher than Normanby could have anticipated'.[150] However by September 1841, Clarke had already begun encountering difficulty navigating the conflicting imperatives of his two roles as Crown purchase officer and Chief Protector. In his first report to the Governor, he observed that two or three of his purchases had 'led to various remarks among the natives, more or less prejudicial to my duties as chief protector'. Clarke had further struggled to satisfy the complainants as to 'the great disproportion between the price the government gave for their lands, and the amount they realised when resold'.[151]

Hobson supported Clarke's concerns, and forwarding his report to the Colonial Office, he observed that Clarke's purchasing activities 'interefere in some measure, I fear, with his conservative vocation of Protector'.[152] In December 1841, Hobson requested that the Colonial Office relieve Clarke of his dual role.[153] Lord Stanley, then Secretary of State for War and the Colonies (1841 to 1844), agreed that the same official holding both positions was improper and Clarke was relieved of the responsibility of undertaking new purchases from December 1842, this duty being transferred to the oversight of the Surveyor-General.[154]

Governor Hobson died in September 1842, before the Colonial Office's decision on this matter reached New Zealand. Willoughby Shortland served as temporary successor as 'Officer Administering the Government' and, once Clarke was relieved of his purchasing duties, moved quickly to prepare 'a set of Instructions for the guidance of an Agent for the purchase of land from the Aborigines in this Colony on behalf of the Crown'.[155] The instructions had to do with both the standards to be observed and matters of procedure. They stipulated that purchases were to be conducted by a single agent acting on the recommendation of the Surveyor-General, while the Chief Protector was to report on whether the Māori concerned were disposed to sell and on the reserves that would be required. Notice of the proposed transaction was to be published

in the 'Maori Gazette' (*Te Karere o Nui Tireni*) which was published by the protectorate from January 1842.[156] Once a decision had been made to proceed with purchase, the agent would 'treat with the owners of the soil on the spot', assisted by a surveyor. The latter would prepare a plan with the size of the block, the quality of land, and boundaries set out. The purchase agent would then provide the Governor with a signed agreement stating the amount to be paid and the timeframe for payment. If approved, the deed would be passed to the Surveyor-General who would record the purchased area 'in the Map of the District, County or Parish as the case may be'.[157]

Shortland directed that purchases were to be of blocks no less than 10,000 acres and all competing claims were to be settled ahead of time. He directed that the price was not to exceed threepence per acre for land of agricultural quality, and 'Barren Hills, or lands unfit for these purposes, are not to be estimated for in the price, although included in the purchase'.[158] This decision to set the maximum price the Crown would pay for land would form an important and enduring element of its purchasing policy. The instructions also stipulated that the Crown would investigate ownership prior to sale, all those with customary rights were to be identified, and disputes were to be resolved. Finally, all negotiations were to be conducted in public, full and informed consent secured, agreement was to be reached over price, reserves were to be identified, and purchase deeds drawn up and signed by all parties.[159]

These guidelines appear broadly consistent with Normanby's instructions regarding good faith transactions and purchases of land held under customary title. However, Chief Protector Clarke opposed the stipulation regarding the minimum block size of 10,000 acres. His objection was partly that blocks of that size were at greater risk of being subject to disagreements between multiple groups with interests in the land, and partly that Māori needed more land for subsistence purposes than that which they occupied and cultivated – a need that might be imperilled by large-scale purchasing.[160] In Clarke's view, when seeking Māori land for British settlement, the Crown could only acquire it 'by a gradual process of small purchases'.[161] In our view, these were important statements made at the outset of the development of the Crown's purchasing policy. Clarke recognised Māori rights and interests in large tracts of land and was concerned that large-scale purchasing would have damaging effects on their communities. He first raised these objections in 1842 and would continue to raise the issue of the size of Crown purchases. However, his proposed approach implied higher purchase prices, higher transaction costs, a limited supply of land for settlement purposes, and limited revenues for the Crown. Shortland did not defer to this advice, and his guidelines were adopted as Crown policy.[162]

(3) *The Mahurangi and Omaha transaction*

The Mahurangi and Omaha block was the only area of land the Crown sought to purchase in Te Raki during the 1840s. Historian Dr Barry Rigby described this large block as extending from the North Shore of the Waitematā in the south to Te Ārai Point in the north – covering the East Coast of the Mahurangi taiwhenua. The western boundary went 'inland to the watershed between the East Coast and the Kaipara Harbour'.[163] Dr Rigby observed that Mahurangi became important to the Crown as 'the gateway to Auckland' after Hobson decided to move the colonial capital there from the Bay of Islands in 1840.[164] Clarke, who conducted the transaction, signed the deed in Auckland in April 1841 with only 22 'Chiefs and people of Ngatipaoa Ngati Maru Ngatitamatera and Ngatiwhanaunga' – all of them Hauraki tribes – for an area placed at 100,000 acres, although a more recent estimate suggests that it was 220,000 acres.[165] The original 1841 deed included provision for a reserve at Te Waimai a Tumu, which was 'excepted as a place of residence';[166] however, Dr Rigby observed that the absence of a plan for the original purchase meant that the location of the reserve 'cannot be determined'.[167]

Customary rights to the Mahurangi coast, especially the prized shark fishery, were disputed.[168] In chapter 3, we discussed the conflicts between Hauraki peoples and Ngāti Manuhiri and Te Kawerau hapū during the 1700s. By the 1790s, other groups including Te Parawhau of Whāngārei and Ngātiwai, who had intermarried with Ngāti Manuhiri, were drawn into a series of raids into Ngāti Paoa territories.[169] Conflict in the district continued into the 1800s

The Waiwera River (foreground), the Puhoi River (middle ground), and the Mahurangi Harbour (background), circa 1927–37. In the early 1840s, this area was seen as the gateway from the north to the new colonial capital in Auckland. Mahurangi was targeted for acquisition and the original 1841 purchase was completed in Auckland with 22 Hauraki rangatira, despite the contested customary interests across the large purchase area.

as Hongi Hika and other Ngāpuhi leaders led a campaign south, attacking settlements on the Mahurangi coast as utu for the death of two Ngāti Manu rangatira in prior conflicts.[170] The Mahurangi hapū who survived the Ngāpuhi onslaught were pushed out of their homelands, but some returned later in the 1820s.[171] Ngāti Rongo, numbering about 100, went to live with Ngāti Manu under the protection of their rangatira Pōmare II, who had Ngāti Rongo ancestry, and Te Whareumu.[172] Peace was made during the 1830s, and Hauraki, Te Kawerau, and Ngāpuhi all asserted rights along the Mahurangi coast.

Ngāti Maraeariki, Ngāti Manuhiri, Ngāti Rongo ki Mahurangi, Te Uri Karaka, and Maki-nui descendants consider their tūpuna to have been the primary owners,

while Ngāti Manu also asserted rights through a tuku to Pōmare II, and all should have been parties to any negotiation. Regardless of the respective strength of these claims, the Crown's peremptory approach to recognising – and extinguishing – rights in Mahurangi lands meant that other groups with interests 'were not even privy to the information that their lands were about to be sold'.[173] There was no prior investigation into the claims of the four Hauraki iwi who made the original offer, let alone those of any other claimants, and no public notification of the proposed transaction was issued.[174] Historian Peter McBurney argued (and we agree) that the Crown

> might have been expected to carry out a robust inquiry into the customary ownership of such an extensive and valuable tract of land as Mahurangi, rather than signing a deed of conveyance with the first 'vendors' to appear on the scene.[175]

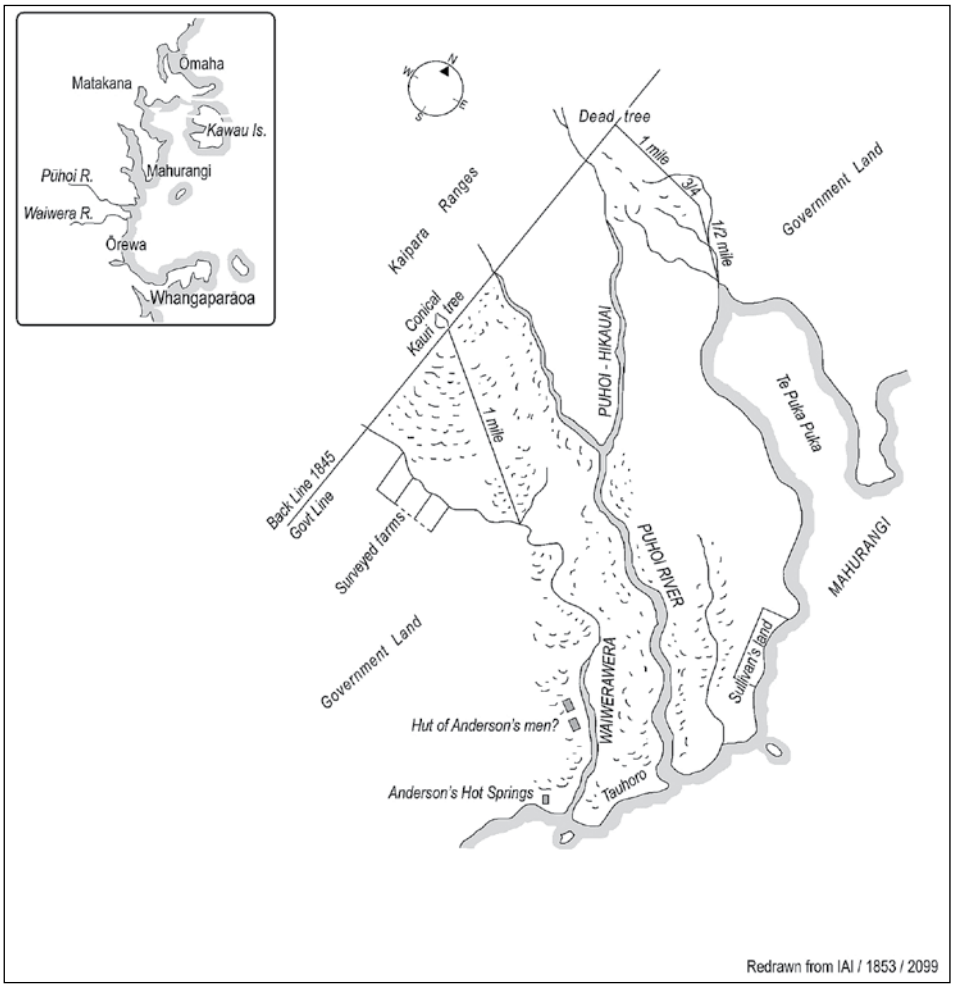
O'Malley dismissed the idea that the Crown lacked the resources at the outset to investigate the offer. Instead, he suggested, the Chief Protector could have convened a hui of interested parties at Mahurangi and sought information on the villages located on the block offered for purchase, and at least visited those that were near the coast.[176] Dr Rigby described the transaction as 'hastily arranged, and . . . poorly documented', while Dr O'Malley labelled it as 'farcical'.[177]

The Crown's attempt to purchase Mahurangi–Omaha clearly failed to match even its own standards of the time, as enunciated by Normanby, Shortland, and Clarke. According to Dr Rigby, the doubtful integrity of the Crown's purchase was soon evident. Within weeks of the deed having been signed in 1841, the Crown began to engage in a series of further transactions in an effort to satisfy other claimants who were not involved in the original 1841 transaction.[178] In June 1841, the Crown acquired the signatures of five Ngāti Whātua chiefs and made payment for their interests within the original purchase area.[179] Six months later, Clarke reported he had made a further payment to Kawau and Reweti of Ngāti Whātua for 'a portion of land to the north-west of Auckland, containing Ten thousand, more or less'.[180] The receipts for both payments were recorded on the back of the original April 1841 deed, and Dr O'Malley observed that 'the location of the interests the Crown had purportedly extinguished by virtue of this latest deed remain a mystery owing to the absence of appropriate documentation'.[181] Then, in April 1842, Pōmare II of Ngāti Manu entered negotiations with the Crown to ensure he received some compensation for the land in which he had gained an interest in return for sheltering his Ngāti Rongo and Te Kawerau kin.[182] This round of further transactions was concluded when the Crown purchased the reserve at Te Waimai a Tumu from Ngāti Whanaunga in 1844, only three years after it had been set aside.[183]

By the mid-1840s, the Crown apparently had sufficient confidence that Māori title in Mahurangi had been extinguished to begin issuing timber licences to settlers in the area. John Taylor was granted a license in 1846 to cut timber 'on Government Land opposite to the Island of Kawau between George Paton's Grant and the headland commonly called Little Point Rodney'.[184] However, the arrival of sawyers in the area prompted an immediate complaint from Te Hemara Tauhia of Ngāti Rongo and Te Kawerau and other rangatira. Within a month of the timber licence being issued, they sent a letter demanding:

> you will forthwith desist from felling & sawing Timber upon Land situate[d] at Mahurangi . . . I am also directed to say that payment will be immediately demanded by them for all Timber removed for the land referred to. The Land has never been sold to the Govt as can be proved by Public Documents and by the united testimony of many honorable and influential chiefs of several tribes.[185]

The letter was forwarded to Charles Whybrow Ligar, the Surveyor-General, who was caught by surprise when George Clarke informed him that in fact a reserve had been set aside 'near Waiwerawera' for Te Hemara 'and his dependents'.[186] The reserve, near the south head of Mahurangi Harbour (in what is today Te Muri Regional Park), was 'the result of a personal promise made by Governor Hobson to the chief at the time' and had not been recorded on the original 1841 deed. O'Malley suggested that at this point, '[p]erhaps the alarm bells were

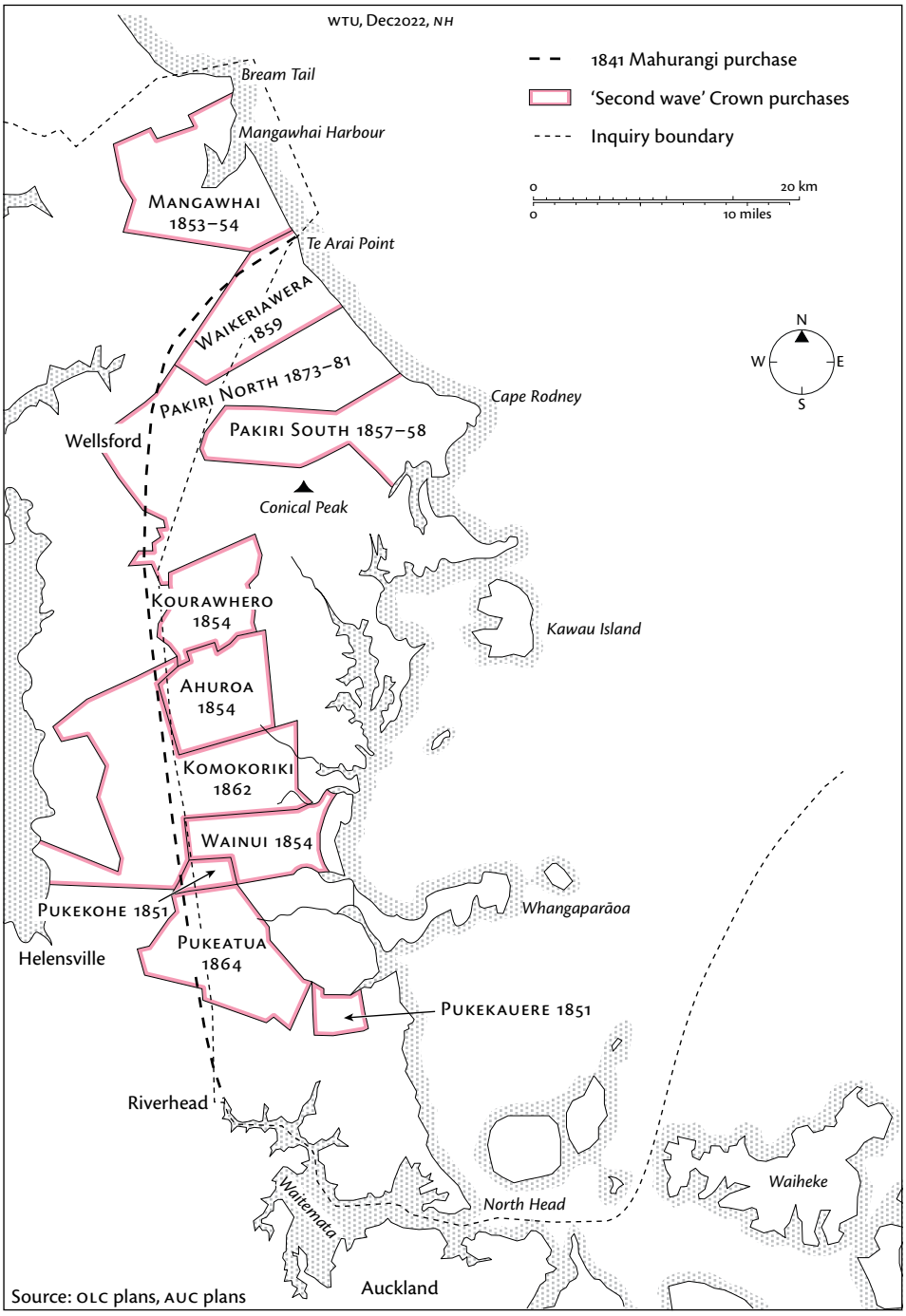


John Grant Johnson's 1853 sketch of Te Hemara's reserve at Waiwera-Puhoi. Ngāti Rongo rangatira Te Hemara Tauhia opposed the original 1841 Mahurangi transaction. Upon his return to Mahurangi in 1842, Te Hemara was promised a reserve at Waiwera near the south head of the Mahurangi Harbour by Governor Hobson. In the mid-1840s, he protested after the Crown began to issue timber licences to settlers in the area. The boundaries of the reserve were eventually sketched by John Grant Johnson, then a Native Interpreter, during his investigation of outstanding claims in the area in 1853. No further steps were ever taken to establish Te Hemara's reserve before it later came before the Native Land Court.

starting to ring just a little more clearly for at least some Crown officials.'[187] Ligar felt that he would be required to 'go to the place and see the Natives'.[188] However, without prior investigation into the nature of the claims to the land the Crown had supposedly purchased, neither Ligar, nor the Native Secretary, Charles Nugent, appreciated that the issue was not one of disgruntled owners who had missed out on a share of the payment, but a 'distinct tribal groupings who had not been party to the original transaction at all'. O'Malley argued:

> These groups, most notably Kawerau and Ngāti Rongo, now saw lands which they had never relinquished being allocated by the Crown for the purposes of settlement and timber licensing without any prior consultation with them.[189]

The Crown eventually took steps to investigate customary ownership in the block after a further dispute arose over timber licensing of land in Matakana in 1851. That year, settler John Heyd'n wrote to the Government that a chief named Parihoro 'claims the timber on the Land that



Map 8.2: Crown purchasing in Mahurangi and Omaha.

I have licensed from the Government and . . . insisted that I shall not cut any of the timber until he is paid'.[190] Here the Crown faced a problem. By 1852, the timber trade had become well established in the district, and a substantial shipyard had been constructed on the Mahurangi Harbour,[191] but as settlement and economic activity in the district progressed, the existence of outstanding Māori claims to the land posed a real risk of further unrest. In chapter 5, we discussed a muru at Matakana in January 1845 conducted by Parihoro and others against the sawyers Millon and Skelton, who, Rigby noted, 'had negotiated [their] pre-Treaty land transaction there with the same Hauraki chiefs who featured in the . . . 1841 Mahurangi Crown purchase'.[192]

In response, Nugent directed the surveyor (and later Native Land Purchase Commissioner) John Grant Johnson to investigate:

> the nature and extent of the Native claims to the Mahurangi and Matakana District, [and] the limits into which their reserves could be confined, and the relative extent of those reserves compared with the rest of the block.[193]

In his report to the Native Secretary, Johnson identified the outstanding claims as belonging to 'Ngati rongo [*sic*], a branch of Kawerau, of whom Parihoro and [Te] Hemara are the remnants'.[194] Te Hemara, Johnson recorded, sought 'a large reserve to live on', while Parihoro had 'extravagent claims on a large portion of the block'.[195] Over this same period, rangatira from Ngāti Whātua, including Te Keene, also lodged further claims with the Crown and received compensation,[196] as did some Hauraki chiefs who secured further payments.[197]

In February 1853, Nugent travelled to Te Hemara's residence near the south head of the Mahurangi Harbour and reported that 'this Native has a claim to some reserve or compensation in that district'.[198] This should not have been a surprise to Crown officials; as O'Malley noted, Te Hemara's reserve at Waiwera–Puhoi had already been the subject of a timber dispute in 1846.[199] Nugent also found that Parihoro had claims to '[a] considerable block . . . which includes land sold by the Government, and also land belonging to land claimants'.[200] He suggested that Te Hemara should receive a liberal settlement. However, Parihoro's claim overlapped with

> several farms belonging to the Europeans who have purchased from old land claimants who have got Crown grants, and also a farm of 50 acres, for which a settler named Boyds has got a Crown grant.

Nugent suggested 'it would be judicious to extinguish [Parihoro's claim] by giving a money payment and also a reserve of land'.[201]

In August 1853, Te Hemara and others, including Reweti and Te Peta, again obstructed sawyers' efforts to harvest timber on the land, and Ligar once again sent Johnson to Mahurangi to establish the boundaries of Te Hemara's reserve.[202] After resuming negotiations with Te Hemara, Johnson reported that the matter of the Waiwera–Puhoi reserve was settled and sawyers were back at work after making payment to local Māori for their timber.[203] He also provided Nugent a sketch map of the reserve that showed the northern and southern boundaries 'to the back line of the block formerly cut'; the areas to the north of Puhoi and south of Waiwera were labelled government land.[204] Shortly after, in November 1853, Parihoro and four 'Rangatira o te Kawerau' signed a deed to extinguish their interests between the Whangateau and Mahurangi Harbours for £150.[205]

O'Malley commented that, while the text of Parihoro's deed included no mention of reserves, the accompanying plan showed three possible sites,

> including Te Hemara's reserve at Waiwera (even though he was not a signatory to the deed), a section of the Tawharanui Peninsula labelled simply 'Parihoro', and an area at Matakana, adjacent to the controversial old land claim of Millon and Skelton, marked simply 'Reserve for the Natives'.[206]

There is no evidence that any further steps were taken to establish any of these reserves, or to provide Te Hemara or Parihoro with grants for the reserved land.[207] Historian Paul Thomas observed that prior to a Native Land Court

investigation into the ownership of the Waiwera–Puhoi blocks in 1866, Te Hemara's reserve 'was legally neither a reserve nor Te Hemara's.'[208] As we discussed in chapter 6, a 20-acre portion of Te Hemara's reserve was also purchased under FitzRoy's pre-emption waiver policy (see section 6.6.2(4)). The native reserve identified in Parihoro's deed similarly came before the Court as customary Māori land during the 1873 Mangatawhiri and Tawharanui title investigations (we return to discuss the fate of native reserves excluded from Crown purchase blocks in section 8.5.2(7)).[209] O'Malley observed that, after 1854, the Crown's attention 'shifted to more localised transactions within the boundaries of the 1841 Mahurangi block, or overlapping into it'.[210] We discuss the Crown's general purchasing practices during this period in section 8.5.[211]

As we have recorded earlier, the Crown conceded that 'in purchasing the extensive area called "Mahurangi and Omaha" in 1841 it breached Te Tiriti o Waitangi/the Treaty of Waitangi and its principles'.[212] The Crown acknowledged that it undertook the initial purchase of the 220,000-acre block without an adequate investigation of customary rights in the district, and that it 'failed to provide adequate compensation and reserves for the future use of and benefit of all Māori owners when it later learned of their interests in the purchase area'.[213] In closing submissions, Crown counsel also acknowledged its failure to properly survey or prepare a plan prior to the deed's signing. The Crown argued, however, that by 1854 it 'had made efforts to identify and purchase Mahurangi lands off all possible vendors' and had greatly improved its skill in and commitment to identifying all landowners. The level of European settlement in the area at this time meant that Māori were 'obliged' nonetheless 'to accept the Crown's position that the sale would not be revisited in any substantial way'.[214] Those who had not yet agreed to the transaction could only accept payment and possibly seek the creation of reserves. The Crown thus conceded:

> In this way, the disadvantage created by the 1841 transaction was permanently locked into place. Iwi who had not participated in that initial agreement lost treasured resources, landmarks and wāhi tapu, substantial interests in land on the eastern coastline of the district, valuable landing places, harbours and estuaries that had supported their traditional way of life and, over time, their identity. The long-term effect of this transaction was to increase tension between tribal groups and settlers, with consequences that continue to be felt today.[215]

We welcome the Crown's concession concerning the 1841 Mahurangi–Omaha purchase. Ngāti Manu, Te Uri o Karaka, Te Uri o Raewera, Ngāti Rongo, and Ngāpuhi ki Taumārere claimants also submitted that this was an important concession.[216] However, as we noted in section 8.2, the parties disagreed as to whether Mahurangi hapū retained sufficient lands by 1865, when native title was finally extinguished in the block. We return to this later.

(4) *Purchasing paused*

With the exception of the Crown's efforts to resolve outstanding claims in the Mahurangi–Omaha block, purchasing in Te Raki practically came to a halt during the decade following that transaction and did not resume until after 1850. Initially, this slowdown stemmed primarily from an economic downturn in the new colony, growing Māori awareness of the value that Pākehā placed on their lands, and a pronounced lack of finance for land purchasing available to the new Governor, Robert FitzRoy, who had been appointed in 1843. Dr O'Malley noted that by the beginning of 1844, the colonial Government was £24,000 in debt and 'unable to pay the salaries of its own staff and denied credit from any bank'.[217] At this time, some Māori, who resented 'the government's inability to purchase land offered to it and . . . evidence of profiteering at their expense in respect of those blocks it had managed to acquire and resell', were increasingly reluctant to 'sell' to the Crown and joined in calls for pre-emption to be abolished.[218] Where before the Bay of Islands and its environs had been seen as the engine of the colony's growth in the North Island, the focus had shifted to nearer Auckland and the Crown's land fund purchasing model suddenly seemed precarious.

Dr Loveridge observed that, in 1843, settlers were increasingly dissatisfied with the Crown's failure to

provide 'secure titles for lands claimed on the basis of pre-1840 purchases'[219] (we discussed the first Land Claims Commission in chapter 6). Similarly, no grants had been issued for lands the New Zealand Company claimed to have purchased. According to Loveridge, 'the only Europeans who had any kind of Crown-guaranteed security of tenure were those who had purchased lands from the Crown in the Auckland district from 1841 onwards.'[220] The land fund model was heavily criticised and indeed was often termed 'the quackeries of Wakefield', as it was negatively associated with Edward Gibbon Wakefield and his New Zealand Company's purchasing practices in central New Zealand – much further south – and high land prices. Auckland interests, in particular, favoured a free trade in lands owned by Māori.[221] As a result, by the start of 1843, the opposition of northern settlers to the Crown's policy of pre-emption and the land fund model for colonisation 'was reaching a peak'.[222]

Partly in response to the failures of the Crown's early purchases and growing settler and Māori dissatisfaction, FitzRoy would move to institute a pre-emption waiver policy in March 1844 for direct private purchase from Māori (we discussed the operation of the pre-emption waiver system in chapter 6). Concerned about the impact on the land fund, Lord Stanley reluctantly approved of FitzRoy's decision to waive pre-emption over what he thought would be limited areas of land. However, the Crown reasserted its right of pre-emption in 1846 after the arrival of the new Governor, George Grey, who denounced the waiver scheme as dangerous and unjust to settlers and Māori, and criticised FitzRoy for acting in excess of his powers.[223]

In the next section, we examine how the protective intent of the Crown's purchasing standards expressed first by Normanby was tested by the new Governor's arrival and changes in leadership at the British Colonial Office during these years.

(5) *The arrival of George Grey and the development of the Crown's policy for large-scale land purchasing*

Stanley informed Grey of his appointment as Governor in June 1845, to replace FitzRoy. In the instructions he issued Grey on 13 June 1845, Stanley repudiated the allegations made by the New Zealand Company and the 1844 Select Committee on New Zealand (see chapter 4, section 4.3.2(3)(b)) 'that the treaties which we have entered into with these people are to be considered as a mere blind to amuse and deceive ignorant savages'. He directed Grey to 'honourably and scrupulously fulfil the conditions of the treaty of Waitangi', though he also observed that '[t]he settlement of the lands in New Zealand has . . . been a fertile source of difficulty'. In his view, the source of the problem had been the Crown's inability to divide the land 'between the Crown, the natives, and the settlers claiming title through them'. He considered that the challenge would not have been so great had Lord John Russell's 1841 instruction that Māori land be registered and defined on maps of the colony been carried out (see chapter 4); had the work of the first Land Claims Commission been completed faster; and had FitzRoy not implemented a pre-emption waiver policy (see chapter 6).[224]

In a second dispatch dated 27 June 1845, Stanley emphasised the importance of registering all New Zealand lands.[225] He saw it as a 'natural consequence' of the treaty that the limits of Māori lands 'should be distinctly recognised and set forth under the sanction of sovereign authority', and directed Grey to register all Māori claims to land within two or three years. Stanley considered that, once this was completed, it would be apparent to Grey 'what portion of the unoccupied surface of New Zealand' could be claimed as the Crown's demesne.[226] We agree with the Wairarapa ki Tararua Tribunal's characterisation of these instructions as 'broad in scope, and not readily capable of implementation',[227] though we note that Stanley provided further explanation in a speech he made in the House of Lords the following month as to how he expected that Māori land rights and interest should be registered. He observed that, while he remained of the view that there were areas of the North Island 'wholly waste and uncultivated', they were few in number. He recognised that 'a large portion of the district in question is distributed among various tribes, all of whom have as perfect a knowledge of the boundaries and limits of their possessions'. Most importantly, Stanley acknowledged that

the Crown was required to consult Māori on those lands that were not claimed and could be 'vested in the Crown'. He went on to state that Māori law and custom, and the rights arising from them, had been guaranteed under the treaty, and that:

> those rights and titles the Crown of England is bound in honour to maintain, and the interpretation of the treaty of Waitangi, with regard to these rights is, that except in the case of the intelligent consent of the natives, the Crown has no right to take possession of land, and having no right to take possession of land itself, it has no right – and so long as I am a minister of the Crown, I shall not advise it to exercise the power – of making over to another party that which it does not possess itself. (cheers).[228]

As noted earlier, upon his arrival in New Zealand, Governor Grey acted quickly to terminate FitzRoy's pre-emptive waiver scheme and then to legally enforce the Crown's right of pre-emption under the Native Land Purchase Ordinance 1846.[229] Introduced into the Legislative Council and passed within just three days, the ordinance rendered it a criminal offence to engage in private land transactions with Māori, whether by sale, lease, or licence. While private transactions of land had been declared null and void by the Land Claims Ordinance 1841, penalties for infringements of the Crown's right of pre-emption were first introduced by the 1846 ordinance.[230] This specified that penalties would be imposed on any person who had entered an agreement with Māori 'for the purchase of the right of cutting timber or other trees, or of the right of mining, or of the right of pasturage, or for the use or occupation of land'.[231]

The key question, asserted the colony's Attorney-General, William Swainson, during the debate in the Legislative Council, was 'whether New Zealand should be colonised regularly and systematically, or the contrary'. FitzRoy's pre-emption waiver scheme, Swainson claimed, had encouraged a revival of 'illegal' purchasing and leasing, practices that 'struck at once at the root of all regular and systematic colonisation'. Thus, the core assumption upon which the measure was based was that 'the peaceable and prosperous colonisation of New Zealand' demanded that 'the disposal of land therein should be subject to the control of the Government of the Colony'.[232]

There was nothing in the Legislative Council debate to suggest that Māori had been consulted or their interests considered, although it was possible that Grey did talk to a small number of rangatira such as Wiremu Maihi Te Rangikāheke, who the *New Zealander* claimed 'commonly [had] access to the Governor', but whose interests were, at least in the newspaper's assessment, only marginally affected.[233] Grey appears to have made no reference to Māori during his address to the Legislative Council on 5 November 1846, nor in the debates on the first and second readings of the Native Land Purchase Bill on 9 and 14 November. The preamble made no reference to the protection of Māori interests. The ordinance's express objective was the creation of a structured rather than free land market, in which the Crown would control the vital matter of price and so be able to implement its preferred land fund model of colonial development. However, it seems to have had other less obvious objectives as well. Halting the emergence of an informal and unregulated land market would constrain the power and authority of rangatira. Outlawing informal 'leasing' would shut down an unpalatable contemporary dynamic in which the rents Māori were earning indicated values for their lands greater than the Crown was willing to pay, and by which Māori could continue to derive an income from their lands without having to sell them.[234] In effect, the ordinance promised to limit Māori contribution and participation in the colonial economy to the roles of land seller and cultivator of such lands as they managed to retain. It would remain in force until 1865.

Complementing the ordinance was Grey's decision, citing cost, to wind down the office of the Chief Protector of Aborigines. To justify this decision, he highlighted the outlay of sustaining the protectorate, observing that, while Clarke and his sons' salaries incurred an annual cost of £2,500, no hospitals or schools had been established 'for the benefit of natives'.[235] In a dispatch to Earl Grey, Governor Grey wrote that he found the protectorate department 'for all practical purposes, an utterly useless

establishment'.[236] Grey first brought the department under the control of the New Zealand Colonial Secretary in 1846, and a year later abolished it altogether, replacing it with a Native Secretary.[237] In the *Ngai Tahu* report, the Tribunal observed that this later decision, made before Grey began his land purchasing programme, 'recombined the role of land purchase officer with that of the protection of Maori interests'.[238]

(a) Earl Grey's 'waste lands' instruction

In 1846, it remained unclear how the Crown would re-establish its purchasing policy following FitzRoy's pre-emption waiver experiment. In June 1846, Grey indicated that he would

> not fail to endeavour to devise and introduce some system by which Lands the property of the Natives may be brought into the market, under such restrictions as are required by the interests of both races.[239]

However, the Colonial Office's position would shift again in July 1846 with the appointment of Lord Howick, now Earl Grey, as Secretary of State for War and the Colonies. As he had in the 1844 select committee (see chapter 4, section 4.3.2(3)(b)), he sought the implementation of the waste lands theory. In December 1846, he sent a dispatch rejecting the declaration in the treaty that Māori were the exclusive proprietors of all the lands of New Zealand:

> To contend that under such circumstances civilized men had not a right to step in and to take possession of the vacant territory, but were bound to respect the supposed proprietary title of the savage tribes who dwelt in but were utterly unable to occupy the land, is to mistake the grounds upon which the right of property in land is founded . . . I must regard it a vain and unfounded scruple which would have acknowledged their right of property in land which remained unsubdued to the uses of man. But if the savage inhabitants of New Zealand had themselves no right of property in land which they did not occupy, it is obvious that they could not convey to others what they did not themselves possess, and that claims to vast tracts of waste land, founded on pretended sales from them, are altogether untenable. From the moment that British dominion was proclaimed in New Zealand, all lands not actually occupied in the sense in which alone occupation can give a right of possession, ought to have been considered as the property of the Crown in its capacity of trustee for the whole community.[240]

Earl Grey recognised that the conditions on the ground in New Zealand were such that 'a strict application of these principles is impracticable', but the Governor was still to look to them 'as the foundation of the policy which, so far as it in your power, you are to pursue'.[241] Dr O'Malley gave evidence that, although Governor Grey was sympathetic to this position, he realised that if he were to follow Earl Grey's instructions and proceed (in effect) to confiscate large tracts of land from Māori, it would risk further conflict in the colony.[242] As we noted in chapter 5, the views of the 1844 select committee had prompted alarm among officials when they reached New Zealand. At the time, Clarke had suggested to FitzRoy that the committee's report would confirm the worst fears of Te Raki Māori at a time when tensions were rising in the north, with Hōne Heke felling the flagstaff on four occasions in Kororāreka in 1844.[243] O'Malley noted that Earl Grey's instructions prompted further disquiet amongst settlers and Māori in Te Raki, and Tāmati Waka Nene was 'employed to reassure Northland Māori that there was no truth to the claims that their lands not under tillage were about to be seized'.[244] When reports of these concerns reached London in April 1848, Earl Grey denied that the Crown intended to confiscate lands forcibly.[245]

(b) Governor Grey's policy

Governor Grey made his first land purchases as Governor at Porirua and Wairau, on either side of Cook Strait, in March 1847, where the Crown acquired large tracts of land to resolve the New Zealand Company's claims in those areas and enhance the security of Pākehā settlement.[246] In a dispatch the following April, the Governor set out his view that native title could be extinguished more effectively through large purchases, rather than pursuing the solution advocated by the company (that the Crown could

Earl Grey, British Secretary of State for War and the Colonies from 1846 to 1852. He sent instructions to Governor Grey that rejected Māori ownership of all lands which they did not occupy, and he suggested that the Crown ought to have asserted rights to all the 'waste lands' ('unused or unoccupied' lands) of New Zealand at the time it proclaimed sovereignty. While it might no longer be practicable to assert such rights strictly, the Governor was still to pursue policies based on these principles. Earl Grey's instructions, issued shortly after the end of the Northern War, prompted disquiet among settlers and Māori in the north.

take possession of any perceived 'waste lands' in those districts). Grey reasoned that Māori did not just support themselves through cultivation but from hunting, and other traditional means of gathering food and other resources. Any attempt to deprive them of access to these resources would be unjust, Grey wrote, and indeed would fail. He considered that Māori yet possessed insufficient agricultural implements to survive from farming alone, and '[t]o attempt to force suddenly such a system upon them must plunge the country again into distress and war'.[247] Grey noted, by contrast, that he had successfully purchased sufficient 'waste lands' in the areas claimed by the company at low cost and had 'concluded a most advantageous arrangement for Her Majesty's European subjects'.[248]

In his response, Earl Grey enclosed a letter from his Under-Secretary, Herman Merivale, to the Reverend John Beecham (Secretary of the Wesleyan Methodist Missionary Society) which, he stated, 'contains a full exposition of my views'.[249] Dr Loveridge considered that this letter was forwarded to Grey in response to his dispatch regarding the Wairau and Porirua purchases.[250] On the question of the Crown's right over 'waste lands', Merivale wrote that if Crown pre-emption were to be enforced,

> it is of little practical importance whether the title to unoccupied land is considered to reside in the natives or in the Crown, since, admitting it to belong to the former, the surrender of their rights can easily be obtained for a mere nominal consideration; and if the Crown is regarded as the proprietor, it is so merely in the character of guardian of the interest of its subjects, and especially of those of the native race whose want of knowledge causes them to stand peculiarly in want of protection.[251]

Merivale also did not accept that the Crown should not purchase lands that could support a settler population because they contained resources on which hapū had customarily relied to help sustain themselves. However, he did stipulate that if the settlement of large areas of land were to deprive Māori of resources, they would have to be provided with other advantages, 'fully equal to those which they might lose'.[252] In the *Te Tau Ihu o te Waka a Maui* report, the Tribunal considered that following receipt of this dispatch, there was a 'shift in the New Zealand Government's views, in response to those of its imperial masters'.[253] The Tribunal found Grey's policy

would subsequently place less emphasis on the importance of providing for traditional Māori economies and resource use, and reserves would be restricted to those lands in occupation or cultivation.[254]

In May 1848, Grey provided the Colonial Office with an outline of his proposed policy for land purchasing. In a dispatch dated 15 May 1848, the Governor advised the Secretary of State that it would be impossible to acquire Māori assent to the principles contained in his 1846 instructions. Grey noted that if the colonial Government were to require Māori to register their claims to land, it would likely prompt disputes where claims overlapped, and risk conflict. It would also require 'a general survey . . . of the island'.[255] However, Grey believed that it was possible to reach a compromise that would 'secure the interests and advantages' of both Māori and settlers.[256]

He claimed that Māori would recognise the Crown's right of pre-emption and would sell their unused lands for a 'nominal consideration'. Grey further expected that there were lands that Māori would cede to the Crown without payment in order to receive the benefits of settlement to their communities, stating,

> in many cases if Her Majesty requires land, not the purpose of an absentee proprietary but for the *bonâ fide* purposes of immediately placing settlers upon, the native chiefs would cheerfully give such land up to the Government without any payment, if the compliment is only paid them of requesting their acquiescence in the occupation of these lands by European settlers.[257]

Grey went on to suggest that even in 'the most densely inhabited portions of the northern part' of the North Island, the hapū involved would:

> cheerfully relinquish their conflicting and invalid claims in favour of the Government, merely stipulating that small portions of land, for the purposes of cultivation, shall be reserved for each tribe.[258]

He argued that Māori resistance to settlement had only occurred in instances where boundaries had not been properly defined or 'lands were not validly purchased before a considerable European population was placed upon them'. As a result, Māori had become aware of the value of their lands and

> refused to part with them for a nominal consideration, but insisted upon receiving a price bearing some slight relation to the actual value of the lands at the time the purchase was completed.[259]

However, the possibility of Māori resistance could be avoided, he continued, by the Crown purchasing land in advance of the spread of British settlement. Grey felt that if the Government took the proper precautions, then the benefits of land sales would become apparent to Māori communities. Māori, he continued,

> are every day becoming more and more aware of the fact, that the real payment which they receive for their waste lands is not the sum given to them by the Government, but the security which is afforded, that themselves and their children shall for ever occupy the reserves assured to them, to which a great value is given by the vicinity of a dense European population. They are also gradually becoming aware that the Government spend all the money realized by the sale of lands in introducing Europeans into the country, or in the execution of public works, which give employment to the natives, and a value to their property, whilst the payment they receive for their land enables them to purchase stock and agricultural implements.[260]

One innovation in the purchasing policy Grey proposed was the certification of reserves. Where Crown purchases extinguished native title over large areas of land, reserves would be established and 'registered as the only admitted claims of the natives in that district'. Grey stipulated that Māori were to receive plans of the reserves and 'certified statements that they were reserved for their use, which documents are somewhat in the nature of a Crown title to the lands specified in them'.[261] This was a departure from the earlier practices under the Chief Protector, where lands were broadly reserved for Māori by being

excluded from the purchase, and thus remained under native title.[262] The creation of reserves under a form of tenure similar to a Crown grant would simplify the problem of land registration, and would assimilate Māori into the colonial land system without clothing the process in a 'compulsory character'. Grey anticipated that Māori would hold such 'grants' in high esteem, and that such a system would 'accustom them to hold land under the Crown, which is an extremely desirable object to attain.'[263]

While defending his own stance, Earl Grey endorsed Governor Grey's proposals.[264] Grey's solution did represent a different approach from the Secretary of State's 1846 'waste lands' instruction, but was a practical compromise that would achieve the same outcome as that envisaged by supporters of the waste-lands theory; he was following what he described to be a 'nearly allied principle'.[265] Instead of claiming 'unoccupied' land as Crown demesne, Grey proposed large-scale purchases ahead of settlement; low prices in anticipation of rising land values; and the certification of the remaining land required for Māori subsistence and future enjoyment as reserves. Māori ownership of all lands had been recognised in principle, but as Dr Loveridge observed, like Earl Grey, Governor Grey 'treated the Maori tenure of unused lands in the context of a pre-emptive regime as being different from their tenure over occupied and cultivated lands'.[266] The Colonial Office found that Grey's policy did not require Earl Grey's instructions to be altered nor his proposed system for registering Māori lands abandoned.[267] Grey's solution had simply reshaped those principles, as Loveridge put it, 'to better suit local conditions'.[268] As a result, the shadow of the treaty remained, but its spirit was undermined.

(6) *Te Raki Māori understandings and expectations of Crown land purchase*

A key question before the Tribunal on the issue of early Crown purchasing relates to Te Raki Māori understandings and expectations of land transactions after 1840, and whether these were respected by the Crown. The claimants submitted that Te Raki Māori understood transactions involving land in terms of tuku whenua; that is, as conditional and temporary allocations of rights which did not prevent their own continuing use rather than as permanent sales. Furthermore, they argued that the Crown was aware of the understanding Māori held and of their expectation of both immediate payment and future benefits, but that regardless of this, the Crown treated land transactions as straightforward commercial sales – full and final.[269] Crown counsel, on the other hand, maintained that Māori accepted that these transactions with the Crown constituted permanent alienations.[270]

We have already considered at length Te Raki Māori understandings of pre-treaty transactions in chapter 6 of this report (see section 6.3) and need not repeat that discussion here. Our conclusion was that, while there may have been a growing awareness of what settlers meant by sale by 1840, Te Raki Māori did not accept that the British view should prevail. Rangatira retained substantive authority in the district in their dealings with individual settlers and conducted these tuku whenua in accordance with tikanga.

We observe, first, that there is little available evidence on this issue in the period following 1840. As we discuss further in section 8.5.2(1)(a), official correspondence concerning land purchases in Te Raki provides limited evidence on the events leading up to purchase agreements and offers little insight into how Māori viewed these transactions.[271] The documentary record also contains few statements from Te Raki rangatira concerning how they viewed land purchasing during this time. By contrast, we have a better picture of Te Raki Māori views on pre-treaty land transactions thanks to the te Tiriti discussions and the evidence provided by the first Land Claims Commission (see chapter 6, section 6.3).[272] As a result, in considering this issue we must also look to the wider context in which the Crown undertook its purchasing programme in Te Raki, official statements about Māori attitudes, and evidence of Māori action following purchase agreements.

Following the signing of the treaty, the Crown began its process for investigating the validity of the large number of pre-treaty transactions in Te Raki. However, many of these claims remained undefined for many years, and lands continued to be in shared occupation with Māori.

The Waiwera hot springs. The springs were a wai tuku ora o te iwi (a place of healing waters for the peoples of Ngāti Rongo), and claimant Arapeta Hamilton described the healing waters as a taonga of Ngāti Rongo. Settler Robert Graham purchased the small Waiwera block that included the geothermal springs in 1844 under the Crown's pre-emption waiver policy. Ngāti Rongo viewed this transaction as a tuku that has never been honoured. In 1885, Te Hemara removed the plugs from the hot pools following Graham's death to assert his hapū's ongoing rights in the resource.

It is likely that some Te Raki Māori came to better understand how the British viewed sales when the boundaries of grants made to settlers and the 'surplus' land claimed by the Crown were eventually surveyed, and as the words of the written deed were consistently preferred by officials to the oral evidence Māori offered in various commission hearings of the 1840s and 1850s. The Crown's assertion of pre-emption in the treaty marked a further important shift in the options available for Te Raki Māori in transacting their lands. As we have noted, Te Raki Māori were not informed of this feature of the Crown's plans in February 1840 and protested to FitzRoy about the new restrictions placed on the ways in which they could transact their own lands.[273] Whether Māori came to accept the British concept of sale after these developments is a separate question entirely. We explore this issue in the discussion that follows.

It is unlikely that Te Raki Māori expectations and understandings of land sales would have changed much in the first years after the signing of the treaty. During the early 1840s, the lands transacted with settlers in the preceding decade remained undefined on the ground and largely in shared occupation. The only Crown 'purchase' in Te Raki during this period was the Mahurangi–Omaha

block, and McBurney considered it doubtful that the Hauraki chiefs who made the initial 'sale' fully understood that the Crown intended the transaction to permanently and totally extinguish their rights in the land.[274] When Pōmare II signed a further purchase receipt in 1842 to formalise the sale of his interests in Mahurangi, the document describes a tuku. Claimant Arapeta Hamilton defined this as a 'gift' to the Crown, rather than a hoko (sale).[275] We also note that Ngāti Rongo's 'sale' of the Waiwera hot springs to the settler Robert Graham under a pre-emption waiver certificate was considered a tuku; one which claimant counsel submitted 'has never been honoured and is still in place'.[276] As we discussed in chapter 6, rangatira continued to act as if they understood that they retained authority over the hot spring decades later: in 1885, Te Hemara Tauhia returned to the Waiwera hot pools and removed their plugs. According to researchers David Armstrong and Evald Subasic, he did this in 'anger and frustration at the manner in which his ambitions for himself and his hapu had come to nothing'.[277]

Some insight into whether the views of Te Raki Māori on land sales had changed by the mid-1850s is provided by the 1856 Board of Inquiry Appointed to Enquire Into and Report Upon the State of Native Affairs,[278] established by Governor Thomas Gore Browne to investigate Native Affairs policies under consideration by the Government. The board consisted of Charles Whybrow Ligar (chairman of the board and Surveyor-General), Major Nugent (former Native Secretary to Governor George Grey), Thomas Smith (Acting Native Secretary and resident magistrate at Rotorua), and William C Daldy (member of the House of Representatives for Auckland City).[279] Among the topics before the board were Māori expectations and understandings about land transactions. The questions posed to participants on this subject included:

- 'Are the Natives generally willing to sell their Lands?'
- 'Can the Natives who desire to sell land be required to mark it out, either by a trench or in some definite manner, before the survey is commenced, and after the survey of the outline has been made?'
- 'Would the Natives generally sell most readily to Government or Private Individuals?'
- 'Would the Natives be satisfied with the Government selling their lands as agents for them, by auction or otherwise, they receiving the nett proceeds?'
- 'Has a Native a strictly individual right to any particular portion of land, independent and clear of the tribal right over it?'
- 'After the boundaries are defined, should a public notice be given, calling upon all claimants to appear within a given time, or forfeit their claims?'
- 'If individual Native owners received Crown Grants, would there be any danger of their selling all their land and becoming paupers?'[280]

The 25 Pākehā men who gave evidence to the inquiry included settlers, missionaries, and government officials who were experienced in dealing with Māori land – including many based in Te Raki.[281] Nine rangatira also presented their views to the board on issues relating to land purchasing practices and policies. 'Te Hira Taiwhanga' of Kaikohe (most likely Hirini Rāwiri Taiwhanga of Ngāti Tautahi and Te Uri o Hua), the only Te Raki rangatira who gave evidence, stated:

> They [Māori] consider the country as their own, and the Europeans as visitors, and should the natives sell land extensively, they imagine that their present position would be changed or reversed. I am not aware of any individual claim among the native people . . . I do not know the natives would like to have Crown grants; they do not understand the nature of Crown grants. Those who are enlightened would like to have Crown grants. In cases where the majority of the tribe understood the matter – the object, – they would consent . . . They would allow the Government to sell [to settlers] should they receive the net proceeds.[282]

Taiwhanga's evidence suggests that he understood the distinction between customary Māori title and Crown grants and considered that the latter had some benefits; however, he was clear that this was not a widely held view.

In particular, Māori would be more open to the permanent sale of their lands to settlers if they thought they were receiving the full value, not just nominal prices under the land fund model.

Overall, the board received a mix of affirmative and negative opinions on the willingness of Māori to sell their lands. Notably, all but two of the witnesses provided evidence that Māori did not hold individual rights to land, independent and clear of a tribal right.[283] After receiving evidence in person and in writing from these witnesses, the board addressed the question of Māori expectations of Crown purchase transactions. It noted that Māori had initially only offered settlers 'a title similar to that, which they, as individuals hold themselves. The right of occupancy'. However, it observed that after further contact with Europeans who had communicated the shortcomings of this form of tenure, Māori had quickly taken up the practice of offering 'written titles in perpetuity'. The board's main concern appeared to be that delay in the extinguishment of Māori title would make land purchasing more difficult and expensive, as Māori became more aware of the value of their lands.[284]

The solution the board proposed was to issue 'to individual natives, or to the heads of families, a Crown Grant for such portions of land as may be actually required for occupation'.[285] The board recommended that Crown grants with individual titles be issued to Māori. According to the board, 'While they continue as communities to hold their land, they will always look to those communities for protection, rather than to the British laws and institutions.' The board stated that these grants 'should be similar in effect to that issued to Europeans in every respect' and should not include 'a restriction preventing the sale of [land] within a certain number of years'. Board members argued that the 'strong attachment' of Māori to their land 'would prevent them from parting with it, so as to leave themselves destitute'.[286]

After the board reported to the General Assembly, Donald McLean wrote to the Governor's Private Secretary, F G Steward, stating that his views 'do not materially differ from those of the board's'. The board had suggested that native title should be extinguished or transferred to the Crown in order for Crown grants to be issued to Māori landowners through repurchase. Nonetheless, McLean was concerned that Māori misunderstandings about the permanence of land sales could impede any effort to implement this suggestion. He argued that Māori had

> no original idea of a transfer or exchange of land in perpetuity, and . . . this idea has only of recent years become fully intelligible to them as a matter of bargain and sale, in which light alone can they understand the subject, and in which manner alone could they be induced to give to the Crown such a title as would enable the Crown to issue grants to individuals.

McLean followed this up, however, by stating:

> I consider it of the utmost importance that every facility should be afforded to the natives to acquire land by purchase from Government [the re-purchase scheme by individuals that he had already begun implementing], as this will be the surest means of breaking up their tribal confederacies, and of inspiring greater confidence in that power from which their more secure and permanent tenure is derived. I am aware that to effect this will be a work of time, as existing customs, and the mode of living in communities, will only be gradually relinquished when the natives – naturally a jealous race – feel an entire security, not only in the present, but in the eventual objects and intentions of the Europeans towards them; and nothing will tend so much to induce this confidence as the certainty that they can obtain land which they can leave with an undisputed title to their posterity.[287]

In other words, McLean was well aware from previous experiences that many Māori had not accepted British understandings of the nature and implications of land sales, and that this would only change gradually.[288] By 1856, McLean had begun implementing his policy of offering Māori Crown grants through the repurchase of lands already alienated to the Crown. His comments to the Private Secretary illustrate how he viewed this policy: as a means of replacing Māori community land interests with a form of individual title. This change, McLean suggested, would be key to enforcing the British notion of purchases

as permanent alienation (we consider the repurchase policy further in our discussion of reserves in sections 8.4.2(3) and 8.5.2(7)).

As we will also discuss further, purchasing started in earnest in Te Raki after 1854, and this increase in the exposure Te Raki Māori received to British expectations of permanent alienations likely had an impact on their understandings of land transactions. For the remainder of the 1850s, Crown land purchase commissioners would become a more regular presence in parts of the district. As more blocks were surveyed and purchase blocks were gradually on-sold to settlers, Te Raki Māori would have had more familiarity with the Crown's view of purchases, and may have felt increasing pressure to conform to that view. The start of the second Land Claims Commission (the Bell commission) in 1857 (which we discussed in chapter 6) also signalled that the Crown wished to finally settle outstanding pre-emption waiver and old land claims with clearly delineated apportionments of transacted land between Māori, settlers and the Crown.

The Crown also made a strong statement of its intention to enforce its view of land transactions with its formulation of purchase documents once McLean became Chief Native Land Purchase Commissioner in 1854. Deeds became increasingly detailed and explicit. Printed deeds were also introduced during this period, which McLean distributed to his purchase commissioners.[289] From 1854, earlier forms of these printed deeds were less detailed and simply stated agreement to 'sell the land' to the Crown ('te hoko i tenei whenua ki a Kuini').[290] In the main, Crown land purchase commissioners appear to have relied on handwritten deeds prior to 1856.[291] However, from 1855, a number of deeds introduced new language into these contracts, including references to the resources and features of the block.[292] In a December 1856 deed concerning land on Great Barrier Island, the te reo translation was:

> Heoi kua oti i a matou te hurihuri te mihi te poroporoake te tino tuku rawa i tenei Kainga o a matou tipuna tuku iho i a matou me ona awa me ona Ma[u]nga me ona roto me ona wai me ona rakau me ona otaota me ona kohatu me ona wahi parae me ona wahi ataahua me ona wahi kino me nga mea katoa ki runga ranei o te whenua ki raro ranei o te whenua me nga aha noa iho o taua whenua ka oti rawa i a matou te tino tuku rawa atu i tenei ra e whiti nei kia Wikitoria te Kuini o Ingarangi ki nga Kingi Kuini ranei o muri iho i a ia a ake tonu atu.[293]

The English text given was:

> Now we have for ever given up and wept over and bidden farewell to and transferred this Land which has descended to us from our ancestors with its streams and its rivers and its lakes and its waters and its trees and its pastures and its minerals and its level spots with its fertile spots and its barren places with all above the said Land all below the said Land and with all appertaining to the said Land we have now entirely given up under the shining sun of this day to Victoria the Queen of England or to the Kings or Queens her successors for ever and ever.[294]

The use of more elaborate language to convey the permanency of alienations would be formalised in the standard forms McLean introduced in 1857, and which would be used in subsequent purchases during this period.[295] Dr Rigby commented that these standard printed deeds 'introduced legal language designed to make Crown purchase transactions more comprehensive and complete than previously handwritten deeds recorded'.[296] For example, the deeds included a reference to a plan that would be annexed to the deed setting out the boundaries of lands purchased, and stipulated that the transfer of ownership would include:

> its trees minerals waters rivers lakes streams and all appertaining to the said Land or beneath the surface of the said Land and all our right title claim and interest whatsoever thereon To Hold to Queen Victoria Her Heirs and Assigns as a lasting possession absolutely for ever and ever.[297]

This was often expressed in te reo as:

> Me ona rakau me ona kowhatu me ona wai me ona awa nui me ona roto me ona awa ririki me nga mea katoa o taua

> whenua o runga ranei o raro ranei i te mata o taua whenua me o matou tikanga me o matou paanga katoatanga ki taua wahi; Kia mau tonu kia Kuini Wikitoria ki ona uri ki ana ranei e whakarite ai hei tino mau tonu ake tonu atu.[298]

In these standard deeds, such as that for the Waikare block in 1864, the Crown took pains to underscore to Te Waiariki the permanency of the alienation to which they were supposedly agreeing. The deed was stated in English to be

> a full and final sale conveyance and surrender by us the Chiefs and People of the Tribe of Te Waiariki whose names are hereunto subscribed And Witnesseth that on behalf of ourselves our relatives and descendents we have by signing this Deed under the shining sun of this day parted with and for ever transferred unto Victoria Queen of England Her Heirs the Kings and Queens who may succeed Her and Her [*sic*] and Their Assigns for ever in consideration of the sum of Nine Hundred and fifteen Pounds (£915.0.0) to us paid by William N Searancke on behalf of Queen Victoria . . . all that piece of our Land situated at Taiharuru and named Waikare the boundaries whereof are set forth at the foot of this Deed and a plan of which Land is annexed thereto.[299]

In the Māori text, however, a jumble of related but distinct words and phrases were presented to Te Waiariki as a translation of the English, such as 'tino hoko', 'tino hoatu', and 'tino tuku whakaoti atu'.[300] Indeed, all 51 of the deeds drawn up between 1858 and 1865 begin with these phrases (the standardised opening being 'he Pukapuka tino hoko tino hoatu tino tuku whakaoti atu na matou na nga Rangatira me nga Tangata o nga hapu o . . .').[301]

We note again the inherent difficulties of ascribing English meanings to Māori words and concepts (see chapter 6, section 6.3). Claimant Pereri Mahanga (Te Waiariki) gave evidence that illustrated how Māori could have taken away different understandings from the language employed in the deeds. Regarding the deed for Waikare, Mr Mahanga told us that the clustered phrases were clearly intended to emphasise to Māori that the Crown 'wished to give effect to the aims of the purchaser'. However, he also told us that the use of multiple phrases did not make grammatical sense, and amounted to 'an over use and perhaps even random uttering of these kinds of words and concepts'. He stated that the language 'does more to confuse what our tupuna's intentions were'. However, he argued that they 'would not, and could not, have understood that they were parting with their lands forever'.[302]

We have some sympathy with this view. The listing of the resources and topographical features, such as waterways, in purchase deeds was also largely a new development, and with few exceptions, had not appeared before in pre-treaty deeds. This list, and the invocation of a poroporoaki, were clearly intended to communicate the concept of permanent alienation of land in terms more familiar to Māori. The emphasis on full and final sale that McLean and his purchase officers were trying to convey through this wording – albeit somewhat clumsily – was clearer in these later examples. We do think, however, that the increasing precision of wording and the repetition of phrases also illustrates that the land purchasing department was conscious that customary practices had continued. Thus, while Māori still may not have accepted Crown claims to full and permanent purchases, they were likely becoming increasingly aware that this is what the Crown and settlers intended and that their own tikanga was being disregarded.

In our view, we cannot rely solely on the wording of the deeds signed by Māori to indicate their understandings and expectations of land transactions. As the Tribunal observed in *The Taranaki Report*:

> Maori parties cannot be presumed to have understood the transaction in the terms of the deed. It is likely they did not. It is well known now that not only was the sale of land unknown to Maori but it invoked concepts antithetical to their world view.[303]

That there remained much room for different understandings to coexist is clear from the broader evidence of Te Raki Māori relationships to lands that they had supposedly sold and their continued use. Dr O'Malley observed that many of the lands purchased during this period 'were

not settled by Europeans or cleared of bush sometimes for decades'. As a result, in his view, 'nominal purchases had no real meaning or discernable consequences on the ground'.[304] In the case of the Mokau block, which the Crown had supposedly purchased in 1859 from Wiremu Hau and nine members of Ngāi Te Whiu, various hapū (including Ngāi Te Whiu) continued to occupy the land for more than 40 years from 1865 (we discuss the Mokau purchase further in section 8.5.2(3)).[305] In 1883, T W Lewis, the Native Under-Secretary, observed of continuing Māori claims to the Ruapekapeka block that lands were 'not utilised or sold by the Govt and this fact leads the natives to continue to assert their claims'.[306]

While these further claims of ownership related to lands that remained unsettled years after the Crown purchased them, Māori sometimes occupied purchased lands even where greater settlement had occurred. In 1863, the Russell resident magistrate, R C Barstow, reported:

> of late a practice of occupying 'pakeha' land by 'Maories' has prevailed in this neighbourhood, and I fear that at some future time trouble may arise on the white purchaser attempting to regain possession.[307]

The missionary Richard Davis made similar comments that same year:

> Even here there are cases in which the natives are resuming their lands, which they had fairly sold to Europeans, and the titles to which had been examined and proved valid in the Commissioners' Court, and for which Crown Grants have been issued. Of course they must be left to do as they like. The Government is not in a position to render protection.[308]

Dr O'Malley cited similar examples where Māori continued to occupy and use purchased lands. For instance, the *Daily Southern Cross* reported in 1863 that the Maungakaramea block 'was literally in possession of the Maoris, who were engaged in digging it over for the kauri gum'.[309] The block, which was purchased in 1855, was sold to settlers in 40-acre lots, the last of which had been on-sold in 1861. However two years later, no settlers had taken up residence on their sections, and it was reported that the bush had been 'burnt off three times . . . by the Maori gum diggers'.[310] The newspaper's correspondent saw these events as 'further evidence of the uncertain tenure by which European settlers hold their land and property in this island'.[311]

There are similar examples throughout Whāngārei, the taiwhenua most affected by Crown purchasing at this time. For instance, the Nova Scotian settlers at Waipū complained that Māori had 'no sense of private property, and as a consequence would walk over the wheat fields, appropriate potatoes, or enter houses just as if they were their own property'.[312] Settlers at Parua Bay recorded in 1858 that a track used by Māori on the site of their residence remained in continued use, with local Māori 'marching in the front door and out the back'.[313] O'Malley argued that such examples reflect a Māori understanding of what land transactions entailed which differed markedly from that of Pākehā settlers, and suggested that Māori did not consider 'sales' to have extinguished their authority over and access to land well after 1840.[314]

This view was also adopted by the Tribunal in the *Muriwhenua Land Report*. The Tribunal explained that the behaviour of Māori with respect to their purchased lands during this period served as a test for their understanding of land sales. The fact that blocks acquired by the Crown were not occupied by settlers for many years, and that Māori were able to continue to use the 'sold' land without restriction or interruption, would have reinforced Māori assumptions that they had not permanently and irrevocably parted with it. Further, the reservation of land and the promises of 'collateral benefits' were likely to have been interpreted to mean that Māori maintained an enduring authority over, a close association with, and a material interest in the lands they had transacted. In short, the Tribunal concluded that Māori interpreted the negotiations as establishing an alliance with the Crown and creating new economic and social relationships from which both parties would benefit, rather than involving permanent alienation and permanent displacement. For Māori, purchase deeds thus marked a beginning, and they expected further benefits to follow. However, for the

Crown, purchase deeds marked an end; the extinguishment of customary title and the opportunity to construct a new social and economic order.[315]

The Tribunal reached a similar conclusion about Māori understandings of Crown purchases during the 1850s in *The Wairarapa ki Tararua Report*.[316] With the end of the leasehold economy in Wairarapa, the Tribunal considered that 'Māori must have known that more was being asked of them than before, and they expected more back as a result'. But Wairarapa Māori were concerned with more than the immediate payments, as '[o]ther benefits both tangible and intangible were promised, and were expected'. The Tribunal noted that in promoting Crown purchasing, Grey had spoken of the marriage of two peoples, Māori participation in the district, and equal access to education and services. Wairarapa Māori placed great value on these promises and viewed subsequent transactions as forming a partnership between the Crown and themselves.[317] As a result, the Tribunal concluded that Wairarapa Māori agreed to provide the Crown with practical authority over purchased lands. However, this did not mean that they understood the transaction as a permanent alienation by which they had surrendered all their own rights.[318] There was, in the Tribunal's view, 'strong evidence that things continued to be dealt with using customary practices and understandings, although inevitably with changes over time'.[319]

We consider that the Tribunal's conclusions in these inquiries are also broadly applicable in Te Raki from the late 1850s to 1865. Furthermore, we agree with the Tribunal's conclusion in *The Wairarapa ki Tararua Report* and *He Whiritaunoka* that the tikanga of land transactions created a partnership with reciprocal obligations. The 'collateral benefits' or 'real payments' that, at Governor Grey's explicit direction, Donald McLean, Henry Kemp, and other Crown purchase agents emphasised, served to assure Māori that their relationship with their land had not been irrevocably surrendered. The message to them was that only the Crown could provide security of title in the form of land grants and the roads and other infrastructure that they so desired, in which they would participate and from which they and settlers would benefit together. Governor Gore Browne himself, along with Te Raki rangatira, invoked the language of a 'union' between the races, and shared prosperity.[320] These promises were not included in the written deeds but remained significant to Māori. This was well recognised by Crown officials. As McLean wrote in 1858,

> It is well ascertained that the New Zealand tribes regard their land as a National property, the cession of which when decided on, they prefer making as a National Act to Her Majesty, even while they are aware, that the sums to be realized by such cessions are inconsiderable. Nor do they generally attach so much importance to the pecuniary consideration received for land held by them in common, as to the future consequences resulting from its alienation.[321]

Among the benefits Māori expected were new markets for their produce. One settler in the Whāngārei district described how local Māori discussed with him the advantages arising from hosting a Pākehā on their land: they would be able to 'sell all the maize and potatoes they could raise' and sell pigs from home rather than driving them to the Bay of Islands.[322] They were encouraged to expect other direct material and political gains from dealing with the Crown: notably towns, hospitals, schools, roads, and 'other sought-after infrastructure'. According to O'Malley, similar expectations were fostered by the Crown and drove the purchase of the Mokau and Kawakawa blocks, which were also acquired very cheaply.[323] Elsewhere, Bay of Islands rangatira, including Tāmati Waka Nene, understood from discussions with purchase agent Kemp that the purchase of the Okaihau 1 block would result in the creation of an inland township in the area and consequent growth of the local economy.[324] These anticipated benefits were a major impetus for Māori offering the Crown rights to their land in exchange for nominal payments.

During this period, rangatira played a key role in fostering these new relationships and opportunities through land transactions. As we discussed in chapter 3, rangatira were economic leaders who were responsible for coordinating and guiding hapū activity. However, decisions about the distribution of rights in land were made through

Historian Dr Vincent O'Malley presenting research into Northland Crown purchases to the Tribunal during hearing week 12 in February 2015 at Akerama Marae, Whāngārei.

consensus and required the support of the collective.[325] Researchers Drs Manuka Henare, Hazel Petrie, and Adrienne Puckey gave evidence that Ngātiwai rangatira Te Kiri said to McLean and land purchase commissioner John Rogan in 1862 regarding Hauturu that 'Te Urunga, Hore te More, Wiremu Taiawa, Paratene Te Manu, Henare Te Whahipu Taukokopa, these are the people and the island is theirs, but it is through me only they can sell it'.[326]

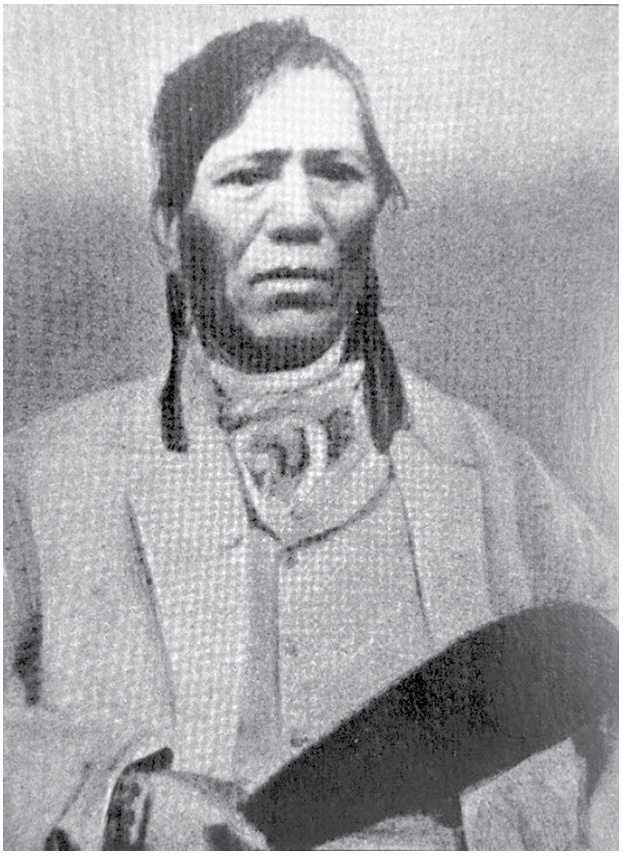
In his treatise on customary law, Tā Eddie Taihakurei Durie commented that the influence rangatira had in land transactions 'does not necessarily indicate that they were motivated by personal greed or the elevation of their personal status'. Instead, he argued that 'historical evidence suggests that rangatira projected land sales as opening up long term and enduring benefits for their people by associations with settlers'.[327] Profits from land transactions funded investment in community assets such as schooners and mills, as well as the residences of rangatira as an expression of mana.[328] For example, in 1850, Rewa, a rangatira from the Bay of Islands, agreed to provide the Government with about 135 acres in and around Kororāreka in return for finance for the sailing ship he desired.[329] In response to Tribunal questions about whether this sale of land to fund the construction of a schooner was 'essentially a sale in the European sense of the word', O'Malley argued that 'the question of transacting land for capital . . . is not necessarily inconsistent with the notion of ongoing access to those lands that are transacted'.[330] Furthermore, as Paul Monin has argued in his article on the Māori economy of Hauraki, schooners and mills offered 'new ways of conducting inter-hapu competition'. He cited 'the boost schooner-ownership gave to mana, of both chief and hapu'.[331]

Dr O'Malley gave evidence that early settlers could find themselves under the protection of local Māori, despite having purchased their land from the Crown. He explained: 'the chiefs concerned were under an obligation to literally protect "their" Pākehā from harm's way – failure to do so would be seen as lessening the mana of the host'.[332] A notable example of a rangatira who acted in this way towards settlers was Te Tirarau Kūkupa, rangatira of Te Parawhau, who had substantial influence in the Mangakāhia and Whāngārei taiwhenua.[333] As Dr O'Malley put it, Te Tirarau 'personally visited' every settler who arrived at Maungakaramea 'and offered to help them in any way he could'.[334] Paul Thomas has written that Te Tirarau also acted as a marriage broker between European men and Māori women. Thomas considered that '[t]hese marriages, like all the other actions of assistance, were intended to benefit Maori as well as Pakeha through tying valued settlers more closely to the local community'.[335]

During the 1850s, land purchase commissioner Johnson came to rely on Te Tirarau to negotiate the Crown's purchase of a large area of land in Whāngārei (we discuss Johnson's purchasing practices in more detail later).[336] Te Parawhau claimants submitted that 'Te Tirarau was a Rangātira of foresight, and would have looked to the long-term advantages arising from transactions'.[337] Claimant

Marina Fletcher gave evidence that '[Te] Tirarau's motivations were the strengthening of a long term mutually beneficial relationship in which his mana and rangatiratanga were enhanced not diminished'.[338] In our view, the evidence does not suggest that Te Tirarau (and other rangatira like him) could have foreseen that their authority over their lands would eventually be displaced as a consequence of these transactions. He continued to act as a rangatira, strengthening relationships with the Crown and settlers that he believed would bring benefits and enhance the mana of his hapū. He extended manaakitanga and whanaungatanga towards the new settlers under his authority, which suggests that the tikanga of reciprocal responsibilities remained important following land transactions and settlement.

It is also likely that these expectations of continued use and occupation would have been challenged as settlement progressed, fences were built, and boundaries increasingly enforced. We agree with Dr O'Malley that 'those early 1840 transactions[,] Maunganui and Mahurangi[,] take place in quite a different context to say Ruapekapeka in 1864'.[339] But even by the end of the 1850s, there is little evidence that Te Raki Māori accepted the Crown's conception of land purchases as permanent alienations. As we discussed in chapter 7 (see section 7.4.2(1)), during Governor Gore Browne's visit to the Bay of Islands in 1858 and the re-erection of the flagstaff at Maiki Hill, Te Raki rangatira sought to revive their alliance with the Queen after a period of neglect following the Northern War, and remained hopeful that the promise of a township in the Bay of Islands (and the associated economic benefits) would soon be fulfilled.[340] Yet, the township at Kerikeri promised by Gore Browne did not eventuate, and when Te Raki rangatira attended the Kohimarama Rūnanga two years later, they remained reticent in response to McLean's proposals for the administration of their lands under Crown titles recognised by English law. As we noted in chapter 7, despite McLean's promises of substantial control over land title and dealings, rangatira were far from persuaded. Some consented to consider the proposals; others warned that a number of communities would reject them outright (see chapter 7, section 7.4.2(7)).[341]



Te Parawhau rangatira Te Tirarau Kūkupa. He was a leader whose authority was extensive; he 'held the mana across the land from Mangawhai to Kaipara and north to the Bay of Islands tribes'. He signed te Tiriti in May 1840 but was at first suspicious of subsequent government intentions – as he was also suspicious of missionary teachings and determined to protect tikanga from government interference. But he decided not to fight in the Northern war, despite his close kinship with Kawiti, and he based his subsequent policies on strengthening relationships with the Crown and attracting settlers to the Parawhau rohe. The tactics of Crown purchasing agents in Whāngārei and the northern Wairoa 'border zone' from 1853 resulted in tensions between Te Tirarau and kin groups with whom Te Parawhau had close relationships – Ngāpuhi, Te Uri o Hau, and Ngāti Whātua – as Te Tirarau sought to protect and enhance the interests of Te Parawhau in a number of land transactions. In 1862, the tensions would erupt into armed conflict at Mangakāhia, costing several lives. Only in 1880 did the disputes come to an end when Te Tirarau, then very elderly, took steps to achieve this, withdrawing his claims to the land in the Native Land Court.

Despite the substantial efforts of Crown officials to impress their conception of land sales on Te Raki Māori, we consider it would be unrealistic to expect communities to have departed entirely and voluntarily from their long-held customary understandings since the foundation of the colony. While we are unable to generalise about every transaction across the district, there is little evidence that Te Raki Māori widely accepted the British conception of land purchases as permanent alienations that entailed neither ongoing rights on their part nor obligations on the Crown or settlers who came into possession; rather, the weight of the evidence suggests that Māori were motivated to enter new arrangements with the Governor, and with settlers, in the expectation that they would bring reciprocal benefits to their communities. As Professor Alan Ward put it, '[t]he line between "selling" in the European sense, and bringing in some Pakeha friends and allies in the Maori sense, was still a blurry one'.[342]

8.3.3 Conclusions and treaty findings

Normanby's 1839 instructions for the colonisation of New Zealand provided the new colonial Government with two policy priorities: to protect the Māori interests that the British government had already recognised, and to acquire sufficient land to promote British settlement and development of the colony by means of the land fund. In purchasing Māori land, the Crown expected to acquire large tracts for low prices and to be able to use the profits from the resale of the land to fund further purchases, infrastructure, administration, and emigration. In order to uphold its responsibilities to Māori, the Crown also required its officers to establish who the rightful customary owners of land were, and ensure that they understood the nature of the negotiations and the transactions into which they were entering and the deeds they were signing. The purchased blocks should be defined and surveyed, and the Crown would ensure that Māori retained sufficient lands for their immediate and future needs. The existence and acknowledgement of these standards, and particularly their status as binding instructions from the Crown itself, demonstrates that colonial officials recognised that they had an obligation to act in good faith towards Māori and to recognise their interests and rights as the British understood them. However, following the signing of the treaty, it remained to be seen how these standards would be reflected in a land purchasing policy.

In our view, it would have been reasonable to expect the Crown to engage with Te Raki Māori to come to a negotiated agreement as to how settlement would proceed in the district while ensuring these standards were met. The Crown faced significant challenges in establishing processes for determining who owned the lands it wished to acquire, and for the transfer of land to settlers without causing harm to the very communities it had sworn to protect. These were questions of great importance to Te Raki Māori, and there were clearly shared priorities which could have formed the basis for these negotiations. However, Crown officials made no efforts to involve Te Raki in decisions about the development of its purchasing policy despite the clear room for accommodation. Rather, as we found in chapter 4, the Crown assumed control over Māori land and how it would be transacted by asserting radical title over all the lands of New Zealand and a sole right of pre-emption neither of which had been explained to Māori (see chapter 4, section 4.3.2(3)(b)).

In the years following the signing of the treaty, Crown officials clearly struggled to find a balance between acquiring sufficient land for settlement and protecting Māori interests, or even upholding their own standards. We have discussed the only Crown purchase during the 1840s in the Mahurangi and Omaha block, which the Crown conceded was acquired without the knowledge and consent of all Māori owners and before an investigation into the customary ownership of the area was conducted, in breach of the treaty and its principles.[343] Those who had not yet agreed to the transaction could only accept payment and possibly seek the creation of reserves, and the Crown further conceded that it failed to provide adequate compensation and reserves for the future benefit of Mahurangi Māori with interests in the purchase area.[344] We have welcomed these concessions.

A further challenge to Māori tino rangatiratanga and ownership of all lands in New Zealand came from advocates of the 'waste lands' theory, such as Earl Grey. A

shrewd observer, Governor Grey perceived that purchasing land would prove to be a more just and acceptable way of proceeding than peremptorily claiming under the British law all Māori land not currently occupied. Purchase at nominal prices and resale at a profit would enable the Crown to meet the colony's two greatest wants, immigration and public works, while for Māori the 'real benefits' would materialise in the form of health and education services, trade with settlers, and rising value and greater security of ownership of the lands they retained.[345] In 1847, before he set out his purchasing policy in full, Grey had also made some acknowledgement of the importance of providing sufficient lands to support the traditional Māori economy, and granted large reserves.[346] However, under pressure from the imperial government to establish the Crown's ownership of all unoccupied lands, Grey adopted a far more restrictive policy after 1848.

As Chief Protector, Clarke had warned in 1843 that purchasing large tracts of land risked causing conflict and injury among Māori communities,[347] a caution that was not heeded. As Governor Grey began to develop his vision for a large-scale purchasing programme, he disestablished the Chief Protector's office and reaffirmed the Crown's commitment to large purchases. In setting out his policy, Grey entirely dismissed the legitimacy of Māori claims to large tracts of land where multiple groups held interests, and suggested that Māori would readily relinquish their rights – open to challenge from others – in return for a Crown-protected title in any small reserves they required for their cultivations and occupation. He justified this vision on the basis that all that Māori wanted were settlers, public works, and capital with which to develop the lands that they retained.[348]

As Professor Ward has commented, Grey's claims were clearly 'over-optimistic'.[349] Indeed, Grey was himself aware of 'Maori attitudes to land and of Maori capacity for military resistance'.[350] In Te Raki, the end of the Northern War in 1846 had left an uneasy balance between the Crown's authority and the ongoing enforcement of customary law by rangatira. As we will discuss further, Te Raki Māori sought to re-engage with the Crown in the years after the war, not through large sales, but instead they primarily sought the establishment of townships which would offer them new markets for trade.[351]

In our view, his May 1848 dispatch offered no indication that Governor Grey was concerned with Māori preferences for the settlement of their lands, or how economic benefits would be distributed. Despite his prior acknowledgement of the legitimate claims Māori had to lands outside of their cultivations and settlements, Grey adopted language that gave a far more limited view of Māori equity in land.[352] Furthermore, in denigrating Māori land rights in this dispatch, Grey chose words that would achieve the imperial government's approval for his policy. As he framed it, he would not enforce 'a strict principle of law', such as the Crown's claim to the underlying title on what it perceived as unused waste lands, but sought 'some nearly allied principle'.[353] We agree with Professor Ward, who considered the 1848 dispatch 'indicated the Governor's dangerous tendency to be patronising and manipulative'.[354]

In the *Te Tau Ihu* report, the Tribunal concluded that Grey's policy departed from fundamental parts of Normanby's instructions, and 'was shorn of the active protection' they envisaged and that the treaty promised.[355] We agree with this assessment. Though he did not propose to implement the widespread confiscations that were anticipated by proponents of the 'waste lands' theory, Grey nonetheless sought the same outcome: to extinguish customary title over large tracts of land and confine Māori to small reserves for the purposes of cultivation. In our view, such goals were inconsistent with the Crown's duty to recognise and respect Māori tino rangatiratanga, and crucially failed to account for Te Raki Māori independence within their sphere of authority under the treaty.[356] Within that sphere, the Māori understanding was that land transactions did not mean an end to all their rights but rather a partnership entailing obligations on both parties.

We therefore find that:

- The Crown failed to engage with Te Raki Māori in developing its purchasing and settlement policy during the 1840s, and prioritised its political and economic objectives at the expense of Māori interests

and treaty-protected rights in breach of te mātāpono o te tino rangatiratanga, and te mātāpono o te houruatanga/the principle of partnership.

- By denigrating the validity of Te Raki Māori rights in land and accepting the principle that those rights could be extinguished over large tracts of land at low cost, while hapū and iwi could be confined to small reserves for cultivation and occupation, Crown policy breached te mātāpono o te houruatanga/the principle of partnership, te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development, and te mātāpono o te matapopore moroki/the principle of active protection.

In the next section, we consider how Grey's policy was implemented in the Crown's purchasing programme of the 1850s and 1860s.

8.4 Was the Crown's Implementation of its Purchasing Policy Consistent with its Treaty Obligations?

8.4.1 Introduction

The appointment of George Grey as Governor initiated major changes in the Crown's land purchasing policy, including the reassertion of the Crown's right of pre-emption and the crystallisation of the principle that Māori 'waste lands' would be purchased at nominal prices. This strategy produced almost immediate results in the South Island, where Grey was focused on acquiring as much land as he could in sparsely populated areas well suited for the implementation of his policy of buying great tracts of land at low cost ahead of British settlement.[357] However, it was not until 1854 that Grey's purchasing policy would be implemented in Te Raki by the Native Land Purchase Department under Chief Native Land Purchase Commissioner Donald McLean. In this section, we consider the preparations the Crown made for its programme of large-scale purchasing in Te Raki, and how it planned to implement its policy. We also set out how Te Raki Māori responded to the Crown's reassertion of pre-emption, and how far this was considered in the Crown's planning and objectives.

Claimants contended that the Crown's prohibition of private leasing and purchasing of mineral and forestry rights in Māori land under the Native Land Purchase Ordinance of 1846 removed owners' rightful control over their own land and resources. The ordinance had the effect, they argued, of leaving sale to the Crown as the only real option for Māori wishing to transact their land.[358] The descendants of Hone Karahina, and members of the hapū of Te Uri o Hua and Ngāti Torehina; members and descendants of Whānau Pani, Tahawai, and Kaitangata hapū; Te Tahawai and Ngāti Uru hapū; Te Ihutai and associated hapū; and, Ngāti Hineira, Te Whānau Whero, Ngāti Korohue, Te Uri Taniwha, and Ngāpuhi iwi claimants argued that leasing was consistent with Māori tikanga, and their tūpuna had entered into similar private arrangements during this period – although they were referred to as 'tuku whenua'.[359] They submitted that the Native Land Purchase Ordinance removed from them the opportunity to lease or mortgage their lands, and was inconsistent with the assurance that the Crown gave Māori through te Tiriti that their existing rights would be actively protected with the utmost good faith and to the fullest practicable extent.[360] In the words of Te Ihutai hapū claimants, this policy shift was intended 'to keep Maori in a position of subservience and usurped the mana of rangatira and hapu'.[361] They argued that had their tūpuna been able to raise capital through leasing some of their hapū land in the northern Hokianga between 1840 and 1865, they might have been better placed to start their own businesses and reap the economic benefits of the booming timber extraction industry at this time.[362]

Crown counsel argued that the framework Governor Grey established for purchasing Māori land was clear in its intent: reserves sufficient for Māori present and future needs would be set aside and would benefit Māori, alongside the anticipated collateral benefits of settlement. From 1854, the new Native Land Purchase Department under McLean continued this approach.[363] In relation to the prohibition of the leasing of Māori land under the Native

Land Purchase Ordinance, Crown counsel referred to the lack of evidence of an instance in which the Crown actually enforced the ordinance in Northland.[364] The claimants argued that, although no evidence of the ordinance being applied in Te Raki has been located, its 'main effect . . . was probably not in actual prosecutions of Europeans who had occupied Māori land but in deterring others from doing likewise.'[365]

8.4.2 The Tribunal's analysis

(1) *Māori respond to the Crown's purchase policy*

Grey's claim (noted in the preceding section) that Māori would 'cheerfully' part with their land at purely nominal prices was soon contested. Early in 1849, Te Wherowhero and a number of Waikato rangatira pressed the Governor 'very urgently, to permit them to sell their lands to Europeans as formerly', and complained of 'the great injustice of the Governor buying their lands for a penny or two per acre, and selling it afterwards for as many pounds'. By not allowing direct purchase, they added, Māori did 'not receive the true value of their lands, and are compelled to sell at any price that the Government chose to offer, if they wish to sell at all'.[366]

While there is evidence of resistance to Grey's policy of large-scale Crown purchasing from the late 1840s, Te Raki Māori also expressed their desire for settlement during this period. As we discussed in chapter 7, northern rangatira made several attempts after the Northern War to reengage with the Crown as a means of bolstering the district's declining economy. In September 1847, Grey travelled to the Bay of Islands to discuss a proposed township in Kerikeri with Tāmati Waka Nene and Hōne Heke. Heke however objected to the proposed location of the town on the western side of the Bay of Islands as it would leave him without access to the sea.[367] After Heke's death, the question was reopened when 90 rangatira wrote to Grey in February 1851 asking for:

> fulfilment of your word, that a Town should be laid out, so that the wishes of this meeting may be fully carried out by you, and that the Queen and ourselves may in truth be joined as one people.[368]

In 1855, CO Davis, the Government interpreter, also reported that he had heard '[s]everal touching appeals' for settlement in Hokianga.[369] O'Malley argued that 'Ngāpuhi could see no harm to themselves from encouraging further settlement'. He observed that, during the 1850s, Te Raki Māori remained numerically dominant and did not consider that settlement, or the establishment of a township, would impact on their ability to control their own affairs.[370]

Te Raki rangatira also pressed for the right to lease their lands. In August 1849, the Legislative Council accepted a petition from 11 rangatira from around the North Island, including Te Raki (listed as Epiha Putini, Arama Karaka, Wetere, Erneti Porutu, Ruinga, Taimo, Ngakete, Kupenga, Koinaki, Paora, and Wiremu), in which they stated: 'At the Meeting of Waitangi we did not consent to allow the Governor to have control over our Island'. They stated that they had heard of Māori leasing land to settlers in Wairarapa and claimed the right to utilise their lands as they saw fit: 'Are we children? Or are we slaves, that we are not allowed to dispose of our property? . . . Give us laws like unto your own.'[371] Loveridge observed that frustrations of northern settlers at the lack of land available for pasture had also 'finally came to a head' during the 1849 session of the Legislative Council in Auckland.[372] In response, Grey proposed a subcommittee be appointed to consider the merits of allowing northern Māori 'the right to lease their waste lands to Europeans, so that large tracts of country shall be opened up for depasturing cattle'.[373] The committee was made up of five members of the Legislative Council, including Sampson Kempthorne, William Hulme, and Land Claims Commissioner Henry Matson.[374]

The subcommittee received testimony about the starvation of cattle as a result of overstocked runs, which 'the stockholders allege to have been forced upon them by the difficulties which they have met in obtaining suitable runs

for themselves from the Crown'. It recommended that the Government provide relief in the form of permission for:

> the Stockholders of the Northern Province to depasture cattle on the Lands of the Natives, on such terms and conditions as may be agreed upon between the Native landowners and the European stockholders.

This step, the subcommittee considered, would also benefit other trading industries by 'opening up the country to Europeans' and bring Māori and Europeans into 'more intimate and friendly connexion'. The subcommittee stipulated that the Governor could introduce a measure to provide legal recognition for leasing of Māori land 'under such restrictions as are required by the interests of both races'.[375]

In response, Grey reiterated his conviction that the interests of both Māori and Pākehā were best served by the Government purchasing large tracts of land from the former and opening them to 'the European stockholder in the ordinary manner'. The latter, he added, 'would find it infinitely more advantageous to themselves to hold their runs under a secure tenure from the Crown, than to be subjected to the caprice of the Natives'.[376]

Despite the Governor's refusal to provide regulations or other statutory instruments formalising leasing, there was clear evidence at the time that illegal leasing of Māori land was continuing in Te Raki. Loveridge noted that it had emerged in mid-1847 that Grey had 'long since embarked on what might be described as a covert experiment in Government-controlled "direct leasing"'.[377] In the year following the passage of the Native Land Purchase Ordinance 1846, Pākehā lodged 57 applications relating to the leasing of lands in the Auckland district; of these, 29 related to lands owned by Māori under customary title. One of the applications was for Māori land in Whāngārei and a number were for Crown lands in Hokianga.[378] In effect, the Government was issuing leases and licences over lands owned by Māori and for which it charged the lessors fees.

A large portion of these applications dealt with timber-cutting rights. As we have discussed in earlier chapters and our stage 1 report, Te Raki Māori had participated in a valuable trade in timber for decades prior to the 1846 ordinance (see chapter 3, section 3.4.2, and chapter 4, section 4.4.2(2)(a)).[379] The trader Joel Polack had recorded the manner in which Te Raki Māori entered into transactions with Europeans for their timber in 1838:

> Where timber is purchased by the Europeans, the proprietor of certain trees or forest land, arranges the price he has to receive in return for a single tree, or a number of trees; providing to deliver the same in the dock or timber-yard of the purchaser, who furnishes the use of blocks, tackles, &c. required to drag the ponderous loads from the forest to the water.[380]

The Crown made early attempts to control the trade in kauri spars with the 1841 kauri proclamation. As we discussed in chapter 4, these regulations were largely ignored in parts of the district where the Government was unable to enforce its authority, but appear to have contributed to an economic downturn in the Bay of Islands and Hokianga by 1844.[381] The arrangements for the leasing of Te Raki Māori timber lands to Europeans differed from the pastoral leases, prevalent in other parts of the colony, where lessees occupied large runs of land that they improved with imported grasses, fences, stockyards, and permanent housing.[382] In contrast, timber leases enabled Te Raki Māori to sell rights to a resource already standing on their land and that could be harvested over a relatively short period. Mills could be built for processing timber outside of timber lands along adjacent rivers, and the land would revert to Māori customary tenure after the terms of the agreement had expired.[383] Informal timber leases were therefore a straightforward and well-established form of land transaction in the district, and the evidence in our inquiry is clear that Te Raki Māori expected to receive payment for access to this resource. Indeed, Dr O'Malley gave evidence that trade in illegally leased timber continued

to flourish within the Mahurangi–Omaha block into the 1850s.[384]

That Māori and settlers continued to negotiate leasing and licensing arrangements is not surprising. As we have discussed, Te Raki rangatira were anxious for economic engagement with settlers and retained authority over the enforcement of laws in the district. Certainly, many settlers across the country were unwilling to wait for the Government to first buy and then on-sell land to them, instead entering into deals for the leasing of Māori land, in contravention of colonial law.[385] Despite Grey's pragmatic response to the situation he inherited, he was clearly opposed to private leasing. However, as the Crown noted in its submission in our inquiry, we received no evidence that the prohibition against leasing was enforced in Northland.[386] It appears that for a time, the Crown was willing to turn a blind eye to, or in some cases even tacitly support, such arrangements, provided they did not interfere with its own purchase plans.[387] Nonetheless, Grey remained committed to purchasing and did not, during his first term as Governor, introduce regulations allowing Māori to lease their lands privately, thereby denying Te Raki Māori an important continuing source of private revenue which may have enabled them to retain their lands and control their management and ultimate disposal.

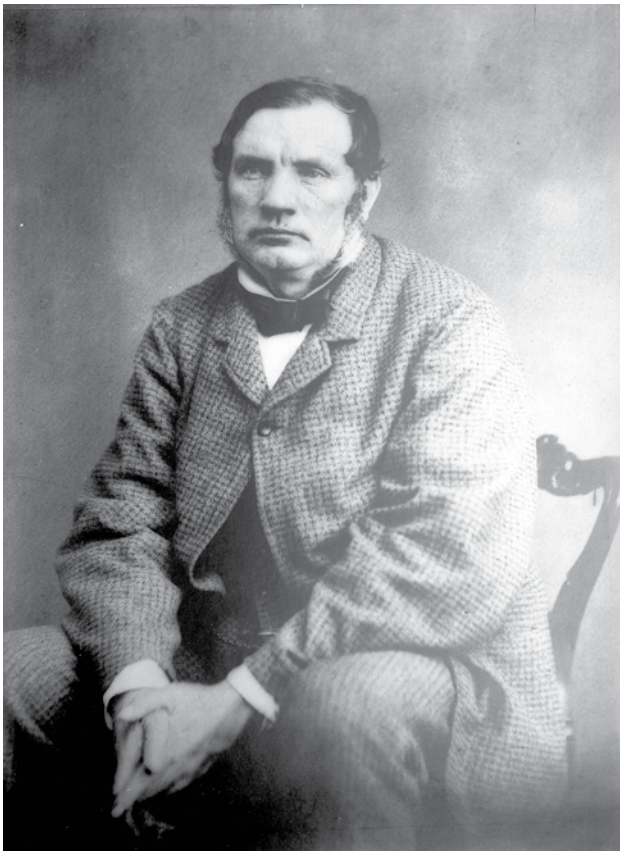
(2) *The Native Land Purchase Department is established*

The Native Land Purchase Department was established in 1854 as the central agency responsible for land purchasing at a time of increasing pressure on the Government to acquire areas for settlement in the North Island. Land operations under Grey's governorship were greatly assisted by the £220,000 he secured as grants-in-aid from the imperial government.[388] It is worth noting that FitzRoy, by contrast, had struggled to implement Crown policy without this assistance. Prior to the establishment of the central agency responsible for land purchasing, Grey's first acquisitions were intended to strengthen government control over particular districts, settle outstanding issues from the New Zealand Company purchases, and provide for landless immigrants; they included the Wellington–Hutt–Porirua purchase and the acquisition of Whanganui, Taranaki, Wairau, and Waitohi. Notably, Northland was omitted from these early purchase operations. This perhaps reflected the uneasy balance that existed between rangatira and colonial authorities in the aftermath of the Northern War, despite official pronouncements to the contrary. According to O'Malley, many settlers preferred to live in other parts of the country 'where the rule of (British) law was a reality rather than legal fiction.'[389]

The next focus of Crown purchase activity was the South Island where, Dr O'Malley noted, Grey's policy 'brought about almost immediate results.'[390] However, further north there was scarcely any impact felt at first. While progress was initially much slower in the North Island, from 1851 to 1853 this trend began to change with the Crown's acquisition of extensive areas in Hawke's Bay and Wairarapa.[391] O'Malley observed that 'a further influx of settlers into the province as economic conditions began to improve placed heavy pressure on the Crown to acquire further lands.'[392]

In part, the new settlers were attracted by the reduced cost of land, as Grey attempted to put more Crown land on the market from March 1853. Before the power to regulate the sale of the 'waste lands' of the Crown passed to the General Assembly (under section 72 of the New Zealand Constitution Act 1852), Grey issued new regulations that halved the price of Crown lands from £1 to 10 shillings per acre, or five shillings in the case of inferior land.[393] The regulations also provided for Māori repurchase of land from the Crown under the same terms as settlers (we will discuss McLean's repurchase policy further).[394] The reduction in price, Grey declared, was intended, in part, to enable 'the frugal and industrious easily to acquire small freehold properties.'[395] The decision was especially welcomed in Auckland, whose business and speculator community had long lobbied for access to cheap Māori land.[396] Accordingly, demand for land in the province rose appreciably, as improving economic conditions also contributed to an influx of new settlers to the colony.[397] Between April 1853 and April 1855, 324 purchases of lots from 80 to 200 acres occurred in Auckland, compared with only 130 purchases of over 200 acres of land.[398]

An increase in sales of Crown land was not enough,



Donald McLean, one of the Crown's most successful purchasing agents. McLean advocated for the establishment of the Native Land Purchase Department and in 1854 was appointed to head it as Chief Native Land Purchase Commissioner. He held this position until 1865, and in 1856 he was also appointed Native Secretary, a position from which he resigned in 1861. During this period, McLean exercised substantial control over the Crown's purchasing policies and publicly defended the record of his department, despite evidence that the purchasing practices of the commissioners under his oversight had created disputes among Māori and between Māori and the Crown.

however, to silence criticism, as the arrival of more settlers increased pressure on the Government to purchase more land.[399] The Auckland press claimed that Grey had 'never made any purchase of native lands adequate to the growing necessities of the northern settlers', but rather had abruptly terminated FitzRoy's pre-emption waiver policy, enticed Māori to repudiate their land transactions, prohibited private purchase, prohibited leasing, and denied Māori – as farmers, millers, ship owners, and dealers – the opportunity to use their lands as collateral security.[400] O'Malley commented that with much of the South Island and southern districts of the North Island already purchased from Māori or under negotiation, the focus increasingly shifted to the northern half of the North Island.[401]

Grey departed New Zealand in late 1853 and was succeeded by Robert Henry Wynyard as Acting Governor. Prior to Grey's departure, Donald McLean, who was then recognised as the Crown's most successful purchasing agent, proposed the establishment of a land purchase department so that 'under a steady and well-regulated system of negotiation, the whole country could be acquired at a comparatively moderate outlay'.[402] O'Malley gave evidence that McLean's proposal emphasised the need to place Grey's purchasing system 'on a permanent footing prior to the governor's departure'.[403] The following April, McLean was put in charge of land purchase operations by the Colonial Secretary, who directed him to 'effect the purchase of land in sufficient quantities to meet the probable requirements of this Settlement [Auckland] for some years to come', and to focus on the acquisition of 'all the lands north of the Waikato'.[404]

In the weeks immediately after the first General Assembly was convened in Auckland in May 1854 (we discussed the establishment of the settler Parliament in chapter 7), McLean pressed for the establishment of the land purchase department. It appears his primary concern was to avoid further delay and cost in facilitating settlement in those districts where little land had been purchased, including Te Raki. The sense of urgency was the result of McLean's belief that '[t]he longer the purchase of land is delayed, the more will be the expense and difficulty in acquiring it'.[405] He thought that no other subject had 'embarrassed the Government in its dealing with the Natives, or retarded the progress of the Colony so much, as the adjustment of the Native Land question'.[406] McLean also shared Grey's view that sufficient land should be

purchased to meet future settlement needs. 'While the demand for land was comparatively limited', he wrote, 'it might have sufficed to purchase merely what was required for immediate settlement', but that 'a system of purchasing which provides only for the exigency of the moment is not sufficient to promote, on an extended scale, the great objects of colonization'.[407]

McLean envisaged the appointment of dedicated officers to selected districts as the most efficient means of negotiating purchases. They would be required to acquire a knowledge of iwi, to ascertain the extent and nature of their claims, and 'to give their undivided energy and attention to the purchase of land'.[408]

McLean insisted that the proposed department should not be 'a mere contingent appendage of the Government', but an established agency with an annual appropriation and a leader responsible and accountable for the allocation and control of expenditure.[409] The Surveyor-General relinquished responsibility for the purchase of land from Māori, and McLean was appointed as Chief Native Land Purchase Commissioner. Among the districts nominated was the new province of Auckland, which covered the northern half of the North Island.[410] With the exception of the Mahurangi and Omaha purchase, almost all the purchases in Te Raki were conducted by the Native Land Purchase Department.

(3) *McLean's purchasing plan for Te Raki*

As McLean pressed for the establishment of a land purchasing agency, in June 1854 the newly established settler Parliament indicated its desire for the purchase of a total of 12,000,000 acres over a five-year period (we discuss the first meeting of the General Assembly in chapter 7, section 7.3.2). That desire arose, in large part, from the growing inflow of immigrants (as noted earlier), especially into Auckland province, and the Government's conviction that 'The native lands are daily acquiring more value in native estimation, and [thus] there ought to be a proper and energetic arrangement made to effect the purchase.'[411] Pressed by the general Government and Auckland's newly formed provincial government (following the passing of the Constitution Act 1852), McLean was to prepare plans to purchase, 'under a judicious system' and over that five-year period, no fewer than 7,000,000 of the province's 14,000,000 acres (of which just 800,000 acres at that stage had been already acquired from Māori). Those 7,000,000 acres lay to the north of Auckland 'together with those [to the south] on the Waikato and Waiapa [*sic*], and the Manukau'. The cost was estimated at £500,000.[412]

By mid-1854, therefore, the major elements of the Crown's land purchasing apparatus were in place. A dedicated agency of the State had been established and staff assigned, McLean had been appointed to head the Native Land Purchase Department, and a decision had been taken to direct purchasing efforts north of the Waikato. There were two major concerns: namely, the speed with which land could be secured, and the cost. Purchase through the acquisition of large tracts would hasten the rate at which customary lands passed into Crown ownership, minimising both the number of separate and protracted negotiations and, as a result, the transactional costs involved. As noted earlier in this chapter, in 1854, John Grant Johnson was assigned as Native Land Purchase Commissioner for the Mahurangi and Whāngārei districts, and Henry Tacy Kemp was dispatched to commence negotiations at the Bay of Islands and Whangaroa in 1855.[413] John Rogan, who was appointed as land purchase commissioner for the Kaipara district in 1857, would also operate in Te Raki during this period.[414]

The cost of the purchasing programme was expected to be funded initially through borrowing, and would be met in significant part by the prompt selection of 'the best sites at the mouths of rivers and harbours for towns and villages' so that 'an artificial value might be given to particular spots, which would render the land revenue raised by the resale enormously large'.[415] Extinguishing customary title over large areas was also considered to offer the Government a means of establishing its authority over Māori communities, especially those residing in the densely inhabited portions of the northern half of the North Island. McLean wrote in 1854:

> in the acquisition of every block of land, the Natives residing thereon, become virtually incorporated with the European

> Settlers, become amenable to English Law, and imperceptibly recognise the control of the Government in their various transactions.[416]

Another priority was to establish Crown control over ongoing illegal leasing. In the Wairarapa district, where a substantial illegal leasehold economy had been established, the Tribunal observed that 'McLean's arrival on the scene brought new resolve to use the Land Purchase Ordinance to deter squatting'.[417] In Te Raki, the Government was concerned that the illegal trade in timber leases in the Mahurangi–Omaha block in particular would create a disincentive for Māori to agree to sell their lands to the Crown.[418] In 1853, Native Secretary Nugent reported that Mahurangi Māori who had been excluded from the original 1841 transaction were

> more obstinate on account of their receiving payments from Europeans for permission to cut firewood and timber on the disputed land, which there would be no means of stopping unless the Native Land Purchase Ordinance were put in force.[419]

In 1854, as Johnson continued his efforts to extinguish outstanding claims in the Mahurangi and Omaha block, McLean instructed him that:

> [the] leasing of timber from the Natives . . . must be gradually checked, so that the existence of such an irregular system, that has grown up in consequence of land-purchasing being so much in arrear[s], may not impede your operations.[420]

(4) *McLean's repurchase policy*

Like the reserve policy set out by Governor Grey in 1848, McLean's repurchase scheme sought to eliminate the need for reserves in their previous form as lands that were simply excluded from purchase blocks and remained under customary title.[421] As noted, Grey's 1853 regulations enabled Māori to repurchase land from the Crown under the same terms as settlers.[422] Thus, repurchased lands were not reserves as such, but individual Crown grants that carried no restrictions on alienation. However, Crown officials discussed them as a form of reserve, or an alternative to previous forms of native reserve, and they are therefore relevant to our consideration of the Crown's policy on reserves during this period.

McLean was clear that repurchased sections would be 'within' purchase blocks, and in this way, the Crown could acquire large areas of land, or whole districts, and customary title would be completely extinguished.[423] The lands required by Māori for their cultivations and settlements could be repurchased by them using the original sale moneys, ensuring that a large portion of the Crown's expenditure was diverted back into the colonial economy. McLean expected that the repurchase scheme would be a means of speeding up the purchase of 'waste lands'. When advocating for the establishment of the Native Land Purchase Department in 1854, he had argued that the ability to repurchase lands would help overcome the challenges of purchasing land from Māori, created by what he patronisingly described as 'the complicated nature of their claims, their jealousies of each other', and 'their superstitious objections to the alienation of the lands of their ancestors'.[424] As we have discussed, McLean also gave a lengthy response to the report of the 1856 Board of Inquiry on Native Matters that proclaimed the benefits of this repurchase mechanism as a means of reinforcing the British notion of permanent alienation.

The policy also reflected wider assimilationist goals. In his evidence, Dr O'Malley explained that a widely held belief among Crown officials during this period, including by McLean, was that Māori could only be saved from extinction through the adoption of British customs and values. They viewed Māori community rights in land as a fundamental obstacle to their survival, and 'it followed that the extinction of native title was deemed a vital part of the "civilising" process'.[425] Held under Crown grants, repurchased blocks would replace Māori collective ownership with a form of individualised title. McLean hoped that this fundamental shift in the organisation of Māori communities would break up what he termed 'tribal confederacies'.[426] Repurchase, McLean explained, would mean:

> their present system of communism may be gradually dissolved; and that they may be led to appreciate the great advantage of holding their land under a tenure more defined and more secure for themselves and their posterity than they can possibly enjoy under their present intricate and complicated mode of holding property.[427]

McLean clearly had great hopes for this policy initiative as a means of assimilating Māori communities into the structures of the settler State and the colonial land system. The new 'repurchase' component of Crown policy was applied in Taranaki when, in 1853 to 1854, the Crown acquired the Hua block, estimated at 12,000 acres, for £3,000. McLean justified the price on the grounds that Māori had agreed, 'instead of having extensive reserves, which would monopolize the best of the land', to repurchase 2,000 acres at 10 shillings per acre. Such purchases, he claimed, gave Māori a security of tenure that they had not previously enjoyed and would allow them to participate as voters in the colony's political life. Moreover, he added:

> it dispenses with the necessity that existed under their former precarious tenure and customs of living in confederate bands in large pas, ready at a moment's notice to collect and arm themselves either for defence or depredation.

Such a system would ultimately lead

> without much difficulty to the purchase of the whole of the Native lands in this Province [Taranaki], and to the adoption by the Natives of exchanging their extensive tracts of country at present lying waste and unproductive, for a moderate consideration, which will be chiefly expended by them in repurchasing land from the Crown.[428]

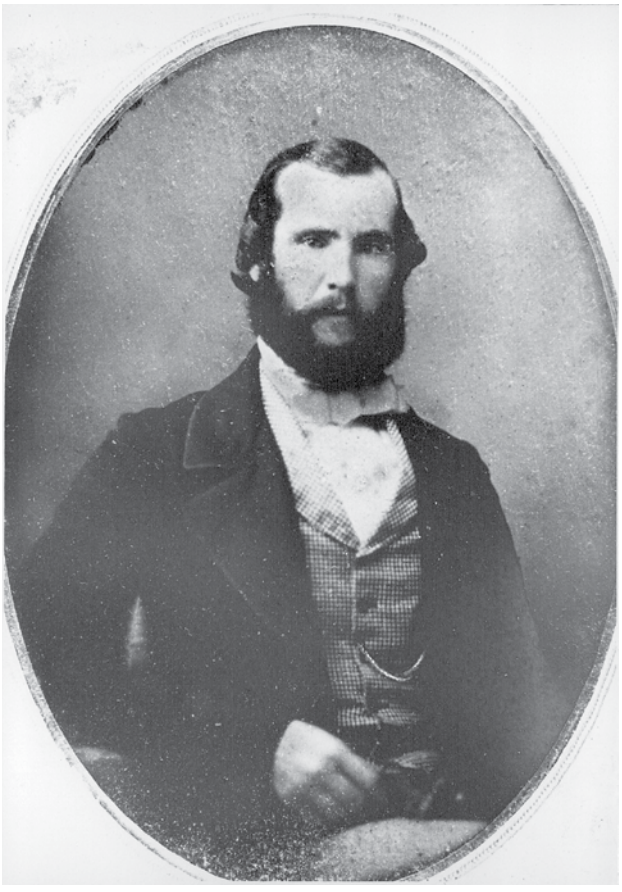
In this instance, the Māori owners were granted first choice over the purchase of surveyed allotments in the Hua block.[429] In *The Taranaki Report*, the Tribunal noted that 'hostilities broke out over who might receive sections'.[430] It found that 'uncertainty of ownership arose not from the Maori dispute but from the Government's practice of treating with sellers without allowing for a prior agreement on ownership and boundaries'.[431] It also appears that New Plymouth settlers became disenchanted by the fact that Māori were able to repurchase the best sections of the block first, and a pre-emptive right of repurchase was not again offered to Māori following the acquisition of Hua.[432] The Taranaki Tribunal concluded that repurchase gave the Government the greater advantage 'because non-sellers had to join in or miss out on the section allocations'.[433]

In June 1855, almost one year after his experiment in the Hua block, McLean drew the attention of Māori in the *Maori Messenger/Te Karere Maori* to clause 7 of the newly published land regulations adopted by the Auckland Provincial Council, which provided that they could 'purchase at the rate of ten shillings an acre any portion of such land, and the same may be conveyed by Crown Grant accordingly'.[434] Clause 7 did not guarantee vendors a pre-emptive right of purchase but offered an opportunity to purchase part of the land subject to the Crown's consent.[435] There is no evidence that Māori were advised of their liability for rates, taxation, and fencing costs that accompanied the purchase of land, or how the selection and survey of individual sections would be done. In his message to Māori, McLean did not attempt to disguise the assimilationist aims of his policy, stating:

> It is much more desirable that those Natives who desire to live peacably in accordance with English customs, should acquire land from the Government for themselves; that an end may be put to the continued troubles arising out of the lands held in accordance with Native tenure.[436]

The Colonial Secretary described the repurchase arrangements as 'extremely satisfactory', and Acting Governor Wynyard was reportedly delighted. McLean was advised that Wynyard considered

> the new feature introduced by you in the negociations of Native land, to be one of great importance, and, with proper



John Grant Johnson, who was Native Land Purchase Commissioner for Mahurangi and Whāngārei between 1854 and 1858. These areas were sought after for Pākehā settlement, and in a wave of purchases Johnson secured most of the Whāngārei Harbour frontage, along with the large coastal Ruakaka and Waipu blocks for the Crown.

> precautions, likely to lead to results highly conducive to the interests of both races.[437]

The Government expected that through repurchase, net costs would also be appreciably reduced as Māori would spend a 'very considerable' part of the purchase moneys on the repurchase of land from the Crown, for which they would receive individual Crown grants; they might then sell their titled sections to settlers. 'This money', it was anticipated, 'would therefore immediately return again into the treasury chest'. Reserves would be limited to areas around kāinga and māra. Moreover, by rendering land a tradeable commodity, repurchase would speed up the process by which Māori land would pass into settler ownership. Overall, the Crown expected that prompt and careful selection of key sites, the purchase of large tracts ahead of demand, and repurchase of land by Māori would result in the speedy recovery of government expenditure.[438] We look in vain in the discussion of this scheme for any government concern for Māori economic development or well-being.

(5) *Crown purchasing tactics*

The instructions McLean issued to district land purchase commissioners are an important measure of the extent to which the Crown intended to uphold its obligations to Māori in implementing its purchase policy. In Te Raki, the instructions to land purchase commissioners were relatively limited at first.

In deploying Johnson to Whāngārei and Mahurangi in May 1854, McLean emphasised the urgency of acquiring land due to '[t]he increasing demand for land by the European inhabitants of this Province'. It would be important to encourage 'the Natives to act with greater fidelity in their land transactions than they have been recently in the habit of doing'. He was confident that Johnson would be able to effect this goal by conducting public negotiations, systematically arranging Māori claims, and clearly defining the lands purchased and any reserves. The boundaries were to be 'read aloud three times in the presence of the Natives, whose assent should be unanimously given before appending their signatures to the transfer'. McLean also supplied Johnson with two model purchase deeds. Johnson was to make payments in instalments and to advise Māori 'of the advantages of re-purchasing properties for themselves out of the Crown Lands'.[439]

When Kemp was deployed to the Bay of Islands and Whangaroa in 1855, McLean offered no additional

instructions but simply directed him to 'make arrangements for the purchase of land from the Native Tribes in that district', stating that he would trust in his 'prudence and discretion in making such arrangements'.[440] Professor Ward observed that these instructions 'continued to emphasise Grey's policy of buying all the land in large districts, save for reserves'.[441]

Despite the lack of detail in these initial instructions, further parameters of the Crown's purchasing activities were to be fleshed out over time. As McLean observed to the Private Secretary in 1856, '[t]he duties of these officers have been defined by instructions issued to them from time to time for their guidance'.[442] For instance, that same year Governor Gore Browne instructed the district land commissioners 'to connect and consolidate Crown lands' so that the European population 'should not be more than necessarily isolated'. Indeed, district commissioners were instructed that, except with the consent of the Governor, they were 'not to commence negotiations for the purchase of land unless adjacent to and connected with Crown lands'.[443] In 1856, McLean also advised Kemp that small blocks 'entail[ed] great expense in the purchase and survey, which might be obviated by treating in a more general manner for a considerable extent of country'. The purchase of small blocks was to be avoided unless such transactions constituted part of a plan to acquire larger tracts.[444] Most importantly, district commissioners were directed, within their districts, to 'acquire from the Natives the whole of their lands . . . which are not essential for their own welfare, and that are more immediately required for the purposes of colonization'.[445]

From 1856, McLean would also require pre-purchase surveys.[446] As we discuss further in section 8.5.2(1)(d), the Surveyor-General, Charles Ligar, previously considered it sufficient for the land purchase commissioner to walk the boundaries of the block and furnish a sketch plan to accompany the purchase deed.[447] However, when McLean secured the necessary surveyors to support the land purchase department in 1856, he directed Kemp and Johnson that:

> The boundaries of each block must be carefully perambulated, as well as the reserves for the Natives, and a plan made of the same to be attached to the Deed of Sale before any payment is made to the Natives.[448]

On no account were purchase blocks to be surveyed until unanimous agreement to sale had been reached. Surveying, he recorded, was considered by Māori 'an exercise of the right of ownership' and would only excite animosity towards his officers and prejudice their land operations.[449]

In his 1857 communications with district commissioners, McLean began to emphasise the importance of ensuring that vendors retained 'ample' and carefully defined reserves, chosen by the 'wishes of the vendors' and at the discretion of his purchasing agents.[450] Previously, he had also advised Johnson that where possible, reserves were to be 'situated within natural boundaries, such as rivers, creeks, hills, ranges, or other conspicuous features of the country'.[451] But as we have noted, McLean was clear throughout this period that his preference was for his district land purchase commissioners to advise Māori about the advantages of repurchasing allotments under Crown grants.[452] In May 1854, McLean communicated this to Johnson, and in July 1855, he indicated to Kaipara land purchase commissioner Rogan that every encouragement should be given to Māori to create ample reserves for themselves through the repurchase of individual allotments 'in accordance with the pre-emptive right guaranteed to them by the Auckland Provincial Land Regulations': '[a]mple reserves should be made for the Natives'.[453] In 1857, with reference to land purchasing in Taranaki, McLean directed the district land purchase commissioner that if it were necessary to set aside land as reserves,

> I should prefer that you should follow the system adopted in the Hua purchase; that, namely, of allowing the Natives (subject to certain limitations) a pre-emptive right over such portions as they may desire to re-purchase; such land to be

> thenceforward held by them under individual Crown Grants – instead of having large reserves held in common.[454]

Importantly, customary ownership was to be determined in advance of purchase and an effort made to establish the nature of the rights and interests asserted. In October 1854, McLean directed Johnson to supply – for both 'the present use of the Government . . . [and] for the future well-being of the Natives' – details of:

> 1st: The original and derivative rights of conquest.
> 2nd: The rights of occupancy by permission of owners.
> 3rd: How these rights originated.
> 4th: The divisions or boundaries between the different tribes inhabiting the country between the North Cape and the district of Auckland.[455]

In 1857, land purchase commissioners were warned to be wary of those who were most eager to sell and of those who engaged in any 'noisy or boasting demonstration' of ownership.[456] McLean directed his agents to study the history and genealogy of the iwi involved, and to investigate carefully all rival claims. 'To acquire a knowledge of the state of Native Title', observed McLean, 'is a preliminary of such urgent importance', adding:

> great care should be taken not to give too much prominence to that class of claimants who are frequently the first to offer their lands for sale, from the fact of their title being in many instances very defective.[457]

Johnson, in fact, had already attempted to distinguish between claims based on ancestral connections and those acquired through more recent warfare.[458] The lists of rangatira, hapū, and places of residence of Northland Māori supplied to Governor Grey on his arrival in New Zealand for his second term in 1861 indicated that the Crown had accumulated considerable information.[459] One reason McLean placed such importance on defining ownership was to ensure that later sales of the land by the Crown to settlers would not be challenged by owners excluded from purchase payments.

District land purchase commissioners operating in Te Raki were also advised to establish the area of land that Māori had already alienated, not with a view to ensuring that they retained 'sufficient' land but to make certain that lands were not being purchased twice over. This was a response to the significant uncertainty that surrounded the pre-treaty transactions and indeed, some Crown purchases.[460] The absence or inadequacy of surveys had led to general doubt around the precise delineation of blocks in this area and the extent of remaining Māori land, with many instances of single claims leading to multiple grants, single grants covering multiple claims, and areas of overlap between claims.[461] It was such situations that McLean sought to avoid and that the Bell commission was intended to resolve.

8.4.3 Conclusions and treaty findings

The reimposition of Crown pre-emption under Governor George Grey signalled the Crown's clear priority of regaining control of the colonial land market. The numbers of immigrants from the United Kingdom and the Australian colonies were growing, as settlers found ways of transforming the colony's natural resources into sources of output. As the demand for land rose accordingly, the Crown's commitment to protection originally enunciated by Normanby came under pressure. That pressure would further expose the different understandings of the treaty, the basis upon which Māori and the Crown entered into land transactions, and the expectations that each entertained of the outcomes. Following Grey's departure, McLean took steps to establish the organisational infrastructure that would place the Crown's land purchasing policies 'on a more regular and comprehensive footing'.[462] McLean was familiar with the complex nature of Māori land rights and was critical of what he viewed as 'superstitious objections' to alienations.[463] He envisaged that these obstacles could be overcome by the land purchase commissioners of his department, who would work efficiently to facilitate

purchase agreements. In this way, the Crown entrusted its responsibilities to recognise and protect Māori interests and land rights to purchasing officers with clear directions to proceed with urgency in, as McLean put it, 'opening up the country for steady and progressive colonization' (we discuss the Crown's delegation of its obligations to protect Māori interests further in section 8.5.2(1)(b)).[464]

Te Raki Māori remained interested in re-engaging with the Crown following the Northern War and sought further British settlement in the north. From 1847, Crown officials were aware of Te Raki Māori wishes for the establishment of townships, as concentrated settlements that offered trading opportunities for hapū and iwi. McLean himself acknowledged to the Colonial Secretary that '[t]he Natives regard the transfer of their land as an act of great national importance'.[465] Officials were also conscious that even after penalties for illegal leasing of Māori land or felling its timber were introduced by the 1846 ordinance, the practice continued in Te Raki where Māori remained interested in participating in the colonial timber trade. In a small number of cases, Grey did provide tacit support for direct leasing of Māori land in the form of Government-issued licences and leases. However, Dr Loveridge considered that this experiment appears to have been shortlived, and likely ended in 1847 as Grey prepared to begin his purchasing efforts in the lower North Island and South Island.[466] From 1849, rangatira, including Te Raki rangatira, expressed their opposition to Grey's refusal to provide statutory recognition for leasing of Māori land resources, and similar advice was reiterated by the Legislative Council.[467]

In our inquiry, the Crown submitted that it was not aware of 'any example where the Crown did enforce the 1846 ordinance in Northland'.[468] Despite the lack of evidence on this point, we consider that the Crown's unilateral decision to withhold recognition for informal leases, which it understood to be the preference of many Māori including those based in Te Raki, remains significant. In *The Wairarapa ki Tararua Report*, the Tribunal found that the Crown had an obligation to support Māori leasing their lands if it 'was more likely to enable Māori to continue to exercise te tino rangatiratanga, and it was an option that they preferred to outright purchase'.[469] We agree with this assessment. Dr O'Malley considered that, while the 1846 ordinance may not have resulted in any prosecutions, it likely deterred settlers from entering into similar arrangements.[470] Claimant counsel agreed with Dr O'Malley that that 'chilling effect' (unless settlers had a license from the Crown) 'would be impossible to quantify'.[471] What is clear is that, as the Tribunal concluded in *The Wairarapa ki Tararua Report*, contrary to Grey's claims, the 1846 ordinance had little protective effect for Māori: '[i]t was intended primarily to benefit Europeans'.[472] The Crown viewed leasing as an obstacle to its purchasing ambitions and in refusing to recognise lease arrangements, it was motivated by its desire to acquire large areas of land as efficiently and cheaply as possible.

In addition to securing land for settlement, the Crown had political motives for extinguishing Native title over large tracts of lands, and entire districts where possible. In promoting the establishment of the Native Land Purchase Department, McLean made a clear link between his purchasing plans and the colonial Government's wider ambition to expand the authority and reach of the Crown, especially in the densely inhabited portions of the northern half of the North Island.[473] Grey's successor, Governor Gore Browne, also emphasised the importance of enhancing internal security by 'connect[ing] and consolidat[ing]' Crown lands and linking Pākehā settlements.[474] By such purchases, the Crown, through the establishment of a range of Crown agencies, would be able to exercise its policing powers and eliminate any obstacles that Māori might pose to surveys, the construction of public works, and the advance of settlement.[475] As Henry Sewell (the colony's first Premier) asserted in 1857:

> to govern a people who retain to themselves the paramount seigniory of the soil is simply impossible. Theoretically there is a plain and inseparable connection between territorial and political Sovereignty.[476]

Crown officials had assimilationist ambitions for the implementation of the purchasing policy in Te Raki. By removing large areas from customary tenure, purchases

would discourage shifting cultivations and seasonal food-gathering migrations, and limit Māori to small, rural settlements where, it was assumed, they would predominantly engage in subsistence farming. Acting Native Secretary Francis Dart Fenton deemed '[f]ixity of residence' essential for the purposes of security, policing, and administrative control. Civilisation was equated by many officials with concentration and permanency of residency (a view we first discussed in chapter 4).[477] McLean's repurchase policy was a centrepiece of this assimilationist vision. It was founded firmly on McLean's belief that offering individualised titles to Māori would not only facilitate the efficient transfer of land but also begin to transition hapū and iwi away from their community landholdings towards a form of tenure based in British law. In addition to speeding up the purchasing process, an underlying goal of this policy was to transform the customary structures of tribal society, which McLean viewed as an obstacle both to Māori civilisation and to colonisation. As O'Malley observed, McLean's repurchase policy

> envisaged a landed gentry of Māori chiefs holding their estates under individual Crown grants from the Crown, but requiring significantly less land to live upon as the non-chiefly classes reverted to their correct role in society as 'hewers of wood and drawers of water' for their superiors, in much the same way that the Pākehā labouring classes were expected to do.[478]

In our view, the vision Crown officials had for the settlement of the district, which they laid out in their plans to purchase great tracts of land and replace customary tenure with Crown grants for defined sections, bore little-to-no resemblance to the future hopes and aspirations of Te Raki hapū and iwi. It seemed, indeed, that little land was to be left for Māori; on various occasions, McLean emphasised the importance of acquiring all Māori lands 'which are not essential for their own welfare'.[479] Māori were to pay a high cost for the land fund model, including not only the loss of their land at low prices but also the denial of their ability to secure a regular income from their lease. As McLean wrote in July 1854:

> leasing lands from the Natives was threatening to entail a most serious evil on the prospects of the Colony, as they would not of course alienate any of their lands to the Crown if such a system was permitted to exist.[480]

The Crown's policy of shoring up and developing the colony through large purchases at low cost could only have benefited Te Raki Māori if they had been meaningfully involved in decisions about how lands were to be alienated and settlement advanced. However, this never occurred; nor did we receive evidence that the Crown sought Te Raki Māori support for its plans in the years after the Northern War and prior to the establishment of the Native Land Purchase Department in 1854. As the Muriwhenua Land Tribunal concluded, 'Maori never consented to the substitution of an alternative tenure system or the diminution of the laws of their ancestors'.[481] Instead of a negotiated solution that recognised the shared interest that Te Raki Māori and the Crown had in the settlement of the district, the purchasing programme that McLean sought to implement was intended to bring rangatira and their lands under Crown authority. The Crown's policies were designed to satisfy the demands of the growing settler population, and inasmuch as they sought to benefit Māori, they denigrated their customs and tikanga as obstacles to be overcome.

Accordingly, we find that:

- By limiting the ability of Māori to exercise all the rights of ownership through failing to provide legal recognition for existing lease arrangements in an attempt to induce Māori to part with their land, the Crown breached te mātāpono o te tino rangatiratanga and te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development.
- By not adequately considering Te Raki Māori views and interests and by implementing a land purchase policy after 1848 that favoured the interests of settlers and sought to bring Te Raki Māori communities under the control of British institutions and laws through assimilationist policies, the Crown breached te mātāpono o te houruatanga/the principle of

partnership, te mātāpono o te tino rangatiratanga, and te mātāpono o te mana taurite/the principle of equity.

8.5 Were the Crown's on-the-Ground Purchasing Practices Consistent with its Treaty Obligations?

8.5.1 Introduction

Claimants raised a range of issues relating to Crown purchasing practices in the inquiry district. They noted the sheer extent of the purchasing programme that took place: some 482,115 acres of land in Te Raki prior to 1865, with old land claims and pre-emptive waiver purchases accounting for a further 274,601.88 acres.[482] A number of key issues emerged from the claims concerning Crown purchases during this period:

- the overall integrity of the purchasing process, including an alleged failure of the Crown to identify, engage with, and secure agreement of all owners in the blocks that it sought to acquire;
- valuations and the inadequacy of price paid;
- the failure of promised collateral benefits to materialise;
- the insufficiency of the lands retained by Māori; and
- the inadequacy of reserves.[483]

Claimants made further specific allegations about the Crown's failure to uphold its own purchasing standards across a range of taiwhenua. For example, claimants from the hapū of Te Uri o Hua and Ngāti Torehina stated that the Crown's failure to properly identify and consult with all owners prior to completing the purchase of the Okaihau blocks resulted in:

> tribal land being taken from Te Uri ō Hua without giving the rangatira or any member of the hapū the opportunity to make a meaningful choice about whether they wished to sell or retain their lands.[484]

Claimants from Te Hokingamai e te iwi o Mahurangi, Ngā Wahapū o Mahurangi, and the Te Tāōū hapū of Makawe alleged that inadequate or non-existent surveys made it even more difficult for customary owners to protect their interests, since it was not always clear, even to Crown officials, which lands were affected by a transaction.[485]

Claimants made specific submissions criticising the Crown's extensive purchasing activities in the Whāngārei and Mangakāhia taiwhenua that created and exacerbated intertribal conflict, resulting in the transfer of over 250,000 acres out of Māori hands.[486] For example, claimants for Te Uriroroi, Te Parawhau, and Te Māhurehure ki Whatitiri hapū discussed the sale of the Maungatapere block and its uncertain transaction details due to the existence of two purchase deeds for it (discussed later).[487] Claimants from Te Parawhau and Ngāti Hau hapū described the extent of Crown purchasing in the Whāngārei taiwhenua (27,011 acres) in the two decades following the signing of te Tiriti, stating that much of this was Te Parawhau land.[488] Ngā Uri o Mangakāhia claimants argued that the Crown targeted rangatira who were willing to transact land but failed to ascertain 'who actually held interests to ensure the validity of the transaction'.[489] The claimants described Crown purchasing as the 'catalyst for conflict' between Te Tirarau of Te Parawhau, and Matiu Te Aranui of Te Uri o Hau (a hapū of Ngāti Whātua) and Te Māhurehure at Waitomotomo in May 1862.[490] Te Uriroroi, Te Parawhau and Te Mahurehure ki Poroti hapū claimants submitted that the conflict arose 'over rights to the gum field in the Kokopu area'.[491]

Whangaroa claimants cited Pupuke, the largest single purchase in that taiwhenua, which the Crown acquired to 'create a large contiguous area of Crown land, and provide access to Whangaroa Harbour'. It also contained extensive stands of kauri and other timber. Yet, the price paid was 'a mere fraction' of the sum settlers later obtained for the timber in the block. The claimants contended that after acquiring this valuable resource, the Crown failed to provide Whangaroa Māori with the economic benefits or investments in the district's infrastructure which it promised would accompany sales. As a result, they claimed, their tūpuna were prevented from exercising their rangatiratanga over their lands through the establishment of

relationships with settlers of their own choosing, on their own terms, and in pursuit of their own objectives.[492]

Crown counsel acknowledged that a key issue was whether the Crown inquired adequately into the nature and extent of customary interests in the lands that it acquired during the period from 1840 to 1865. The Crown conceded that where it failed to inquire fully into those rights, it breached the treaty.[493] However, as we have noted, the Crown did not concede that there was any systematic failure in the conduct of its purchasing policy and submitted that by 1855 it was better at and more committed to identifying all Māori who owned land it wanted to obtain.[494] Crown counsel asserted that Te Raki Māori lodged relatively few complaints about the identification of the rightful owners during the period under consideration. Counsel identified four blocks whose purchase had prompted complaints: namely, Kawakawa, Ruapekapeka, Ruakaka, and Mokau. Of these, counsel argued, Mokau was 'the only situation in this inquiry where there is evidence that Māori complained that their interests had been sold without their consent'.[495]

In respect of prices paid by the Crown, counsel argued that low purchase and high resale prices meant that both Māori and Pākehā contributed to and were able to benefit from the Crown's efforts to encourage and invest in the development of the colony.[496] Counsel cited the Tribunal's assessment in the Kaipara inquiry of the Mangawhai purchase to the effect that 'it had insufficient evidence to quantify the real or perceived benefits there may or may not have been for the sellers of Mangawhai or their descendants'. According to counsel, a similar position arose in the case of Te Raki blocks. Finally, the Crown 'acknowledged that an independent valuation system' was not established until some time after 1865.[497]

8.5.2 The Tribunal's analysis

(1) *The purchasing process*

(a) The matter of records

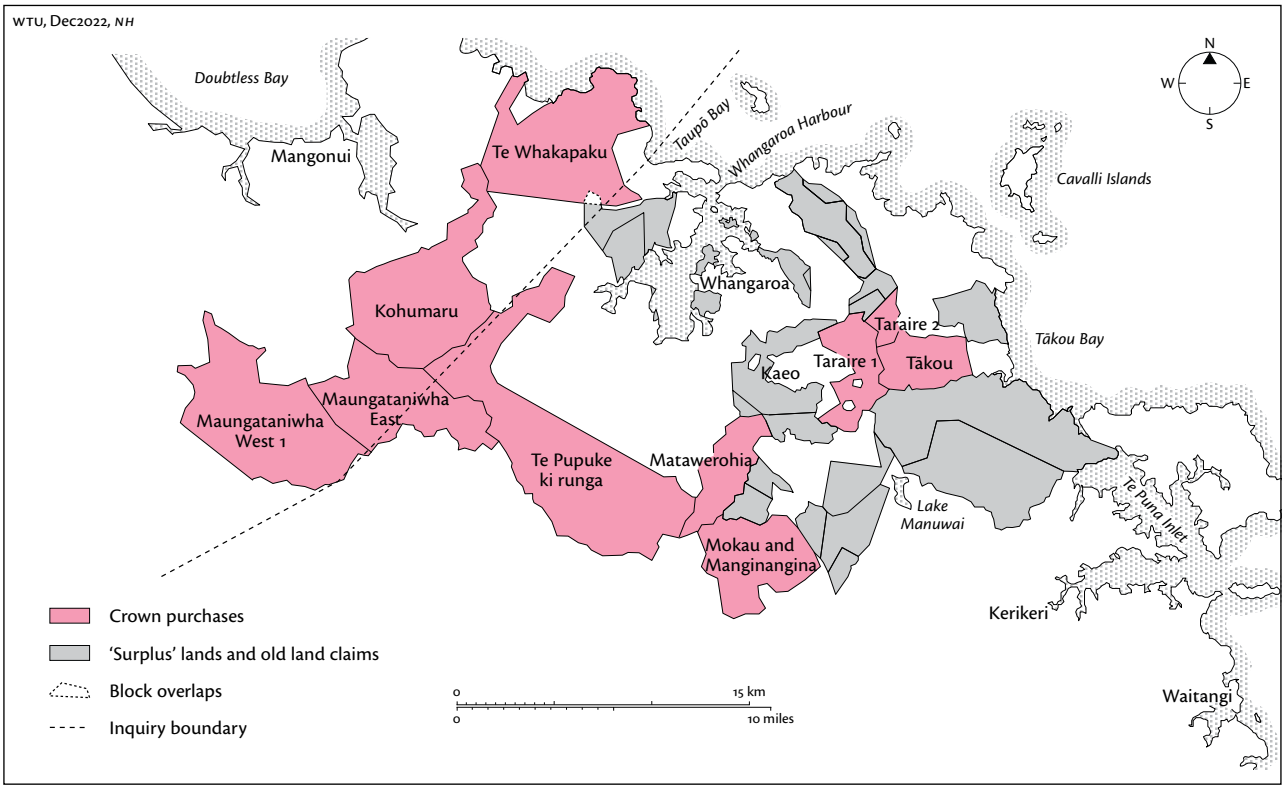
We deal first with the matter of records. Documentation assumes considerable importance in light of the Crown's claim that few Te Raki hapū and iwi lodged complaints regarding its failure to identify and conclude land transactions with all rightful owners. This claim rests upon the absence of records.[498] In making this argument, the Crown cited Dr O'Malley's evidence, which stated:

> With the exception of the Mokau block, research undertaken for this report has revealed relatively few formal petitions and appeals relating to the Northland Crown purchases after 1865.[499]

It is important to note that O'Malley referred to *formal* petitions and appeals and that his observation related to the post-1865 period. In the Crown's view, the lack of complaints indicates satisfaction on the part of Māori that all rightful owners had been identified and purchase negotiations conducted in an equitable manner.

While the Crown argued that allegations of treaty breach had to be proved case by case, its own record-keeping makes this an extremely problematic demand. First, the existing reports of officers on the ground were brief and lacked detail as to what was said at negotiations. Also, as is well known, many of the Crown's records were destroyed, mostly by fire, the central incident being the 1907 Parliament Buildings fire that consumed many of the Native Department's key files covering the period from 1840 to 1891. In 1872, the destruction by fire of the Auckland Provincial Government Buildings had already resulted in the loss of the Auckland Provincial Government's records to that point.[500] Such loss has had serious implications for our ability to establish a full picture and analysis of land transactions in Te Raki. The Crown did not accept that the destruction of records accounts for the apparent absence of complaint.[501]

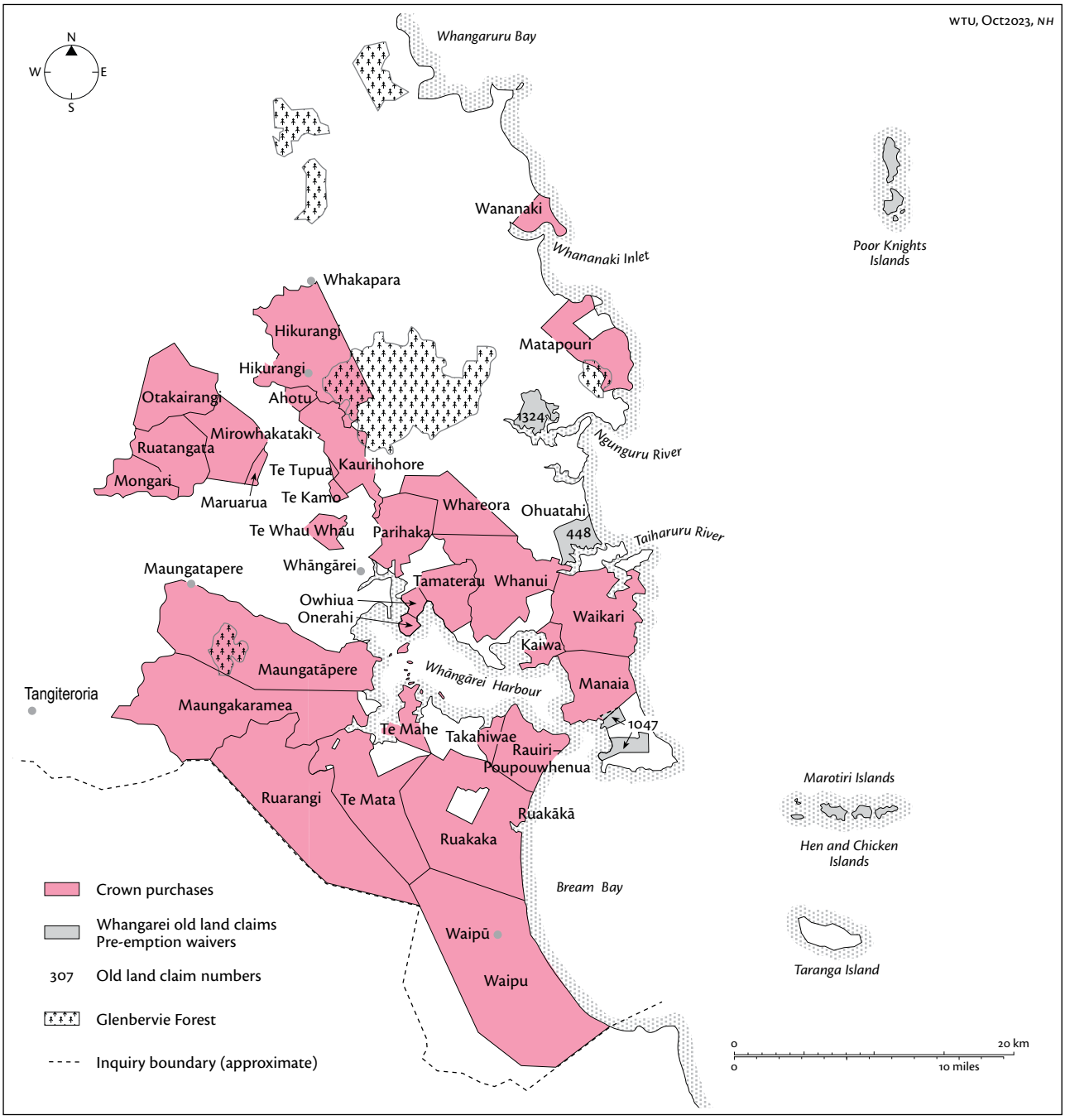
Māori commonly chose to register their objections to a purchase by means other than petitions and appeals. Extant files of Crown purchases in other districts, including large acquisitions in which ownership was contested, contain many letters of complaint, some numerously signed, and petitions that were not presented to Parliament and therefore not considered by the appropriate select committee. In some instances, Māori embarked



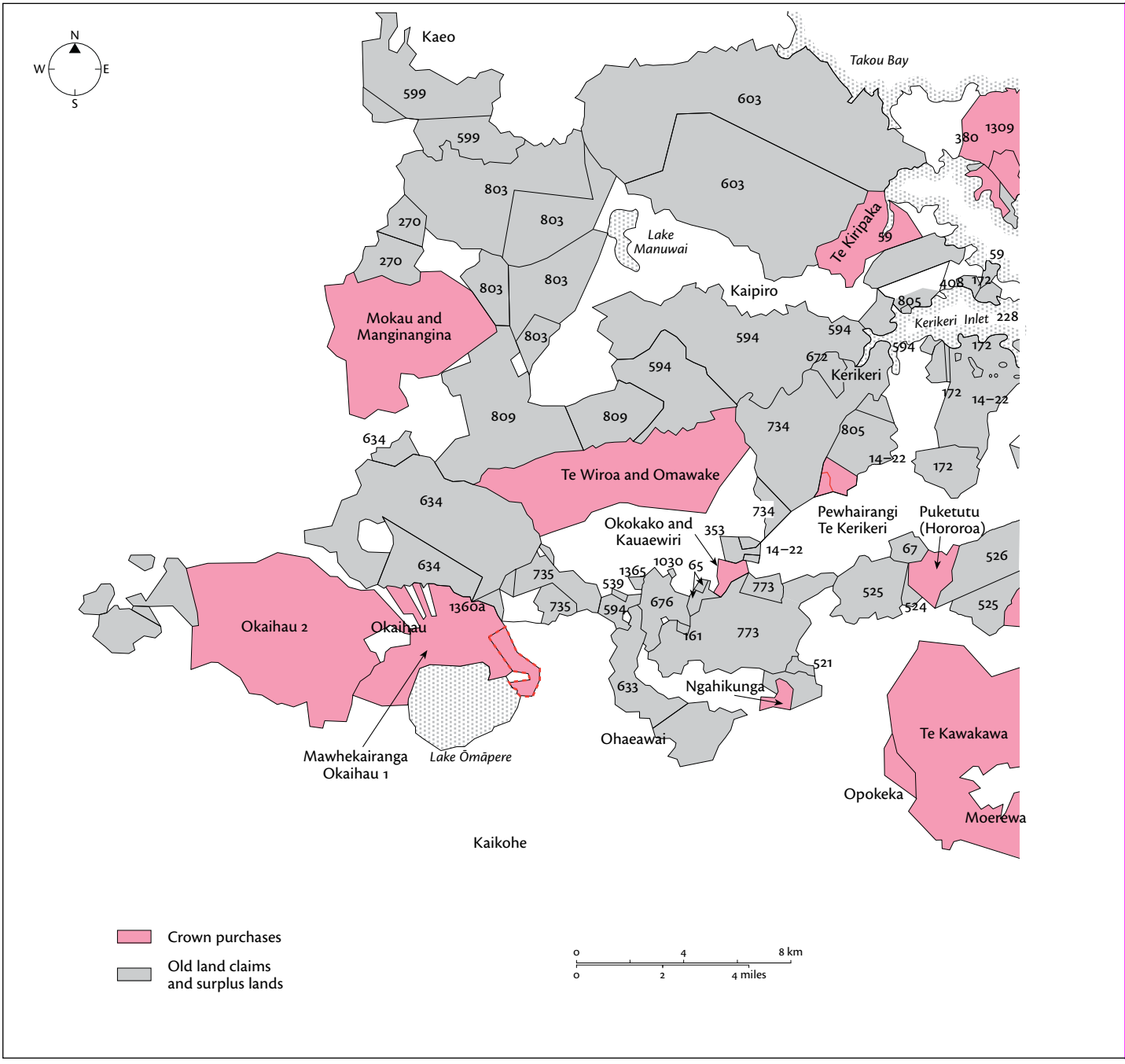
Map 8.3: Crown purchasing in Whangaroa, 1840–65.

upon extensive letter-writing campaigns through the colonial press. Complaints or objections also took the form of measures intended to prevent possession by the Crown: among them, the ejection of surveyors, the confiscation of survey equipment, the removal of survey pegs, and calibrated attacks on property.[502]

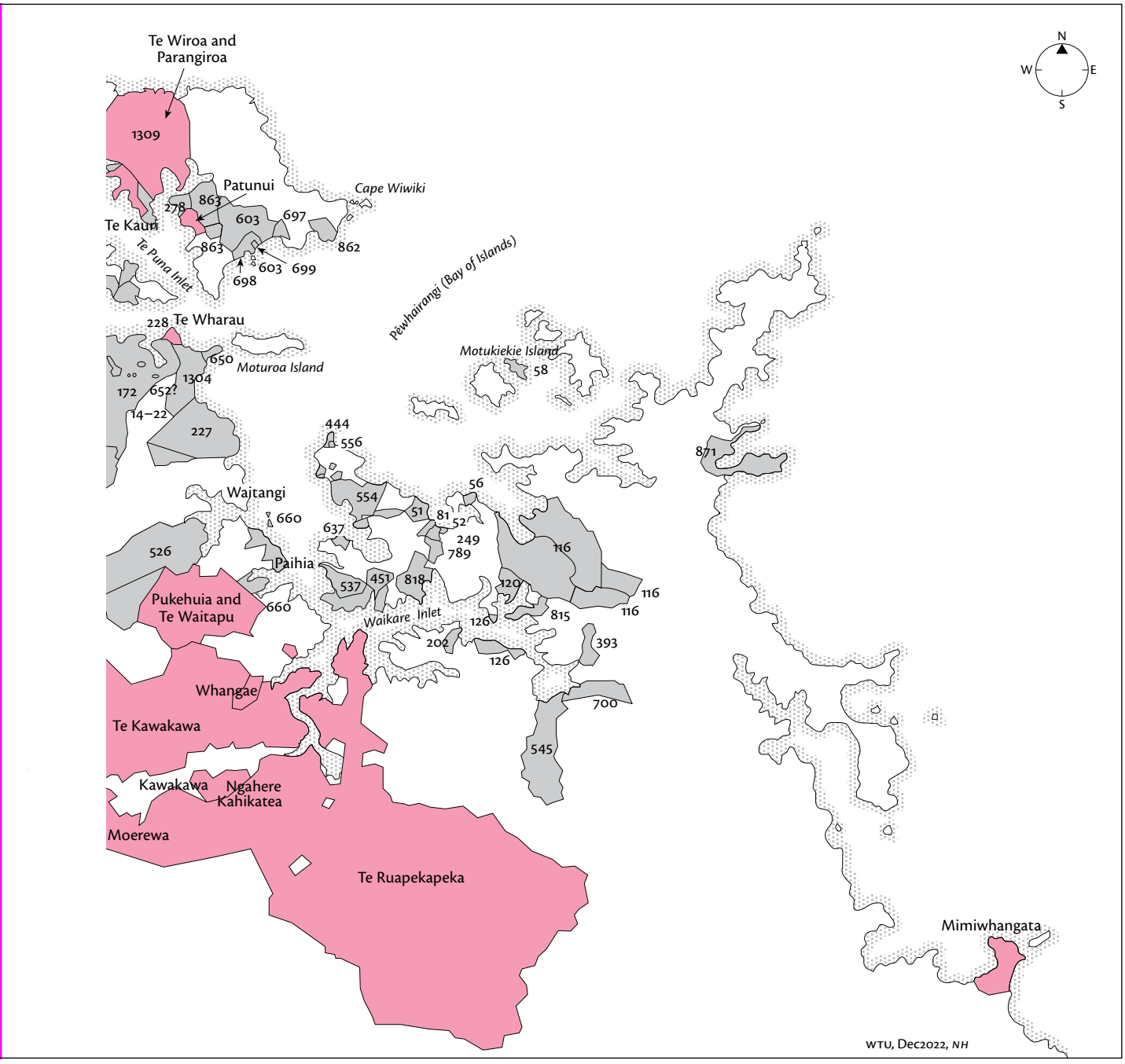
This happened in Te Raki as well. Māori objections to land purchases in this inquiry district included the removal of survey pegs, muru (plunder or confiscation as a form of dispute resolution; see chapter 3, section 3.2.5(4)), and letter-writing. Claimant Paraire Pirihi gave evidence of an example of an objection to a land sale when Patuharakeke tupuna Te Pirihi 'exercised his mana rangatiratanga . . . in the only way he then knew, by muru, i.e plundering the occupier of his land', in response to the 1841 Mahurangi purchase.[503] In March 1857, Haimona Te Hakiro temporarily stopped a land survey from being carried out at Parua Bay in Whāngārei Harbour by removing survey pegs and drawing a sword on surveyors while ordering them to leave. This was an attempt to prevent government intrusion on this land, which the Crown purchased the same year as the Kaiwa block.[504] The deed for this purchase was signed by rangatira Te Tirarau but neither Te Hakiro nor Hori Kingi Tahua, who had also been involved in negotiations and did not agree to the proposed price of £150 did so (see section 8.5.2(1)(c)(iv)).[505] Johnson's private correspondence with McLean explained that Te Tirarau had 'threatened either to tapu the place for ever, or seize upon it and the adjoining country, both of which courses would only have further complicated the



Map 8.4: Crown purchasing in Whāngārei, 1840–65.



Map 8.5: Crown purchasing in the Bay of Islands, 1840–65.


Te Wiroa and Parangiroa
1309
Patunui
Cape Wiwiki
278
863
603
697
Te Kauri
863
862
Te Puna Inlet
603
699
698
228
Te Wharau
Pēwhairangi (Bay of Islands)
Motukiekie Island
58
650
Moturoa Island
1304
172
652?
14–22
227
444
556
871
56
554
Waitangi
660
51
81
52
637
249
789
116
526
Paihia
537
451
818
120
116
116
Pukehuia and Te Waitapu
660
Waikare Inlet
126
815
202
393
126
700
Whangae
Te Kawakawa
545
Kawakawa
Ngahere
Kahikatea
Moerewa
Te Ruapekapeka
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question'. What was more, Johnson informed McLean, Hamiona Te Hakiro was 'indignant'.[506] Ngāi Te Whiu also protested the Crown's claims in 1859 to have purchased their Mōkau land. They disputed these claims in 'letters, petitions, protests and court actions' and continue to do so.[507] We discuss the Mokau purchase in section 8.5.2(3).

It is likely that prior to 1865, few among Te Raki Māori were familiar with either the mode or process of petition to Parliament, a purely Pākehā institution. The first Māori members of the House of Representatives would not be elected until 1868. Many Māori did not trust the Crown to deal with any complaints or objections that they might choose to lodge. In May 1861, the missionary Samuel Williams, who was based in Te Aute at the time, suggested that Governor Grey's departure at the close of 1853, followed in 1855 by that of Wynyard, his acting successor, had created a perception among Māori that they had no avenue of appeal, leading to growing distrust of the Crown. Williams also stated that Māori felt that 'they had been handed over to the tender mercies of the Land Purchase Commissioners, who almost entirely disregarded their remonstrances'.[508] Te Raki Māori had had little success with raising their objections before the Bell commission during the late 1850s. The commission had rejected Ngāi Te Whiu's claims in the Puketotara (Te Mata) block, for example, despite their continued occupation of the area (as we discussed in chapter 6).[509] In practice, for most Te Raki Māori their sole contact with the Crown during the period from 1840 to 1865 (in times of peace) was through the land purchase department, and as we have explained, its primary objective was the purchase of land for the benefit of settlers and the Government itself, not the protection or advancement of Māori interests.

We take the view that it was incumbent upon the Crown to create and maintain the records necessary to support and substantiate its claims to have concluded purchases in a full and proper manner. The scant nature of land purchase commissioners' reports indicates that deficiencies in the Crown's record-keeping cannot be solely explained by accidental fire. We endorse the position of the Muriwhenua Land Tribunal that it was the Crown's responsibility to:

> enrol in some permanent public record the method by which the land ceased to be Maori land, and, if ever required to do so, to establish from clear records that the alienation was in all respects fair.[510]

Under questioning by the Tribunal about the 'practical implications' of the Crown's inadequate documentation of its land purchases, Crown counsel made some acknowledgement that it could have an adverse effect on the ability of Māori to challenge purchases afterwards.[511]

It is noteworthy that, though the Crown claimed that by 1855 it was 'much more skilled at, and committed to, identifying all owners of land it sought to purchase', it did not identify any evidence to support this assertion.[512] As we discussed in section 8.4.2(5), by the mid-1850s the Crown had begun to compile information on the customary landscape of the district.[513] However, the existence of these records does not demonstrate that the land purchase commissioners always identified all those with rights in land. Nor does the fact that this information was collected relieve the Crown of its responsibility to maintain records of its transactions and any disputes that may have arisen. The question might reasonably be asked whether, in the absence of such records, the Crown can demonstrate that it conducted and completed all Te Raki purchases in a manner that was consistent with Normanby's instructions regarding 'fair and equal contracts', and with the Crown's obligations under the treaty. In the absence of sufficient evidence to demonstrate that these obligations were upheld, we do not expect claimants to prove, on a case-by-case basis, the impropriety of every purchases.

As we see it, the Crown cannot rely on the absence of records of formal petitions and appeals to suggest that Te Raki Māori were satisfied that the Crown had properly and fully identified all those holding customary rights.

(b) Delegation and control

During the 1850s especially, McLean wielded a great deal of power as Chief Native Land Purchase Commissioner, and as Native Secretary from 1856. Accountable not to the general Government but to the Governor, and enjoying the full confidence of both Gore Browne and Grey,

McLean established, staffed, and controlled the Native Land Purchase Department from 1854 to 1861. As we discussed in chapter 7, the newly formed settler ministry resented McLean as he was able to exert control over the Government's executive functions in relation to Native Affairs until his resignation as Native Secretary in 1861 (see section 7.3.2(3)). In the face of growing resistance and criticism from the Stafford ministry (1856 to 1861) in particular, McLean shaped land purchasing policy, controlled its implementation, resisted ministerial influence, and supported the Governor's determination to retain imperial authority over Māori affairs when responsible government was granted in 1856 and settler ministries were formed from elected members of the new House of Representatives. (The creation of the settler ministries and the development of responsible government is discussed further in chapter 7, see section 7.3.2(3).) Over these years, the Crown's protective obligations passed to McLean; and in respect of land purchase, he, in effect, delegated them to individual purchase commissioners. As we have discussed, the instructions he gave his land purchase commissioners recognised the importance of securing the consent of all owners, defining boundaries clearly, and providing sufficient reserves. However, his instructions gave little practical guidance as to how these obligations were to be met.

As we set out in section 8.4.2(3), in 1854 McLean had forecast that his department could acquire 7,000,000 acres of land in the Auckland province over five years.[514] Yet after one year, the Native Land Purchase Department faced financial obstacles to reaching this goal. In August 1855, McLean requested additional funding of £50,000 per annum 'to enable the Government to carry on arrangements for extinguishing the Native title to lands in these Islands'.[515] However, the desired funding was not granted, and O'Malley noted that 'a temporary halt was called to new purchases due to insufficient funds in September 1855'.[516] The following year, the Government allocated £180,000 to land, and half this sum was directed to land purchases within the Auckland province.[517]

In order to meet settler demand, McLean sought to ensure his purchasing processes were as efficient as possible. He demonstrated little interest in exercising control over his land purchase commissioners if it might result in delays in their negotiations. Instead, he was content to rely on their judgement and discretion. In June 1855, when he directed Kemp to commence work in the Bay of Islands, McLean assured him:

> From your practical knowledge of the Bay of Islands . . . you are peculiarly qualified for undertaking this service; I shall, therefore trust to your own prudence and discretion in making such arrangements as you may deem advisable for carrying out an object of such importance.[518]

McLean also considered it appropriate to leave the assessment of Māori ownership to his purchase commissioners. In June 1856, following the report of the Board of Inquiry on Native Affairs (discussed earlier, in section 8.3.2(6)), McLean acknowledged the challenge that faced the purchase commissioners in tracing various claims, stating:

> a knowledge of the genealogical history of the tribes, their conquest, and all other subjects connected with the nature of their tenure, was considered necessary, in order to qualify the Commissioners for this difficult and sometimes very perplexing duty.[519]

Despite this, he did not provide his land purchase commissioners with clear guidance on how to identify customary owners of blocks they wished to purchase, or the standards they were to apply in assessing Māori claims. No system in fact existed for investigating Māori customary rights in land, though the need would be increasingly accepted by officials and settlers alike over this period (see chapter 9, section 9.3). In the meantime, McLean wrote that Crown purchase agents had been directed 'to make themselves acquainted with the natives of their districts, to investigate their various and conflicting claims to land'.[520] His view was that '[t]he rule which applies to one portion of land does not apply to another; each piece of land has its own history', and therefore '[a] great deal must be left to the discretion of the person purchasing'.[521]

In other words, purchase officers were deciding who owners were.

Some of McLean's land purchase commissioners were uncomfortable with the absence of clear instruction. In 1858, Johnson, attempting to conclude the purchase of Kaiwa, complained that the Government had never defined

> what, in their opinion, constitutes a valid claim on the part of a Native to land, – or, if it has been determined, no instructions have ever been given on the subject for my guidance, and the usages of the Aborigines themselves being so completely at variance in parallel cases that no rule of action can be formed from them.[522]

Johnson does not appear to have secured the guidance that he clearly sought. The delegation of important decisions about customary ownership and terms of purchase appears to have been McLean's standard practice, which extended to other districts. He advised John Rogan, district land purchase commissioner for a short period in Te Raki, with respect to proposed purchases in the Waikato, that he considered it:

> unnecessary to fetter you with any particular instructions, as I conceive you will be better able to decide on the spot, when you have communicated with the Native claimants, how the purchases should be conducted.[523]

On issuing instructions to Taranaki's land purchase commissioner, McLean advised him 'that it is an object of great solicitude on the part of the General Government to have purchases made on terms the most advantageous for the public interests'. He went on to add:

> Much must, however, be left to your own judgment and discretion in making the best and most economical terms with the Natives: and I may add, that it is not the desire of the Government to fetter you with any instructions that will impede your operations.[524]

We note that Kemp and Johnson had mixed levels of experience in negotiating 'fair and equal' purchase agreements with Māori.[525] As we discussed in section 8.3.2(3), Johnson had been deployed to investigate outstanding claims in the Mahurangi and Omaha block in 1852, before he became the deputy commissioner of the Native Land Purchase Department in 1854. Prior to that, he had worked as a Government official in Auckland and Russell and as a trader in the Waikato.[526] As the son of a missionary, Kemp had local knowledge of parts of the district. He had previously worked as an interpreter and protector attached to the first Land Claims Commission, and subsequently as a land purchase commissioner in the South Island.[527] However, his major purchase there, in 1848, was marked by a failure to carry out his instructions to survey the boundaries of the reserves Ngāi Tahu wished to keep. As a consequence, Kemp had been reprimanded and replaced by Walter Mantell.[528] John Rogan, who succeeded Johnson as land purchase commissioner in Whāngārei in the late 1850s, had been involved in land purchasing at Kāwhia and Taranaki and was a qualified surveyor.[529]

The crucial point is that commissioners were responsible for purchasing land *and* determining its rightful owners. They were qualified to serve as land purchase commissioners by their previous success in acquiring land for the Crown, not their record of protecting Māori rights and interests. Overall, the Native Land Purchase Department, as a centralised Crown agency, seems to have viewed its role primarily as assessing the progress of land acquisition against the expected inflow of migrants and the demand for land (as indicated by the number of land orders issued), and identifying purchase priorities.[530] A key question thus arises as to whether, in the absence of clear and comprehensive directions and effective control from the centre, the district land purchase commissioners at work in Te Raki departed from established purchasing standards and did so to the disadvantage of Māori. A further question is whether the lack of intervention by McLean reflected his tacit endorsement of their conduct. We consider these issues in the following sections.

(c) Monitoring purchasing standards: identifying owners and gaining collective consent for transactions

Almost from the time Crown Colony government was established, its key officials (some of whom had been raised in New Zealand) quite clearly understood the nature and complexity of Māori customary land rights. As discussed at section 8.3, they also understood and acknowledged both the need to identify and secure the consent of all local hapū communities to any proposed alienation and the requirement to ensure that payment was distributed appropriately. 'Lands that are thus possessed in common', the Chief Protector Clarke advised the Colonial Secretary in 1843, 'involving the interests of so many claimants, are exceedingly difficult to purchase.'[531] The complex nature of Māori customary rights was again recognised in 1856 in the report of the Board of Inquiry on Native Affairs (see section 8.3.2(6), and chapter 9, section 9.3.2). While rangatira would play an important role in purchase negotiations, the board maintained that they 'have only an individual claim like the rest of the people to particular portions'.[532] It was well established throughout this period that for lands held in common, alienation required collective consent. While it may have been appropriate for the Crown to conduct negotiations via individual rangatira, Crown officials understood that it was inconsistent with their own standards to reach deals solely with those rangatira willing to enter land transactions, and to finalise such transactions before apprising themselves of the full extent of customary interests in the land, and of actual consent by the various communities who held rights there.

In order to establish collective consent for purchases, one recommendation made by the Board of Inquiry on Native Affairs was that purchase blocks should be perambulated and surveyed, and a description of the area publicised to ascertain any further claims to the land.[533] However, McLean saw practical difficulties in the land purchase department taking responsibility to ensure that all owners were informed of and participated in purchase negotiations. In response, McLean wrote to the Private Secretary that taking this additional step would be 'of no avail' in distant districts where the notices would not reach 'the natives interested'. Furthermore, he was concerned that 'the loss of time involved in sending up such a notice, in its publication and return, would, in most instances, be prejudicial to the negotiation'.[534] It appears that McLean considered that the demands already placed on his purchase commissioners by the requirement to investigate Māori customary rights in land were a substantial obstacle to his purchasing ambitions. As he put it,

> the various duties disconnected with the purchase of lands which the officers have been called upon to perform, such as the adjustment of disputes between the Europeans and natives, consequent upon the extension of English settlements, the arrangement of territorial and other feuds among the natives themselves, the opposition generally manifested by them to the sale of lands, the time required to obtain a knowledge of the natives in their several districts, together with various other causes, have operated against the acquisition of that extent of territory by the officers of this department which the European inhabitants, in their anxiety to obtain land, might expect.[535]

In these passages, McLean carefully defended the record of his land purchase department by setting out the difficulties that a thorough investigation of customary ownership presented to the Crown's aim of efficiently acquiring large areas of land for settlement. He went on to downplay the risk that disputes might arise from transactions where owners had been excluded from negotiations, assuring the Private Secretary that '[p]ublicity is generally pretty well attained on a subject so deeply interesting to the natives as the sale of land'. However, where issues did arise, or in cases where the Crown learned of further claims subsequent to purchases being completed, these could be 'provided for out of subsequent instalments, which may extend over a period of two or more years'.[536]

The kind of instalments described by McLean were, in the first instance, payments to owners willing to transact

their lands prior to a full investigation of other claims. If other owners were excluded from the initial purchase and disputed the transaction, he proposed that their interests could be acquired through the payment of further instalments, either out of the residue of the original purchase price or as payments additional to the original price. In this sense, they were a means of denying other owners the opportunity to withhold their lands from purchase. It appears that this was a tactic used by Johnson in the Whāngārei and the Mahurangi and Gulf Islands taiwhenua, and he recorded in October 1854 that he had paid by instalment for the blocks he had 'lately acquired' in those districts.[537] For example, in the 15,941-acre Wainui block, Johnson made a first payment of £600, a portion of which he specified was 'to appease the jealousy of Ngatiwhatua [*sic*]' and to 'set at rest any apprehension which may have existed of uneasiness in that quarter'.[538] In January 1855, Johnson would make a further payment of £200 pounds to a different group of owners to complete the purchase (we discuss Johnson's use of instalments in the Ruakaka, Waipu and Maungakaramea purchases further below (see sections 8.5.2(1)(c)(i)–(iii)).[539]

McLean's position appears to have been that owners excluded from original transactions should only receive nominal payments, as the Crown had already purchased the land and made payment. For instance, he advanced £270 to owners of the Pakiri South block during his tour of the district in March 1857, which led to the completion of the purchase of the 35,144-acre block for a mere £1,070.[540] McLean justified the low price on the basis that the land had already been purchased by the Crown in 1841 as part of the Mahurangi and Omaha block despite the significant shortcomings of that initial transaction (see section 8.3.2(3)), writing:

> Where lands have been purchased, and a fair price given to the Natives, it appears to me that a nominal sum is all that can be considered as justly due to those claimants whose rights from various causes may not have been recognised at the time.[541]

We note that instalments could also mean staggered payments to the same group of owners. In purchasing the 25,784-acre Ahuroa and Kourawhero block (nominally two blocks that were included in one deed as a contiguous area), Johnson wrote that 'I have endeavoured strenuously to extend the payments over a time, and to induce the Natives to re-purchase from the Crown any land they may wish to retain in the blocks for themselves' (we discuss the 'repurchase' reserve created in the block further in section 8.5.2(7)).[542] Dr O'Malley observed that Johnson 'succeeded with both measures to a modest extent . . . with the owners agreeing to accept three-quarters of the payment at the time of signing and the remainder on 1 January 1855'.[543] These kinds of instalments were also used in two purchases in 1854 and 1856 that extinguished customary title over Aotea (Great Barrier Island) where there were also a number of unsurveyed old land claims and pre-emption waiver claims on the island (see chapter 6, sections 6.5.2(3) and 6.6.2(1)). Dr O'Malley noted that McLean personally undertook the second purchase, covering the central portion of the island to which the deed was signed by members of Ngāti Maru and Ngātiwai. The deed provided that a second payment of £100 would be made in June 1857 (out of an overall purchase price of £300), but there is no receipt to confirm that this was paid.[544]

Instalments may have been more widely used, and there is evidence that Māori disliked them.[545] Overall, there does not appear to have been a consistent practice, and it is difficult to tell whether subsequent payments were typically made to a new group of claimants, or whether they were actual instalments to owners involved in the original transaction. In the latter case, instalments were a means of ensuring Māori remained committed to the terms agreed, and allowing those not party to the original transaction to register their claims and receive compensation. Alternatively, payments could be withheld. In the case of the Okaihau lands, Kemp withheld purchase moneys in a successful effort to persuade owners who supported the transaction to pressure those opposed to sale, or to induce them to ignore other claims.[546] In his evidence,

Dr O'Malley considered that McLean's support for these practices reflected his lack of concern for 'the fact that such groups had no say as to whether to retain or sell their interests'.[547]

In the face of unrelenting settler pressure to acquire land, a shift from securing the consent of all owners to securing the consent of a handful in the comfortable or self-serving belief that they represented the views of all, or that other claimants could subsequently receive payment for their interests, held considerable appeal. We note that this was a practice previously employed by McLean while in the field himself in Taranaki during the early 1850s, where the Tribunal found that Māori 'were dealt with privately and secretly, and payments were made to secure cooperation'.[548] In *The Wairarapa ki Tararua Report*, the Tribunal found:

> McLean apparently felt comfortable conducting an unfolding process in which all was to be confirmed later (probably much later, given the limited surveying capacity), but it left Māori vulnerable indeed.[549]

On occasion, purchase agents reported that their negotiations had proceeded smoothly and the agreement of all those with interests had been secured. Kemp recorded with reference to the Ōruru Valley, in 1856, that he had 'assembled the different claimants' and secured their agreement to a price 'after a series of well-conducted discussions'.[550] Referring to the purchase of several blocks in the Bay of Islands the year after, he again reported that '[t]he negotiations have been conducted in the most public manner, and every facility given to claimants, or other interested persons, to appear.'[551] The following December, again with reference to purchases in the Bay of Islands, he noted that '[a]ll the proceedings connected with the fixing of [purchase] sums have been carried out in the most public manner, on the spot.'[552] William Searancke, who for a short period acted as land purchase commissioner in the Whāngārei district, recorded with respect to the Whanui and Taiharuru blocks that he assembled 'the whole of the Natives interested in those blocks of land', and that his offer of two shillings per acre 'was unanimously agreed to by the whole of the Natives present'.[553]

Such claims were largely belied by the evidence. Dr O'Malley considered that evidence of Crown agents in Te Raki walking the boundaries of purchase blocks or convening hui with all customary owners is rare.[554] This might reflect the inadequacy of the Crown's record-keeping practices and the lack of available documentation. However, an analysis of the number of signatories to Northland deeds for the period from 1840 to 1865 suggests that only in a few instances did the Crown document the formal consent of all customary owners with interests in the land. Of 118 purchase deeds, 51 were signed by no more than five persons, and a further 29 by six to 10 persons. Only one purchase deed – for Maungatapere (16,640 acres) in January 1855 – was signed by over 50 persons, suggesting that extensive consultation had taken place and that general agreement to the sale had been secured. But as we discuss further, another deed for the Maungatapere purchase had been signed by only two owners beforehand, and it was this deed that was provided to the Colonial Secretary. The extent of the problem is apparent even when accounting for the relative size of the blocks: the 29,832-acre Waipu block was purchased with only 12 signatures on the deed.[555] It is possible that rangatira did consult and secure general assent or consensus, but there is no evidence that the Crown independently satisfied itself that they had done so in any systematic way.

In practice, McLean appears to have had little interest in intervening in the purchasing process to protect the rights and welfare of Māori, and he remained reluctant to issue any instructions that might have acted as 'fetters' upon his district commissioners. In recognising the complexity of Māori rights in lands and the importance of investigating customary ownership, his instructions maintained appearances. However, there was a significant difference between McLean's carefully worded directions and the standards he was willing to enforce. We received no evidence that McLean rejected any purchase agreements

because the price was too low or that insufficient signatures were recorded on the deed. This seems a significant omission in light of the small number of signatories evident in many deeds of purchase for substantial blocks of land. The absence of any intervention by the purchase department in the process suggests that McLean likely turned a blind eye to the shortcomings of hastily arranged purchase agreements. As McLean sought to keep up with settler demand for land, in Dr O'Malley's words, '[e]xpediency reigned supreme'.[556]

In order to meet that demand, McLean was also overt in his support for the continuation of Grey's practice of fostering and favouring 'friendly' rangatira as a means of conducting purchasing. For instance, in 1857 McLean suggested to Grey's successor, Gore Browne, that:

> it would not be difficult to ascertain the names of the principal [northern] Chiefs whose co-operation would be essential for carrying out the views of the Government, and who should, in return for their exertions (where efficiently rendered) to preserve the peace of their respective districts, be rewarded with marks of approbation, and fixed annuities for their services.[557]

McLean advocated dealing with particular rangatira, obtaining their consent first, and then using it as leverage to gain the agreement of neighbouring chiefs. This was a common practice by the land purchase department from the start of its purchasing activities in the district. In Whāngārei, Johnson employed this tactic, in particular with Te Tirarau Kūkupa (see section 8.3.2(6)). In December 1853, Johnson reported that he had 'ascertained the nature of the native claims' in the Whāngārei area and decided that Ngāpuhi prevailed north of the harbour and Te Parawhau to the south, but that both were 'in a great measure, controlled by Tirarau'.[558] However, as we have discussed, rangatira such as Te Tirarau understood these relationships differently, and expected that the transactions they entered into would strengthen their partnership with the Crown and bring lasting benefits to their communities; these understandings were fostered by the Crown in its negotiations, its marks of favour, and promises of benefit.[559]

The flaws in the Crown's general purchasing practices were recognised at the time and attracted bitter criticism, not least from the missionaries Octavius Hadfield and Samuel Williams. Hadfield accused McLean of negotiating with selected rangatira, of being

> guided by no fixed principles in acquiring the land . . . sometimes he dealt with the conquerors, when they were inclined to sell, at other times with the conquered, sometimes with the leading chief, at other times with an inferior one.[560]

Conducting purchase negotiations in secret, relying on small numbers of signatories, purchasing from persons who were not rightful owners or were not authorised to sell, and the system of 'paying money to any person in connection with the land who would receive it, leaving the money to work its way into the land' – otherwise known as 'potato planting' – were among the unsavoury tactics intended to subvert opposition to land sales that McLean's critics identified.[561]

In response, McLean resorted to what his biographer, Ray Fargher, termed 'self-righteous repudiation', unwilling to admit that he had placed settler demand ahead of protecting Māori interests.[562] By the late 1850s, as historians Rose Daamen, Barry Rigby, and Paul Hamer have observed:

> The apparent consensus on the complexity of Maori interests in land declared by the board of inquiry and McLean in 1856 had evidently foundered on the shoals of the Waitara dispute.[563]

As McLean and Governor Gore Browne sought to defend their decision to push through purchases despite opposition, they became increasingly dismissive of the need for common consent, as Professor Ward observed.[564] In our view, the Crown's increasingly pragmatic and cynical approach to these negotiations was clearly self-serving and posed significant potential prejudice to Te Raki Māori

hapū and iwi. In the following sections, we consider a number of case studies from the Whāngārei taiwhenua, a key area targeted for settlement, where Johnson provided a more extensive account of his purchases. These illustrate the Crown's failure to enforce its acknowledged purchasing standards.

(i) *The Ruakaka and Waipu purchases*

Two of Johnson's first purchases in Whāngārei were the 16,524-acre Ruakaka and 29,833-acre Waipu blocks.[565] In December 1853, Johnson reported to the Colonial Secretary that Whāngārei Māori had offered approximately 240,000 acres of land for only £600, and that an area in the Ruakākā Valley had been identified by a group of Nova Scotian immigrants as a suitable site for settlement.[566] The prospect of such a grand purchase saw Johnson sent north to complete the negotiations without delay, but he quickly discovered that things were less straightforward than he had assumed. As he reported 'the extinction of the native claims are fraught with more difficulty, and the price required will be much greater, than I had anticipated'.[567] Apparently, members of Ngāti Whātua had visited the area and divided the 240,000-acre block he had identified for purchase into four separate blocks (Mangawhai, Ruakaka, and Waipu blocks, and an area Johnson referred to as Ikaranganui) and had 'entrusted the disposal of the same to different parties'.[568] We have not seen any evidence that sheds light on this move by Ngāti Whātua, but perhaps they sought to ensure that the payment for land in each block was made to those specific groups associated with it.

Despite the changed circumstances, Johnson proceeded quickly to confirm arrangements for the Crown to purchase the areas targeted for settlement in the Ruakākā Valley. By the end of the following week, he reported that he had completed negotiations to purchase an area which he estimated to be 60,000 acres and included the Ruakākā and Waipū Valleys.[569] He had encountered difficulty in 'confining the natives into a reasonable reserve in the valley of the Ruakaka', and it was the view of the Nova Scotian settlers that 'unless the natives could be confined to a limited reserve, the valley could not be made available as their settlement' (we discuss the status of this reserve in section 8.5.2(7)).[570] The Ruakaka block also contained an 'enormous extent of country' claimed by former British Resident James Busby (see our discussion of his claims in chapter 6, section 6.7.2(10)), who had written to the Māori owners demanding that Johnson not be permitted to intrude on his land.[571] Johnson forwarded Busby's letter to the Colonial Secretary, reporting that it had been 'met with great applause when read at the several meetings of the claimants'.[572]

In the circumstances, Johnson was concerned that Busby's influence would become an obstacle to his purchase negotiations. For this reason, he said, he elected not to adopt 'the usual and safer method of assembling all the claimants before making payment'. Instead, Johnson proceeded to simply accept offers and began dealing with whoever had indicated their willingness to sell. He wrote to the Colonial Secretary:

> I accepted the offers of the Chiefs who first came forward to sell the Ruakaka, and paid to them the sum of One hundred pounds (£100) for their claims, reserving the sum of Two hundred and fifty pounds (£250) to satisfy the other parties with whom I had not yet come to terms. This decisive step showed the opposition that when the real owners of land are disposed to sell to the Government, it is not to be intimidated by the clamour of disaffected factions, exercising very little, if any, ownership at all over the lands sought to be purchased.[573]

It is unclear why Johnson reserved more than two-thirds of the purchase price for those who had 'not yet come to terms' with him, while claiming that the 'real owners' had initiated the transaction.[574] However, as Dr O'Malley observed, the original deeds reveal a 'pattern of staggered payments made privately to individual groups'.[575] The Ruakaka deed is dated 16 February, and includes a signed acknowledgement from 'Pou, Te Mania and the rest of our tribe' as having received £250 on that date, but further payments of £50 were recorded as being made to two other groups of owners, including Te Rehe

The Waipū River in the Ruakākā Valley. Native Land Purchase Commissioner Johnson purchased this area from Whāngārei Māori in 1854. The Ruakākā and Waipū Valleys had been selected by a party of Nova Scotian settlers who had lobbied the Government directly for preferential rights for up to 50,000 acres to be purchased near Whāngārei. Johnson sought to confine Ruakākā Māori to a small reserve containing poor-quality land so that the valley could be opened up for settlement.

on 8 March and Te Pirihi, Paora Pere, Eru Toenga, and Ti on 17 March 1854.[576]

Johnson 'adopted a similar course' in negotiations for the purchase of the Waipu block. The deed was dated 20 February 1854, when £200 was paid to Wiremu Pohe and his party with an undertaking that this payment would also satisfy the claims of Te Tirarau and Hori Kingi Tahua. However, two further payments of £50 were made on 2 March 1854 to Hone Tepa and Te Hu, and on 8 March 1854 to Pou and Te Rehe.[577] In this case, Johnson did convene a general meeting with the owners at Otaika in Whāngārei on 17 March, but not until after payments had already been made.[578] During this meeting, it was clear that Johnson's piecemeal payments had not satisfied all owners. Te Tirarau and Hori Kingi Tahua refused the share allocated to them by Wiremu Pohe and demanded an additional sum of £50 in recognition of their rights in the land.[579] Johnson acceded to their demands, and the payment to Te Tirarau was recorded in a further deed signed in July 1854.[580] A further payment would also be made to Eurera Toenga on 26 May 1854 for his claim in the Waipu block, by way of an additional deed.[581]

For both the Ruakaka and Waipu blocks, Johnson's strategy of making payments to those who agreed to the purchase first, without conducting wider consultation, meant that the other owners had no choice other than to accept payment for the alienation of their lands, or perhaps demand a better price. Johnson conducted these negotiations prior to taking up his role as a land purchase commissioner in the Native Land Purchase Department. His subsequent appointment indicates that rather than taking any issue with his conduct, McLean was 'suitably impressed', and in May 1854, Johnson received his formal appointment.[582]

(ii) *The Maungatapere purchase*

In the case of the 1855 purchase of the 16,640-acre Maungatapere block, Dr O'Malley recorded that two purchase deeds were signed in what appears to have been a tactic intended to overcome opposition to sale.[583] One of these deeds was signed by some 114 owners on 31 January 1855, which O'Malley suggested might be considered 'a widely-signed agreement for the transfer of the block'. However, O'Malley also pointed to an earlier deed 'buried among the records of the Colonial Secretaries' office', dated 19 January 1855, which had been signed in Auckland by Te Tirarau and Te Manihera only.[584]

In Johnson's November 1854 report on the purchase negotiations for the Maungatapere block, he estimated that it contained 18,500 acres and that a sum of £1,500 would be required for the purchase. Following a meeting with Te Tirarau at his residence earlier that month, he wrote to McLean that a further condition of purchase was that Te Tirarau should be granted a pre-emptive right to repurchase an area of 1,000 acres at 10 shillings per acre.[585] He also informed McLean of the block's strategic value, with frontage on the Whāngārei Harbour. He considered that the purchase would have a 'moral effect' on other Māori in the district, as a result of

> the example of an influential chief like Tirarau, in conjunction with several others who in the late war in the North fought against us about the sovereignty over the country, now disposing to the Crown for European colonization, a tract situated in the midst of one of their most valuable and cherished localities.[586]

Johnson considered that the ownership of the block was undisputed, 'the family hereditary possession of the Chief Tirarau and the late Iwitahi, father of Te Manihera'.[587] O'Malley described this conclusion that the two rangatira were the sole owners of the block as 'little short of fanciful'.[588] Nonetheless, the proposed purchase was promptly approved in January 1855, and Johnson informed the department that the purchase deed had been signed and Te Tirarau had paid £500 for a selection of 1,000 acres.[589] Johnson's report was dated 20 January 1855 and was not published by the Native Land Purchase Department. However, by this point (prior to the signing of the second deed) Johnson clearly considered that customary title had been extinguished. For, as he reported, 'the purchase of the Maunga Tapere Block has been this day completed', including receipt of the £500 from Te Tirarau, 'which he was authorised to make in the said block conformable to the 15[th] clause of Sir George Grey's land regulation'.[590] This report suggests that Te Tirarau and Te Manihera did receive payment for the block when they signed the deed on 19 January 1855, as Te Tirarau paid over the £500 at once for the land he was repurchasing.

Following Johnson's report, Kemp recorded a minute that Johnson was to return to Whāngārei the following Monday with Te Tirarau, who had remained in Auckland seeking assurance that 'His Excellency had given Instructions in reference to the Survey of the Block he has chosen and paid for'.[591] Kemp made no reference to a second deed, and at this point there is no explanation in the documentary record as to why it was considered necessary to produce two purchase deeds for the same block when payment had already been made. Further confusing the picture is the fact that Kemp waited until 9 April 1855 to forward the deed signed on 19 January by Te Tirarau and Te Manihera to the Colonial Secretary, Andrew Sinclair. Kemp recorded that a sum of '£1500 has been paid into the hands of the Native owners, the two principal Chiefs having signed the Deed of Conveyance to the Government'.[592] However, he added that, 'another deed will be furnished by Mr Johnson on his return to Whāngārei from the Bay of Islands to which the signatures of nearly all the sellers will be attached'.[593] It appears that by this point, the second deed had not yet been received in Auckland, and Kemp viewed the first deed signed by Te Tirarau and Te Manihera as the crucial record of the conveyance as he added that 'there exists no impediment to [the land] being surveyed and laid open for selection'.[594]

The two rangatira signed the 31 January deed in Whāngārei as well, which also records the owners' receipt of £1,500.[595] However, it seems highly unlikely that the Crown made a second payment when the further deed was signed, and we received no evidence on whether the

purchase moneys were distributed by the rangatira. It is unclear why Kemp waited over three months to forward the first deed signed by Te Tirarau and Te Manihera to the Colonial Secretary's office, especially since it was signed in Auckland. There is evidence, however, that officials began to express concerns about the adequacy of the first deed soon after it was received by the Colonial Secretary in April 1855. A few days later, Sinclair sent it on to the Attorney-General and asked that he provide an opinion on whether 'the conveyance from the Natives is sufficient'.[596] In te reo Māori, the first deed recorded,

> He pukapuka tuku whenua tenei . . . Ko te whakaae pono tenei o maua o Te Tirarau raua ko te Manihera, no Ngapuhi, kia tukua rawatia tetahi wahi o to matou whenua ki Whangarei kia te Kuini Wikitoria o Engarangi [*sic*], ki nga Kingi, Kuini ranei i muri i a ia ake tonu atu.[597]

This was translated as:

> This deed of sale of land . . . is the true and faithful consent of us 'Te Tirarau' and 'Manihera', Chiefs of the tribe called Ngapuhi, to sell entirely a portion of our land situated at Whangarei to the Queen Victoria of England, to the Kings or Queens who may succeed her for ever and ever.[598]

Frederick Whitaker, the acting Attorney-General, responded with a minute recorded on the first page of Kemp's letter questioning whether the language in the deed expressed 'a consent to sell and not a transfer'.[599] He noted that deeds should use expressions 'of sale from the natives to the effect that the Land is transferred and conveyed by the Deed itself'.[600] The Colonial Secretary recorded a further minute that 'Mr Kemp instructed accordingly', presumably meaning that Whitaker's concerns about the first deed were passed on to Johnson.[601] These criticisms appear to be unrelated to Johnson's decision, months earlier, to proceed to Whāngārei to collect further signatures on the second deed, although we note that the second deed, signed by 114 owners, described the conveyance in more developed terms:

> [K]o te whakaaetanga tenei o matou, mo matou ake, mo a matou whanaunga, mo a matou huanga, mo a matou tamariki, a muri i a matou, kia tukua rawatia tetehi wahi o to matou whenua kia te Kuini Wikitoria o Ingarangi, ki nga Kingi, Kuini ranei a muri ake i a ia ake tonu atu, hei utu mo nga pauna moni ko tahi mano, erima rau £1,500, kua riro mai ki o matou nei ringaringa i a Te Honiana (John Grant Johnson) tetehi kai whakarite whenua mo te Kawanatanga o Nui Tireni, i tenei rangi kua oti te tuhi tuhi nei . . . Koia, matou ka whakarerea, ka tukua rawatia, tenei wahi o to matou whenua ki a te Kuini Wikitoria o Ingarangi, awa, roto, waimaori, tarutaru, rakau, kowhatu, pari, me nga ahatanga katoatanga, ki runga, ki raro o taua whenua.

This was translated as:

> This is our consent, for ourselves, for our relations, for our friends, for our children who may survive us, to finally make over to The Queen Victoria of England, and heirs for ever, a portion of our land in consideration of the sum of One Thousand five hundred pounds which we have this day received at the hands of John Grant Johnson Esquire a Commissioner for the purchase of Land on behalf of the Governor of New Zealand . . . Therefore we have taken leave of, and entirely given up this portion of our Land to the Queen Victoria of England, with all its rivers, lakes, waters, grass, trees, rocks, cliffs, and everything, above and below the said land.[602]

It is unclear when the second deed was sent to Auckland, and as Dr O'Malley pointed out, if it was signed in January then there is no explanation as to why by April it had still not been received.[603] However, it must have been received by the following September, when Johnson wrote again to McLean regarding a reserve along the bank of the Otaika River which had been included in the second deed, but not the first. Neither deed included a plan, but the second deed identified the Motukiwi wahi tapū, and the cultivations on the bank of the Otaika River as 'exempted from the sale'.[604] Johnson informed McLean in September 1855 that it had been Te Tirarau's intention that

this part of the block would be included in the purchase lands, but that these reserves were granted as a temporary measure 'to conciliate the Natives living on the cultivations'. However, he was concerned that '[t]he back country to the Otaika river is of such a nature that it is almost useless without this frontage'. Thus, Johnson had arranged to purchase the reserve for £100, as part of his negotiations for the Maungakaramea block, which was adjacent to Maungatapere to the south (see section 8.5.2(1)(c)(iii)).[605]

The subsequent inclusion of the reserves identified in the second deed for the purchase of an adjacent block is a further irregular development. O'Malley gave evidence that Johnson's September report could be taken to suggest that a second deed was drawn up following objections from owners who had not signed the original deed, and Johnson had

> sought to assuage the disgruntled claimants by giving up their claims to the lands they occupied in return for part of the payment on the adjacent Maungakaramea block for which he was then in negotiation.[606]

O'Malley pointed out that Johnson's September report came seven months after the official purchase deed was ostensibly signed the previous January, and he wrote 'as if this was all news'.[607] It was his opinion that 'the possibility that the official deed was fraudulent cannot be entirely dismissed'.[608]

In our view, the most likely explanation for these irregularities is that the first deed was signed by the two rangatira in Auckland in secret. The decision to sign the deed in Auckland may have been a pre-emptive move by the rangatira following Te Tirarau's meeting with Johnson in November 1854, to get the transaction under way and to secure the right of repurchase for Te Parawhau. After signing the deed and paying over the purchase money, Johnson proceeded to Whāngārei to acquire further signatures with Te Tirarau's support, though it is not clear from the evidence that he intended to produce a separate deed at this point, and subsequent events are far more opaque. It appears that Johnson may have encountered some opposition in Whāngārei, and the other owners sought to exclude their cultivations and wāhi tapu from the purchase area. It is also plausible that Te Tirarau himself may have sought to hold the issue over so that other owners in Whāngārei could have their say as to where the reserves were to be located (after himself 're'purchasing 1,000 acres).

The exchange between Sinclair and Whitaker also suggests that an internal discussion was taking place between officials at this time about the language used in land purchase deeds. As we discussed in section 8.3.2(6), conveyancing language was also a matter of great concern for McLean, and he had first introduced printed deeds in 1854. While Crown purchasers continued to largely rely on handwritten deeds prior to 1857, from 1855 they had begun to introduce new language into these contracts, including references to the resources and features of the block.[609] In this case, the Maungatapere purchase was a particularly complex transaction. Te Tirarau had paid a large sum to repurchase some 1,000 acres of land and sought assurances that his selection would be surveyed shortly after making the payment. It is surprising then, that the first Maungatapere deed was not brought to the attention of the Colonial Secretary until months after Johnson submitted it in January.

We can only speculate on Johnson's reasons for producing a second deed, but it seems unlikely that he would have made that decision before the first deed was scrutinised by officials in Auckland. We cannot rule out the possibility that doubts surfaced about this important matter before April, and the official correspondence was staged after a decision was made to produce a separate deed using more robust language. That would explain Johnson's decision to produce a second deed on 31 January 1855, but not why that deed had not yet been received in Auckland until months later. Another possibility is that the deed was backdated after Whitaker and Sinclair's exchange in April; or that both records were fraudulent. Ultimately, the documentary record is silent on Johnson's meeting with the other owners; there is no record of when it actually occurred besides the deed itself. However, in our view, the

Te Tirarau Kūkupa's house at Mataiwaka on the Wairoa River.

surrounding circumstances cast considerable doubt on the integrity of the official deed, and the Crown's purchasing processes at this time.

We also lack evidence on whether, or how, the purchase moneys were distributed among the wider group of owners. However, as we saw in the Ruakaka and Waipu purchases, and as the following examples also illustrate, Johnson widely relied on private side deals to overcome opposition to land purchases in Whāngārei. Despite the limited evidence available, it is clear that by making a payment to Te Tirarau and Te Manihera before establishing general consent for the purchase, the Crown increased the pressure on the other owners to agree to the transaction in order to receive some of the benefits. In this case, Johnson was forced to agree to the owners' demands for additional reserves. However, as noted, he viewed this as only a temporary arrangement and would acquire the Otaika reserve soon afterwards as part of the Maungakaramea purchase (discussed below).

(iii) *The Maungakaramea purchase*

The purchase of the Maungakaramea block (17,462 acres) was another occasion on which Johnson relied heavily on Te Tirarau to complete the transaction. He reported in August 1855 that Te Tirarau had agreed 'to give up a sufficient quantity of land' and had recommended 'the payment of a sum of Two thousand seven hundred pounds, for the Maunga Karamea Block'.[610] O'Malley gave evidence that it was only after consulting Te Tirarau that Johnson sought agreement from the other owners of the land.[611] In September, Johnson also reported that the owners wished to repurchase three reserves (1,220 acres) which

he considered 'would not from their intrinsic worth be purchased by Europeans, but are valued by the Natives . . . so that the public rather profit by the transaction than otherwise.'[612]

On 5 October 1855, a deed of conveyance was signed by Te Tirarau and 18 others for the Maungakaramea block; however, O'Malley noted that Johnson had only paid Te Tirarau £2,000 of the promised £2,800 purchase price.[613] The remaining £800 payment (including the £100 for the Otaika reserve) was initially withheld by Kemp; citing 'repeated applications to the Government of several influential persons of the Ngatiwhatua [*sic*] tribe', he stated that payment should be delayed until these leaders had an opportunity to discuss the transaction with Te Tirarau.[614] Despite the clear existence of other claims, a second deed was signed by Te Tirarau and 16 others on 11 December 1855 when the remaining £800 was paid over.[615] O'Malley gave evidence that the papers published by the Native Land Purchase Department 'provide no reference to any authorisation for this second payment'. He argued that, as with the Maungatapere purchase, the records 'were clearly purged of material deemed particularly sensitive prior to publication in 1861.'[616]

Whatever the Crown's reasons for completing the purchase, it sparked tensions between Ngāti Whātua and Ngāpuhi. An account published in *Te Karere* described a large hui at Mangawhare in December 1855 attended by Ngāti Whātua and Te Tirarau and his allies.[617] *Te Karere* reported that Te Tirarau and Parore Te Āwha's supporters attended the meeting armed. Ngāti Whātua alleged a loaded gun had been pointed at their chief, Paikea; however the newspaper asserted this was merely an excuse 'to advance their claims to the land'.[618] Following the hui, Ngāti Whātua proceeded to construct a pā in anticipation of an attack by Te Tirarau. In March 1856 T H Smith, acting Native Secretary, informed Governor Gore Browne:

> the purchase by the Government of the Maunga Karamea Block has indirectly led to the revival of a feud between two tribes both claiming the land in that District. At present it is uncertain whether the endeavour of the Government to mediate in the matter will be successful. Should strife begin and loss of life ensue, it is impossible to say to what extent we may become involved.[619]

On 8 May 1856, Johnson reported that the survey of Maungakaramea had been disrupted by members of Te Uri o Hau (a hapū of Ngāti Whātua) who claimed ownership interests in the block.[620] In an attempt to exculpate himself, Johnson indicated that Te Uri o Hau's opposition at Maungakaramea spoke to much deeper inter-tribal conflict; 'the present state of the block has arisen from a native quarrel over which I have no control, originating about land in another part of the District'.[621] At the end of May *Te Karere* recorded Fenton as having successfully convinced parties to agree to an arbitration meeting in Auckland with McLean.[622]

The promised mediation finally occurred in late 1856, when McLean sought to 'strike a boundary between the tribes'.[623] Such a boundary would give Te Tirarau rights to sell land north of the Tauraroa River, and Paikea rights to sell south of it. Paul Thomas described this solution as both simplistic and unrealistic, however, there is little evidence of how rangatira interpreted it.[624] In November 1856, McLean notified Johnson that Te Uri o Hau had disposed of their claims to the land located between the Tauraroa and Manganui Rivers, which extended into the back boundary of the Maungakaramea block.[625] However, they declined to accept an additional payment of £100 that McLean had offered them for their interests in the disputed land in the Maungakaramea block 'to remove all future difficulties in connection with that transaction.'[626] He stated:

> [It] appeared to me that they [Te Uri o Hau] felt apprehensive that Tirarau would make it a cause of quarrel with them if they accepted any payment on land sold by him and bordering so close on the Tangihua range, therefore it is perhaps as well that the matter should stand over, leaving Tirarau to adjust it himself.[627]

McLean's solution was to simplify the disputed customary rights of the groups involved, and it was clearly motivated by a desire to facilitate further purchasing in the

district. Over the following years, the Crown's failure to adjust its approach to purchasing and continued reliance on Te Tirarau increasingly exacerbated tensions in the area until armed conflict would finally break out in 1862 (see section 8.5.2(1)(c)(v)).

(iv) *The Kaiwa purchase*

In the case of the acquisition of the 1,232-acre Kaiwa block, the purchase agreement was signed by Te Tirarau in November 1857 following an earlier failed attempt to survey it in March the same year.[628] The previous April, Johnson reported that the survey had been obstructed by Hamiona Te Hakiro, who had removed the survey pegs and ordered that the survey party 'quit the ground'.[629] Johnson had considered that Te Hakiro had 'a *bonâ fide* claim' in the block, and he could not 'force him to sell his claim against his consent'.[630] The survey was thus discontinued until May 1857, when Johnson reported that he had overcome opposition to the purchase 'by dealing with it in separate portions'.[631] He observed that Hori Kingi Tahua and Te Tirarau had offered the block for purchase, and that he was in

> no doubt of being able to obtain the rest of the block from the Natives of Ngunguru and Pataua, who are now holding back, lest King [*sic*: Tahua] and Tirarau should appropriate too large a share to themselves.[632]

The Government's original offer of £150 was rejected by Tahua, who requested a purchase price of £300. This news reached McLean privately through Te Tirarau, who was apparently in direct contact with him and had demanded that a further £50 would be required to complete the purchase. McLean wrote to Johnson in September 1857, questioning why the failure of his negotiations had not been reported earlier and to instruct his land purchase commissioner to 'confer with Tirarau and have a conveyance of land in question made without further delay'.[633]

Johnson responded days later and provided an account of the customary interests in the block, observing that the claimants included '[Wiremu Eruera] Pohe's tribe', who owned a large block at Parau Bay, and 'an old Chief named Horuona who resides near it'. Tahua only had a claim to 200 acres on the block, but he had gained the support of the other owners for an extension of the boundaries to an estimated area of 1,372 acres on the basis that they would receive a portion of the payment. Johnson recorded that the other claimants did 'not belong to the tribes of Tirarau and Hori King [*sic*] Tahua', and had warned him that 'if these conditions are not complied with, they will resist the occupation of the land'.[634]

Johnson considered that these conditions could be fulfilled by taking care to obtain the signatures of all the owners concerned before payment was made, 'by which means Tahua will be compelled to share the payment with them'. However, Johnson explained that he had not been aware that 'Tirarau had been moving in the matter', and he considered that his 'having made up his mind to demand £200 changed the state of affairs'.[635] The land purchase commissioner wrote again to McLean on 5 October 1857, this time privately, informing him that Te Tirarau sought immediate payment for the block without any restrictions on himself. The rest of the claimants, including Haimona Te Hakiro, wished to divide the payment amongst the owners 'in the ordinary way'. However, Johnson felt that the opposition to Te Tirarau was 'not strong enough to withstand him', and if paid the full purchase price, then 'there will be an end of the matter'.[636] He therefore sought authority from McLean to pay Te Tirarau for the lands 'waiving all former precedent – and the rights of the natives'.[637] However, after criticising Johnson for his failure to progress negotiations, McLean went silent and did not respond with official instructions, preferring to work behind the scenes, despite receiving a request from a district commissioner facing a complex situation.

Failing to receive instructions, one month later Johnson once more wrote privately to McLean on 19 November informing him that he had paid Te Tirarau the purchase moneys on 6 November after 'a long conference with that Chief'. Te Tirarau had promised Johnson 'to procure the signatures of the other claimants to the Deed, and pay them a share of the money for the land'. In the meantime, Johnson forwarded a purchase deed signed only by Te Tirarau.[638] He noted his discomfort with taking this step

not having received McLean's official approval. However, he was concerned that Te Tirarau was 'so impatient of any delay', and it was agreed that the purchase moneys would remain untouched in Te Tirarau's possession until McLean approved the matter.[639] As O'Malley observed, the land purchase department's official record provides no further details as to Johnson's decision to proceed with completing the purchase with Te Tirarau alone.[640] However, a further private letter from Johnson to McLean dated 16 November suggests that Johnson was concerned that denying Te Tirarau might have a negative impact on his future purchase operations. Johnson gave the following account:

> Tirarau came over to see me personally last week on the subject – and insisted upon having the money – he was very civil and friendly – for the purpose of attaining his object, and I saw nevertheless that if I withheld it that a rupture of friendly relations between myself and him would be caused which might have very baneful effect in any future operations which I may be engaged in . . . I judged it to be less productive of injurious consequences to pay the money to Tirarau, than it would be to withhold, as he threatened either to tapu the place for ever, or seize upon it and the adjoining country, both of which courses would only have further complicated the question, and I accordingly paid Tirarau on behalf of all parties concerned and took a conveyance from him of the Land.[641]

In his official report on the purchase, Johnson noted that he had paid Te Tirarau alone 'on the recommendation of the Chief Commissioner, who has the confidence in the integrity of that Chief'.[642] O'Malley suggested that the discrepancy between this report and his prior letter indicated that McLean had failed to issue instructions on this point, but 'had a decisive say behind the scenes in approving the deal done'.[643] The Chief Native Land Purchase Commissioner evidently refrained from issuing Johnson official directions that were in conflict with his general instructions.

Another telling feature of Johnson's report was the disclosure that had he not agreed to pay Te Tirarau, it would have endangered the sale of an adjacent block of 16,000 acres, the survey of which he reported as completed and which he feared might be vetoed along with 'all the land in the district'.[644] Dr O'Malley described the transaction as 'one of the most dishonest Crown purchases conducted anywhere in New Zealand in the pre-1865 period'.[645]

In our view, there were clear flaws in the purchase of the Kaiwa block. The Crown was aware of the extent of claims to the land, and Johnson had taken steps to establish an arrangement where the various owners would consent to the sale. However, as Dr O'Malley put it, McLean deliberately overrode the interests of the other claimants to the block, confirming the purchase of Kaiwa with Te Tirarau alone, and conducting 'a truly contemptible retrospective "investigation" into the claims of those previously acknowledged as owners of the block in order to justify their exclusion from the deal'.[646] After refusing the original purchase price of £150, Wiremu Eruera Pohe, Hori Kingi Tahua, and Haimona Te Hakiro were excluded from any opportunity for input into the transaction. In March 1858, Johnson noted that no distribution of the purchase moneys had been made to the other owners, and that 'Tirarau has neither told me or them what he intends to do with it'.[647] Te Hakiro appears to have written to Johnson seeking a portion of the purchase moneys, though there is no evidence of the land purchase commissioner taking any steps to ensure that payments were made. By the following May, Johnson reported that Pohe also still sought payment from Te Tirarau, and though Johnson had previously recognised his claim to a portion of the block, he now dismissed it as 'very vague and uncertain'.[648] In the end, Johnson gave up on acquiring the signatures of the other owners, and abandoned any responsibility for recording their consent to the purchase. After he convinced Pohe to 'consent to the occupation of the Block by the Europeans', despite not yet receiving payment, he considered the matter of the purchase moneys as 'entirely a Native one between themselves'.[649]

Te Tirarau's approach to the negotiations appears to have been that of an intermediary, who acted to finalise the agreement in partnership with McLean. It remains unclear whether he had the support of some of the other

owners in taking this step, but clearly the Crown had not established general consent for the purchase or the price; rather, it used Te Tirarau's authority in the district and his desire to strengthen his relationship with the Government as the basis for its unjustifiable decision to exclude the other owners from the final purchase agreement.

(v) *Crown purchasing and the Mangakāhia conflict*

Crown purchasing was the catalyst for armed conflict between Te Tirarau of Te Parawhau and Matiu Te Aranui of Te Uri o Hau hapū of Ngāti Whātua and Te Māhurehure at Waitomotomo in May 1862.[650] Throughout the 1850s and early 1860s, Crown purchase activity in Whāngārei and the river valleys of Wairoa, and Mangakāhia had given rise to a number of land disputes between hapū of Ngāpuhi, Ngāti Whātua, and their relations, Te Uri o Hau. Armstrong and Subasic observed:

> land disputes were a feature of the history of the region, and continued through the 1850's as the land, and the valuable timber growing upon it, became an increased focus of Crown and settler attentions.[651]

Paul Thomas described the northern Wairoa as a 'border zone' between these groups, who had 'a long history of intermarriage and warfare, and a multi-levelled and fluid system of tribal affiliations'.[652] Te Parawhau had been able to expand their territorial interests west into Kaipara and Te Roroa territories following the defeat of Ngāti Whātua and Te Uri o Hau at Te Ika a Ranganui in 1825 (we discuss these events and the tribal landscape of this area in chapter 3, see sections 3.3.4(3), 3.3.7(3), and 3.4.1).[653] However, when Te Uri o Hau and Ngāti Whātua returned to Kaipara from their respective exiles, Te Parawhau rangatira Te Tirarau found himself increasingly in competition with his relative Paikea Te Hekeua over authority and territorial interests in the area.[654]

The Crown was aware of these tensions before it set out to begin purchasing in the district. In his initial instructions to Johnson, McLean directed him 'to take an early opportunity to visit the Kaipara district to arrange a dispute between the Ngapuhi and Uriohau [*sic*]'.[655] Crown officials broadly viewed the purchase of Māori land as the best means of resolving inter-tribal disputes, as well as assimilating Māori into the colonial land and legal systems. They also failed to recognise Te Raki Māori understandings and expectations of land transactions.[656] As Thomas observed, the Crown's continued reliance on land purchasing as a means of resolving inter-tribal tensions 'was predicated on an assumption that the signing

Paikea Te Hekeua, a rangatira of the Te Uri-o-Hau hapū of Ngāti Whātua, and the cousin of Te Parawhau leader Te Tirarau Kūkupa. Paikea departed the district following Ngāti Whātua's defeat at Te Ika a Ranganui in 1825 but later returned and settled in northern Wairoa. Tensions between him and Te Tirarau increased during the 1850s as the Crown began purchasing large tracts of land in Kaipara and Whāngārei, contributing to the outbreak of open conflict at Waitomotomo in 1852.

Parore Te Āwha, a Te Parawhau and Te Roroa rangatira and one of Te Tirarau's allies during the Mangakāhia conflict of 1862.

of a land deed extinguished all Maori interests in that land'.[657] However, Te Raki Māori did not widely accept that land transactions had this effect, as McLean himself had acknowledged in 1856. Land transactions instead represented stronger relationships with the Crown and settlers that would bring benefits and enhance the mana of rangatira and their hapū (see section 8.3.2(6)). As Thomas put it, 'local tribes viewed them as a method of gaining rather than losing power'.[658] In this way, purchases were thus a further arena for inter-tribal competition, and if carried out without sufficient concern for common consent of all owners, they had the potential to spark or worsen inter-tribal tensions rather than resolving them.

Te Uri o Hau claimed interest in a number of Whāngārei blocks, including the Maungakaramea, Maungatapere, Ruakaka, and Waipu blocks.[659] Thomas observed that 'the Crown's perceived favouring of Tirarau caused enormous disquiet among the chief's Maori rivals'.[660] As we have discussed, the Maungakaramea purchase had led to an armed confrontation in December 1855 between Te Tirarau and members of Ngāti Whātua and Te Uri o Hau, and disruptions to the survey of the block the following year. In October 1856, McLean sought a mediated solution that would provide a pathway for further purchasing by striking a boundary line between Te Tirarau, and Paikea's lands on either side of the Tauraroa River.[661] However, it was clear to McLean that his boundary agreement had done little to resolve the core of the dispute. Only a few weeks later he wrote to Johnson directing him to seek to prevent Te Tirarau from bringing an armed party to harvest timber in a forest near the residence of his ally Parore Te Āwha, and within 'the territory now in dispute between him and Paikea'.[662] Johnson responded that 'it has for many years been the practice of the Northern tribes to resort to the Wairoa river for the purposes of squaring spars, and collecting kauri gum'. In a tacit acknowledgement of the continuation of the overlapping resource rights and interests held by Ngāpuhi and Ngāti Whātua rangatira in the area, he suggested that the task of persuading Te Tirarau to relinquish access to the timber resources was probably beyond him.[663]

With matters unresolved, McLean visited Walton's farm in Maungatapere in February 1857, where he treated with Te Tirarau and Parore Te Āwha, and discussed possible land transactions (including the Tangihua block in the Kaipara district), and the conflict with Ngāti Whātua and Te Uri o Hau. This visit came one month after Matiu Te Aranui had written to the Governor to call his attention to Te Tirarau's plans to sell land to McLean. The land, Te Aranui wrote, did not belong to Te Tirarau, but to himself and his people. He would not consent to any survey,

for it would constitute an 'unlawful taking' of the land.[664] Thomas noted that McLean only issued an invitation to Paikea to meet with him and the other rangatira after journeying with Te Tirarau to the Mangawhare residence of the merchant Hastings Atkins. Paikea was outraged at this slight and declined to attend, interpreting McLean's actions as further evidence of the Government favouring his rivals.[665] Following McLean's visit, William White, a trader with close connections to the Kaipara tribes, wrote to the Governor to convey his great sense of concern about the effect of the Government's actions:

> That the Ngatiewhatua [*sic*] tribes generally, view with the most serious alarm and regret, the extraordinary proceedings of the Land Purchase Department, and point with especial emphasis and significance to Mr Commissioner McLean's late visit to the Kaipara as the climax of a series of transactions which has hastened matters to the very brink of a crisis, which the Ngatiwhatua have most anxiously laboured to avoid.[666]

Thomas observed that White's pleas were met with silence from the Government, despite receiving further reports that 'Maori throughout Kaipara and Wairoa continued their acquisition of firearms and ammunition'.[667] A large hui was held in March 1858 to settle ongoing conflicts about tribal boundaries.[668] Henry Kemp (the Bay of Islands District Land Commissioner) and a number of native assessors attended this meeting and the settler press reported both Matiu Te Aranui and Te Tirarau's ally, Hori Kingi Tahua, had arrived with groups of armed men.[669] It appears that neither Te Tirarau nor Paikea attended. The meeting concluded with the different parties firing their guns as they departed, and Thomas concluded that there did not appear to be a consensus reached on tribal boundaries in Mangakāhia.[670] By late 1858, John Rogan, who had by then replaced Johnson as land purchase commissioner in Whāngārei described his discussions with Māori in the district as like entering the 'midst of the fire'.[671]

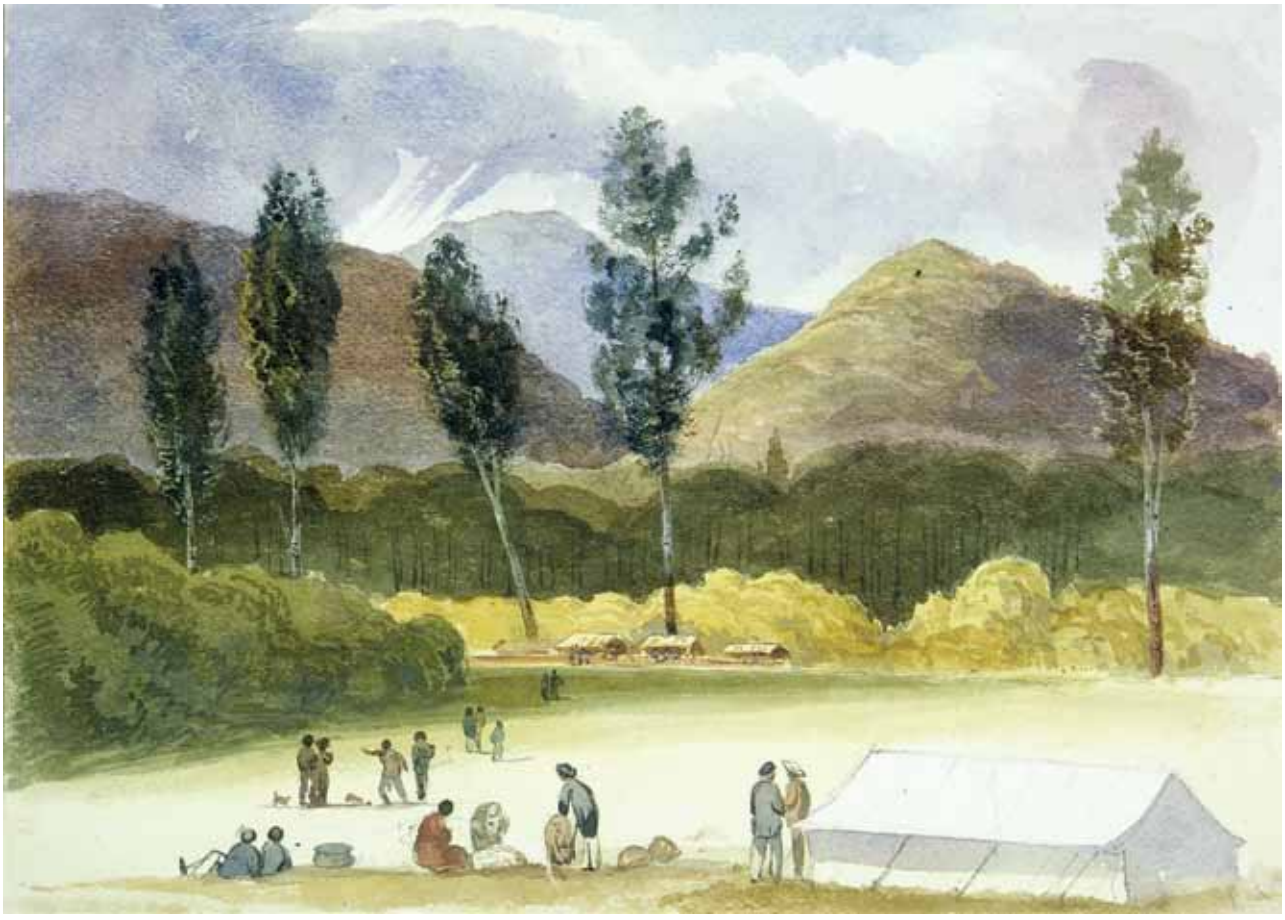
In an attempt to diffuse tensions, Governor Gore Browne raised the possibility of further mediation in early 1859. Each party indicated their support; however, for reasons that are unclear, the meeting never took place.[672] In 1860, Ngāti Whātua and Ngāpuhi convened their own 'great meeting' in Te Kopuru, highlighting a mutual desire to resolve the disputes. The importance of the meeting was emphasised by Ngāti Whātua's refusal to leave the meeting at Government surveyor, S. Percy Smith's request to defend Auckland against an anticipated attack from tribes of Waikato.[673] Percy Smith remained in attendance at the meeting, reporting that after six days of 'old formality' and 'ceremony' some degree of 'peace was made'.[674]

However, this fragile peace was shortly threatened again as Rogan renewed purchase negotiations in Kaipara in 1860.[675] By early 1861 Te Uri o Hau had renewed their protests that the Crown continued to negotiate purchases with Te Tirarau at Mangakāhia and Wairoa. In February 1861, Matikikuha of Te Uri o Hau wrote to Gore Browne warning that 'the word spoken by us was that te Kopuru be the end. Trouble has now arisen, and it will be very bad'.[676] For their part, Te Tirarau, Parore Te Āwha, and Hori Kingi Tahua complained to the Government that Matiu Te Aranui was determined to survey their lands and was preparing for a large-scale confrontation. They wrote to Gore Browne, stating:

> we are not willing to have the chain dragged over the living and the dead. For this place belonged to our ancestors, descended to our fathers and has come down even to us who now live upon it.[677]

By the end of 1861, Rogan was forced to concede that his purchase negotiations had failed to resolve the dispute and 'the Wairoa question is now more complicated than heretofore'.[678]

In early 1862, rumours once again spread that the Crown had entered into negotiations with Te Tirarau for land in the disputed Mangakāhia area.[679] Bay of Islands Civil Commissioner George Clarke senior dispatched Resident Magistrate Henry Williams to meet with Matiu Te Aranui to assure him that the Crown had no intention to purchase the disputed land. However, Thomas observed that these appeals would hardly have been credible as '[j]ust the year before, Rogan had been attempting to purchase disputed land in the area'.[680] Apparently



Te Tirarau's village at Mareikura, near Tangiteroria, on the Northern Wairoa River. The artist is William Fox (1812–93), who was the Premier of New Zealand for four short terms in 1856, 1861 to 1862, 1869, and 1873.

in response, Te Aranui had threatened to begin to survey the land at Mangakāhia, which Te Tirarau viewed as a provocation.[681] By April 1862, Te Tirarau and Matiu Te Aranui had constructed pā and assembled their forces near Waitomotomo. Serious fighting broke out on 16 May, following several days of skirmishes. Historian Tony Walzl gave evidence that at least three men on Te Aranui's side were killed and others wounded on 16 May. Two days later, several women on Te Tirarau's side had taken up a canon and exchanged small arms fire, but no one was injured.[682] The reports on the numbers of people killed during this fighting vary.[683]

The conflict continued until June, when a ceasefire was reached. After meeting Paikea, Te Hemara, and other rangatira, Governor Grey visited the district and the government-mouthpiece newspaper *Maori Messenger/Te Karere Maori* emphasised his role in securing the peace. However, Thomas argued that 'it would seem that the essential decision to stop the fighting had been agreed to before he had even arrived.'[684] Further arbitration between

the rangatira was held in Auckland in early 1863, presided over by F D Bell. Matiu Te Aranui had fallen critically ill and died the previous December, and his case was taken over by the Hokianga rangatira Te Hira Ngaporo. During the mediation Hare Hikairo, who gave evidence in support of Te Hira Ngaporo, set out the core of Matiu Te Aranui's grievance:

> Now this is the real reason why that blood flowed. Matiu and his people were living at Mangakahia – when he heard that Maungatapere had been sold, that Tangihua had been sold, that Maungaru had been sold . . . Matiu thought . . . [that] he would lose the remaining portions of his land which still remained to him; he had never received anything, that was the reason that blood was spilt.[685]

In the end, the arbitration failed to reach a settlement, and it fell to Governor Grey to make a decision. Grey determined that Te Tirarau had an 'overall' right to the land, but if he sold it Matiu Te Aranui's descendants should receive a share of the payment; the Government would determine the relative payments in the event of a dispute over further purchases. Researchers David Armstrong and Evald Subasic observed:

> Grey's decision appears to have been based on his understanding that in Maori customary terms, long and undisturbed possession conferred a good title. But land sales were an innovation unknown to Maori custom. Hence, according to Grey, when land was sold the original owners were entitled to a share.[686]

While this solution was celebrated in the press, Thomas argued that it had the hallmarks of a politically motivated decision designed to facilitate future purchases.[687] Armstrong and Subasic similarly thought that Grey's decision 'certainly had the potential to advance settler interests, and that appears to be its underlying *raison d'etre*'.[688] In their view, it was not surprising that 'tensions continued to simmer into the 1870s and there were a number of disputes, complaints and reinterpretations of Grey's award'.[689] Ultimately, this drawn-out conflict did not come to an end until August 1880 during the Native Land Court title determination of the Waitomotomo block where Te Tirarau withdrew his claims to the land, stating,

> Listen to me. My word to you is this. Leave me out of the title. I give all my share to you both (both sides), only let there be no fighting. I am very old, and shall soon die. Let me be sure that when I am dead there shall be peace amongst the young men. Take the land. Let my friend Rogan settle it this day.[690]

Armstrong and Subasic concluded that ultimately it was not Grey's arbitration or the Native Land Court which resolved the underlying source of the tensions between the two groups. Rather, 'peace seems to have been maintained by old Tirarau himself in a selfless gesture which no doubt served to enhance his mana and his standing as a great rangatira'.[691]

(d) Sketch plans and surveys of boundaries and reserves

The claimants argued that many of the blocks the Crown acquired in Te Raki had uncertain boundaries, and that survey or other plans were often not prepared prior to the completion of those transactions. In such circumstances, they contended, Te Raki Māori consent to alienations could scarcely be considered meaningful.[692] Crown counsel took the opposite view, noting that in December 1856, Johnson had reported that Te Raki Māori were 'much pleased with the system of surveying the land previous to sale'. Counsel also submitted that from 1856 onwards 'there does not appear to have been a general failure to ensure surveys were completed before a deed was signed'.[693] Finally, Crown counsel asserted that he was unaware of evidence that Te Raki Māori were prejudiced in any specific case because of a failure to ensure completion of a survey prior to a deed being signed.[694]

From early on, McLean was certainly aware of the need to undertake surveys as part of the purchasing process. In October 1854, he recorded:

> As a general rule when the Natives agree to sell a Block of land the first step is to have its external Boundaries

> perambulated and surveyed, the Native Sellers themselves pointing out the boundaries of the land they wish to dispose of, the reserves should then be accurately marked off and surveyed, always in the presence of the Natives concerned.[695]

However, McLean's concern for the importance of surveys when purchasing Māori land was not shared by the Surveyor-General, Charles Ligar. As we have discussed, Ligar recorded that it was sufficient for the Crown purchase agent to walk around the boundaries, estimate the area, and supply sketches with deeds. The object, Ligar noted, 'was to acquire one block after another', rendering unnecessary 'a distinct survey of each . . . as it would have only shown the manner in which the whole district had been acquired'.[696] In other words, the Crown expected that it would acquire whole districts, obviating the need to survey constituent blocks, even though large districts almost certainly would have included lands owned by several hapū, and surveys were intended, in part, to ascertain whether there was opposition on the ground.

Therefore, prior to 1856, surveys of purchased blocks were to be conducted after deeds had been signed. However, the absence of pre-purchase surveys created substantial challenges when the lands were to be on-sold to settlers by the Auckland Waste Lands Board. In September 1855, surveyor C P O'Rafferty pointed out that the sketch plan attached to the purchase deed for the Ruakaka block was 'valueless to either the seller or buyer of any part of the block'.[697] Similarly, he noted that the Ahuroa and Kourawhero blocks were represented on a sketch with 'four ruled lines enclosing the words "not yet explored". This is all I know, or can learn here about it.'[698] After receiving further appeals from Charles Taylor, the Chief Commissioner of Waste Lands, Ligar agreed that the Government would undertake to satisfactorily define the boundaries of the blocks purchased to date, stating that 'although it will entail a heavy expense, I do not see how it can be avoided'.[699] As O'Malley noted, 'while it was considered perfectly acceptable to purchase lands from Māori without surveys, it was unthinkable that they should be sold to settlers on the same basis'.[700]

In his evidence to the 1856 Board of Inquiry on Native Affairs, McLean highlighted the delays in completing purchases caused by deficiencies in survey. He noted his directions 'that the external boundaries of each block should be perambulated in the presence of the native owners; [and] that the reserves for their own use should be carefully surveyed'. However, he remarked, '[a]s yet no provision has been made for effecting these surveys, although they form an indispensable part of the purchasing operations.'[701] O'Malley gave evidence that McLean's 1856 appeals finally secured him the funding for two surveyors to support land purchasing in Te Raki.[702] In September 1856, McLean advised Kemp and Johnson that surveys would now be conducted prior to purchase and plans attached to deeds of sale.[703] A few weeks later, he reminded Kemp that 'all boundaries should be distinctly defined previous to any payment being made to the Natives'.[704]

Kemp appears to have found the direction irksome. In May 1858, he proposed what he termed 'the simplest form of survey'; that is, fixing the principal points and estimating the area of land involved which, he suggested, 'would be effectual and binding upon the Natives where purchases become connected'.[705] McLean rejected the idea, insisting that the Government was 'most anxious to adopt the most economical system; provided always that such surveys are so clear and distinct that no question can afterwards arise respecting the boundaries'. All transactions with Māori, he informed Kemp,

> should be so clear, distinct, and well understood, that no possibility of a question arising in consequence of insufficient surveys should ever exist. The subsequent evils resulting from undefined boundaries are often much greater than the first expense of an accurate survey.[706]

In May 1861, McLean found it necessary to remind his district land purchase commissioners that all reserves 'should be defined and marked off before the final payment is made for the block of land of which they may form a part', and that before any block was handed over to the commissioner of Crown lands of the province within which it was located, a plan of the block 'with all the Reserves specified, duly certified by you or a Surveyor

authorised by you, should be furnished to the Provincial Land Office'.[707]

Whether McLean adhered to his insistence that the boundaries of a proposed purchase should be walked by all involved, and whether all district land purchase commissioners complied, is less clear. Dr Rigby's list of pre-1865 Te Raki Crown purchases identified the deeds that were accompanied by a plan or a sketch plan. Of 101 purchases, 46 were listed as containing plans, and 26 as containing sketch plans, while 29 were listed as having none.[708] Of those 29 deeds listed as having neither plans nor sketch plans, 11 involved transactions completed from 1857 onwards. This evidence does not entirely support the Crown's contention that, after 1856, surveys were generally completed prior to deeds being signed.

As we have noted, Government officials considered that the sketch plans produced before 1856 were highly questionable. Evidently, these issues remained unresolved in some cases, particularly if the purchased lands were not to be immediately on-sold to settlers. In his report on Waimate North Māori lands, historian Craig Innes noted that the February 1856 Wiroa and Omawhake purchase deed included a sketch plan that specifically included the 'proposed location of a township', which could have had a substantial and positive economic impact. He also mentioned the use of a 'semi circle of stones' to specify the location of a wāhi tapu site on the land being purchased, and this was included on the sketch plan. However, according to Innes, the plan was so roughly drawn that 'it would have been impossible to directly relate the sketch to the extent of the purchase on the ground'. As a result, it was later necessary to rely on the written descriptions of the boundaries as evidence of 'the extent of the purchase and therefore the area of land later available for determination by the Native Land Court'.[709]

Furthermore, there is evidence that the plans produced after 1856 remained flawed records of the lands that had been transacted. In the case of the Matawherohia block in Whangaroa, the purchase deed referred to a sketch plan although no such plan was attached.[710] In October 1858, Kemp reported that the block was likely to be purchased for £250 and estimated its area to be 8,000 acres. By January 1859, the block had been surveyed, and the actual area ascertained was 3,200 acres. This discrepancy was pointed out by the office of the Chief Native Land Purchase Commissioner, and it was further noted that this had 'the effect of nearly trebling the price per acre', as compared with Kemp's original estimate.[711] O'Malley notes that Kemp's response was not included in the correspondence published by the Land Purchase Department, but 'it was evidently deemed satisfactory, since in June 1859 the purchase of the block at the price of £250 was completed'.[712]

Overall, McLean's instructions regarding surveys notwithstanding, a certain amount of laxity crept in. This was notable in some of Kemp's purchases, including that of the 12,390 acre Kawakawa block (completed in May 1859) for which no plan was attached to the deed. In this case, Kemp had arranged the survey of a much larger block, which he estimated to be 50,000 acres and included both the Ruapekapeka and Kawakawa purchase blocks.[713] However, when Maihi Parāone Kawiti rejected the proposed purchase price of £2,000, Kemp was forced to accept the purchase of only the northern portion (the Kawakawa block), from Tāmati Pukututu and 26 others for £1,000.[714] He apparently did not consider it necessary to provide a plan for the smaller block prior to completing the purchase, and the block was not surveyed until the following August.[715] It is also unclear why the survey plans were not attached to the June 1859 Matawherohia purchase deed. However, in a further unexplained development, Kemp recorded a larger area of 3,746 acres for the block in October 1859, casting some doubt on the status of the original survey and the information it had ascertained about the purchase area.[716] In the end, O'Malley commented:

> no one knew quite exactly what was being transacted, no plan was attached to the deed despite reference in the text to one, and (as usual) no reserves were set aside for Māori occupation and use.[717]

Though it might seem that the Crown lost out in this purchase by reason of its miscalculation, the purchase price for the reduced area remained low, at only 1s 6d per acre.

In March 1859, McLean again found it necessary to remind Kemp:

> In every instance, the surveys of external boundaries should precede the purchase of any Blocks of land that may be offered for sale by the Natives, in order to avoid dispute and misunderstanding relative thereto.[718]

In 1858, John Rogan, a surveyor by training, criticised Johnson's sketch plans as well, describing them as 'daubs that look as if a quantity of bullock's blood has dropped accidentally on a sheet of cartridge paper and bespattered it all over'.[719]

The claim that Te Raki Māori were not prejudiced by lack of survey in any specific case is also contradicted by the evidence. The area of Te Whakapaku (purchased in 1856), for example, was estimated at 2,688 acres, and the Crown paid £200 or almost 1s 6d per acre. After purchase, on survey, the block was found to contain 12,332 acres, representing a huge discrepancy. No adjustment in the purchase price appears to have been made, meaning that the Crown acquired the land at the rate of just under fourpence per acre.[720] The Muriwhenua Land Tribunal, in whose district Te Whakapaku largely sits, described the transaction as 'a paper thing without any obvious reality'.[721] The story was repeated elsewhere in our inquiry district. Kemp estimated the area of Te Wiroa and Parangiora at 1,000 to 1,500 acres; the owners were paid £200 or 2s 8d per acre for 1,500 acres. The block's area was subsequently established as 2,550 acres, so that the owners received only 1s 7d per acre. Similarly, Kemp estimated the area of Kaipataki at 1,200 to 1,800 acres and paid £1s 7d for 1,263 acres. The block in fact had an area of 2,650 acres, so that in effect the Crown secured an additional 1,387 acres at no cost.[722]

(2) *Prices*

On the matter of the price paid by the Crown for the large tracts of land that it acquired from Te Raki Māori during the period from 1840 to 1865, claimant counsel distinguished between the moneys paid by the Crown and the collateral benefits Te Raki Māori were assured would accompany Pākehā settlement and economic development. The claimants' central allegation was that, even when the promised collateral benefits are considered, the prices were 'inadequate'. The claimants contended that the Crown's control of land purchasing allowed and encouraged the transfer of wealth in the form of the colony's key natural resources from its customary owners to settlers, and that such transfer had major implications for their capacity to participate in and contribute to the development and expansion of the colonial economy. Several other common allegations supported that core contention:

- The Crown failed to establish accurately the areas that it acquired.
- The Crown failed to factor in the value of standing timber.
- Independent valuations were never sought.
- The Crown instead set the maximum prices it would pay.
- No provision existed for independent arbitration when prices were disputed.
- The Crown foreclosed on alternatives, such as leasing and licensing of timber-felling, by unilaterally extending its pre-emptive powers.
- The promised collateral benefits did not materialise.[723]

Crown counsel acknowledged that the prices paid for land acquired from Māori were generally low but argued that it was difficult to establish what constituted a fair or reasonable price, given that land values varied according to such factors as quality and location. Counsel then added that the real price was not the main consideration so much as the collateral benefits that would flow from settlement and development – provided Māori retained sufficient land.[724] We discuss the issue of collateral benefits and whether the Crown delivered on its promises to Te Raki Māori in the next section.

In this section, we consider what factors drove the prices the Crown paid for land during this period, and whether they were fair in the context of the Crown's asserted right of pre-emption over land purchases.

As we discussed in section 8.3.2, a key premise of the land fund model for colonisation was that Māori land could be purchased for nominal value and that, as

settlement proceeded along with development in the district, Māori would participate in its benefits so long as they retained sufficient reserves. Crown officials were aware of the implications for the Government's plans when Māori began to appreciate the monetary value Pākehā placed on land. It was an ongoing anxiety for officials. FitzRoy commented on it, as did Grey.[725] For example, in 1848 Governor Grey observed that Māori were

> becoming aware of the value that had been given to their lands, and actuated by motives of self-interest, refused to part with them for a nominal consideration, but insisted upon receiving a price bearing some slight relation to the actual value of the lands at the time the purchase was completed.'[726]

During the 1850s, the Government set the price its land purchasers could offer for land in Te Raki. For instance, in January 1854 Johnson was advised by the Colonial Secretary that he could offer for large blocks, 'including all lands', not more than sixpence per acre, and up to one shilling per acre for smaller, desirable blocks 'which may prove available at once, and likely to be soon required'.[727] Consideration of price was one reason for pursuing the purchase of large blocks; as McLean advised Johnson in November 1857, the practice of acquiring small blocks meant that the prices were 'much larger than the average agreed upon by other Commissioners'.[728] Similarly, when Kemp proposed to purchase the 3,576-acre Taraire block for £400, McLean responded by criticising the 'excessively high' suggested price.[729] This appears to be one of the few areas where McLean was willing to rebuke his agents.

The 1856 Board of Inquiry on Native Affairs also discussed the matter of price. It lamented the decision of many Māori to retain large tracts of land 'which the European settlements have enhanced in value', and restated a familiar argument that the difficulties being experienced (presumably the higher prices being sought) would not have arisen had 'all the land' been acquired upon the establishment of the colony.[730] It further argued that the longer the purchase of land was delayed, the greater would be the cost of purchase. 'If this is not done', the board concluded:

> every piece of land which is fenced in, and reclaimed, every road which is made, and every European settler, who arrives in the country, only serves to give a value to the unimproved tracts of native land which surround the settlements.

Offering higher prices was not deemed necessary. 'The price with them is a secondary consideration', it claimed. According to the board, '[m]ore or less, every transfer of land may be looked upon as a national compact, and regarded as binding both parties to mutual good offices'. It then proposed that prices should be negotiated, under pre-emption as favoured by Māori (it claimed).[731] In effect, the existing system of pricing and purchasing would remain, but the board wanted the process expedited.

Crown officials justified low prices for large tracts on the grounds that they included lands of varying quality and utility. When giving evidence much later before the 1891 Commission into the Native Land Laws, Rogan, the former Kaipara and Whāngārei district land purchase commissioner, explained that his response to Māori challenges about the low prices paid was that the blocks acquired included both 'the good as well as the bad, and that this 6d an acre is paid for those sandhills which are being blown away, as well as for the good land. The private purchasers would not do that.' He recorded Māori as intimating that they would 'keep the sandhills if you will allow us to sell to any man we like'.[732] It was an incisive and deft response to which Rogan appeared to have had no answer.

On the other hand, the Crown refused to recognise the value of the resources on the land it sought to purchase. In mid-1859, Rogan suggested to McLean that the Crown had obtained the 38,000-acre Pakiri block 'at a ridiculously low price'.[733] Acquired in March 1858, the Crown paid £1,070 or 6.75d per acre for the block; its kauri alone was recognised at the time as being worth 20 times the sum paid.[734] Similarly, O'Malley argued that the Crown's purchase of the 19,592-acre Pupuke block in Whangaroa for £1,273 was 'strategic and resource based'.[735] This block would connect the Crown and settler lands in the Bay of Islands with those in Mangonui, and it was apparent that it contained extensive kauri reserves. Though Kemp had

been required to pay an increased per-acre rate (2s 6d per acre) to secure this favourably positioned tract, with its outlet to the Whangaroa harbour, he 'evidently did not consider that the value of the timber on the block should be appraised and factored into the price paid'.[736] O'Malley also gave evidence that the timber was eventually sold to Europeans for a shilling per 100 feet of timber in the 1880s, and was valued at six shillings per 100 feet by the 1920s. Assuming 10,000 feet of timber per square acre, O'Malley considered that 'the Crown's purchase money paid for Pupuke and other Northland land blocks containing extensive timber reserves was easily recouped many times over'.[737]

There is little doubt that the Crown thought it was acquiring land at a good price. Johnson suggested to McLean that, although the Kaurihohore block had cost £550, it would realise over £3,000 on resale as it contained excellent agricultural land and was easily accessible, being immediately adjacent to Whāngārei.[738] Kemp also noted that he had secured the 4,554-acre Okaihau 1 block – 'thought by good judges to be worth at least £5,000' – for £450.[739]

In a limited number of cases, rangatira were able to negotiate higher prices, though only within the terms set by the land purchase department. For instance, in regard to the 1856 purchase of the Omawake block, Kemp recorded that he had offered the rangatira concerned the sum of £300, while suggesting that 'should the Chiefs not accede to these terms, an additional hundred might be offered'.[740] The offer was accepted, and this block was subsequently purchased for £400.[741] We have also discussed Te Tirarau's demands for further payment from Johnson for his interests in the Ruakaka and Waipu purchases.[742]

Such concessions to Māori demands were rare, and the evidence points towards widespread dissatisfaction about the prices the Crown paid. One of the only instances of Crown consultation with Te Raki Māori about prices during this period occurred at the Kohimarama Rūnanga of 1860 (discussed in chapter 7 section 7.4). There, Māori speakers both lamented their lack of bargaining power and decried the prices offered by the Crown for land. In his address to the assembled rangatira, McLean acknowledged that the low prices were a source of dissatisfaction, as was 'the fact that the land is sold at a higher rate when it comes into the possession of the Government'.[743] McLean then simply restated the Crown's position and implied that development was solely contingent on European settlement and investment.[744] He reasoned that the discrepancy in price was justified by the Crown's investment in the survey of the land and the construction of bridges and roads 'by means of which the produce of the land may with facility be conveyed to the towns for sale'. He explained that land could only become productive after it was surveyed, and it was the 'improvement consequent on European settlement which really enhances the value'.[745]

As we noted in chapter 7, Te Raki rangatira were muted in their response to McLean's statements and his proposals concerning land. However, as Daamen, Hamer, and Rigby observed, '[w]hen Maori began to speak at Kohimarama on 11 July 1860, they lost no time in denouncing Crown offers of sixpence an acre'.[746] Te Keene of Ngāti Whātua stated that he had asked the Crown for five shillings an acre, but was only paid sixpence. His grievance was that the Crown's refusal to negotiate over price undermined his authority. As he put it, 'Na, kahore he ture i a hau. Na konei a hau i pouri ai. Ko te ahau kau o te ture kei au (Therefore I have no law. On this account am I grieved. Only the shadow of the Law belongs to me)'.[747] In his written response for Te Parawhau, Wiremu Pohe also submitted:

> In selling land, we receive but a small price per acre, namely two shillings per acre for the good portions, and six pence per acre for the inferior. This causes dissatisfaction. The heart is not content with that price.[748]

The sense of grievance expressed in these statements suggests that the Crown's refusal to negotiate on the matter of price was viewed both as unfair and as an encroachment on the authority of rangatira. In June 1861, almost a year after the Kohimarama Rūnanga, Kemp acknowledged that opposition to Crown purchasing was increasing among Te Raki Māori. He had found that resistance to

Crown land purchase in Taranaki, where war had broken out in March 1860, was 'the permanent subject of discussion with the natives here'. He claimed that it had been suggested to Māori – by whom he did not say – that:

> the present system of purchase has been but part of a scheme under which to dispossess them of their lands, (the price given for below its real value,) and eventually to confirm their own claims to certain limited spots; the residue to become unconditionally the property of the Crown.

Kemp added that, in his view, Māori would be glad to see

> some modification in the present mode of extinguishing Native Title – at present, their confused notions of the real value of land, make it sometimes very difficult to convince them, that the price paid per acre by the Government for Waste Lands is generally speaking fair and reasonable.[749]

Kemp did not explore those 'confused notions' nor did he specify the 'modifications' that he may have had in mind. Yet his comments were offered at a time when Crown purchases in Te Raki had contracted sharply and when Ngāpuhi and other Te Raki Māori were closely watching developments in Taranaki and in the Waikato.

(3) *The Mokau block*

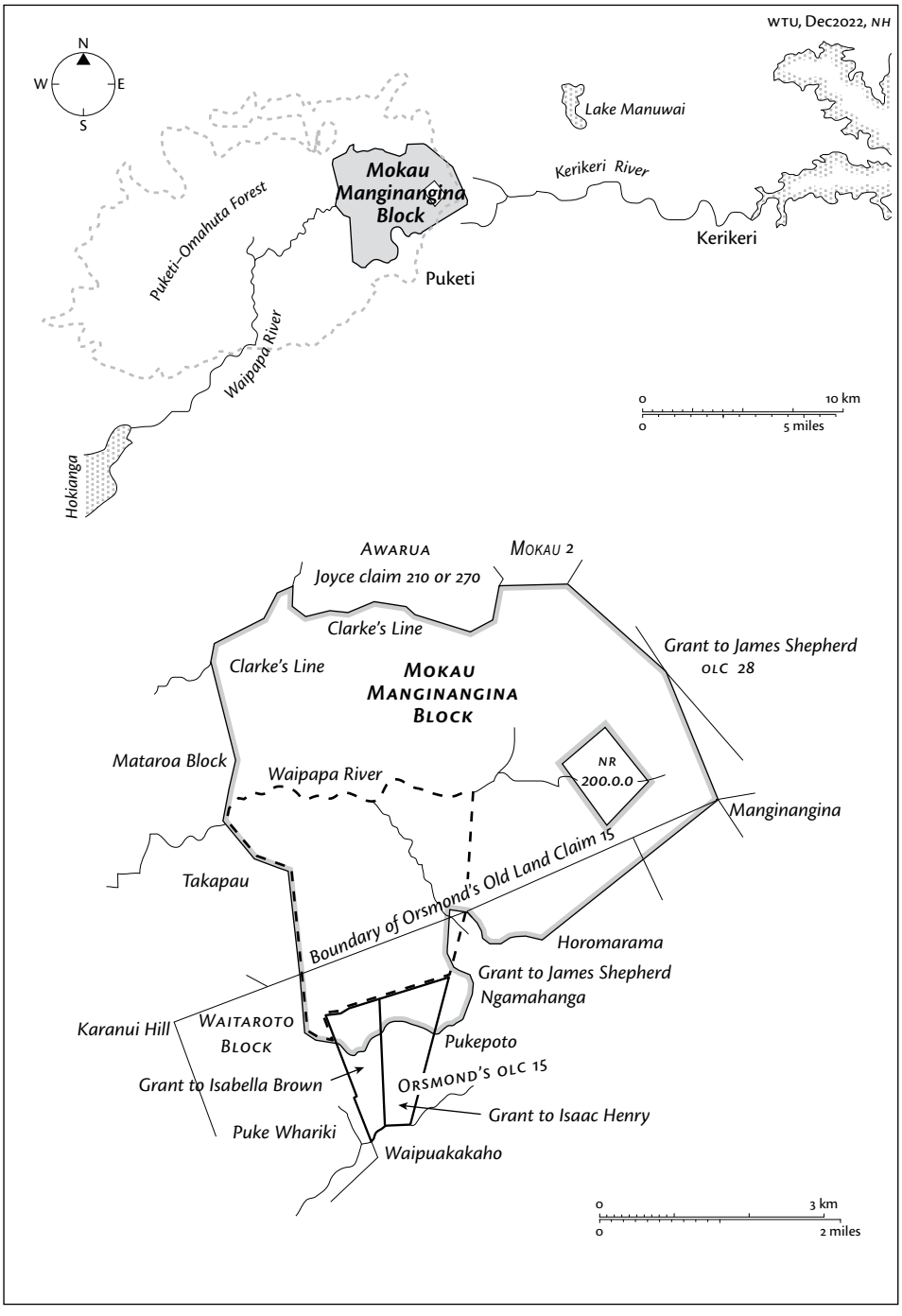
The Mokau block straddled the rohe of multiple Whangaroa, Bay of Islands, and Hokianga hapū, including Ngāi Te Whiu, as well as Ngāti Tautahi, Ngāi Tāwake, Ngāti Whakaeke, and Ngāti Uru of Whangaroa.[750] The 1859 purchase of this block exemplifies a number of issues arising from the Crown's purchasing practices. Land purchase commissioner Kemp purported to purchase the 7,224-acre block from the rangatira Wī (Wiremu) Hau and nine other members of Ngāi Te Whiu in January 1859 for the sum of £240. However, Kemp failed to record the basis on which he had deemed Wī (Wiremu) Hau, Ranga, Wiremu Kauea, Hongi, Hone Taua (Na Hone Poti), Hare Napia (Charles Napier), Tau, Winiata Tutahi, Kira Kingi Wiremu, and Hamiora Hau to be valid owners of the entire block.[751] Nor did he demonstrate that he had otherwise probed the extent of any further customary interests in the land, or investigated whom the named sellers claimed to be representing.[752] A further problematic feature of the transaction was the reference to both the Mokau and Manginangina blocks in the title of the deed, which would later prompt disputes about what land had been alienated.[753]

Ngāi Tūpango claimants stated that most of the owners of the block were not aware of the 'purported sale' and remained living on this land throughout the second half of the nineteenth century.[754] Te Waimate Taiāmai hapū claimant John Rameka Alexander affirmed this, noting multiple accounts of Māori continuing to occupy Mokau and utilise its resources for 50 years after the 1859 transaction.[755] Claimants from Ngā Uri o Te Aho noted that members of their hapū at Mokau had subsequently petitioned

> against the inadequate detailing, the price paid for the blocks, and most significantly against the failure by the Crown to inquire into customary rights prior to the deed being signed.[756]

Moreover, claimants from the Ngāti Rēhia hapū stated that 'the Crown acted for the benefit of settlers to the detriment of Ngāti Rēhia' in its acquisition of the block, as the Crown came under increased pressure to provide land to settlers in Te Raki.[757] The claimants' submissions also discussed the inadequacy of the payments for the Mokau block. Counsel for Ngāi Tūpango claimants noted that Kemp, who had purchased the block for £240, had himself described that sum as being 'as low as could be made'.[758] In the claimants' view, the Mokau purchase demonstrated the Crown's 'disregard for its obligation to protect tangata whenua in the exercise of authority over their lands and dominions'.[759]

The Crown did not accept that any aspect of the sale was untoward. Crown counsel acknowledged two different responses to the complaints about Mokau. The first was the assessment of Judge Frank Acheson in 1939. The judge concluded that, although the records were silent as to whether District Land Purchase Commissioner Kemp



Map 8.6: The Mokau–Manginangina Crown purchase.

had undertaken due diligence to ensure that he was dealing with the sole and rightful owners, it is unlikely he consulted all of those with an interest in the block. Crown counsel argued, however, that Judge Acheson's conclusions were based on unfounded assumptions. Counsel preferred the conclusions reached by the Myers commission in 1948, which found that there was no basis on which to conclude that Kemp had dealt with the wrong people. Counsel concluded, therefore, that Mokau 'is not a case where customary interests in land were sold without the consent of rights holders'.[760] The Crown further endorsed the Myers commission's findings that the price that the Crown paid for the block was fair when compared with similar kauri-forested blocks sold around the same time.[761]

O'Malley gave evidence that for 40 years after the transaction, local Māori, both those who had and had not been party to the sale, 'continued to freely occupy and utilise the resources of the block for birding, pig-hunting, gum-digging and other purposes, seemingly without impediment from Crown officials'.[762] He considered that they likely did not become aware of the land passing out of their ownership until around 1902, when a forest ranger was appointed to prevent trespass in Puketī Forest, which had been transferred to the New Zealand Government Railways department for milling. At that time, some owners who had not been involved in the sale had apparently lodged a petition with Parliament, O'Malley submitted; however, there is no official record of this petition. In its 1948 report, the Myers commission noted that the petition was said to have been made by Hōne Heke Ngāpua (then member of the House of Representatives for Northern Maori). But the report dismissed this on the basis that the petition could not have been made before an earlier commission, the Stout–Ngata commission (officially known as the Royal Commission Appointed to Inquire into the Question of Native Lands and Native-Land Tenure), had sat in the district.[763] We note that the Crown has made the same argument in our inquiry:

> Had Māori complained about the sale to the Stout–Ngata Commission, the Commission would have referred to that complaint in their report, but the Commission made no such reference.[764]

Ultimately, we do not have sufficient evidence to reach a conclusion on this matter.

Whatever may have been the case in 1902, the issue was picked up again a generation later when a number of petitions were made to Parliament. In August 1926, a petition was presented by Hohaia Patuone seeking 'inquiry into the alleged wrongful taking of the Puketi [Mokau] Block'.[765] However, as Drs Henare, Petrie, and Puckey noted, this 'was neither considered nor commented on'.[766] It appears that a further two petitions concerning the block were made in 1935.[767] Dr O'Malley argued that one sent by Hemi Riwhi 'was not formally addressed to Parliament [which] allowed officials to ignore the complaints'.[768] A further petition made by Hone Rameka and 25 others was more difficult to ignore. The petitioners sought an investigation into the 'unjust act' by which their lands known as Takapau had been included in the Mokau block. They definitively stated that 'this land was not sold by our parents or elders'.[769] Despite the efforts of the Survey Department to prove the claims to be 'without any merit', the Native Affairs Committee referred this petition to the Government for inquiry in October 1936.[770]

After the Native Under-Secretary recommended that no action be taken on the matter, some of the Mokau owners met with the Prime Minister Michael J Savage in Auckland in February 1937. The following September, Napia and Wi Anaru Heketerai also filed a petition on behalf of a committee 'representing the owners' of the Manginangina block seeking a 'judicial inquiry into their claims on the block'.[771] Their petition included new complaints that the area of land known as Manginangina and Takapau had been included within the boundaries of the Mokau purchase block. The petitioners' lawyer Hall Skelton noted that '[t]he Manginangina and Takapau blocks contain one of the largest Kauri forests in New Zealand', and contended that the price of £240 'was in any case quite unconscionable at the time'.[772] This petition and that of Hone Rameka were both subsequently referred to Judge Acheson of the Native Land Court under section

Milling in the Puketī Forest in the early twentieth century.

16 of the Native Purposes Act 1937, which limited the inquiry to issuing recommendations on the merits of the claim and did not provide for any title determination to be made.[773]

Two groups presented evidence before the Court: one led by Tamati Arena Napia, who represented some of the descendants of those who had been involved in the original transaction, and the other by Hone Rameka, representing those who had not.[774] Both groups challenged its legitimacy, arguing that the deed was not properly executed and that the owners who had signed it did not represent all those with rights in the land. They further contended that the owners who had signed the deed had intended to sell their interests in the Mokau block, not Manginangina, which had been included in the deed without their knowledge. They also challenged the fairness of the purchase price, which they contended did not sufficiently account for the value of the timber on the block.[775]

In his report (which was undated but released to the Native Minister in 1941), Judge Acheson concluded that Wī Hau and the other vendors would never have presumed to part with anything but those specific areas of the block they controlled and that, as a result, other groups with interests in the land would not have believed their own portions to have been included in the sale.[776] However, the judge found that the petitioners' case was seriously prejudiced by the 80-year delay in bringing the claim.[777] While he agreed that execution and witnessing of the deed 'were certainly irregular and even seriously defective according to conveyancing standards in force at the time', he rejected this aspect of the petitioners' grievances; he deemed it 'far too late now to raise any questions as to the method of execution of the Deed'.[778] He concluded that the purchase price was 'the crux of the whole question'.[779] The payment of £240, especially given that the block was one of rich kauri forest, was described by Judge Acheson as 'unconscionable and even outrageous'.[780] His words were damning. In his report, he concluded:

> The protection guaranteed by the Treaty of Waitangi to Maori tribes, chiefs, families and individuals in respect of their lands seems to have been overlooked by the Crown's officers participating in the negotiations for the purchase of the land in question. An otherwise praiseworthy zeal to protect the Queen's and the Nation's Purse seems to have thrown into the background and even entirely submerged the Crown officers' collateral duty to protect the Queen's and the Nation's Honour. So 7224 acres comprising probably the lordliest Kauri Forest . . . in New Zealand was bought for a pittance (£240, or 8d an acre) from a few chiefs who by no stretch of the imagination could, in Maori custom, have been the sole and true owners.[781]

In his covering letter to Acheson's report, Chief Judge G P Shepherd took a contrary view and made no

Waitangi Tribunal site visit to Manginangina scenic reserve in the Puketī Forest during hearing week four.

recommendations on the matter. He was concerned that if the Mokau purchase was found to be flawed, this would encourage Māori to pursue further 'fruitless and abortive proceedings' to overturn 'contracts anciently entered into'.[782] Shepherd's dismissal of Acheson's conclusions would provide the Native Affairs Committee with grounds to take no action on the 1935 petition for a number of years. Nonetheless, 'Acheson's report had provided enough grounds for the claimants to hope that their complaints in relation to Mokau might eventually be addressed by the Crown', as Dr O'Malley observed.[783]

In 1943, Tamati Napia and 48 others filed a further petition repeating some of Judge Acheson's findings. The Native Affairs Committee took no action on the matter until another petition to Parliament was made by Tamati Mahia and 140 others in 1944, challenging Shepherd's rejection of their claims and asserting that he had dismissed them 'against the weight of evidence'.[784] This time, the Native Affairs Committee referred the petition to the Government for consideration, and in 1947 the matter was referred to a royal commission of inquiry headed by Sir Michael Myers. The commission was appointed to inquire into claims 'Preferred by Members of the Maori Race Touching Certain Lands Known as Surplus Lands of the Crown' in Northland (we discuss the Myers commission in more detail in chapter 6).[785]

The Myers commission considered that Acheson had employed 'very exaggerated language'.[786] The commission considered that, in valuing the block, Acheson had based his judgment on what it considered to be the contemporary value of the timber on the land rather than on its value in 1859. In any case, the block had not been purchased as 'forest reserve' but for settlement purposes, the implication being that the value of the kauri on the block, despite its contemporary monetary worth as a marketable commodity and despite the acknowledged skills of Māori as loggers, was not relevant to the matter of the purchase price. The commission compared the price paid with those for other blocks carrying large stands of timber and concluded that eightpence per acre, while low, was 'not unreasonably low', and certainly not 'unconscionable'. That the value of timber on all blocks that it cited may have been similarly discounted appears not to have occurred to the commission. Its conclusions were based, in part, on modern evidence as to the extent and accessibility of the kauri stands, and no reference was made to the fate of the timber; that is, whether it was simply destroyed, or whether the Crown first secured timber royalties before opening the land for selection.[787]

In our inquiry, the Crown argued in closing submissions that there was 'no basis . . . to reach findings that are different to the finding of the Myers Commission'. According to the Crown, 'the Myers Commission report is a careful and thorough examination of all the claims regarding the sale of Mokau . . . [which] . . . found there was nothing untoward with the sale'. The Crown disputed Acheson's findings about the value of timber and agreed with the commission 'that there was limited to no value in the timber in that region in 1859' and that timber prices on this block of land only became 'commercially viable' in the early twentieth century. Additionally, the Crown shared the Myers commission's view that Acheson had assessed the value of this timber in accordance with its worth at the time of his own inquiry and had failed to take into consideration the additional 80 years of growth that had taken place.[788]

It is not at all clear that the conclusion of the Myers commission that timber was not considered to have been of value in 1859 was justified. Crown counsel cross-examined Dr O'Malley about the Mokau block, including whether the timber was accessible by road at this time. O'Malley responded that, as Acheson had explained in his decision, the Crown was 'well aware' of the kauri on Mokau, and that there had been 'road access' to the timber.[789] Kemp had reported in July 1858, for example, that 'there was already "an available road" connecting Mokau with elsewhere'. Similarly, evidence presented to the Myers commission suggested that 'far from being isolated, roads or trails connecting [the block] with Whangaroa and Hokianga ran through or very close to the block' at the time it was purchased.[790]

Moreover, Roderick Campbell, a retired Conservator of Forests in Auckland, gave evidence before the Myers commission that the trees on the block would have been

able to have been harvested and removed by floating them downriver (the primary means of transporting timber during this period). He further conceded that the price paid for Mokau was similar to that for blocks which only contained small quantities of timber.[791] It is clear to us that the Crown was aware of the value of the timber in 1859 and, consistent with its general policy, did not account for this in the purchase price (see section 8.4.3).

We think it significant that the injustice of the purchase price was not raised by any petitioners until Napia's 1936 petition. In our view, their complaint and Judge Acheson's conclusions support the likelihood that the signatories, Wiremu Hau and the nine others, believed they were transacting only that small portion of the block where Ngāi Te Whiu had interests, rather than the entire area. The Crown considered it had bought an extensive tract of land that local Māori knew as Manginangina and Takapau, and which occupied an important strategic position as a watershed between the Bay of Islands, Taiāmai, Hokianga, and Whangaroa. However, the vendors thought they had alienated a much smaller area called Mōkau, which lay to the north-east, as well as a small part of the Puketī area.[792] Acheson was not willing to question the boundaries of the block 80 years after the fact but he did think it 'incredible that Wi Hau and other Ngatiwhiu chiefs should have seriously claimed the right to name and to sell the portions on the other three sides of the watershed'. It was more likely, in his view, that,

> Under these circumstances, the name 'Mokau' would convey nothing to the other sub-tribes interested in the 7224 acres. 'Mokau' would be Ngatiwhiu's land. If Wi Hau and others sold Ngatiwhiu's land called 'Mokau', that would be their concern. To this extent therefore, the name 'Mokau' must have been quite misleading to others than Ngatiwhiu. It could have given them no warning of the sale of their portions to the Crown.[793]

Acheson considered that the Crown's looseness in applying names to purchase blocks likely explained 'the great interest displayed by all Ngapuhi in this Inquiry'.[794] Dr O'Malley agreed with this assessment, and so do we. Mokau was a large block where a number of hapū had interests, and O'Malley highlighted Acheson's view that Kemp's investigation of the issue appeared to have been limited.[795] The evidence available indicates that the Crown was motivated to purchase the block because of its position and timber resources, and had expended little effort in ascertaining the nature of its customary ownership. Instead, it was content to pay a small number of owners a low price for their interests without adequately defining what was actually transacted. In our view, the Crown's purchase of the Mokau block clearly failed to meet its own standards and left even those owners who had been involved in the 1859 transaction aggrieved. We do not accept the Crown's further contention that the lack of Māori protest against the transaction in the decades after 1859 undermines claimant allegations that their tūpuna never intended to sell these lands.[796] Since Māori continued to occupy and use the land long after the sale – while, conversely, the Crown remained absent – the hapū involved in the transaction with the Crown, and those uninvolved, were untroubled by any Crown assertion of right to the larger block. In our view, it was only when Māori became aware of the extent of the purchase through the Crown's assertion of ownership and exclusion of them from the land in the early twentieth century that petitions began to be lodged and other calls for investigations into their own rights were made.

(4) *'Real payment' or 'collateral benefits'*

As we outlined earlier, many Te Raki hapū and iwi still understood land transactions in customary terms, and that such transactions would form the basis for ongoing and mutually beneficial relationships between iwi, hapū, and the Crown. Therefore, their 'willingness' to transact land was likely influenced by their understanding of what land sales entailed and a continued desire to strengthen their relationship with the Crown. No doubt indebtedness, on the one hand, and the wish, on the other, to raise capital for goods and investment also played their part. Other important factors were the Crown's repeated

references to and promises in respect of the material benefits that would flow from land sales.[797] As noted by O'Malley, Wiremu Hau (in common with other northern rangatira at the time) 'sold' land to the Crown at

> a discounted rate in the expectation of receiving various long-term benefits from the Crown's promised investment in the north through the Bay of Islands Settlement Act of 1858 and other related developments.[798]

This expectation was reinforced by the promises made by prominent Crown officials throughout this period. During his first term as Governor, Grey acknowledged that he directed land purchase commissioners 'to impress upon the mind of the natives that the money consideration was not the only nor the principal consideration they were to receive', adding that 'those were the instructions I always gave . . . I explained to them that the payment made to them in money was not really the true payment at all'.[799] We have already noted McLean's 1858 acknowledgement that Māori, for the most part, did not ascribe 'so much importance to the pecuniary consideration received' for communally held land 'as to the future consequences resulting from its alienation'.[800] When Governor Gore Browne visited Te Raki in January 1858, he made promises that the Crown would invest in 'developing the economy and infrastructure of the region'. As we discussed in chapter 7 (see section 7.5.2(3)), Grey made similar promises again when he visited the district in 1861 to urge Te Raki Māori to adopt his new rūnanga system.[801]

The negotiations for new townships in this inquiry district demonstrate the importance Māori placed on receiving promised future benefits of land sales. Despite plans for a new township at Kerikeri foundering in 1847 and then again in 1851 (in part due to Heke's opposition to this location for a township), by the mid-1850s 'northern tribes were willing to transact lands with the Crown in return for new townships in their midst'.[802] In 1855, C O Davis (a Government interpreter) wrote that he had heard multiple appeals for a township when he was touring the Hokianga district. In one speech, reported Davis, it was stated:

> During former years even until this time, we have been exclaiming, 'Alas! there is no town! alas! there is no town!' We are impoverished and neglected as you now see us. We know that love is in your heart towards us, therefore we wish you to carry with you our thoughts, and lay them before the Governor, in order that something may be devised to remedy the present state of things.
>
> I ara tau tuku iho ki enei wahi, e karanga tonu ana matou, 'Aue! kahore he taone! Aue! kahore he taone!' E rawakore nei matou, e kitea nei e koe. E matau ana matou he aroha kei roto kei tou ngakau, no konei matou i mea ai kia kawea atu o matou whakaaro ki a te Kawana, me kore ra nei e rapua tetahi tikanga hei whakaora i a matou.[803]

There was also specific provision made early in the period for some of the revenue created by the on-sale of land to be dedicated to providing services and benefits to Māori communities. In January 1841, Lord Normanby's successor Lord Russell stipulated:

> 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 per cent in the purchase-money, which sum will constitute a fund for defraying the charge of the protector's establishment, and for defraying all other charges which, on the recommendation of the protector, the governor and executive council may have authorized for promoting the health, civilization, education and spiritual care of the natives.[804]

After the protectorate was abolished in 1846, Grey adopted a similar proposal in 1851 that once the costs of surveying and administration had been met, a set portion of the profits from on-selling land should be spent on Māori purposes: specifically, building schools and hospitals to which Māori would have the same access as Pākehā; funding resident magistrates, native magistrates, and native police; rewarding chiefs for services rendered; and 'such other purposes as may tend to promote

the prosperity and happiness of the native race, and their advancement in Christianity and civilization'.[805] A few weeks later, Grey asserted that he retained the right to appropriate up to 15 per cent of the land fund for Māori purposes, recording:

> the Natives have been given to understand, on many occasions, in disposing of their land, that the proportion of the land fund . . . would if necessary be expended in promoting their welfare; and as it has also been frequently explained to them that such expenditure of part of the land fund, rather forms the real payments for their lands than the sums in the first instance given to them by the Government.[806]

Grey's proposal to spend 15 per cent of the profits from on-selling land on Māori purposes was an explicit commitment to Māori when negotiating for their lands that the Crown had regard for their welfare and that they would be directly compensated for accepting low prices. It should be noted here that this percentage was not the only money at the time being spent on Māori affairs: a yearly sum of £7,000 for 'Maori purposes' was included in the provisions of the 1852 Constitution Act, most of it earmarked for 'Maori education by religious bodies'.[807]

Grey was evidently keen, as he prepared to leave New Zealand, to give the promise of collateral benefits practical form. In August 1853, he authorised the Civil Secretary to direct the commissioner of Crown lands in Auckland to pay

> one fifteenth [*sic*] . . . of the proceeds of the sales of any lands purchased from the aborigines previously to this date, into the general treasury in order that such amounts may be devoted to the object for the benefit of the Native Race, in accordance with agreements entered into with the owners at the time of the purchase of those lands.[808]

The initial instructions issued to District Land Purchase Commissioner Johnson in November 1853 included a directive that 'a clause will be inserted in the deed of purchase reserving for native purposes ten per cent of the future proceeds which may be realised from the sale of the land'.[809] How one-fifteenth became 10 per cent is unclear, while it is of interest to note that the koha clause included in many of the Wairarapa deeds of sale specified five rather than 10 per cent.[810]

According to the Commissioner of Native Reserves, Charles Heaphy, in 1874, per cent clauses were inserted into seven purchase deeds in the Province of Auckland.[811] Out of these, the 1854 Ruakaka and the 1862 Hikurangi purchase were in the Te Raki district, and both in the Whāngārei taiwhenua.[812] Notably, the deed for the Hikurangi block does not include a per cent clause;[813] however, it is included in Heaphy's report on what he collectively termed the 'Auckland Ten Per cents'. Heaphy reproduced the clause in full:

> It is further agreed to by the Queen of England, on her part, that there shall be paid for the following purposes, that is to say, for the founding of schools in which persons of our race may be taught, for the construction of hospitals in which persons of our race may be tended, for the payment of medical attendance for us, for annuities for our chiefs, or for other purposes of a like nature in which the Natives of this country have an interest, 10 per cent., or ten pounds out of every hundred pounds, out of moneys from time to time received for land when it is re-sold.[814]

This was a formal promise by the Crown that the 'real payment' for the land with which they had parted for nominal sums would indeed materialise in the form of schools and hospitals and the inauguration of a mutually beneficial relationship with the Government.[815] Although the intention had been to extend the policy throughout the colony, in May 1854 McLean directed Johnson 'not to insert any clause for additional per centage being paid to the Natives' until definite instructions had been issued on the matter.[816] We consider the specific case of the Ruakaka percentage clause in the following section.

The available evidence suggests that it was not until the mid-1850s that Māori began to express some scepticism over promises of 'collateral benefits'. Ngāti Whātua rangatira Pāora Tūhaere, in the evidence that he tendered to the 1856 Board of Inquiry on Native Affairs, claimed:

> The natives have heard of the Government buying at a cheap and selling at a dear rate. They do not like it. The natives do not know what is being done with the money. I have heard that it is spread out upon the roads, and a part upon schools. The natives are suspicious, and say that this statement is only put forth in order to get the land at a cheap rate from the natives.[817]

It appears that some Māori, at least, had concluded that promises of future benefits constituted little more than an inducement to sell. The subsequent contraction in the rate at which the Crown acquired lands in Te Raki may have owed a great deal to the same sort of scepticism as that expressed by Pāora Tūhaere. Accordingly, McLean, reporting on a visit to Kaipara and Whāngārei in 1857, proposed to Governor Gore Browne that in order to facilitate land purchase, the Government should:

> expend a certain definite proportion (and that no inconsiderable one) of the moneys realized by the waste-land sales on roads and other improvements exclusively within those districts from which they have accrued.

He again predicted that the development of roads and other improvements would

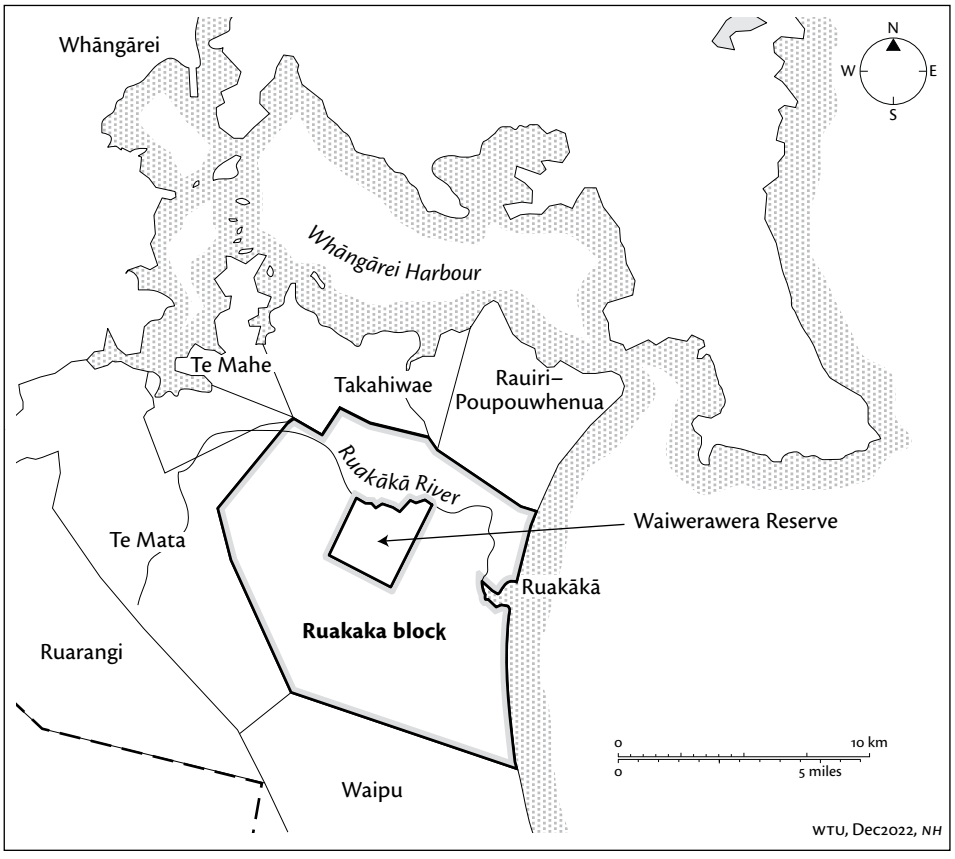
> do away with present or future dissatisfaction on the part of the Native sellers at the price they receive for their land as compared with the value it acquires when in the hands of the Government.[818]

However, the overwhelming evidence in our inquiry is that these promises were not kept (at least not during this period) and the benefits of the proposed township at Kerikeri were also slow to materialise. Likewise, schooling was a benefit that was supposed to be provided to Māori following the sale of land, and yet the Crown's funding of schools in the north before 1867 'was limited to subsidies to missionary schools';[819] meanwhile, Māori had to gift land to the Government for native schools.[820] There was some limited medical funding.[821] These are matters that will be discussed in the subsequent volumes of our stage 2 part 2 report; for now, we note that Te Raki Māori often expressed disappointment at the level of Crown investment and of settlement.

(5) *Ruakaka and the percentage clauses*

The deed of purchase for the Ruakaka block (dated 16 February 1854) included an abbreviated version of the 10 per cent clause. This version specified that 'Ten per cent of the proceeds of the sale of this land [are] to be expended for the benefit of the Aborigines.'[822] What part, if any, that clause played in inducing the owners of Ruakākā to accept the Crown's offer is not clear, but it is likely to have been considerable. The sixpence per acre paid by the Crown for the 14,087-acre block was even less than the less-than-eightpence per acre paid for the Mangawhai block, and rather more was paid for other blocks in the adjacent Kaipara inquiry district, suggesting that the low price for Mangawhai may have been acceptable to Māori because of the 10 per cent provision.[823] The Crown's promises that 10 per cent of the proceeds from the sale of the Ruakaka block would be expended for the benefit of Māori were slow to be implemented and only partially kept.

In 1874, Heaphy was charged with distributing the Auckland and Wairarapa funds, a task he carried out on a block-by-block basis. In his report, he listed seven blocks in the Auckland Province and recorded that the 'ten per cents' amounted to £5,827 1d, while the total payments (mostly for construction of the Ōrākei bridge) amounted to just over £1,145.[824] With respect to the Ruakaka block, he recorded that the sum of £473 16s 10d had accrued.[825] However, this amount was only an estimate of what might be due, as detailed revenue records were not kept.[826] Without offering any specifics, Heaphy recorded that of the nearly £474, £237 was appropriated for 'education and hospitals'; this was received by Taurau, representing the vendors. Heaphy recorded that £16 of the total was appropriated for administrative costs, and that £220 remained to be distributed 'amongst the Native sellers'. That distribution hardly seemed consistent with the clause included in the deed and instead was more in keeping with the apparent desire of the Government to dispose of the funds and any further claims the vendors might have. In the end,



Map 8.7: The Ruakaka block.

Heaphy failed to convene a meeting of a sufficient number of sellers to distribute the funds. He recorded making payments to 'the extent of £35, but found it necessary to leave with Mr Robert Mair, at Whangarei, and the Rev Mr Gittos, at Kaipara, blank receipt forms to be signed by certain indicated Natives'. In Heaphy's view, the sellers of the block had 'entirely forgotten the stipulation relating to the 10-per-cents.'[827]

No further funds were paid out after 1874. Meanwhile, further amounts for survey, administration, travel, and other costs were deducted.[828] In 1878, a sum was transferred to the Public Trustee: the balance sheet for 1878 to 1879 recorded a 'Native 10 per cents., Auckland' account that held £1,445 on 30 June 1879. This is considerably less than the £4,682 that Heaphy retained in 1874.[829] By the end of March 1899, the account held £2,542, and those moneys were subsequently transferred to the Consolidated Fund.[830]

Heaphy was apparently mistaken in his assumption that Māori had forgotten about the percentage clauses. O'Malley noted that 'from the late nineteenth century northern Māori interested in the tenths blocks began petitioning and appealing for the payment of the money owed them by the Crown.'[831] From 1899, numerous petitions were made to Parliament, and in 1920 the Department of Lands and Survey was finally induced to try to establish what the course of land sales had been in the 10 per cent blocks.[832] This reconstruction was such a challenge that in 1924, the

Charles Heaphy (1820–1881), Commissioner of Native Reserves, artist, and Native Land Court judge from 1878.

Native Department Under-Secretary advised his Minister that '[a]pparently, it was either considered unnecessary to keep proper records or the matter of keeping accounts was overlooked.'[833] In short, the Crown failed to establish separate block accounts. Heaphy's earlier investigations indicated that the Crown failed to define a policy for the allocation and management of the funds involved, failed to consult the original owners of the blocks concerned, and had failed for 20 years to recognise the need for or to take any remedial action. In 1925, the Under-Secretary of Lands and Survey proposed that 'the whole of the liability' should be liquidated through payment to the Native Trustee of a sum to be determined (presumably by the Crown) 'to be dealt with in a manner consistent with the aims and objects covered by the clauses in the various purchase deeds.'[834] Ultimately, the issue of the 10 per cent blocks would be resolved by the Royal Commission on Confiscated Lands and Other Grievances (the Sim commission).

In 1925, Maki Pirihi, the son of Wiki Te Pirihi (whose father had received £50 for extinguishing his claim to the Ruakaka block), along with 60 others, submitted a petition asking for the Ruakaka 10 per cents to be paid to those who were legally entitled to them. This was one of the petitions directed to the Sim commission in 1926. The commission accepted the Crown's estimate that the sales of land in the Auckland 10 per cent blocks had yielded a total of £89,827. Of the £8,982 generated as a result, Heaphy distributed just £1,678, leaving a balance of £7,304 owing to Māori.[835] O'Malley observed that total revenue on Ruakaka alone was estimated at £10,770, meaning that the payments made by Heaphy in 1874 were only just over one-fifth of the total amount they might have expected to receive by the time of the Sim Commission inquiries.'[836] However, the Sim commission recorded that the Crown had expended over £2,000,000 on education and health services for Māori. Its conclusion, on which the Crown relied, was that such expenditure should 'be treated as a performance of the obligation created by the covenants.'[837]

It does not appear that any consideration was given to how much of this expenditure had benefited the vendors. *The Wairarapa ki Tararua Report* dealt with a similar five per cent proceeds clause and found that fund expenditure should not have included services 'for which the Crown should anyway have been liable', and that the execution of these payments was inadequate.[838] In that report, the Tribunal offered some searching criticisms of the concept, in particular raising questions as to whether what it termed 'the funding trajectory' (declining income as land was sold) of the 'koha/five percents' was ever explained to or understood by Māori. It found the following: access to the fund was limited to those whose purchase deeds contained the relevant clause; the Crown used the funds to finance projects that had been separately promised;

the Crown was 'never really committed to the koha/five percents as a means of delivering a social endowment'; and it failed 'to develop a clear and coherent policy for the purpose and use of the five percents'.[839] The Tribunal concluded,

> In both process and substance, the Crown breached the Treaty in its interpretation and management of the koha/five percent clauses and the fund, as described here. It breached the contracts it entered into in the deeds, breached article 3 by using fund moneys to pay for services to which Māori were entitled as citizens, and also signally failed to protect Māori interests actively.[840]

In *The Kaipara Report*, the Tribunal found that the prices paid for the Mangawhai block 'would have been fair if the 10 per cent provision in the deed had been fully implemented', and that:

> The Māori vendors had reason to expect that they, their hapū, or their descendants (or all of them) would receive an identifiable benefit from this provision. However, the Crown failed to keep adequate records after 1874 and failed to act in good faith by not continuing to implement this provision.[841]

We endorse these general conclusions.

The 10 per cent clause was not inserted in deeds of purchase after February 1854, and thus its use was not a feature in most Crown transactions in our district inquiry. According to the Sim commission, Attorney-General Swainson, realising the (unspecified) 'difficulties' that this policy created, directed its discontinuance.[842] Whether Māori were consulted over or advised of that decision and whether they were offered any compensating assurances is not known. As noted by Dr O'Malley, the total revenue for the Ruakaka block was estimated at £10,770, which meant that the payments made by Heaphy were slightly over one-fifth of the total that the vendors 'might have expected to receive by the time of the Royal Commission on the Confiscation of Native Lands and Other Grievances (the Sim commission) inquiries'.[843] In our view, these failures constituted a breach of good faith.

(6) *'Sufficiency' of land retained by Te Raki Māori communities*

The extent of the Crown's land purchases during this period raises the question of how Māori land was to be protected for hapū occupation, development, and their mana and well-being. There are, it seems to us, two measures of whether the Crown made sufficient provision for the present requirements and development opportunities of Te Raki communities: the extent to which it monitored land purchase from those communities and reduced purchasing activity where this was warranted by prior alienations; and the provision and protection of reserves. While these matters were often linked in the claims before us, they are examined separately in the discussion that follows. We first consider whether the Crown monitored whether Te Raki Māori retained a sufficiency of land during the period under consideration.

The Crown accepted that it was obliged under the treaty to ensure that Māori retained 'a sufficiency of lands'. It also claimed that, at 1865, Te Raki Māori did retain a 'sufficiency' – that is, some 65 per cent (1.387 million acres) of the total area of the Te Raki inquiry district – for their existing and future needs in the form of lands that they had excluded from sale as well as reserves created by the Crown from lands it had acquired. At the same time, Crown counsel claimed that Māori did not always require land to be set aside as reserves, nor was the Crown obliged to do so in respect of every purchase.[844] The Crown subsequently indicated that it had employed the term 'sufficiency' according to section 24 of the Native Land Act 1873: that section specified that the Crown was obliged to set aside in any district 'a sufficient quantity of land . . . for the benefit of the Natives of the district' being defined in the Act as not less than 50 acres per person.[845] The Crown went on to argue that the 1.387 million acres in the Te Raki district would have supported 27,736 individuals, a number that greatly exceeded the estimated Māori population in the period under consideration.[846]

The Chief Protector of Aborigines, George Clarke, turned his attention to the question of northern Māori land retention as early as 1843, assessing this in terms of hapū requirements. Clarke calculated that in 'the northern

district', that is, the area between Otou/North Cape and Te Whara/Bream Head, there resided at least 100 hapū, 'embracing a population of about 20,000'. Of an estimated area of about 5,000 square miles, a maximum of 1,500 square miles could be available for agriculture; that is, some 10,000 acres of available land for each hapū. But, Clarke noted, in addition to land for cultivation, hapū required 'a large piece . . . for pig runs', leaving 'but a small block of desirable land eligible for disposal to [the] Government'. He recorded:

> as their independence is only to be maintained by holding possession of their land, I think it would not only be difficult, but very injurious to them to purchase large blocks of country, even if offered.

Clarke concluded by suggesting:

> They can dispose of small portions of land without embroiling themselves with their neighbours, and with manifest advantage, but in attempting to dispose of large tracts of land they are certain either to injure themselves or to come into collision with others.[847]

But this early warning was ignored or forgotten. In the years that followed, the Crown gave little thought to what would constitute a sufficiency of land or how such sufficiency might be measured; nor did it contemplate halting its land operations. By default, sufficiency was conceived of in terms of the area of land necessary to provide for the existing subsistence needs of iwi and hapū.[848] The Government did not possess or endeavour to acquire a reasonably accurate estimate of the size of the Te Raki Māori population on which to base an assessment of likely Māori subsistence and commercial land needs. Donald McLean, in March 1857, acknowledged that '[n]o correct return of [the] Native population of this Northern peninsula has yet been taken', while offering his own estimate of 8,000.[849] Moreover, the Crown did not always possess a clear understanding of the ownership of the lands that it sought to purchase or even, in the absence of surveys, the area of the blocks it had acquired.

In the absence of this information, it is difficult to see how the Crown could have arrived at a reasonably accurate assessment of the landholdings and needs of individual hapū communities, even had it attempted to do so – but it did not. In short, it failed to establish the basis on which 'sufficiency' could have been assessed, though Clarke had provided strong indications of the sort of approach that should be taken. No discussion appears to have taken place after 1854 as to what sufficiency for subsistence and maintenance meant in practice. Rather, the assumption was that Te Raki Māori, given their apparently declining numbers, would require little more than the existing areas they occupied and cultivated, with some allowance for grazing and food-gathering purposes. The Crown's land purchase agents were not offered any specific instructions or guidelines by which they were to approach and assess all matters relating to sufficiency, even for the purposes of subsistence and maintenance. In summary, there is little evidence that the Crown monitored, or even considered monitoring, the consequences of land alienation for hapū communities, or even for Te Raki Māori overall, despite the many statements acknowledging the importance of Māori not being entirely dispossessed of their land.

(7) *Reserves*

With respect to reserves, the claimants broadly advanced a number of allegations:

- A key component of the 'real payment' under the land fund model was that Māori would retain strategically located reserves that would increase in value, thereby off-setting or compensating for the nominal prices the Crown was prepared to pay for land.
- Such reserves were intended to ensure Māori retained adequate land for their existing and future needs and thus constituted one of the most important protective mechanisms that the Crown could have adopted.
- While 57 reserves were created between 1840 and 1865, their acreage totalled just 13,940 acres, and almost 80 per cent of Northland land purchase deeds contained no reserve provisions at all.[850]

- With respect to setting aside reserves, the Crown failed to exercise any initiative befitting its duty to actively protect Māori interests. Those reserves set aside were established at the request of the Māori vendors, and in some instances the Crown rejected or modified their requests.[851]

Moreover, claimants contended that such 'reserves' as were established carried no formal status but rather constituted exclusions from the blocks acquired by the Crown. As such, they remained vulnerable to purchase, and in fact there were a number of cases in this inquiry district where reserves established from earlier Crown purchases were subsequently acquired by the Crown prior to 1865.[852] Finally, Te Raki Māori claim that the Crown assumed that the eventual extinction of Māori would render reserves unnecessary or that, in order to avoid such fate, they would 'assimilate'.[853]

The Crown acknowledged that where it did not reserve sufficient land for the present and future needs of iwi and hapū when purchasing land prior to 1865, it failed to uphold its duty to actively protect their interests.[854] However the Crown rejected the contention advanced by claimants that the reservation of 13,940 acres clearly indicated that insufficient land was set apart. Crown counsel argued instead that the reserves created were in addition to the lands excluded from sale to the Crown, and that reserves were not required where the lands excluded from sale constituted a 'sufficiency'.[855] Counsel cited Governor Grey to the effect that 'Areas of land sufficient to meet the future needs of Māori would be reserved from such purchases'. The Crown also recorded that McLean, as Chief Native Land Purchase Commissioner, 'continued Grey's policy of buying all interests in large areas except for reserves, which were to be confirmed to Māori under Crown grants'. Crown counsel also quoted McLean, who stated that the reserves consisted of:

> blocks of land excepted by the Natives, for their own use and subsistence, within the tracts of lands they have ceded to the Crown for colonization . . . Those lands are in general cultivated and occupied by the Natives, and in most instances the reserves are sufficiently extensive to provide for their present and future wants.[856]

Additionally, Crown counsel cited *The Kaipara Report*, which noted that 'these ideas continued to underpin the Crown's purchasing policy for the remainder of its pre-emption period'.[857] The Crown concluded that land purchase commissioners were instructed to ensure that Māori did not sell more than they required for their own needs.[858]

In brief, the claimants view the Crown as failing to take active measures to ensure sufficient land was reserved for both the subsistence and commercial needs of Te Raki Māori, and they argue that the Crown therefore failed to discharge its obligation to protect their interests. The Crown's position, on the other hand, was that the small number of reserves showed that most hapū retained sufficient other land, obviating any need to set aside land for their protection.

In previous reports, the Tribunal has found that the Crown failed to develop and implement a carefully considered policy on reserves in this period. The *Muriwhenua Land Report* criticised Crown reserve policy, concluding that 'reserves' were ephemeral creations, 'provided for one day, and then purchased the next'.[859] The Tribunal emphasised the lack of planning on the part of the Crown, arguing that:

> The whole business of colonisation was about providing for the future. Thus the large land acquisitions, even before the settlers arrived. The entire [colonisation] scheme was future-driven and the problem was simply double standards: there was one standard in securing land for European settlers, and another in reserving land for Maori. Reserves were not created as they should have been, those that were created were not protected, and as a result Maori were denied the single most important obvious opportunity they had to share in the economic development of the country.[860]

The Tribunal agreed in *The Wairarapa ki Tararua Report*, that the reserve policy was 'flawed from the start – contradictory, vacillating, and . . . limited in nature'.[861] The

Crown largely focused on the reservation of intensively used sites such as kāinga, māra, pā, urupā, and fishing sites. These sites were required for subsistence agriculture, to provide access to particularly valued resources, and to furnish rangatira with small holdings as a reward for cooperation over land purchases. Reserves in that district were thus not intended to ensure that Māori retained land for commercial purposes; they had little bearing on the wider matter of sufficiency. Further, the Tribunal considered that the colonial Government considered reserves to be a 'temporary measure' for a people whose eventual fate appears to have been either extinction or assimilation.[862] In that inquiry, the Tribunal concluded:

> the Crown's policy and practice as regards reserves had serious problems. Reserves were created erratically, their purpose was muddled, and their size varied (although they were mostly small and limited to land that Māori were using intensively) . . . [and] they were not well protected.[863]

In *Te Mana Whatu Ahuru*, the Tribunal noted that there was a distinction between reserves that were understood as 'native reserves', and those that were simply excepted from purchase lands. The Tribunal described native reserves as 'areas that should be specifically protected, including by the issuing of a separate Crown grant to the beneficiaries named in the purchase deed'. Lands excluded from sale were 'treated as ordinary Māori customary land, with title to be determined by the Native Land Court'. However, the Tribunal noted that 'the Crown and the court often confused these categories, and any measures intended to specifically protect reserve lands were at best unevenly applied'.[864] Another form of reserve the Tribunal identified was 'repurchased reserves', which we discussed in section 8.4.2(4).[865]

We see the same range of serious deficiencies as to the protections provided by reserves made in Te Raki. Despite directions to his officers in the field stressing the importance of setting aside lands for the future welfare of Māori, McLean did not provide a definition of the term 'ample'. This phrase was not used for very long, and McLean's injunction to use 'your own discretion' clearly implied that it would be the Crown, and not Te Raki Māori, who made final decisions regarding the size and location of reserves. The only clear instructions issued by McLean were that wherever possible natural boundaries should be chosen and that they should be defined and marked off before final payment was made.[866] Such instructions were intended to protect the Crown's interest against unexpected claims, minimise survey costs, and preclude disputes between Māori and settlers over stock trespass. They were aimed, McLean noted, at 'preventing differences from the unalterable nature of such boundaries'.[867] It was the same approach that he had employed in his earlier purchase negotiations elsewhere in the colony.

There is little doubt that district purchase commissioners exercised the 'judgment and discretion' that McLean granted them, and that they were quite prepared, in the interests of facilitating settlement, to restrict the area of lands that Māori wished to exclude from sale. The majority of reserves were small to average size, and were associated with a small number of Crown purchases. According to the data for our inquiry district compiled by Dr Barry Rigby, the 57 reserves established before 1865 ranged in area from four to 2,510 acres; while the average was 244.6 acres, 25 were of less than 50 acres. The average size of the 53 reserves of less than 1,000 acres was 143.1 acres. The 57 reserves were associated with 17 Crown purchases, including six with the 4,554-acre Okaihau purchase of 1858, 12 with the 12,500-acre Kawakawa purchase of 1859, and 14 with the 24,150-acre Ruapekapeka purchase of 1864. Thus 32 were associated with just three blocks in the Bay of Islands. In the remaining 71 Crown purchase blocks, no reserves were set aside for Māori.[868]

The available evidence suggests that they likely involved land already intensively used – māra, bird reserves, landing places, fisheries, and wāhi tapu, including urupā and burial caves. The only formal native reserve within Mahurangi, Te Waimai a Tumu, which had been set aside for Hauraki Māori, was purchased by the Crown within three years of it having been created.[869] Over the following two decades, the Crown appeared to recognise a number

of informal reserves throughout the Mahurangi block (that is, 'reserves' for which there were no legal restrictions on alienation),[870] including those of Te Hemara Tauhia at Waiwera–Puhoi and Parihoro at Matakana–Tawharanui. Yet it failed to define them adequately by survey or provide secure titles. Furthermore, as Dr Rigby noted, with no record of the Māori population of Mahurangi at this time, it is difficult to determine whether these reserves could be considered 'sufficient' even on a per capita basis.[871]

In the case of the 16,524-acre Ruakaka block, the deed plan included a 'native reserve' of 1,227 acres labelled 'Waiwarawara.'[872] Johnson's opinion was that the valley could not be settled 'unless the natives could be confined to a limited reserve'. Johnson reported that the Māori owners had 'insisted on keeping the most valuable tract back for themselves, to which I could not consent'. He went on to note that 'After much discussion . . . the natives acceded to my idea of the quantity they required for their use', and agreement over the location of a reserve was finally reached.[873] For his part, Johnson was evidently persuaded that Māori were doomed to extinction and so deemed it unnecessary to reserve land for them, least of all the superior lands otherwise required for settlement.[874] He wrote privately to McLean in 1857 that:

> the good Land ought in my opinion to be obtained and a liberal price paid for it – its value will increase the longer time it remains in the hands of the Natives – in this part the bad Land – does not afford pasturage like the stony plains and ranges of the south, but is utterly worthless, and before the country is sufficiently peopled for it to be required, the Native race will have died out, and the Govt will have the Land for nothing.[875]

Such private comments suggest Johnson viewed reserves to be as much about controlling as they were about providing for Māori, and evidence strongly suggests that hapū were encouraged to accept that they should retain only the land required for subsistence and maintenance.

As we have discussed, the reserve policy Grey established in 1848 was that Māori would be:

> furnished with plans of these reserves, and with a certified statement that they were reserved for their use, which documents are *somewhat in the nature of a Crown title*. [Emphasis in original.][876]

But it was not intended that a Crown title would be issued. The historian Janet Murray explained that land purchase commissioners were instructed by the Government to provide plans of reserve land once it was surveyed, and the 'registration of the reserves . . . was intended to serve as a form of a Domesday Book.'[877] However, this policy does not seem to have been implemented in Te Raki, at least at first. In November 1854, almost a year after Johnson had begun purchase negotiations in the Whāngārei district, Surveyor-General Ligar, responding to a request from the House of Representatives, recorded that there were 'no Native Reserves' in the province of Auckland. He explained that the Government had allowed Māori to retain enough land for 'their own use and occupation', land that remained in customary Māori title.[878] These reserves 'remain as regards their title, precisely in the same state as the bulk of the Native land which has not yet been disposed of by the Natives to the Crown.'[879] That same year, in correspondence to the Colonial Secretary, McLean similarly referred to the reserves as 'blocks of land excepted by Natives, for their own use and subsistence.'[880] Thus there was no register of reserves.

The 1856 Board of Inquiry on Native Affairs also addressed the status of reserves, stating 'wherever the Natives make reserves within the Block, they should be set out and surveyed before the completion of the purchase of the surrounding land.'[881] The board's more general conclusion was that Crown-granted individual titles should be issued to Māori.[882] McLean agreed with the board on 'the advantages that would flow from such a system'. He informed the Private Secretary that he had directed that reserves 'should be carefully surveyed.'[883] However, as we have discussed, McLean's preference was that Māori should repurchase land that had already been transacted and receive individual Crown grants (see section 8.4.2(4)). He had been promoting the repurchase policy since 1854 as a development of the reserve policy established

by Grey. For McLean, repurchase and Crown grants offered an opportunity to break up 'tribal confederacies'. Conversely, reserves held in common would obstruct that end.[884] Small reserves afforded the Crown an opportunity of confining Māori to particular areas and of limiting their migratory habits.[885] Nor would Māori be able 'in the capacity of large landed proprietors', as land purchase commissioner Mantell expressed it, 'to continue to live in their old barbarism on the rents of an uselessly extensive domain'.[886]

Throughout this period, McLean's instructions to his land purchase commissioners emphasised his preference that Te Raki Māori should receive individual Crown grants for the sections they would repurchase (see section 8.4.2(5)). Johnson advised McLean, in June 1854, that he had 'endeavoured strenuously to . . . induce the Natives to re-purchase from the Crown any land they may wish to retain in the blocks for themselves'. He went on to state that encouraging repurchase (at the Crown's ruling price for 'waste lands') was of great importance in a district 'where the sellers of land are so fond of making reserves, which are very inconvenient to the settlers, when they can do so without paying for them'; in our view, an extraordinary and telling comment.[887] Johnson continued to act on McLean's advice, noting, in September 1855, that he had encouraged rangatira to exercise a pre-emptive right to purchase at 10 shillings per acre, with the cost being deducted from purchase moneys.[888] In other words, Māori vendors collectively would meet the cost of having lands 'reserved' in the legal ownership of just a few of their number. However, in Te Raki, McLean's repurchase policy appears to have largely failed to achieve his grand aims.

A small number of the 'reserves' made in Te Raki were in fact areas set apart for repurchase from the Crown predominantly in the Whāngārei taiwhenua, as we have mentioned. One example where this did occur in Te Raki was in 1861 when Te Tirarau, Te Ahiterenga, Eruera Toenga, Hemi Pea, and other vendors of the Maungakaramea block repurchased 516 acres of 'reserves', as Johnson called them, for 10 shillings per acre.[889] We also referred earlier to Te Tirarau's repurchase of 1,000 acres out of the Maungatapere block in 1855.[890] An 1861 return of Crown grants issued to Māori revealed that the grants for these two blocks had been issued to Te Tirarau alone.[891] Before 1865, it appears that only two further repurchase reserves were created subsequently. In the case of the 140-acre Onerahi block (purchased by the Crown in 1863 for a very high £500 or some £3 12s per acre), no reserves were specified, yet 20 one-quarter-acre repurchase reserves were 'promised' to the sole vendor, Te Tirarau.[892] The deed for the 1864 Matapouri purchase recorded that two reserves had been made: one was an urupā, and the second a 'repurchase reserve' that appears to have comprised the vendors' 'Plantation at Tokoroa'.[893] We did not receive evidence as to whether Crown grants were issued in these cases.

The evidence suggests that very few among Te Raki Māori were inclined to repurchase their own land, whether under the regulations or otherwise.[894] Claimant Titewhai Harawira (Ngāti Hau) gave evidence that illustrated how repurchasing was viewed by Te Raki Māori:

> The Crown had an agenda in the restriction of our reserves. It was clearly intended to force us to purchase back our land at ten times more than what we were paid for it. Crown officials were aware of the profit being made. The Crown was paying us low purchase prices. These prices weren't accepted out of greed, they were accepted because the alternative was we would lose our whenua and receive nothing. We were coerced into these arrangements.[895]

Nor was there a consistent practice during this period for the recording of repurchased sections. For instance, the Maungakaramea and Maungatapere deeds do not mention the 'reserves' repurchased by Te Tirarau; rather, they are recorded in the published papers of the Native Land Purchase Department.[896] By contrast, the deed for the 1854 Ahuroa and Kourawhero purchase recorded that Te Kiri would return payment of £20 to Johnson 'for forty acres – a sacred p[l]ace which is not included in this sale of land'. First, we note that this was a high price to pay for the protection of wāhi tapu. Furthermore, Johnson's reference to the land being excluded from the sale casts some doubt on whether the reserve was in fact 'repurchased'

under Grey's regulations for the sale of Crown lands, or whether it was merely a private arrangement with Johnson that excluded a portion of the block from the sale.[897] That this reserve was not included in the 1861 return suggests that the Crown grant was not in fact issued.

Other than in this handful of cases where Te Raki Māori, largely in Whāngārei, were willing to repurchase their lands, Crown officials were apparently reluctant to offer any substantive official recognition for the need for reserves. As Dr O'Malley observed, 'Crown purchase officials in the north proved unwilling to allow Māori "free" reserves that might have undermined the already failed policy [of repurchase].'[898] As a result, he found, the remainder of the reserves created during this period 'carried no official status as such, but were simply deemed to be exclusions from the transactions, rather than permanent tribal endowments'.[899] This was consistent with how reserves were treated in other parts of New Zealand during this period. Murray noted that most of the reserve land 'continued under customary title until the Native Land Court was established'.[900]

An inspection of the Crown's purchase deeds also raises further questions about the status of the reserves that were set aside for Māori use. Craig Innes explained the scope of the problem in his evidence in our inquiry:

> Of all the problems associated with the Northland Crown purchases the issue of the reserves has been one of the most confusing. A large number of the reserves were not named in the deed text. In many cases the area of the land to be reserved was not indicated. In addition a number of reserves are sometimes shown on a plan which are not referred to in the deed text. A number of plans show cadastral lines without any explanation of what the lines are supposed to indicate. Because many of the transactions in the Northland area overlapped it would not be safe to assume that every reserve within the area transacted by a conveyance owed its existence to that transaction.[901]

Despite McLean's instruction that reserves be carefully surveyed, this was not carried out with any consistency, even after additional provision was made for surveyors to be appointed by the land purchase department in 1856.[902] Government surveyor, Andrew Sinclair, commented on this very issue in 1862 when preparing a 'Return of Native Reserves Made in the Cession of Native Territory to the Crown'. He found that the Crown's purchase deeds were 'incomplete'. In order to compile his return, he was required:

> to examine the whole of the maps in this and the Crown Lands Office, to search for information in the Waste Lands and other Offices, to read over nearly the whole of the correspondence of the Native Department relating to this subject, and to consult every other available authority: which has been a work of considerable magnitude.[903]

In the absence of clear plans marking the boundaries of reserves, and secure titles, we consider Māori were offered little certainty and very few protections indeed. The lack of secure titles for reserves reflected the absence of any statutory provision for their protection during this period. In his report on Māori reserves, Ralph Johnson referred to the Court of Appeal's 1873 decision in the *Regina v FitzHerbert* case which considered an application for the repeal of the 1851 Crown grants for New Zealand Company lands in Wellington vested in the Crown. In its judgment the Court observed:

> it appears . . . that the creation of Native reserves was not one of the objects especially provided for in the statutes, charters, instructions, and ordinances by or under which the management or disposal of the demesne lands of the Crown was regulated.[904]

The New Zealand Native Reserves Act 1856 provided Māori with the opportunity to obtain Crown grants for their reserves if they agreed to hand over their administration to a Commissioner of Native Reserves. However, under section 15 of the Act the commissioner would be empowered to alienate their lands by sale or lease 'either for or without valuable consideration, and either

absolutely or subject to such conditions as the said Commissioners may think fit'.[905] We received no evidence that this option was ever considered by Te Raki Māori during this period. As the Act did not provide for Māori control of their reserve lands, we consider that it would likely hold little appeal, even if they were aware of it. In the absence of any other statutory provision for the recognition of their native reserves, Te Raki Māori were thus called upon to trust an informal undertaking offered by the Crown. At best, the Crown's policy amounted to one of neglect.

8.5.3 Conclusions and treaty findings

(1) *The purchasing process*

As the Crown embarked upon its major land purchasing effort in Te Raki in the early 1850s, McLean initially emphasised the importance of purchase through open negotiation with all claimants to a particular block, securing the consent of all rightful owners, the creation of permanent and inalienable reserves, and the public payment of purchase moneys to hapū leaders.[906] However, we found no evidence that McLean took any steps to enforce the purchasing standards that he had articulated or those which had been previously identified by Crown officials.

McLean's district land purchase commissioners employed a range of tactics intended to circumvent opposition to the Crown's land purchasing programme. These included initiating negotiations without first attempting to settle any disputes between hapū and iwi; negotiating with those seen to be willing to sell, irrespective of whether they were principal, secondary, or remote claimants (notably in the case of Mahurangi); paying instalments before consent for the purchase had been obtained; offering inducements in the form of Crown grants for land retained; covertly purchasing land from those willing to take the first payments without the knowledge or consent of others or their hapū; concluding deeds of sale with few signatories; placing great emphasis on the collateral benefits that would follow alienation though the Crown did little to ensure that this happened; failing to allow sufficient time for all claimants to come forward; and failing to keep adequate records of negotiations, purchase transactions, and reserves.

The absence of official oversight within the Native Land Purchase Department is particularly notable in Whāngārei. At Ruakākā and Waipū, Johnson openly admitted that he avoided calling meetings of owners, in order to target owners he called 'willing sellers'.[907] O'Malley considered that his dependence on Te Tirarau to obtain large tracts of land at Kaiwa and Maungatapere was:

> both a mark of just how little influence or authority the Crown was able to exert in the region and, in some instances, a measure of the willingness of officials to sacrifice appropriate standards in favour of short-term gains.[908]

Any instance of entering into secret deals with particular owners, and excluding other owners, had the potential to damage relationships between hapū, and between hapū and their rangatira. Furthermore, the existence of a number of deeds for a number of Crown purchases (notably the Maungatapere block) casts significant doubt on the legitimacy of the transactions negotiated during this period. As the Crown conceded, Mahurangi Māori were significantly impacted by the shortcomings in the Crown's purchasing practices – in that case, signing a deed in Auckland without any prior inquiry into the customary ownership of the vast block being transacted.

With regard to Mokau in particular, it is not sufficient for the Crown to surmise from the silence in Kemp's records that, as land purchase commissioner, he must have conducted an adequate investigation into customary interests in the block. As we have observed, the Mokau block straddled the rohe of multiple hapū, many of whose rangatira had never agreed to sell areas within which they claimed interests. In our view, as a treaty partner bound by the article 2 guarantee of tino rangatiratanga and te mātāpono o te kāwanatanga, the Crown should have positively demonstrated that it conducted such an investigation and recorded the results. Indeed, this requirement was embodied in the Crown's own purchasing guidelines.

It is not incumbent on Māori to prove, in the absence of any systematic Crown records, that the purchase had been improperly conducted when it was subsequently disputed, and when Māori can demonstrate deficiencies in the Crown's record-keeping itself. Further, in this instance subsequent investigation identified serious flaws in the transaction, including the failure to identify all owners.

Accordingly, we find that, by employing land purchasing tactics that prioritised the interests of settlers and colonial development above the interests of Te Raki hapū and iwi, the Crown acted inconsistently with its duty to act in good faith towards its treaty partner, in breach of te mātāpono o te houruatanga/the principle of partnership and te mātāpono o te mana taurite/the principle of equity.

Our more specific findings on Crown purchasing follow.

(2) *Prices*

In *The Wairarapa ki Tararua Report*, the Tribunal accepted that 'if the Crown was to take an active role in promoting orderly settlement it had to purchase some land for resale at a profit'. However, this premise left unanswered how much profit the Crown needed to sustain the land fund, and what payment and proportion of the land's value Māori should immediately receive. The Tribunal concluded that, having asserted a monopoly on purchase, the Crown had an 'obligation to deal fairly with Māori'.[909] It cited *The Ngai Tahu Report 1991*, which stated:

> With the tribe unable to find alternative buyers, the Crown was under a strong obligation to deal with the utmost good faith in such matters as the quantity of land purchased and the price paid.[910]

We agree with these assessments. The Crown had an obligation (which it had recognised at the outset) to ensure that its purchases did not compromise the economic well-being of hapū and iwi and ability to provide for their future development. It was also unable to impose purchase prices on Māori that were not agreed beforehand, as was plainly stated in both the Māori and English texts of article 2 of the treaty.[911] Thus, prices should have been subject to negotiation, and the Crown was obliged to listen to, recognise, and respect Te Raki Māori views about the value of their lands, and bargain in good faith. If agreement on price was not possible, then the article 2 guarantee would protect the right of Te Raki Māori to retain their lands until a compromise could be reached. However, we received no evidence that the Crown systematically sought to establish an agreed approach to prices with Te Raki Māori during this period. Instead, the Crown set the maximum price it would pay for Māori land without consultation. One of McLean's clearest instructions to his land purchase commissioners was that they should purchase land at low prices.

Some Te Raki rangatira saw the Crown's unwillingness to negotiate on the prices paid for their land as an offence to their authority. When they raised these concerns at the Kohimarama Rūnanga in 1860, McLean dismissed their worries, repeating the Crown's view that their land had only nominal value under customary title. The Crown instead employed a number of other tactics intended to sustain the low prices it offered, notably purchasing large tracts of land well in advance of demand, purchasing tracts that embraced land of varying quality as a justification for those prices, and promising Te Raki Māori that 'real payment' in the form of infrastructure and economic opportunities would follow the sale of their lands. As we have noted, there is little evidence of the Crown attempting to ensure that such commitments were kept.

Accordingly, we find that:

- By not dealing with Te Raki Māori in good faith with regard to price-setting for their land, and utilising its monopoly advantage to insist on the low maximum prices it would pay, the Crown breached te mātāpono o te houruatanga/the principle of partnership.
- By paying nominal prices which reduced the ability of hapū to develop their remaining land if they so wished and enter the economy on an equal footing with settlers, the Crown breached te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right

to development, te mātāpono o te mana taurite/ the principle of equity, and te mātāpono o te tino rangatiratanga.

(3) *'Real payments' or 'collateral benefits'*

What began as a loosely worded notion, the 'benefits' that would accrue to Māori following the introduction of settlers and capital into New Zealand gradually evolved into explicit assurances over 'real payments'. As a matter of course, 'collateral benefits' were held out to and, it was said, accepted by Māori as the 'real payment' for their land. The promise of collateral benefits was evidently intended to convey an assurance that the Crown was committed to conserving and advancing the interests of Māori. These undertakings were inserted into a small number of purchase deeds as per cent clauses, but were more widely promised by Governors Grey and Gore Browne, and land purchase commissioners.

The 10 per cent clauses were intended to fulfil the promises made in respect of collateral benefits. As inserted in some purchase deeds, the clause constituted a commitment that the Crown was obliged to honour. It was intended to provide owners of a block with a share in the rising value of their land when it was on-sold; to that extent it had a commendable objective. Yet the 10 per cent scheme was utilised only in three cases in Te Raki and was terminated prematurely for reasons that had little to do with its intrinsic merits or flaws – seldom has a policy been more half-hearted. Successive Governments also failed to administer the truncated scheme in a manner that was fair to those who, partly on the strength of the clause, had sold their lands to the Crown. The Crown also failed to develop an alternative policy to honour the promises freely made to Māori that collateral benefits would follow land sales.

There were serious shortcomings in the Crown's carrying out of its obligations in respect of the Ruakaka purchase. In 1874, Heaphy distributed £237 to Taurau and those present in Whāngārei for the purpose of 'education and hospitals' and made further payments of £35 to other unidentified owners. The 1927 Sim commission's conclusion was that the Crown's obligations to the sellers were otherwise discharged, based on its general expenditure on Māori education and health services prior to 1925. No explanation was offered as to why the proceeds from the on-sale of land in those few blocks were expected to fund the provision of certain services to all Māori, or how the clause could be held to compensate the vendors for the low prices they had received for their lands. The conclusion reached by the Sim commission (and maintained by the Crown) was inconsistent with the manner in which Heaphy approached his task, preparing detailed accounts for each block and distributing moneys to former owners.[912] In our view, the Sim commission failed to appreciate the basic obligation into which the Crown had entered. For the Crown, the commission's finding in this matter was politically expedient rather than a reflection of the promises made to the Ruakākā people or in the treaty in general.

It is evident that the Crown made more general promises to Te Raki Māori of collateral benefits – including towns, public works, public services, the rising value of land retained, and commercial opportunities – not as an affirmation of partnership but as an indeterminate assurance intended to facilitate the implementation of its plans for a settler-dominated society and economy. Promises of 'real payments' in the form of rising land values consequent upon the building of roads, schools, hospitals, and so forth constituted a clear and unambiguous inducement to sell to the Crown which then it did little to put into actual effect. This was exemplified in the Bay of Islands Settlement Act 1858, and its fate. When Governor Gore Browne visited Te Raki in January 1858, and Governor Grey in 1861, Bay of Islands Māori had been promised a township and the associated investment in the economy and infrastructure. However, after the outbreak of war in Taranaki and Waikato, the proposed township was forgotten by Crown officials, and large areas of purchased land were held by the Crown unsettled for many years. In the absence of any Crown delivery on the promised opportunities and benefits that would accompany land sales, O'Malley argued, the 'real payment' Te Raki Māori

received was only the sum of money and goods that the Crown paid at the time of the deed signings.[913]

Acccordingly, we find that:

- By failing to adequately implement its 10 per cent commitment to Te Raki Māori as recorded in certain purchase deeds, the Crown breached te mātāpono o te houruatanga/the principle of partnership, and te mātāpono o te kāwanatanga.
- By failing to take timely steps to meet its commitment to ensure that Te Raki Māori would receive collateral benefits they were promised, the Crown breached te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development.

(4) *'Sufficiency' of land and reserves*

In previous reports, the Tribunal has found that the Crown, at an early stage, recognised that it was obliged to ensure that Māori retained sufficient land for their subsistence and maintenance *and* for development opportunities. Such recognition was implicit in Normanby's 1839 instructions: if Māori were to retain enough land for their present and future needs and to benefit from the increasing value of their lands, as Normanby envisaged, then they would have to retain a good deal more land than was required for bare subsistence purposes.[914] The Tribunal has also recognised that the Crown played a major, if not central, role in shaping the colonial society and economy. Through the redistribution of land once owned by Māori, it enabled settlers of modest means to invest labour, skills, and capital in transforming natural resources into sources of output – a transformation that lay at the heart of colonial economic development. The ownership of land was, from the outset of colonisation, regarded as the key to material prosperity, and a core role of the Crown was to ensure what was regarded as reasonable equality of opportunity.[915]

The conclusions reached by the Tribunal in other inquiries on the 'sufficiency' of reserves and land retained by Māori are based on two major premises: namely, that Māori sought to contribute to and benefit from the colonial economy, and that the Crown, through its duty of active protection, was obliged to encourage, support, and assist Māori to do so. In the *Muriwhenua Land Report*, for example, the Tribunal concluded that 'a settlement plan that was sensitive to Maori people was needed if Maori interests were to be provided for'.[916] In *The Ngai Tahu Report 1991*, the Tribunal recorded that the Crown's 'duty was to ensure that Ngai Tahu were left with sufficient lands for their present and future needs'. It went on to observe: 'Sufficient land would need to be left with Ngai Tahu to enable them to engage on an equal basis with European settlers in pastoral and other farming activities.'[917] In *The Hauraki Report*, the Tribunal, while acknowledging that 'historical contexts' could not be ignored, nevertheless concluded 'that governments could have fostered a wider Maori involvement in the new economy', but that the Crown had failed to ensure Māori retained sufficient land for earning income.[918] In *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (2004), the Tribunal reached similar conclusions, while also noting that the Crown's responsibility to undertake positive action was explicit in Normanby's instructions, and in both the preamble and article 3 of the treaty.[919]

The Tribunal examined the matter of sufficiency at some length in the *Wairarapa ki Tararua* report, concluding:

> The assurance to Māori that they would retain adequate land for their future welfare, and in the fullness of time would be in a position to reap the benefits of British settlement, was fundamental to the relationship between Crown and Māori.[920]

Thus, so they could engage in new commercial activities and in order to meet their cultural and resource needs, Wairarapa Māori needed to retain sufficient land to be able 'to benefit from its increase in value to make up for what they sold at low prices'. The Tribunal went on to suggest that these were not modern notions of sufficiency but ideas that were articulated by colonial law makers.[921] It concluded:

> in nineteenth-century New Zealand, land ownership and the control of resources associated with it were widely perceived as important ways to derive wealth from the new opportunities

> expected to arise with settlement. From the beginnings of settlement, it was also understood that protecting the right amount of land for Māori would be important in ensuring their capacity to participate in these opportunities.

This, it added, 'was a key message in the assurances which persuaded Māori to part with their land'.[922]

These are important conclusions about Government obligations and policy which we endorse and accept in our inquiry.

By contrast, the fundamental premise on which the Crown prepared to embark upon an extensive land-purchasing programme was that Te Raki Māori would remain in an essentially marginal position in the colonial economy. The Crown therefore assumed that Māori would require land only for the purposes of subsistence and maintenance of their population which was considered to be dwindling, and further, that they required little more than the lands they already occupied and cultivated. It failed to heed the import of Clarke's early conclusion that Te Raki hapū could not afford to alienate more land, and it failed to test his conclusion. No evidence emerged that indicates the Crown carried out any investigations that might have assisted it to establish a basis on which to assess the land needs of each Te Raki hapū community or, indeed, to monitor the implications and consequences of its purchases for those hapū. In short, the Crown adopted a very narrow concept and definition of sufficiency that served its interests rather than those of Te Raki hapū and iwi. By so doing, the Crown once again exposed an unresolved tension between its treaty obligations to Te Raki Māori and its desire to promote immigration and the development of the colonial economy through small-farm settlement by immigrants.

We accept claimant counsel's conclusions that the Crown had a duty to 'ensure that Te Raki Māori retain and retained their lands, estates, forests, fisheries, other properties and taonga as long as it was in their desire to do so', as well as actively protecting them from 'the loss of their land and economic resources . . . to ensure that [they] retained a sufficient land and resource base for their effective participation in the colonial economy'.[923] The Crown conceded that it had 'a responsibility to ensure that the alienation of land, including Northland lands, did not render the alienors impoverished'.[924]

We conclude that, in pursuing its purchase objectives, the Crown acted inconsistently with that duty. The Crown failed to develop, either independently or in consultation with Te Raki Māori, a robust policy concerning land retention and reserves, including matters such as economic usefulness; suitability for hapū purposes; size, quality, and location; alienability; nature of ownership; and legal status. Whereas McLean had early in his land purchasing career set considerable store on creating large, permanent, inalienable, and collectively owned reserves, as the head of the Native Land Purchase Department he instructed his district land purchase commissioners to use their own discretion on the matter. There is evidence from this period that where reserves were granted, land purchase commissioners sought to restrict them to less valuable portions of blocks. For instance, Johnson wrote to McLean that he 'could not consent' to Ruakākā Māori retaining a 'valuable tract' of land.[925] There is also evidence that Johnson on occasion viewed reserves as an inconvenience to settlers.[926] However, McLean neither questioned nor raised any objections to the apparent aversion on the part of his purchasing agents to ensure that reserves were set aside for those hapū who chose to transact their land. McLean endeavoured to limit demand for reserves by encouraging Māori vendors to repurchase, at a substantial price, land that they just transacted. This policy meant that Māori were obliged to use the proceeds of the transaction to retain a portion of their own land and receive Crown grants for it at a much greater price than they had received – a step towards the 'individualisation' of land tenure that would dominate the Crown's approach to Māori-owned land for the next 100 years. It also meant that those proceeds were then unavailable for the acquisition of whānau economic assets.

Between 1840 and 1865, the Crown established 57 reserves with an aggregate area of 13,940 acres, out of the 482,115 acres that it acquired during this period.[927] In our view, this small amount of land was not enough to support hapū well-being and development. Such reserves as

were created focused on sites occupied and cultivated or employed for mahinga kai, landing places, and places of particular importance to Te Raki Māori; an approach fully consistent with the Crown's cornerstone commitment to the protection of 'occupied' lands, perceived to be the areas that Māori really 'owned' – and to a concept of sufficiency based on adequacy for short-term subsistence. The Crown's failure to set apart substantial reserves of good-quality land meant that Te Raki hapū would never receive a key component of the promised 'real payment'; that is, the rising value of the reserved lands they retained.

With the exception of a small number of repurchase reserves, the reserves that were made in Te Raki during this period did not receive secure titles, and many were not surveyed until much later. Without any statutory recognition for native reserves, the Crown's promises that reserved lands would be protected and would remain in Māori ownership to support hapū communities had little substance and were made in bad faith. As Dr O'Malley argued, Te Raki Crown purchase reserves 'were left bereft of any protection from alienation by the Crown and later subjected to the operations of the Native Land Court'.[928] In the end, the small number of native reserves allocated for Te Raki Māori during this period, but not titled, was an insecure and insufficient tribal estate for their immediate needs and future development.

Accordingly, we find that:

- By failing to ensure that hapū communities each retained a land and resource base to meet their present and future requirements for sustenance and fulfilment of cultural obligations, to provide opportunities for development, and to enable them to participate in the national economy, the Crown breached te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development and te mātāpono o te matapopore moroki/the principle of active protection. It also breached te mātāpono o te tino rangatiratanga.
- By failing to make adequate statutory provision for the creation of secure titles for native reserves for hapū, and by failing to ensure that reserves were surveyed and their boundaries clearly marked, the Crown breached te mātāpono o te houruatanga/the principle of partnership, te mātāpono o te kāwanatanga, and te mātāpono o te tino rangatiratanga.

(5) *Overall finding on the Crown's purchasing practices*

It is clear to us that Ngāpuhi and Te Raki Māori hapū and iwi entered into negotiations over land expecting to implement the partnership embodied in the treaty. Equally, Lord Normanby's 1839 instructions to Hobson established early on that the Crown had an obligation to act in good faith towards Māori, and to recognise their interests and rights. However, alongside these early statements of protective intent was the further imperative on Crown officials to acquire large tracts of land at low cost to sustain the colony's land-fund.

The manner in which land was to be acquired for settlement was of great importance to Te Raki Māori and the Crown, and had implications for both their spheres of authority as recognised in te Tiriti. However, as we concluded in sections 8.3.3 and 8.4.3, the Crown failed to engage with Te Raki Māori in an appropriate, meaningful, and good faith manner, and neither sought, nor secured, their full and informed consent and support for key aspects of its purchasing policy. In our view, the Crown had many opportunities to reach this kind of negotiated agreement on land purchase and settlement. After signing te Tiriti Te Raki hapū and iwi were interested in transacting their land, maintaining a connection with it and settlers in their midst, and sought an economic partnership with the Crown. However, Crown officials did not try to understand Te Raki Māori aspirations. Nor is it clear that they made any real effort to ensure that Te Raki Māori would thrive socially, politically, and economically alongside the colonists. Despite its rhetoric, the Crown showed little interest in policies that would build a society in which both Māori and Pākehā participated and contributed, as the treaty had contemplated and guaranteed. Māori were incentivised to transact their lands by

promises of future benefits. However, by 1865 it was not clear that these would eventuate.

The design of the Crown's purchasing programme was intrinsic to and reflected this failure. As envisaged by officials such as McLean, the Crown's purchasing programme sought to acquire entire districts, and confine Māori communities to small reserves for their occupation and subsistence only. Almost immediately after signing the treaty, the Crown disregarded the guarantees it had made to Te Raki Māori that their tino rangatiratanga would be protected, and that the settlement and development of the colony would be the subject of negotiated agreement. Instead, the Crown pursued a policy of extinguishing customary title through the purchase of large tracts of land at low prices. Privileging the interests of settlers, the Crown targeted the best agricultural and commercial land in the district and sought to restrict Te Raki Māori to reserves that would provide for their subsistence only. As Crown counsel acknowledged, the purchasing programme imposed a process by means of which the alienation of Te Raki hapū land directly funded the development of the colony.[929] Settler society benefited from this development, at the expense of Te Raki Māori.

In pursuing this policy, Crown agents negotiated purchases with owners wanting to access new goods, technology, and beneficial relationships. They often disregarded or circumvented the objections of owners who wished to hold their territories intact. They failed to investigate the full range of customary interests in lands before purchasing them; took other corner-cutting measures (such as dealing with only handfuls of owners, staging payments by instalment, and failing to walk the boundaries) to ensure the swift purchase from Māori of land they sought for resale and settlement; and subsequently failed to ensure the realisation of promised collateral benefits. The Crown failed to devise and implement a robust policy to ensure Māori retained sufficient land for their present and future well-being, and economic and social development.

In light of these overall shortcomings of the Crown's purchasing regime, we find that:

- By failing to act reasonably, honourably, and in good faith, to engage with its treaty partner, and involve Te Raki Māori in decision-making about the alienation and settlement of their lands, the design and implementation of its land purchasing programme and its policy for colonial development in the inquiry district in the period 1840 to 1865, the Crown breached te mātāpono o te houruatanga/the principle of partnership, te mātāpono o te tino rangatiratanga, as well as te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect.
- By failing to uphold its own standards clearly articulated at the time and prioritising the purchase of large areas of land at low cost in order to serve the interests of settlers over respect for and recognition of Te Raki Māori interests, the Crown breached te mātāpono o te tino rangatiratanga, te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development, te mātāpono o te mana taurite/the principle of equity and te mātāpono o te matapopore moroki/the principle of active protection.

8.6 Whakarāpopototanga o ngā Whakataunga / Summary of Findings

In respect of the development of the Crown's purchasing policy, we find that:

- The Crown failed to engage with Te Raki Māori in developing its purchasing and settlement policy during the 1840s, and prioritised its political and economic objectives at the expense of Māori interests and treaty-protected rights in breach of te mātāpono o te tino rangatiratanga, and te mātāpono o te houruatanga/the principle of partnership.
- By denigrating the validity of Te Raki Māori rights in land and accepting the principle that those rights could be extinguished over large tracts of land at low cost, while hapū and iwi could be confined to small reserves for cultivation and occupation, Crown

policy breached te mātāpono o te houruatanga/the principle of partnership, te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development, and te mātāpono o te matapopore moroki/the principle of active protection.

In respect of the Crown's implementation of its purchasing policy, we find that:

- By limiting the ability of Māori to exercise all the rights of ownership through failing to provide legal recognition for existing lease arrangements in an attempt to induce Māori to part with their land, the Crown breached te mātāpono o te tino rangatiratanga and te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development.
- By not adequately considering Te Raki Māori views and interests and by implementing a land purchase policy after 1848 that favoured the interests of settlers, and sought to bring Te Raki Māori communities under the control of British institutions and laws through assimilationist policies, the Crown breached te mātāpono o te houruatanga/the principle of partnership, te mātāpono o te tino rangatiratanga, and te mātāpono o te mana taurite/the principle of equity.

In respect of the Crown's purchasing practices on the ground, we find that:

- By employing land purchasing tactics that prioritised the interests of settlers and colonial development above the interests of Te Raki hapū and iwi, the Crown acted inconsistently with its duty to act in good faith towards its treaty partner, in breach of te mātāpono o te houruatanga/the principle of partnership and te mātāpono o te mana taurite/the principle of equity.
- By not dealing with Te Raki Māori in good faith with regard to price-setting for their land, and utilising its monopoly advantage to insist on the low maximum prices it would pay, the Crown breached te mātāpono o te houruatanga/the principle of partnership.
- By paying nominal prices which reduced the ability of hapū to develop their remaining land if they so wished and enter the economy on an equal footing with settlers, the Crown breached te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development, te mātāpono o te mana taurite/the principle of equity, and te mātāpono o te tino rangatiratanga.
- By failing to adequately implement its 10 per cent commitment to Te Raki Māori as recorded in certain purchase deeds, the Crown breached te mātāpono o te houruatanga/the principle of partnership, and te mātāpono o te kāwanatanga.
- By failing to take timely steps to meet its commitment to ensure that Te Raki Māori would receive collateral benefits they were promised, the Crown breached te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development.
- By failing to ensure that hapū communities each retained a land and resource base to meet their present and future requirements for sustenance and fulfilment of cultural obligations, to provide opportunities for development, and to enable them to participate in the national economy, the Crown breached te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development and te mātāpono o te matapopore moroki/the principle of active protection. It also breached te mātāpono o te tino rangatiratanga.
- By failing to make adequate statutory provision for the creation of secure titles for native reserves for hapū, and by failing to ensure that reserves were surveyed and their boundaries clearly marked, the Crown breached te mātāpono o te houruatanga/the principle of partnership, te mātāpono o te kāwanatanga, and te mātāpono o te tino rangatiratanga.
- By failing to act reasonably, honourably, and in good faith, to engage with its treaty partner, and involve Te Raki Māori in decision-making about the alienation and settlement of their lands, the design and implementation of its land purchasing programme and its policy for colonial development in the inquiry district in the period 1840 to 1865, the Crown breached

te mātāpono o te houruatanga/the principle of partnership, te mātāpono o te tino rangatiratanga, as well as te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect.

- By failing to uphold its own standards clearly articulated at the time and prioritising the purchase of large areas of land at low cost in order to serve the interests of settlers over respect for and recognition of Te Raki Māori interests, the Crown breached te mātāpono o te tino rangatiratanga, te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development, te mātāpono o te mana taurite/the principle of equity and te mātāpono o te matapopore moroki/the principle of active protection.

8.7 Ngā Whakahāweatanga/Prejudice

The Crown directly purchased approximately 23 per cent of land in Te Raki hapū and iwi customary ownership between 1840 and 1865. The Crown's purchases included approximately 95,000 acres (23 per cent) of the Bay of Islands and Te Waimate–Taiāmai taiwhenua, 36,000 acres (15 per cent) of the Whangaroa taiwhenua, 205,000 acres (30 per cent) of the Whāngārei and Mangakāhia taiwhenua, and 148,000 acres (28 per cent) of the Mahurangi and Gulf Islands taiwhenua.[930] Overall, Crown purchasing in the Te Raki district during this period amounted to some 482,000 acres, with the loss from old land claims and pre-emptive waiver transactions accounting for a further 274,592 acres (see map 8.10).[931] By 1865, over 34 per cent of Te Raki Māori land had been alienated. Te Raki Māori were fundamentally prejudiced by such a significant transfer of their tribal estate out of their control at an early stage of the developing treaty relationship and their engagement with the colonial economy.

During this period, the protection of the landholdings of hapū communities was far from a key concern of the Crown's purchase agents. The Crown did not seek to understand how various communities were coping with its purchasing drive, nor how much land and resources these communities retained for themselves. Instead, it prioritised the acquisition of large blocks as the most efficient means of extinguishing native title and consolidating Crown control over the district. These actions contrasted sharply with the Crown's expressions of concern for Māori land loss and welfare before the treaty was signed, and had highly prejudicial consequences for Te Raki Māori. As Marina Fletcher (Te Parawhau) stated, her hapū '[went] from having large tracts of cultivations . . . plentiful stores of food and an abundance of resources, estates, kainga and people' before the treaty, to 'a marked decline in [their] population, health, wealth and general prosperity'.[932]

Johnson's operation in the Whāngārei district epitomised the Crown's reckless approach to land acquisition. Between 1854 and 1858, he purchased some 99,000 acres, all surrounding Whāngārei Harbour.[933] Not included in this figure are Johnson's 1854 purchases of the Ruakaka and Waipu blocks, to the south of the harbour on the east coast, which represent a further loss of 46,359 acres for the local hapū.[934] Through this wave of purchases, the Crown gained control of the valuable harbour frontage, while 'Whangarei Māori were gradually . . . pushed back into the hills', as O'Malley put it.[935] The remainder of the Crown's Whāngārei purchasing was completed after Johnson left the land purchase department, and involved agricultural lands adjacent to the harbour.[936] Despite having retained land in the interior, Whāngārei hapū had lost much of the most valuable land in the district by 1865.

The purchase of the Mahurangi–Omaha block from 1841 is a particularly notable example of the Crown's treaty breaches contributing to long-lasting prejudice. The Mahurangi–Omaha purchase purported to alienate around 220,000 acres of land from the hapū of the district, including Ngāti Rongo ki Mahurangi, Ngāti Maraeariki, Ngāti Manu, Te Uri Karaka, and other Maki-nui descendants.[937] Counsel for the Crown acknowledged that by the 1850s, when it had begun to purchase the interests of the owners not involved in the original purchase,

> European settlement of these lands had begun and Māori were obliged to accept the Crown's position that the sale would not be revisited in any substantial way. All that was left to those who had not already agreed to the transaction was to

choose to accept a payment and attempt to have reserves set aside.[938]

The impact of losing this land is an enduring grievance for these hapū and was addressed by multiple claimants in our inquiry. Arapeta Hamilton (Ngāti Rongo), for example, told us:

> The Purchase of Mahurangi by the Crown has been seen as being very complex and difficult but for the Mana Whenua the process has been devastating. The process of land acquisition by the Crown has been aggressive and the colonisation has been fast, furious and deadly. To be basically landless within your own Rohe in such a short period of time is horrific.[939]

Claimant Michael Beazley (Ngāti Maraeariki) also described the enduring impact of the limited reserves set aside from the Mahurangi–Omaha purchase on his hapū:

> As a result of the Mahurangi Purchase, the Te Kawerau people who had occupied that area for over 200 years were dispossessed and ultimately marginalised on to reserves that represented a fraction of their original holdings. . . . Our loss of land has made us nearly invisible in our own rohe. We have little say on matters of kaitiakitanga . . . Ngāti Maraeariki do not have a marae. We do not have land upon which to create a reserve and build a marae.[940]

Even in the taiwhenua where Crown purchasing activity was comparably less extensive, the impact on Māori communities could be dire, especially if it removed access to key resources or trading opportunities. For instance, in the Bay of Islands the cumulative effect of Crown purchasing, coupled with the losses Te Raki Māori suffered through the ratification of old land claim transactions and the Crown's taking of the 'surplus', was particularly felt by the 1860s. The Crown had purchased another 95,305 acres by 1865 (approximately a further 23 per cent of the district).[941] In their overview report on the Auckland Province, Rigby, Daamen, and Hamer observed that what was retained was the least valuable land.[942]

In Whangaroa, the Crown's purchase of the large Pupuke and Mokau blocks removed the Māori owners' access to substantial kauri and timber resources.[943] Claimant Rowan Tautari pointed out, with reference to the Mokau purchase, that the impact encompassed more than the loss of a landbase:

> The biggest loss to Te Whiu is probably measured in its inability to use the resources growing on such land. Te Whiu were denied vast tracts of kauri forest with a commercial timber value, as well as sources for gum. From another perspective, such sales must have raised emotions of distrust, suspicion and frustration between Maori.[944]

Dr O'Malley observed that, over time, the disparity in the price Māori received for the land and the value of the timber would only increase. By 1948, the price of one tree on the Mokau block was considered to be worth more than what had been received for the block 90 years earlier.[945] Erimana Taniora (Ngātiuru and Te Whānaupani) described the impact that losing the opportunity to receive the economic value of their resources has had on their community:

> Land loss has affected Ngātiuru in a number of ways, the issues go deeper than just the loss of the land. The loss of the land has resulted in a much smaller economic base for our people and the loss of resources . . . The loss of lands has also meant that Ngātiuru lacks an economic base here in Whangaroa . . . We have lost many economic opportunities. And this has probably resulted in the current social and economic deprivation in Whangaroa.[946]

Overall, the Crown's land policies and their implementation during this period failed to ensure that Te Raki Māori were able to maintain key cultural practices or secure a sound and sustainable footing in the regional economy. As we have noted, only 57 reserves were

established during this period, covering 13,940 acres. In our view, this was a woefully inadequate estate to provide for the present and future requirements of Te Raki Māori, especially when considered in the context of the 482,000 acres that the Crown acquired during the period.[947]

Moreover, the limited protection the reserves provided was further reduced by the fact that the majority of the reserves entered on purchase deeds received no legal titles and often were not surveyed until much later. The absence of surveys, or else substandard surveying, made it difficult for Te Raki hapū to know what land had been sold and what remained in Māori ownership. The only means they had to secure Crown grants for their reserves was to repurchase lands out of the proceeds they had received from the Crown. Unsurprisingly, the option to repurchase a portion of their land at the same price settlers would pay for Crown lands was not taken up by Te Raki Māori, except in a few cases. As a consequence, most of the reserve lands remained under customary title, would later come before the Native Land Court, and could then be purchased (as we discuss in the following chapters). For instance, Ruapekapeka Māori reserved 745 acres from sale, but the Crown acquired 486 acres of that area in June 1865 for £1,106.[948] As previously outlined, when the Crown purchased the Ruakaka block, the 1,227-acre Waiwerawera block was set aside as a 'Native Reserve' and labelled as such on the deed plan. However, when the title for this reserve was investigated in November 1873, it was awarded to only five Māori owners (Hona Te Horo, Horomona Te Hana, Parata Te Rata Pou, Ihapera Pomare, and Hira Te Taka), upon which it was promptly purchased by Thomas Henry, a settler.[949]

While we did receive some evidence of contemporary consequences for Te Raki hapū and iwi of the Crown's land purchasing policies, establishing clear causal connections between land loss and socio-economic disadvantage or marginalisation is difficult. Typically, many years elapse before disadvantages become fully manifest. For the period 1840 to 1865, we lack the kind of information on which to base a comprehensive assessment of the nature and extent of the injury that the Crown's actions may have caused Te Raki hapū and iwi. In previous inquiries, the Tribunal has confronted similar difficulties but nevertheless considered it could reach two major conclusions: first, that the loss of land was a major contributor to the adverse social and economic conditions that had emerged in most Māori communities by 1900, and which assumed acute form during the first three decades of the twentieth century; and secondly, that the Crown was responsible, directly and indirectly, for the greater part of the land loss that those communities sustained.[950]

Overall, we think these conclusions apply with equal force to the experiences of Te Raki Māori communities. In fact, while Te Raki Māori had arguably benefited from the early commercial economy, particularly through their interface with the whaling trade, this economy had taken a great hit in the 1840s. As we discussed in chapter 4, the Crown had relocated the capital to Auckland in 1841, and the Bay of Islands was no longer a favoured destination of whaling ships. The Northern War had further depressed local economic activity. Te Raki Māori then had to start again, with many settlers in the district having left during the war or having accepted attractive scrip offers from the Government. If they were to thrive, Māori needed their lands and opportunities to develop them, encourage settlement (on their own terms), and adapt to the new economic circumstances and benefit from them. When it came to potential participation in the new settler economy, the early and extensive nature of land losses in Whāngārei and Mahurangi, in particular, placed Māori in those districts in an extremely disadvantaged position that would develop over subsequent decades.

There is evidence that Te Raki Māori considered that leasing offered them a better means of participating in the colonial economy, and that they continued to enter into informal lease agreements even after penalties were introduced in 1846. However, the Crown's refusal to provide any formal recognition for leases of Māori land ultimately left hapū few options other than accepting the Crown's offers to purchase their lands at nominal prices.

The large-scale alienation of land that resulted early in the development of the colony, coupled with the tardy development of infrastructure that Māori had been promised, meant that Te Raki hapū had little opportunity to participate on an equitable footing.

Indeed, it seems likely that the Crown's purchasing conduct between 1840 and 1865, which significantly reduced the landholding and resource base of Te Raki Māori communities, contributed to a longer-term decline in their socio-economic circumstances. Although the Chief Protector of Aborigines had recognised as early as 1843 that northern Māori could not afford to dispose of large areas of land, his advice and the implicit warning were ignored. In 1857, McLean advised Gore Browne that he was confident that if northern Māori were persuaded 'that the aim and object of the Government [was] to promote impartially the permanent advancement of both races of Her Majesty's subjects', they would respond, adapt, and flourish.[951] His solution to the economic malaise that he clearly recognised gripped Te Raki Māori was the transfer of further land out of Māori ownership: 'The North of New Zealand', he wrote in his journal in December 1858, 'requires the infusion of a colonising spirit; the purchase of land from the natives, and the earnest co-operation of the Government, to give it a start'.[952] Yet by 1865, the land loss suffered by Te Raki Māori as a result of Crown legislation and policy set in motion a process of social and economic marginalisation that would gather strength as settler numbers swelled; more land was then alienated after 1865, and collateral benefits failed to materialise.

It was significant that the Crown's purchasing agenda for Te Raki did not contemplate assisting hapū to re-engage in the commercial economy in ways that allowed them to retain, as they wished, traditional structures and modes of management. Crown agents purchased land from small groups of owners who appeared willing to sell, without properly identifying or consulting with all owners prior to completing transactions. This undermined established hapū authority and greatly inhibited the ability of Te Raki Māori to exercise tino rangatiratanga within their communities. There were instances where these tactics led to conflict and armed dispute between hapū, such as in the Mangakāhia conflict in 1862.

The conduct of the Crown in land purchases in the period after the signing of the treaty damaged its relationship with hapū. Between 1840 and 1865, a number of factors contributed to a growing loss of confidence in the Crown's objectives, governance and institutions, and processes: the Crown's failure to conduct its purchasing negotiations openly; to systematically review and assess its purchasing programme; to recognise and respect the efforts made by Te Raki hapū to define ownership; to pay fair prices; and to agree with them on the allocation of lands to whānau and hapū before identifying the lands available for Pākehā settlement. Land transactions between Māori and the Crown were never just about the land and were fundamentally concerned with the relationship between these two parties.[953] In our view, an emerging and potentially damaging difficulty – and one to which McLean himself had alluded – was a deepening erosion of Te Raki Māori trust in the Crown.

Notes

1. Tony Walzl, supporting documents (doc E34(a)), vol 1, pp 579–580.
2. Dr Donald Loveridge, '"An Object of the First Importance": Land Rights, Land Claims, and Colonization in New Zealand, 1839–1852', report commissioned by the Crown Law Office, 2004 (Wai 863 R01, doc A81), pp 184–185, 276.
3. Waitangi Tribunal, *He Whakaputanga me te Tiriti / The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*, Wai 1040 (Wellington: Legislation Direct, 2014), p 413; Ruth Miriam Ross, 'Te Tiriti o Waitangi: Texts and Translations', NZJH, vol 6, no 2 (October 1972), pp 143–145; Tony Simpson, *Te Riri Pakeha: The White Man's Anger* (Martinborough: Alister Taylor, 1979), p 51; Michael Belgrave, 'Pre-emption, the Treaty of Waitangi and the Politics of Crown Purchase', NZJH, vol 31, no 1 (April 1997), p 26.
4. However, we also stated that Hobson's use of 'pre-emption' in the treaty remained less clear than the language included in a similar treaty presented to rangatira (mostly from the South Island) by New South Wales Governor Gipps on 12 February 1840: that 'the said Native Chiefs do hereby on behalf of themselves and tribes engage, not to sell or otherwise alienate any lands occupied by or belonging to them, to any person whatsoever except to her said Majesty'. That treaty was never signed: Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 389–390, 509.

5. Vincent O'Malley, 'Northland Crown Purchases, 1840–1865', report commissioned by the Crown Forestry Rental Trust, 2006 (doc A6), p 29.
6. The Crown gives a total of 482,115 acres, while technical witness Dr Barry Rigby offered a total of 482,524 acres. Crown counsel accepted that between 1840 and 1865 it purchased approximately 482,115 to 482,525 acres of land from Northland Māori in the district: Dr Barry Rigby, corrections to validation reports (doc A48(e)), p 7; Crown closing submissions (#3.3.404), pp 4–6.
7. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 519, 526.
8. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, Wai 9, 2nd ed (Wellington: Brooker and Friend Ltd, 1991), pp 205–206; Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, 3 vols (Wellington: GP Publications, 1991), vol 3, pp 825–826; Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45 (Wellington: GP Publications, 1997), p 5; Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, Wai 201, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 120; Waitangi Tribunal, *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims*, Wai 785, 3 vols (Wellington: Legislation Direct, 2008), vol 1, p 286; Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, 3 vols (Wellington: Legislation Direct, 2010), vol 1, p 104; Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report*, Wai 903, 3 vols (Wellington: Legislation Direct, 2015), vol 1, p 368; Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims*, Wai 898, 6 vols (Lower Hutt: Legislation Direct, 2023), vol 2, pp 1358–1360.
9. Waitangi Tribunal, *Report on the Orakei Claim*, Wai 9, p 205.
10. Ibid, p 206.
11. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 5; Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, Wai 201, vol 1, pp 120–121; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 1, pp 286, 441; Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 104; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, vol 1, pp 383–385.
12. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 1, p 286.
13. Ibid, pp 286, 299; see also Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 59.
14. Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, vol 3, pp 825–826.
15. Ibid, vol 2, p 639.
16. Ibid, vol 3, p 828.
17. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 279.
18. Ibid, p 281.
19. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 259; Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 368.
20. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 1, p 307.
21. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 206.
22. Ibid, p 207.
23. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, Wai 201, vol 1, p 67. The Te Tau Ihu Tribunal reiterated this: Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 1, p 307.
24. Waitangi Tribunal, *The Hauraki Report*, Wai 686, 3 vols (Wellington: Legislation Direct, 2006), vol 1, p 173.
25. Ibid, vol 1, p 173.
26. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 190.
27. Ibid, p 191.
28. Ibid, p 96.
29. Ibid, p 367.
30. Ibid, p 374.
31. Ibid, p 391.
32. Governor Grey introduced the idea of using a percentage of the on-sale price of land the Crown purchased from Māori to create a fund directly benefiting its former Māori owners. In the Wairarapa, 5 per cent of the on-sale price was to go into the fund. Use of the term 'koha' is found in the early Wairarapa purchase deeds to describe this 5 per cent fund: Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, pp 96, 367.
33. Waitangi Tribunal, *The Whanganui River Report*, Wai 167 (Wellington: GP Publications, 1999), p 140.
34. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 255.
35. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, pp 327, 100, 327.
36. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, vol 1, p 272.
37. Waitangi Tribunal, *Report on the Orakei Claim*, Wai 9, pp 27–28; Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, vol 3, pp 822–823; Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wai 143 (Wellington: Legislation Direct, 1996), p 35; Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, pp 210, 399.
38. Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, vol 3, p 823.
39. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, pp 210, 399.
40. Ibid, p 211.
41. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 246.
42. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 127.
43. Ibid, pp 127–128.
44. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, vol 1, pp 304–305, 314–315, 330–331.
45. Crown statement of position and concessions (#1.3.2), p 3; Crown closing submissions (#3.3.404), p 2.
46. Crown statement of position and concessions (#1.3.2), p 1.
47. Ibid, p 29.
48. The Crown first filed particularised figures for Crown purchasing between 1840 and 1865 in 2012. These figures were further clarified in 2015 by Dr Rigby who was commissioned to complete essential Crown purchase information and comment on the source information where appropriate. In his 2015 validation report, Dr Rigby identified blocks

that were either wholly or partially outside the inquiry district, and noted that the Crown included certain acreages in its figures that it should not have. This included the Crown having twice accounted for the acres purchased in the Mahurangi and Omaha purchase of 1841, which were the subject of further Crown purchases between 1853 and 1865. In September 2017, Dr Rigby filed further revised figures at the request of Crown counsel that clarified the extent to which Crown purchase blocks overlapped the adjacent Muriwhenua and Kaipara inquiry districts. In its submissions, the Crown noted its appreciation of 'all who have contributed to the inquiry and to a better understanding of the extent of alienation of land from Northland Māori': Crown closing submissions (#3.3.404), pp 4–6; Barry Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report', report commissioned by the Waitangi Tribunal, 2015 (doc A53), app A, pp 3–7; Rigby, corrections to validation reports (doc A48(e)), p 7.

49. Crown closing submissions (#3.3.404), p 9.

50. Ibid, p 10.

51. Ibid.

52. Crown memorandum (#3.2.2677), p 19.

53. Crown closing submissions (#3.3.404), pp 9–10.

54. Crown statement of position and concessions (#1.3.2), p 1.

55. Claimant closing submissions (#3.3.208), pp 31–32.

56. Ibid, pp 22–23.

57. Ibid, p 24.

58. Closing submissions for Wai 2394 (#3.3.336), p 44; closing submissions for Wai 2206 (#3.3.400), pp 143–144; closing submissions for Wai 2382 (#3.3.333(b)), pp 45–46.

59. Closing submissions for Wai 2394 (#3.3.336), p 44; closing submissions for Wai 2206 (#3.3.400), pp 143–144; closing submissions for Wai 2382 (#3.3.333(b)), p 45.

60. Claimant closing submissions (#3.3.208), p 5.

61. Ibid, pp 41–42.

62. Closing submissions for Wai 2355 (#3.3.275(a)), p 34; closing statement for the Mangakāhia taiwhenua (#3.3.293), pp 11–12; closing submissions for Whangaroa Taiwhenua (#3.3.385), p 33.

63. Claimant closing submissions (#3.3.208), pp 33–34; closing submissions for Wai 2394 (#3.3.336), p 67; closing submissions for Whangaroa Taiwhenua (#3.3.385), p 34.

64. Closing submissions for Wai 2394 (#3.3.336), pp 55–56; closing submissions for Wai 2382 (#3.3.339(a)), pp 56–57; closing submissions for Wai 1522 and Wai 1716 (#3.3.341(a)), pp 26–27; closing submissions for Wai 1968 (#3.3.337), pp 60–61; see also closing submissions for Wai 1140 and Wai 1307 (#3.3.354), p 28; closing submissions for Wai 1514 (#3.3.357), p 58; closing submissions for Wai 2206 (#3.3.400), p 153.

65. Closing submissions for Wai 2394 (#3.3.336), pp 71–75; closing submissions for Wai 1968 (#3.3.337), pp 77–82; closing submissions for Wai 2382 (#3.3.339(a)), pp 75–79; closing submissions for Wai 1522 and Wai 1716 (#3.3.341(a)), pp 43–48; closing submissions for Wai 2206 (#3.3.400), pp 170–175.

66. Claimant closing submissions (#3.3.208), pp 5–6.

67. Ibid, p 53.

68. Claimant submissions in reply (#3.3.423), p 22.

69. Claimant closing submissions (#3.3.208), p 58.

70. Ibid, p 58; Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (doc A53), p 11.

71. Claimant closing submissions (#3.3.208), pp 58–59.

72. Ibid, p 59.

73. Ibid, pp 60–61.

74. Ibid, pp 63–66.

75. Ibid, p 6.

76. See Crown memorandum (#3.2.2677), p 19.

77. Claimant submissions in reply (#3.3.423), pp 8–12.

78. Claimant closing submissions (#3.3.208), pp 55–57.

79. Claimant submissions in reply (#3.3.423), pp 13–14.

80. Ibid, pp 12–13.

81. Claimant submissions in reply (#3.3.423), p 11.

82. Closing submissions for Wai 2181 (#3.3.242), pp 19–21; closing submissions for Wai 354 (#3.3.392), p 44; closing submissions for Wai 2206 (#3.3.400), p 212.

83. Claimant closing submissions (#3.3.208), pp 9–10.

84. Ibid, p 12.

85. Ibid, pp 12–13; O'Malley, 'Northland Crown Purchases' (doc A6), pp 19–20, 490.

86. Claimant closing submissions (#3.3.208), pp 13, 20–22.

87. Ibid, p 14.

88. Claimant submissions in reply (#3.3.423), p 24.

89. Claimant closing submissions (#3.3.208), p 20.

90. Crown closing submissions (#3.3.404), p 5.

91. Ibid, p 6.

92. Ibid, p 7.

93. Ibid, p 41.

94. Ibid, p 42.

95. Ibid.

96. Ibid, p 11.

97. Waitangi Tribunal, *The Kaipara Report*, Wai 674 (Wellington: Legislation Direct, 2006), p 51; Crown closing submissions (#3.3.404), p 12.

98. Crown closing submissions (#3.3.404), p 12.

99. Ibid, p 17.

100. Ibid.

101. Andrew Irwin, transcript 4.1.32, Waitaha Events Centre, p 221.

102. Crown closing submissions (#3.3.404), p 10.

103. Ibid, pp 41–43.

104. Ibid, p 42.

105. Ibid.

106. Ibid, p 43.

107. Crown statement of position and concessions (#1.3.2), p 3; Crown closing submissions (#3.3.404), p 18.

108. Crown statement of position and concessions (#1.3.2), p 3.

109. Crown closing submissions (#3.3.404), pp 7–8.

110. Ibid, p 8.

111. O'Malley, 'Northland Crown Purchases' (doc A6), p 497; Crown closing submissions (#3.3.404), p 18.

112. Crown closing submissions (#3.3.404), pp 40–41.

113. Ibid, pp 50–51.
114. Ibid, p 54.
115. Ibid, pp 8–9.
116. Ibid, pp 44–45.
117. P G McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (New York: Oxford University Press, 2011), pp 1, 26–27.
118. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), pp 118–119; Professor Alan Ward, *National Overview*, 3 vols, Waitangi Tribunal Rangahaua Whanui Series (Wellington: GP Publications, 1997), vol 2, pp 75–76.
119. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 118.
120. Loveridge noted that '[t]his largesse continued through Grey's term in New Zealand': Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), pp 280–282.
121. O'Malley, 'Northland Crown Purchases' (doc A6), pp 13, 87–88, 91–92.
122. Waitangi Tribunal, *The Taranaki Report*, Wai 143, p 52.
123. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 527.
124. Claimant closing submissions (#3.3.208), pp 42–43; Crown closing submissions (#3.3.404), pp 41–42.
125. Claimant closing submissions (#3.3.208), p 17.
126. Ibid, pp 31–32.
127. Crown closing submissions (#3.3.404), p 46.
128. Ibid, p 11.
129. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 315.
130. Normanby to Hobson, 14 August 1839, IUP/BPP, vol 3, pp 86–87.
131. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 341.
132. Normanby to Hobson, 14 August 1839, IUP/BPP, vol 3, p 87.
133. Ibid, pp 85, 87.
134. Ibid, pp 85–90.
135. Ibid, pp 86–87.
136. Ibid, p 87.
137. Ibid.
138. Ibid.
139. O'Malley, 'Northland Crown Purchases' (doc A6), p 26.
140. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 517–518.
141. Waitangi Tribunal, *Report on the Orakei Claim*, Wai 9, p 206.
142. Crown closing submissions (#3.3.404), p 46.
143. O'Malley, 'Northland Crown Purchases' (doc A6), p 43.
144. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 64.
145. Ibid, p 65.
146. Ibid.
147. Clarke did not specify what proportion of the land should generally be reserved: Clarke to Colonial Secretary, 28 July 1840 (cited in Henry Hanson Turton, comp, *An Epitome of Official Documents Relative to Native Affairs and Land Purchases in the North Island of New Zealand* (Wellington: George Didsbury, 1883), C, p 147).
148. Clarke to Colonial Secretary, 28 July 1840 (cited in Turton, *Epitome*, C, p 147).
149. Clarke to Colonial Secretary, 17 October 1843 (O'Malley, supporting documents (doc A6(a)), vol 15, pp 5190, 5192).
150. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 70.
151. George Clarke, 30 September 1841, IUP/BPP, vol 3, pp 539–540 (O'Malley, supporting documents (doc A6(a)), vol 24, pp 8091–8092).
152. Hobson to Stanley, 15 September 1841 (Turton, *Epitome*, A1, p 119).
153. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), pp 71–72; Hobson to Stanley, 15 December 1841, IUP/BPP, vol 3, pp 538–539.
154. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), pp 71–72; O'Malley, 'Northland Crown Purchases' (doc A6), p 44.
155. Officially, Shortland's title was Officer Administering the Government (cited in Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), pp 72–74).
156. Shortland to Clarke, 29 December 1842 (cited in Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), pp 72–73); Lachy Paterson, 'The New Zealand Government's Niupepa and Their Demise', NZJH, vol 50, no 2 (April 2016), p 48.
157. Shortland to Clarke, 29 December 1842 (cited in Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), pp 72–73).
158. Ibid (p 74).
159. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), pp 73–74.
160. Grey would also recognise that Māori did not support themselves solely by cultivation but also by food gathering and hunting. 'To deprive them of their wild lands, and to limit them to lands for the purpose of cultivation', he observed, 'is in fact, to cut off from them some of their most important means of subsistence, and they cannot be readily and abruptly forced into becoming a solely agricultural people': Grey to Grey, 7 April 1847, IUP/BPP, vol 6, p 16.
161. Clarke to Shortland, 1 November 1843, IUP/BPP, vol 2, p 360 (cited in Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), pp 75–76).
162. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), pp 74–75.
163. Barry Rigby, 'The Crown, Maori, and Mahurangi, 1840–1881', report commissioned by the Waitangi Tribunal, 1998 (doc E18), p 20.
164. Ibid, p 11.
165. This acreage for the unsurveyed purchase of the Mahurangi–Omaha block was not included in the Crown purchase figures provided by Dr Rigby in our inquiry because the area was repurchased by the Crown in a series of 'second wave' purchases. Dr Rigby explained that a number of these subsequent purchases were also not surveyed and 'are better described as extinguishments of tribal claims than as measurable purchases of known areas'. In these cases, the evidence

we received did not include acreage calculations. Instead of including the acreage of the original Mahurangi–Omaha purchase, Dr Rigby's evidence suggested that the acreage of the surveyed 'second wave' Mahurangi purchases was approximately 117,640 acres. This figure includes the Crown's GIS estimates for the following purchase blocks: Waikeriawera (AUC 287), Pakiri South (AUC 111), Ahuroa and Kourawhero (AUC 402), Komakoriki (AUC 98–99), Wainui (AUC 109), Parekakau (AUC 691), Pukekohe (AUC 103), Pukekauere (AUC 62), Pukeatua (AUC 152), and Papakoura (AUC 78): see Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (doc A53), app A; Rigby, corrections to validation reports (doc A48(e)), p 7; O'Malley, 'Northland Crown Purchases' (doc A6), pp 185–186.

166. Henry Hanson Turton, comp, *Maori Deeds of Land Purchases in the North Island of New Zealand*, 2 vols (Wellington: Government Printer, 1877–88), vol 1, p 252 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 186).

167. Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), p 20.

168. Michael Belgrave, Grant Young, and Anna Deason, 'Tikapa Moana and Auckland's Tribal Cross Currents: The Enduring Customary Interests of Ngati Paoa, Ngati Maru, Ngati Whanaunga, Ngati Tamatera and Ngai Tai in Auckland', report commissioned by the Hauraki Maori Trust Board and Marutuahu Confederation, 2006 (Wai 1362 ROI, doc A6), pp 8, 453–454; O'Malley, 'Northland Crown Purchases' (doc A6), pp 185–225; Peter McBurney, 'Traditional History Overview of the Mahurangi and Gulf Islands Districts', report commissioned by the Mahurangi and Gulf Islands District Collective and Crown Forestry Rental Trust, 2010 (doc A36), pp 223–225; Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), pp 12–13.

169. McBurney, 'Traditional History Overview' (doc A36), pp 87–88, 198–199, 355.

170. The rangatira were Koriwhai and Taurawhero of Ngātiwai, Ngāti Manu, and Ngāti Hine: McBurney, 'Traditional History Overview' (doc A36), pp 188–192, 200; Arapeta Hamilton (doc K7), p 3; Rowan Tautari, 'Attachment and Belonging: Nineteenth Century Whananaki' (MA thesis, Massey University, 2009) (doc I32(d)), fol 19; Garry Hooker, 'Maori, the Crown and the Northern Wairoa District – A Te Roroa Perspective', 2000 (Wai 674 ROI, doc L2), pp 55–56, 110, 182.

171. McBurney, 'Traditional History Overview' (doc A36), pp 308–311, 314, 329–330.

172. Arapeta Hamilton (doc K7(b)), pp 4–5; McBurney, 'Traditional History Overview' (doc A36), pp 315, 381–382.

173. O'Malley, 'Northland Crown Purchases' (doc A6), p 187.

174. Ibid.

175. McBurney, 'Traditional History Overview' (doc A36), p 379. Dr Rigby posited that the extent of investigation in customary interests often depended on the particular inclination of relevant Crown officials: Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), pp 18–19. Dr Rigby also agreed with Paul Goldsmith's contention that Crown under-resourcing at this time meant that Chief Protector Clarke 'had insufficient resources to undertake either effective protection or any consistent pattern of purchasing': Rigby, transcript 4.1.12, North Harbour Stadium, p 205.

176. O'Malley, 'Northland Crown Purchases' (doc A6), p 188. The imperial government certainly desired a very lean colonial administration. Normanby made it clear to Hobson that official appointments would be strictly limited (he nominated seven of 'the most evidently indispenable') and that emoluments were to 'be fixed with the most anxious regard to frugality in the expenditure of the public resources': see Normanby to Hobson, 14 August 1839, IUP/BPP, vol 3, p 89.

177. Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), p 23; O'Malley, 'Northland Crown Purchases' (doc A6), p 185.

178. Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), pp 23–24.

179. Ibid, p 24; O'Malley, 'Northland Crown Purchases' (doc A6), p 192.

180. Clarke to Colonial Secretary, 29 December 1841 (Turton, *Epitome*, C, p 151); Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), p 24.

181. O'Malley, 'Northland Crown Purchases' (doc A6), p 193; Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), p 24.

182. See Turton, *Maori Deeds of Land Purchases*, vol 1, p 251; McBurney, 'Traditional History Overview' (doc A36), pp 384, 387–389; O'Malley, 'Northland Crown Purchases' (doc A6), pp 194–195.

183. Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), p 25; O'Malley, 'Northland Crown Purchases' (doc A6), p 195.

184. John Taylor to Colonial Secretary, 11 March 1846 (O'Malley, supporting documents (doc A6(a)), vol 1, p 179); O'Malley, 'Northland Crown Purchases' (doc A6), p 196.

185. O'Malley, 'Northland Crown Purchases' (doc A6), p 196.

186. Clarke, minute, 24 April 1846 (O'Malley, supporting documents (doc A6(a)), vol 1, p 169); O'Malley, 'Northland Crown Purchases' (doc A6), p 197; McBurney, 'Traditional History Overview' (doc A36), pp 389, 391–392.

187. O'Malley, 'Northland Crown Purchases' (doc A6), p 197.

188. Charles Ligar, minute, 23 April 1846 (O'Malley, supporting documents (doc A6(a)), vol 1, p 167); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 197.

189. O'Malley, 'Northland Crown Purchases' (doc A6), pp 200–202.

190. John Heyd'n wrote to the Commissioner of Crown Lands again in February 1852 when he reminded him that he had first brought these issues to the Government's attention in November 1851: O'Malley, 'Northland Crown Purchases' (doc A6), p 197; John Heyd'n to Commissioner of Crown Lands, 3 February 1852 (O'Malley, supporting documents (doc A6(a)), vol 2, p 391).

191. Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), p 32.

192. Ibid, p 90.

193. O'Malley suspected that this report in response to the Colonial Secretary's direction was erroneously dated as 1852; 1853 seems more likely: John Johnson to Native Secretary, 24 February 1852 [*sic*: 1853] (Turton, *Epitome*, C, p 139); cited in O'Malley, 'Northland Crown Purchases' (doc A6), pp 203–204; see also O'Malley, supporting documents (doc A6(a)), vol 4, pp 1248–1249.

194. Johnson to Native Secretary, 24 February 1852 [*sic*: 1853] (Turton, *Epitome*, C, p 139) (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 205); Peter McBurney gave evidence that 'Parihoro

belonged to Te Parawhau of the Whangarei district, but he also had connections to Mahurangi': McBurney, 'Traditional History Overview' (doc A36), p 390.
195. Johnson to Native Secretary, 24 February 1852 [*sic*: 1853] (Turton, *Epitome*, C, p 139) (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 206).
196. O'Malley, 'Northland Crown Purchases' (doc A6), p 203.
197. Ibid, p 204; Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), pp 35–37.
198. Charles Nugent to Colonial Secretary, 24 February 1853 (Turton, *Epitome*, C, p 140) (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 204).
199. O'Malley, 'Northland Crown Purchases' (doc A6), p 204.
200. Nugent to Colonial Secretary, 24 February 1853 (Turton, *Epitome*, C, p 140); O'Malley, 'Northland Crown Purchases' (doc A6), p 204.
201. Nugent to Colonial Secretary, 24 February 1853 (Turton, *Epitome*, C, p 140) (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 205).
202. O'Malley, 'Northland Crown Purchases' (doc A6), p 208.
203. Johnson to Native Secretary, 3 September 1853 (O'Malley, supporting documents (doc A6(a)), vol 2, pp 431–433).
204. Johnson to Native Secretary, 3 September 1853 (O'Malley, supporting documents (doc A6(a)), vol 2, p 434); Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), p 42.
205. AUC 85, Land Information New Zealand (O'Malley, supporting documents (doc A6(a)), vol 22, pp 7308–7311); O'Malley, 'Northland Crown Purchases' (doc A6), p 208. However, just a few days later, Johnson would be required to make further payments of £10 and £20 respectively to Haimona Pita (O'Malley observed that he was apparently a relative of Parihoro) and Te Ara Tinana, who had complained that they had not received payment for their interests: O'Malley, 'Northland Crown Purchases' (doc A6), p 209. This claim (OLC 1/337) is also discussed in Paula Berghan, 'Northland Block Research Narratives', 13 vols, report commissioned by the Crown Forestry Rental Trust, 2006 (doc A39(a)), vol 2, p 206.
206. O'Malley, 'Northland Crown Purchases' (doc A6), p 208.
207. Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), pp 38, 40.
208. Paul Thomas, 'The Native Land Court in Te Paparahi o Te Raki, 1865–1900,' report commissioned by the Waitangi Tribunal, 2016 (doc A68), p 53.
209. Ibid, pp 58–59.
210. O'Malley, 'Northland Crown Purchases' (doc A6), p 211.
211. Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), pp 1, 32.
212. Crown statement of position and concessions (#1.3.2), p 3; Crown closing submissions (#3.3.404), p 2.
213. Crown statement of position and concessions (#1.3.2), p 3; Crown closing submissions (#3.3.404), p 2.
214. Crown closing submissions (#3.3.404), pp 7–8.
215. Ibid, p 8.
216. Closing submissions for Wai 354 (#3.3.82), p 5.
217. O'Malley, 'Northland Crown Purchases' (doc A6), p 39.
218. Ibid, pp 39–40.
219. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), pp 125–126.
220. Ibid, p 126.
221. See, for example, *Auckland Times*, 16 March 1843, p 2. The context indicates that the reference was to E G Wakefield.
222. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 126.
223. Grey to Stanley, 9 June 1846, IUP/BPP, vol 5, p 555.
224. Stanley to Grey, 13 June 1845, IUP/BPP, vol 5, pp 230–232; O'Malley, supporting documents (doc A6(a)), vol 24, pp 8123–8125.
225. Loveridge recorded that during June 1845 'the land question in New Zealand had been discussed at some length in Parliament. Stanley had stated that "a general registration of all titles to land, native or European, within the limits of the two islands" would be of "vital importance" – if, at least, one could "be successfully carried into effect within a limited time"': Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 263.
226. Stanley to Grey, 27 June 1845, IUP/BPP, vol 5, p 233; O'Malley, supporting documents (doc A6(a)), vol 24, p 8126.
227. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 55.
228. 'Treaty of Waitangi, New Zealand', *New Zealander*, 13 December 1845, p 4 (cited in Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 264).
229. O'Malley, 'Northland Crown Purchases' (doc A6), p 42.
230. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, pp 39, 51.
231. Native Land Purchase Ordinance 1846 10 Vict 19, cl 1.
232. 'Legislative Council', *New Zealander*, 21 November 1846, p 3.
233. 'The Native Land Purchase Bill', *New Zealander*, 21 November 1846, p 2. For reports of the debates, see 'Legislative Council', *New Zealander*, 10 October 1846, p 2; 'Legislative Council', *Nelson Examiner and New Zealand Chronicle*, 16 January 1847, pp 183–184; 'Legislative Council', *Nelson Examiner and New Zealand Chronicle*, 23 January 1847, pp 187–188; Jenifer Curnow, 'Wiremu Maihi Te Rangikāheke', in *Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, https://teara.govt.nz/en/biographies/1t66/te-rangikaheke-wiremu-maihi, accessed 7 June 2022.
234. Hobson stated in 1840 that in Auckland, where he had decided to put the capital, the practice of 'leasing' for long terms was 'most universal': Hobson to Gipps, 25 October 1840, IUP/BPP, vol 3, p 438.
235. Grey to Stanley, 10 May 1846 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 46). As part of what was referred to as a 'flour and sugar policy', Grey did implement a range of measures intended to make medical and educational services available to Māori and to provide for loans for economic development purposes: O'Malley, 'Northland Crown Purchases' (doc A6), p 49.
236. Grey to Grey, 4 February 1847, IUP/BPP, vol 5, p 640; O'Malley, supporting documents (doc A6(a)), vol 24, p 8085.
237. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), pp 279–280; Grey to Grey, 4 February 1847, IUP/BPP, vol 5, p 640; O'Malley, supporting documents (doc A6(a)), vol 24, p 8085.

238. Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, vol 2, p 272.
239. Grey, 'Proclamation', 15 June 1846, *New Zealand Gazette*, 1846, no 10, p 42 (cited in Loveridge, '"An Object of the First Importance"' (Wai 863 RO1, doc A81), p 277).
240. Grey to Grey, 23 December 1846, IUP/BPP, vol 5, pp 524–525; O'Malley, supporting documents (doc A6(a)), vol 24, pp 8137–8138.
241. Grey to Grey, 23 December 1846, IUP/BPP, vol 5, p 525; O'Malley, supporting documents (doc A6(a)), vol 24, p 8138.
242. O'Malley, 'Northland Crown Purchases' (doc A6), p 34.
243. Clarke to FitzRoy, 24 February 1845 (O'Malley, supporting documents (doc A6(a)), vol 16, p 5434).
244. O'Malley, 'Northland Crown Purchases' (doc A6), p 35.
245. Ibid, p 36.
246. The Porirua purchase included 69,000 acres, where the Wairau block has been estimated to be three million acres: Ward, *National Overview*, vol 2, p 133; Loveridge, '"An Object of the First Importance"' (Wai 863 RO1, doc A81), pp 333–334; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 1, pp 317–319.
247. Grey to Grey, 7 April 1847, IUP/BPP, vol 6, p 16.
248. Grey noted that of the 270 sections of land the New Zealand Company claimed in the Porirua district, the colonial Government had purchased all but 16: Grey to Grey, 7 April 1847, IUP/BPP, p 15 (IUP, vol 6).
249. Grey to Grey, 3 May 1848, IUP/BPP, vol 6, p 144; Merivale's letter had been written as a response to a memorial written to Earl Grey by the Wesleyan Missionary Society, expressing concerns about the Colonial Office's interpretation of the treaty: Loveridge, '"An Object of the First Importance"' (Wai 863 RO1, doc A81), p 320.
250. Loveridge, '"An Object of the First Importance"' (Wai 863 RO1, doc A81), p 325.
251. In strictly legal terms, Merivale also reached the conclusion that the Crown remained 'the general owner of the soil as trustee for the public good', and '"[t]he existing rule then contemplates the native race as under a species of guardianship"': H Merivale to the Reverend John Beecham, 13 April 1848, IUP/BPP, vol 6, pp 155–156.
252. H Merivale to the Reverend John Beecham, 13 April 1848, IUP/BPP, vol 6, p 155.
253. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 1, p 302.
254. For instance, comparably large reserves had been set aside as part of the Wairau and Porirua purchases. Ward noted that '[s]ome 10,000 acres, about 40 acres per head, were reserved for Ngati Toa at their insistence' as part of the Porirua purchase, and '[r]eserves of over 117,000 acres were made' as part of the Wairau purchase: Ward, *National Overview*, vol 2, p 132; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 1, pp 302–304.
255. Grey to Grey, 15 May 1848, IUP/BPP, vol 6, p 24.
256. Ibid, p 23.
257. Ibid; see also Kirstie Ross, 'The 1854 Mangawhai Crown Purchase', report commissioned by the Ngati Wai Trust Board, 2000 (doc E22), pp 26–27.
258. Grey to Grey, 15 May 1848, IUP/BPP, vol 6, p 24.
259. Ibid.
260. Ibid, p 25.
261. Ibid.
262. Loveridge, '"An Object of the First Importance"' (Wai 863 RO1, doc A81), p 70.
263. Grey to Grey, 15 May 1848, IUP/BPP, vol 6, p 25.
264. Loveridge, '"An Object of the First Importance"' (Wai 863 RO1, doc A81), pp 319–320.
265. Grey to Grey, 15 May 1848, IUP/BPP, vol 6, p 23.
266. Loveridge, '"An Object of the First Importance"' (Wai 863 RO1, doc A81), p 328.
267. Ibid, p 329.
268. Ibid.
269. Claimant closing submissions (#3.3.207), pp 5–6.
270. Crown closing submissions (#3.3.404), pp 44–45.
271. O'Malley, 'Northland Crown Purchases' (doc A6), p 475. We continue to discuss this later.
272. See also Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 357–367.
273. Loveridge, '"An Object of First Importance"' (Wai 863 RO1, doc A81), p 182 fn 478; Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 512–513.
274. McBurney, 'Traditional History Overview' (doc A36), p 376.
275. Turton, *Maori Deeds of Land Purchases*, vol 1, p 253; Arapeta Hamilton, transcript 4.1.12, North Harbour Stadium, p 283; O'Malley, 'Northland Crown Purchases' (doc A6), p 194.
276. Counsel for Wai 354 and Wai 1535, transcript 4.1.31, Ōtangaroa Marae, Whangaroa, p 24.
277. David Armstrong and Evald Subasic, 'Northern Land and Politics, 1860–1910', report commissioned by the Crown Forestry Rental Trust, 2007 (doc A12), pp 940–941.
278. 'Report of a Board Appointed by his Excellency the Governor to Enquire Into and Report upon the State of Native Affairs', 9 July 1856, AJHR, 1856, B-3, p 4.
279. Ibid, p 3.
280. Ibid, pp 1–2.
281. Ibid, p 2.
282. Te Hira Taiwhanga, evidence, 26 April 1856, IUP/BPP, vol 10, pp 560–561.
283. The two witnesses who offered a negative opinion on this question were David Graham and Captain Porter, both of Auckland: 'Report of a Board Appointed by his Excellency the Governor to Enquire Into and Report upon the State of Native Affairs', 9 July 1856, 9 July 1856, AJHR, 1856, B-3, app, p 1.
284. Ibid, p 4.
285. Ibid, p 5.
286. Browne to Henry Labouchere, 23 July 1856, IUP/BPP, vol 10, pp 512–513.
287. McLean to Private Secretary, 4 June 1856 (O'Malley, 'Northland Crown Purchases' (doc A6), pp 447–448).

288. See also the discussion in David Armstrong, '"A Sure and Certain Possession": The 1849 Rangitikei/Turakina Transaction and its Aftermath', report commissioned by the Crown Forestry Rental Trust, 2004 (Wai 2200 ROI, doc A166), pp 131–132.
289. McLean to Johnson, 18 May 1854, AJHR, 1861, C-1, pp 52–53.
290. For instance, see the deed used by Johnson in 1853 to purchase Parihoro's interests in the Mahurangi block, and the deed for the purchase of the Ruakaka block: AUC 85 (O'Malley, supporting documents (doc A6(a)), vol 22, pp 7308–7311); AUC 309 (O'Malley, supporting documents (doc A6(a)), vol 22, pp 7423–7427); Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), pp 38, 55.
291. See Rigby, 'Pre 1865 Te Raki Crown Purchase Validation Report' (doc A53), app A.
292. See the purchase deeds for the Aotea (Lands at Great Barrier Island), Manaia, Ruaranga, Maungatapere, and Ahuroa and Kourawhero blocks: Craig Innes, 'Northland Crown Purchase Deeds, 1840–1865', resource document commissioned by Crown Forestry Rental Trust, 2006 (doc A4), pp 161–164, 261, 267, 271–272, 285–286.
293. Innes, 'Northland Crown Purchase Deeds' (doc A4), p 161.
294. Ibid, pp 161–162.
295. Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), p 55; a survey of the 116 deeds compiled for this inquiry shows that most of the deeds issued contained references to the resources and features of the block in question to be included in the transaction: Innes, 'Northland Crown Purchase Deeds' (doc A4).
296. Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), p 55.
297. This language was included in some 51 purchase deeds from Te Raki: see Innes, 'Northland Crown Purchase Deeds' (doc A4).
298. For example, see Innes, 'Northland Crown Purchase Deeds' (doc A4), p 17.
299. Ibid, p 205.
300. Pereri Mahanga (doc AA79), pp 9–10.
301. Innes, 'Northland Crown Purchase Deeds' (doc A4).
302. Mahanga (doc AA79), pp 9–10.
303. Waitangi Tribunal, *The Taranaki Report*, Wai 143, p 35.
304. O'Malley, 'Northland Crown Purchases' (doc A6), p 490.
305. Ibid, p 375.
306. T W Lewis to Native Minister, 23 May 1883 (O'Malley, supporting documents (doc A6(a)), vol 6, p 1989); O'Malley, 'Northland Crown Purchases' (doc A6), p 490.
307. R C Barstow, 'Report on a piece of land claimed by Mata Topi,' 19 January 1863 (O'Malley, supporting documents (doc A6(a)), vol 6, p 1941); O'Malley, 'Northland Crown Purchases' (doc A6), p 491.
308. Richard Davis to J N Coleman, 25 February 1862 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), pp 491–492).
309. 'Mangapai and Maungakaramea', *Daily Southern Cross*, 27 January 1863, p 3 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 492).
310. Mangapai and Maungakaramea', *Daily Southern Cross*, 27 January 1863, p 3 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), pp 492–493).
311. 'Mangapai and Maungakaramea', *Daily Southern Cross*, 27 January 1863, p 3 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 492).
312. O'Malley, 'Northland Crown Purchases' (doc A6), p 493.
313. R S Anderson, Diary, 10 May 1858 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 494).
314. Vincent O'Malley, transcript 4.1.17, Akerama Marae, Tōwai, pp 612–613; see also Merata Kawharu (doc W10), pp 11–12.
315. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, pp 194–211.
316. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 178.
317. Ibid, pp 178–179.
318. Ibid, p 178.
319. Ibid, p 31.
320. O'Malley, 'Northland Crown Purchases' (doc A6), pp 124–125; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 13, 30, 263.
321. Memorandum by the Native Secretary, 25 June 1858 (O'Malley, supporting documents (doc A6(a)), vol 12, p 3785).
322. Alexander M Rust, *Whangarei and Districts' Early Reminiscenses* (Whāngārei: Mirror, 1936), p 59 (O'Malley, 'Northland Crown Purchases' (doc A6), pp 465, 494).
323. O'Malley, 'Northland Crown Purchases' (doc A6), pp 345–346; Tony Walzl, 'Ngati Rehia: Overview Report', report commissioned by the Ngati Rehia Claims Group, 2015 (doc R2), pp 151, 154–155.
324. O'Malley, 'Northland Crown Purchases' (doc A6), pp 126–127.
325. Walzl, 'Ngati Rehia' (doc R2), pp 37–38; Dr Manuka Henare, Dr Hazel Petrie, and Dr Adrienne Puckey, '"He Whenua Rangatira": Northern Tribal Landscape Overview (Hokianga, Whangaroa, Bay of Islands, Whāngārei, Mahurangi and Gulf Islands)', report commissioned by the Crown Forestry Rental Trust, 2009 (doc A37), p 157; Kiharoa Parker and Hera Dear (doc H11(b)), pp 7–8; Margaret Mutu (doc AA91), pp 37–39. Mr Tahere and Mr Klaricich discussed the importance of inter-hapū alliances: Pairama Tahere (doc B2), p 2; John Klaricich (doc C9), p 14. Mr Klaricich said that decisions were made by discussion and consensus: John Klaricich, responses to questions (doc C9(c)), p [2].
326. Te Kiri to Rogan and McLean, 23 October 1862 (cited in Henare, Petrie, and Puckey, '"He Whenua Rangatira"' (doc A37), p 331).
327. Eddie Taihakurei Durie, 'Custom Law' (Treaty Research Series, Treaty of Waitangi Research Unit), 2013 ed, pp 101–102.
328. Paul Monin, 'The Maori Economy of Hauraki, 1840–1880', NZJH, vol 29, no 2 (October 1995), p 199.
329. O'Malley, 'Northland Crown Purchases' (doc A6), p 336.
330. Vincent O'Malley, transcript 4.1.17, Akerama Marae, Tōwai, p 612.
331. Monin, 'The Maori Economy of Hauraki', p 199.
332. O'Malley, 'Northland Crown Purchases' (doc A6), p 493.
333. Waitangi Tribunal, *The Kaipara Report*, Wai 674, p 77.
334. O'Malley, 'Northland Crown Purchases' (doc A6), p 493.
335. Paul Thomas, 'The Crown and Maori in the Northern Wairoa, 1840–1865', report commissioned by the Crown Forestry Rental Trust, 1999 (doc E40), pp 40–41.

336. O'Malley, 'Northland Crown Purchases' (doc A6), p 276.
337. Closing submissions for Wai 2355 (#3.3.275(a)), p 36.
338. Marina Fletcher (doc AA126(b)), p 29.
339. Vincent O'Malley, transcript 4.1.17, Akerama Marae, Tōwai, p 613.
340. O'Malley, 'Northland Crown Purchases' (doc A6), p 110.
341. 'Proceedings of the Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 15 August 1860, pp 11–13 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, pp 103–104); 'Proceedings of the Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 1 September 1860, pp 4–6 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, pp 107–108).
342. Ward, *National Overview*, vol 2, p 170.
343. Crown statement of position and concessions (#1.3.2), p 3; Crown closing submissions (#3.3.404), p 2.
344. Crown statement of position and concessions (#1.3.2), p 3; Crown closing submissions (#3.3.404), pp 2 7–8.
345. Ward, *National Overview*, vol 2, pp 130–131; see also Ian Wards, *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand, 1832–1852* (Wellington: Historical Publications Branch, Department of Internal Affairs, 1968), pp 385–390.
346. Ward, *National Overview*, vol 2, pp 132–133; Grey to Grey, 7 April 1847, IUP/BPP, vol 6, p 16.
347. O'Malley, 'Northland Crown Purchases' (doc A6), p 439.
348. Grey to Grey, 15 May 1848, IUP/BPP, vol 6, pp 24–25.
349. Ward, *National Overview*, vol 2, p 131.
350. Ibid, p 130.
351. O'Malley, 'Northland Crown Purchases' (doc A6), p 99.
352. Ward, *National Overview*, vol 2, p 131.
353. Grey to Grey, 15 May 1848, IUP/BPP, vol 6, p 23.
354. Ward, *National Overview*, vol 2, p 131.
355. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 1, p 304.
356. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 527.
357. O'Malley, 'Northland Crown Purchases' (doc A6), p 179; Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), pp 335, 350–351; Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, vol 2, pp 261–262.
358. Claimant closing submissions (#3.3.207), p 13; closing submissions for Wai 1514 (#3.3.357), p 61; closing submissions for Wai 1538 (#3.3.303), p 18; closing submissions for Wai 2394 (#3.3.336), pp 83–87.
359. Closing submissions for Wai 1538 (#3.3.303), pp 18–20; closing submissions for Wai 2394 (#3.3.336), p 85; closing submissions for Wai 1968 (#3.3.337), p 93; closing submissions for Wai 2382 (#3.3.339(a)), pp 86–87; closing submissions for Wai 1522 and Wai 1716 (#3.3.341(a)), p 55.
360. Closing submissions for Wai 2394 (#3.3.336), p 87; closing submissions for Wai 1968 (#3.3.337), p 95; closing submissions for Wai 2382 (#3.3.339(a)), p 89; closing submissions for Wai 1522 and Wai 1716 (#3.3.341(a)), pp 56–57.
361. Closing submissions for Wai 1538 (#3.3.303), p 19.
362. Ibid, pp 19–20.
363. Crown closing submissions (#3.3.404), pp 46–47.
364. Ibid, pp 50–51.
365. Vincent O'Malley, response to Tribunal statement of issues regarding 'Northland Crown Purchases' (doc A6(c)), p 20 (claimant closing submissions (#3.3.207), p 13).
366. *Daily Southern Cross*, 3 March 1849, p 2 (cited in Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), p 351).
367. Richard Davis, *Memoir of the Rev Richard Davis* (London: James Nisbet and Co, 1865), pp 335–336; O'Malley, 'Northland Crown Purchases' (doc A6), pp 99–100.
368. Kingi Wiremu Tareha and others to Grey, 5 February 1851 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), pp 104–105).
369. 'Of Mr Interpreter Davis's visit to Hokianga', *Maori Messenger/Te Karere Maori*, 1 November 1855, p 6 (O'Malley, supporting documents (doc A6(a)), vol 19, p 6059); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 108.
370. O'Malley, 'Northland Crown Purchases' (doc A6), pp 108–110.
371. 'General Legislative Council', *New Zealander*, 25 August 1849, p 3; 'General Legislative Council', *Nelson Examiner and New Zealand Chronicle*, 24 November 1849, p 151; 'Thursday, August 23, 1849', *Daily Southern Cross*, 24 August 1849, p 4.
372. Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), p 351.
373. 'General Legislative Council', *New Zealander*, 11 August 1849, p 3.
374. Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), p 353.
375. 'General Legislative Council', *New Zealander*, 28 August 1849, p 3.
376. Ibid, p 2.
377. Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), pp 344–345.
378. Ibid, p 345.
379. See Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 155, 239.
380. Joel Samuel Polack, *Manners and Customs of the New Zealanders: With Notes Corroborative of their Habits, Usages, etc., and Remarks to Intending Emigrants, with Numerous Cuts Drawn on Wood* (London: James Madden, 1840), p 168 (cited in David Alexander, 'Land-Based Resources, Waterways and Environmental Impacts', report commissioned by the Crown Forestry Rental Trust, 2006 (doc A7), pp 43–44).
381. Bruce Stirling and Richard Towers, '"Not with the Sword but with the Pen": The Taking of the Northland Old Land Claims', report commissioned by the Crown Forestry Rental Trust, 2007 (doc A9), pp 448–449, 1094; Nicholas Bayley, 'Aspects of Maori Economic Development and Capability in the Te Paparahi of Te Raki Inquiry Region (Wai 1040) from 1840 to c 2000', report commissioned by the Waitangi Tribunal, 2013 (doc E41), p 49.
382. See Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 75.
383. As we noted in chapter 3, by 1840 more than 20 sawmills had been established along the Hokianga rivers, and another two at Whangaroa: Tim Nolan, mapbook (doc B10(b)), pl 18.

384. O'Malley, 'Northland Crown Purchases' (doc A6), p 209.
385. J Rutherford, *Sir George Grey: A Study in Colonial Government* (London: Cassell, 1961), p 182.
386. Crown closing submissions (#3.3.404), pp 50–51.
387. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), pp 80, 345–348.
388. Ibid, p 282.
389. O'Malley, 'Northland Crown Purchases' (doc A6), p 92.
390. Ibid, p 179; For instance, in June 1848 the Crown purchased 20 million acres of land from Ngāi Tahu in a transaction negotiated by Henry Tacy Kemp known as the 'Kemp purchase'. The Port Cooper purchase of August 1849 also involved 59,000 acres for which the Crown paid £200, and the following month the Crown purchased a further 104,000 acres at Port Levy: Ward, 'National Overview', vol 3, p 266; for a discussion of Crown purchasing in the South Island during this period see Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, vol 1, pp 51–131.
391. Rutherford, *Sir George Grey*, pp 181–184, 187.
392. O'Malley, 'Northland Crown Purchases' (doc A6), p 179.
393. Ibid.
394. Ibid, pp 182, 444.
395. 'Prospectus', *New Zealander*, 17 September 1853, p 4.
396. See, for example, *Daily Southern Cross*, 21 February 1854, p 3.
397. O'Malley, 'Northland Crown Purchases' (doc A6), p 179.
398. Rutherford, *Sir George Grey*, p 202.
399. O'Malley, 'Northland Crown Purchases' (doc A6), p 179.
400. *Daily Southern Cross*, 21 February 1854, p 3.
401. O'Malley, 'Northland Crown Purchases' (doc A6), pp 179–180.
402. McLean to Grey, 29 June 1853 (O'Malley, supporting documents (doc A6(a)), vol 24, p 8364).
403. O'Malley, 'Northland Crown Purchases' (doc A6), p 180.
404. Sinclair to McLean, 26 April 1854, AJHR, 1861, C-11, p 105 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 181).
405. McLean, 'Memorandum Relative to Organization of the Native Land Purchase Department', 15 June 1854 (O'Malley, supporting documents (doc A6(a)), vol 5, p 1748).
406. Ibid (p 1749).
407. Ibid (pp 1743–1744).
408. Ibid (p 1747).
409. Ray Fargher, *The Best Man Who Ever Served the Crown?: A Life of Donald McLean* (Wellington: Victoria University Press, 2007), p 130.
410. McLean, 'Memorandum Relative to Organization of the Native Land Purchase Department', 15 June 1854 (O'Malley, supporting documents (doc A6(a)), vol 5, p 1747); Grey defined the province's boundaries by proclamation on 28 February 1853. Auckland province contained all land north of this boundary line: 'By the River Mokau to its source, thence by a right line running from the source of the Mokau, to the point where the Ngahuinga or Tuhua the principal tributary of the Wanganui River is intersected by the thirty-ninth parallel of South Latitude, thence Eastward by the thirty-ninth parallel of South Latitude, to the point where that parallel of Latitude cuts the East Coast of the Northern Island of New Zealand'. See Grey, 'Proclamation', 28 February 1853 (cited in New Zealand Government, *The New Zealand Constituion Act: Together with Correspondence between the Secretary of State for the Colonies and the Governor-in-Chief of New Zealand in Explanation Thereof* (Wellington: The Honorable Robert Stokes, 1853), p 91).
411. 'House of Representatives', *Daily Southern Cross*, 16 June 1854, p 4.
412. Ibid; 'General Assembly of New Zealand', *New Zealand Spectator and Cook's Strait Guardian*, 29 July 1854, p 3.
413. O'Malley, 'Northland Crown Purchases' (doc A6), pp 13, 288, 334.
414. Waitangi Tribunal, *The Kaipara Report*, Wai 674, p 54.
415. 'House of Representatives', *New Zealander*, 17 June 1854, p 3.
416. McLean, 'Memorandum Relative to Organization of the Native Land Purchase Department', 15 June 1854 (O'Malley, supporting documents (doc A6(a)), vol 5, p 1748).
417. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 64.
418. O'Malley, 'Northland Crown Purchases' (doc A6), p 211.
419. Nugent to Colonial Secretary, 24 February 1853 (Turton, *Epitome*, C, p 140); O'Malley, 'Northland Crown Purchases' (doc A6), p 205.
420. McLean to Johnson, 20 June 1854 (Turton, *Epitome*, C, pp 141–142).
421. Grey to Grey, 15 May 1848, IUP/BPP, vol 6, p 25; O'Malley, 'Northland Crown Purchases' (doc A6), p 444.
422. O'Malley, 'Northland Crown Purchases' (doc A6), pp 182, 444.
423. McLean, 'Memorandum Relative to Organization of the Native Land Purchase Department', 15 June 1854 (O'Malley, supporting documents (doc A6(a)), vol 5, p 1751).
424. Ibid (pp 1745–1746).
425. O'Malley further explained that a widely held belief was 'that Māori were a dying race, doomed to inevitable extinction', which was also shared by Crown officials during this period. However, the belief 'that Māori could be saved from extinction through their rapid adoption of European customs and habits appears to have held more sway with officials such as McLean': O'Malley, 'Northland Crown Purchases' (doc A6), p 444.
426. McLean to Private Secretary, 4 June 1856 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), pp 447–448).
427. Chief Land Commissioner, 'Instructions to District Land Purchase Commissioner relative to purchase of land from the Natives of Taranaki', 26 August 1857, AJHR, 1861, C-1, p 212.
428. McLean to Colonial Secretary, 7 March 1854, AJHR, 1861, C-1, p 198.
429. Rogan to McLean, 14 June 1855, AJHR, 1861, C-1, pp 206–207.
430. Waitangi Tribunal, *The Taranaki Report*, Wai 143, p 50.
431. Ibid.
432. Ann Parsonson, 'The Purchase of Maori Land in Taranaki, 1839–1859', report commissioned by the Waitangi Tribunal, 1990 (Wai 143 ROI, doc A1), p 62.
433. Waitangi Tribunal, *The Taranaki Report*, Wai 143, p 50.
434. 'Friends the Natives', *Maori Messenger/Te Karere Maori*, 1 June 1855, p 4.

435. Ibid.
436. Ibid.
437. Sinclair to Cooper, 24 March 1854, AJHR, 1861, C-1, p 199; Sinclair to McLean, 24 March 1854, AJHR, 1861, C-1, p 199.
438. 'General Assembly of New Zealand', *New Zealand Spectator and Cook's Strait Guardian*, 29 July 1854, p 3.
439. McLean to Johnson, 18 May 1854, AJHR, 1861, C-1, pp 52–53.
440. McLean to Kemp, 1 June 1855, AJHR, 1861, C-1, p 2.
441. Ward, *National Overview*, vol 2, p 145.
442. McLean to Governor's Private Secretary, 4 June 1856, IUP/BPP, vol 10, p 580.
443. Gore Browne, minute, 4 June 1857 (Turton, *Epitome*, C, p 166); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 485.
444. McLean to Kemp, 3 October 1856, AJHR, 1861, C-1, pp 12–13 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 485).
445. McLean to Johnson, 18 May 1854, AJHR, 1861, C-1, p 52.
446. O'Malley, 'Northland Crown Purchases' (doc A6), p 451.
447. Ligar, memorandum, September 1855 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 454).
448. McLean to Kemp, 8 September 1856, AJHR, 1861, C-1, p 11; McLean to Johnson, 9 September 1856, AJHR, 1861 C-1, p 73 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 456).
449. McLean to Private Secretary, 4 June 1856, IUP/BPP, vol 11, p 545 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 456).
450. McLean to Rogan, 31 January 1857 (Turton, *Epitome*, C, p 101).
451. McLean to Johnson, 18 May 1854, AJHR, 1861, C-1, p 52.
452. Ibid.
453. McLean to Johnson, 18 May 1854 (Turton, *Epitome*, C, p 94); McLean to Rogan, 13 July 1855, AJHR, 1861, C-1, p 154.
454. Chief Land Commissioner, 'Instructions to District Land Purchase Commissioner relative to purchase of land from the Natives of Taranaki', 26 August 1857, AJHR, 1861, C-1, p 212.
455. McLean to Johnson, 17 October 1854, AJHR, 1861, C-1, pp 60–61.
456. McLean to Parris, 26 August 1857, AJHR, 1861, C-1, p 212.
457. Ibid; see also McLean to Private Secretary, 4 June 1856, IUP/BPP, vol 10, pp 580–582.
458. See, for example, Johnson to Colonial Secretary, 20 March 1854, AJHR, 1861, C-1, pp 47–48.
459. 'Reports on the State of the Natives in various Districts', AJHR, 1862, E-7, pp 16–22.
460. McLean to Kemp, 24 October 1856, AJHR, 1861, C-1, pp 13–14.
461. O'Malley, 'Northland Crown Purchases' (doc A6), pp 451–453.
462. Ibid, p 181.
463. McLean, 'Memorandum Relative to Organization of the Native Land Purchase Department', 15 June 1854 (O'Malley, supporting documents (doc A6(a)), vol 5, p 1746); O'Malley, 'Northland Crown Purchases' (doc A6), p 182.
464. McLean, 'Memorandum Relative to Organization of the Native Land Purchase Department', 15 June 1854 (O'Malley, supporting documents (doc A6(a)), vol 5, pp 1749–1750); O'Malley, 'Northland Crown Purchases' (doc A6), p 183.
465. McLean to Colonial Secretary, 30 August 1855 (Turton, *Epitome*, A1, p 53); O'Malley, 'Northland Crown Purchases' (doc A6), p 184.
466. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), pp 345–348.
467. 'General Legislative Council', *New Zealander*, 25 August 1849, p 3; 'General Legislative Council', *Nelson Examiner and New Zealand Chronicle*, 24 November 1849, p 150; 'Thursday, August 23, 1849', *Daily Southern Cross*, 24 August 1849, p 4.
468. Crown closing submissions (#3.3.404), p 51.
469. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 66.
470. O'Malley, 'Response to Tribunal Statement of Issues', 2015 (doc A6(c)), p 20.
471. Claimant submissions in reply (#3.3.423), p 28; O'Malley, 'Response to Tribunal Statement of Issues' (doc A6(c)), p 20.
472. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 79.
473. McLean, 'Memorandum Relative to Organization of the Native Land Purchase Department', 15 June 1854 (O'Malley, supporting documents (doc A6(a)), vol 5, p 1748).
474. See, for example, Browne, minute, 4 June 1857 (Turton, *Epitome*, C, p 166).
475. See, for example, James Richmond, memorandum, 29 September 1858, AJHR, 1860, F-3, app A, pp 129–130.
476. Sewell to Secretary of State, 8 May 1857, AJHR, 1858, B-5, p 13.
477. Francis Fenton, minute, 13 October 1856, AJHR, 1860, F-3, app B, p 136.
478. O'Malley, 'Northland Crown Purchases' (doc A6), p 445.
479. McLean to Johnson, 18 May 1854, AJHR, 1861, C-1, p 52.
480. McLean to Colonial Secretary, 6 February 1854, AJHR, 1861, C-1, p 264.
481. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 206.
482. Crown closing submissions (#3.3.404), pp 5–6; Rigby, corrections to validation reports (doc A48(e)), p 7. The old land claim and pre-emption waiver figures are the Tribunal's own calculation: see table 6.1.
483. Claimant closing submissions (#3.3.208), pp 20, 54–58, 60–62, 62–63, 66.
484. Closing submissions for Wai 2394 (#3.3.336), pp 78–79.
485. Closing submissions for Wai 2206 (#3.3.400), pp 143, 166–167, 170, 205–208.
486. Statement 1.3.2(b).
487. Submission 3.3.267, pp 9–10.
488. Submission 3.3.247, pp 1–6.
489. Closing submissions for Wai 1467, 1930, and 990 (#3.3.274(a)), p 11.
490. Armstrong and Subasic, 'Northland Land and Politics' (doc A12), p 266; closing submissions for Wai 990 (#3.3.274(a)), p 12; closing submissions for Wai 2059 (#3.3.267), p 8.
491. Closing submissions for Wai 2058 (#3.3.267), p 8.
492. Closing submissions for Whangaroa Taiwhenua (#3.3.385), pp 38–40.

493. Crown closing submissions (#3.3.404), p 2.
494. Ibid, p 8.
495. Ibid, pp 18–19, 49.
496. Ibid, pp 41–43.
497. Ibid, p 42; Waitangi Tribunal, *The Kaipara Report*, Wai 674, p 136.
498. Crown closing submissions (#3.3.404), p 18.
499. O'Malley, 'Northland Crown Purchases' (doc A6), p 497.
500. 'Great Fire at Auckland', *Press*, 21 November 1872, p 2.
501. Crown closing submissions (#3.3.404), p 17.
502. See, for example, Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, pp 45, 140, vol 3, p 755; Waitangi Tribunal, *The Taranaki Report*, Wai 143, pp 71, 75, 201, 221; Grant Phillipson, 'Bay of Islands Maori and the Crown', report commissioned by the Crown Forestry Rental Trust, 2005 (doc A1), pp 174–175; Waimarie Bruce-Kingi (doc I25), p 30; Paraire Pirihi, supporting documents (doc I29(b)), pp 8–9; Ani Taniwha (doc O14), p 22.
503. Pirihi, supporting documents (doc I29(b)), pp 8–9.
504. Bruce-Kingi (doc I25), p 30; see also O'Malley, 'Northland Crown Purchases' (doc A6), pp 304–305, 311–312.
505. O'Malley, 'Northland Crown Purchases' (doc A6), pp 302–308.
506. Johnson to McLean, 16 November 1857 (O'Malley, supporting documents (doc A6(a)), vol 10, pp 3077–3079); O'Malley, 'Northland Crown Purchases' (doc A6), p 311.
507. Ani Taniwha (doc O14), p 22.
508. *New Zealander*, 11 May 1861, p 3.
509. Bell, memorandum, 26 March 1858 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 939).
510. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, pp 336–337.
511. Crown counsel, transcript 4.1.32, Waitaha Events Centre, pp 220, 226, 229.
512. Crown closing submissions (#3.3.404), p 8; see also submission 1.3.2, p 30.
513. 'Reports on the State of the Natives in various Districts', AJHR, 1862, E-7, pp 16–22.
514. 'House of Representatives', *Daily Southern Cross*, 16 June 1854, p 4; 'General Assembly of New Zealand', *New Zealand Spectator and Cook's Strait Guardian*, 29 July 1854, p 3.
515. McLean to Colonial Secretary, 30 August 1855 (Turton, *Epitome*, A1, p 53); O'Malley, 'Northland Crown Purchases' (doc A6), p 184.
516. O'Malley, 'Northland Crown Purchases' (doc A6), p 184; Sinclair to McLean, 26 September 1855 (Turton, *Epitome*, C, p 162).
517. O'Malley, 'Northland Crown Purchases' (doc A6), p 184.
518. McLean to Kemp, 1 June 1855, AJHR, 1861, C-1, p 2.
519. McLean to Private Secretary, 4 June 1856, IUP/BPP, vol 10, p 580.
520. Ibid.
521. 'Nature of the Maori Land Tenure and Claims', 3 July 1856, IUP/BPP, vol 10, p 584.
522. Johnson to McLean, 17 May 1858, AJHR, 1861, C-1, p 86.
523. McLean to Rogan, 13 July 1855, AJHR, 1861, C-1, p 153.
524. Chief Land Commissioner, 'Instructions to District Land Purchase Commissioner relative to purchase of land from the Natives of Taranaki', 26 August 1857, AJHR, 1861, C-1, p 212.
525. This was the standard established in Normanby's 1839 instructions: Normanby to Hobson, 14 August 1839, IUP/BPP, vol 3, p 87.
526. Una Platts, *Nineteenth Century New Zealand Artists: A Guide & Handbook* (Christchurch: Avon Fine Prints, 1980), p 140.
527. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 132, 143; Ward, *National Overview*, vol 2, pp 37, 133–134.
528. The Ngāi Tahu Tribunal noted that Mantell also failed to comply with his instructions: Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, vol 2, pp 388–389.
529. O'Malley, 'Northland Crown Purchases' (doc A6), pp 317, 460; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, vol 1, pp 277–278.
530. See, for example, McLean to Johnson, 18 March 1856, AJHR, 1861, C-1, p 69; McLean to Kemp, 24 October 1856, AJHR, 1861, C-1, pp 13–14; and Thomas Smith (for McLean) to Kemp, 29 November 1858, AJHR, 1861, C-1, p 32.
531. Clarke to Colonial Secretary, 17 October 1843, IUP/BPP, vol 2, p 357.
532. 'Report of a Board Appointed by his Excellency the Governor to Enquire Into and Report upon the State of Native Affairs', 9 July 1856, AJHR, 1856, B-3, p 4.
533. Ibid, p 8.
534. McLean to Private Secretary, 4 June 1856, IUP/BPP, vol 10, p 581.
535. Ibid, pp 580–581.
536. Ibid, p 581.
537. Johnson to Colonial Secretary, 7 October 1854 (Turton, *Epitome*, C, p 63).
538. Johnson to McLean, 22 June 1855 [*sic*: 1854], AJHR, 1861, C-1, p 57 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 214); Innes, 'Northland Crown Purchase Deeds' (doc A4), pp 133, 317.
539. We note that three names included in the first deed (out of 23 overall) were also included in the second, which only included 16 names: Innes, 'Northland Crown Purchase Deeds' (doc A4), pp 133–135, 317–318.
540. We note that no record was made of this initial payment until the owners received the second payment of £800 and the purchase deed was signed: O'Malley, 'Northland Crown Purchases' (doc A6), pp 215–216; Innes, 'Northland Crown Purchase Deeds' (doc A4), p 138.
541. McLean to Johnson, 21 March 1861 [*sic*: 1857], AJHR, 1861, C-1, p 75.
542. Johnson to McLean, 22 June 1854, AJHR, 1861, C-1, p 57 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 214).
543. O'Malley, 'Northland Crown Purchases' (doc A6), p 215.
544. Ibid, p 231; Innes, 'Northland Crown Purchase Deeds' (doc A4), pp 141–143, 161–163.
545. See, for example, Johnson to McLean, 22 June 1854 (Turton, *Epitome*, C, p 96).
546. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 393–395.
547. O'Malley, 'Northland Crown Purchases' (doc A6), p 470.
548. Waitangi Tribunal, *The Taranaki Report*, Wai 143, p 48.
549. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 152.

550. Kemp to McLean, 29 September 1856, AJHR, 1861, C-1, p 12.
551. Kemp to McLean, 10 June 1857, AJHR, 1861, C-1, p 20.
552. Kemp to McLean, 7 December 1857, AJHR, 1861, C-1, p 22.
553. Searancke to Fox, 2 May 1864 (Turton, *Epitome*, C, p 88).
554. O'Malley, 'Northland Crown Purchases' (doc A6), p 18.
555. Based on Innes, 'Northland Crown Purchase Deeds' (doc A4), pp 8–14.
556. O'Malley, 'Northland Crown Purchases' (doc A6), p 471.
557. McLean to Browne, 20 March 1857, AJHR, 1862, C-1, p 356.
558. Johnson to Colonial Secretary, 12 December 1853 (Turton, *Epitome*, C, p 55).
559. O'Malley, 'Northland Crown Purchases' (doc A6), pp 345–346; Walzl, 'Ngati Rehia' (doc R2), pp 151–152, 154–155.
560. AJHR, 1860, E-4, p 11. For McLean's position, see AJHR, 1860, E-4, p 22; and 1861, E-1, app A, p 3; see also June Starke, 'Octavius Hadfield', in *Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, https://teara.govt.nz/en/biographies/1h2/hadfield-octavius, accessed 2 November 2022.
561. Samuel Williams to the Editor, *New Zealander*, 11 May 1861, p 3. In 1860, William Fox had levelled the same charges at McLean: see 'House of Representatives', *New Zealander*, 29 August 1860, p 3.
562. Fargher, *The Best Man Who Ever Served the Crown?*, pp 180–181; AJHR, 1861, E-1, pp 6–7.
563. Rose Daamen, Paul Hamer, and Barry Rigby, *Auckland*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996), p 168; Waitangi Tribunal, *The Taranaki Report*, Wai 143, pp 67–77.
564. Ward, *National Overview*, vol 2, pp 160–161.
565. This acreage figure is the Crown's GIS estimate of the area of the block: Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (doc A53), app A, pp 4, 6.
566. Johnson to Colonial Secretary, 31 December 1853 (Turton, *Epitome*, C, p 56); Johnson to Colonial Secretary, 12 December 1853 (Turton, *Epitome*, C, p 55).
567. Johnson to Colonial Secretary, 31 December 1853 (Turton, *Epitome*, C, p 56).
568. Johnson also noted that he had made arrangements to purchase the 32,846-acre Mangawhai block (in the Kaipara inquiry district) from Āpihai Te Kauwau, Te Tinana, and Te Keene of Tangaroa Ngāti Whātua: Johnson to Colonial Secretary, 31 December 1853 (Turton, *Epitome*, C, p 56).
569. Johnson to Colonial Secretary, 6 January 1854 (Turton, *Epitome*, C, p 57); Johnson to Colonial Secretary, 20 March 1854, AJHR, 1861, C-1, p 48 (cited in Berghan, 'Northland Block Research Narratives' (doc A39(b)), pp 128–129).
570. Johnson to Colonial Secretary, 6 January 1854 (Turton, *Epitome*, C, p 57); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 279.
571. Berghan, 'Northland Block Research Narratives' (doc A39(b)), p 128; O'Malley, 'Northland Crown Purchases' (doc A6), p 279.
572. Johnson to Colonial Secretary, 20 March 1854, AJHR, 1861, C-1, p 48.
573. Ibid.
574. O'Malley, 'Northland Crown Purchases' (doc A6), p 474; Johnson to Colonial Secretary, 20 March 1854, AJHR, 1861, C-1, p 48.
575. O'Malley, 'Northland Crown Purchases' (doc A6), p 285.
576. AUC 309, Land Information New Zealand (O'Malley, supporting documents (doc A6(a)), vol 22, pp 7423–7427); Johnson to Colonial Secretary, 20 March 1854, AJHR, 1861, C-1, p 48; O'Malley, 'Northland Crown Purchases' (doc A6), p 285.
577. AUC 318, Land Information New Zealand (O'Malley, supporting documents (doc A6(a)), vol 22, pp 7477–7481); Johnson to Colonial Secretary, 20 March 1854, AJHR, 1861, C-1, p 48; O'Malley, 'Northland Crown Purchases' (doc A6), p 285.
578. Johnson to Colonial Secretary, 20 March 1854, AJHR, 1861, C-1, p 48; O'Malley, 'Northland Crown Purchases' (doc A6), p 284.
579. Johnson also noted that a further 'Chief named Pirihi' sought a payment of £10: Johnson to Colonial Secretary, 20 March 1854, AJHR, 1861, C-1, p 48.
580. AUC 310, Land Information New Zealand (O'Malley, supporting documents (doc A6(a)), vol 22, pp 7428–7434).
581. Ibid (pp 7413–7422); O'Malley, 'Northland Crown Purchases' (doc A6), p 285.
582. O'Malley, 'Northland Crown Purchases' (doc A6), p 288.
583. This acreage figure is the Crown's GIS estimate of the area of the block: Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (doc A53), app A, p 6; O'Malley, 'Northland Crown Purchases' (doc A6), pp 289–290.
584. O'Malley, 'Northland Crown Purchases' (doc A6), pp 290–291.
585. Johnson to McLean, 12 November 1854 (O'Malley, supporting documents (doc A6(a)), vol 2, pp 587–589); Johnson to McLean, 20 November 1854, AJHR, 1861, C-1, p 62 (O'Malley, supporting documents (doc A6(a)), vol 12, p 3890).
586. Johnson to McLean, 20 November 1854, AJHR, 1861, C-1, p 62 (O'Malley, supporting documents (doc A6(a)), vol 12, p 3890); O'Malley, 'Northland Crown Purchases' (doc A6), p 290.
587. Johnson to McLean, 20 November 1854, AJHR, 1861, C-1, p 62 (O'Malley, supporting documents (doc A6(a)), vol 12, p 3890); O'Malley, 'Northland Crown Purchases' (doc A6), p 290.
588. O'Malley, 'Northland Crown Purchases' (doc A6), p 290.
589. McLean to Johnson, 9 January 1855, AJHR, 1861, C-1, p 63 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 290); Johnson to Kemp, 20 January 1855 (O'Malley, supporting documents (doc A6(a)), vol 2, p 688).
590. Johnson to Kemp, 20 January 1855 (O'Malley, supporting documents (doc A6(a)), vol 2, pp 688–689).
591. Kemp, minute [date illegible, possibly 22] January 1855 (O'Malley, supporting documents (doc A6(a)), vol 2, p 690).
592. Kemp to Colonial Secretary, 9 April 1855 (O'Malley, supporting documents (doc A6(a)), vol 2, p 612); O'Malley, 'Northland Crown Purchases' (doc A6), pp 290–291.
593. Kemp to Colonial Secretary, 9 April 1855 (O'Malley, supporting documents (doc A6(a)), vol 2, pp 612–613).

594. Kemp to Colonial Secretary, 9 April 1855 (O'Malley, supporting documents (doc A6(a)), vol 2, p 613).
595. Innes, 'Northland Crown Purchase Deeds' (doc A4), pp 280, 282.
596. Andrew Sinclair, minute, 12 April 1855 (O'Malley, supporting documents (doc A6(a)), vol 2, p 611).
597. Maungatapere purchase deed, 19 January 1855 (O'Malley, supporting documents (doc A6(a)), vol 2, p 617).
598. Translation of Maungatapere purchase deed, 19 January 1855 (O'Malley, supporting documents (doc A6(a)), vol 2, p 614).
599. Frederick Whitaker, minute, 14 April 1855 (O'Malley, supporting documents (doc A6(a)), vol 2, p 611).
600. Whitaker, minute, 14 April 1855 (O'Malley, supporting documents (doc A6(a)), vol 2, p 611).
601. Sinclair, minute, 16 April 1855 (O'Malley, supporting documents (doc A6(a)), vol 2, p 611).
602. Innes, 'Northland Crown Purchase Deeds' (doc A4), p 279.
603. O'Malley, 'Northland Crown Purchases' (doc A6), p 292.
604. Berghan, supporting papers (doc A39(a)), vol 6, pp 3556–3558; Innes, 'Northland Crown Purchase Deeds' (doc A4), p 280.
605. Johnson to McLean, 10 September 1855, AJHR, 1861, C-1, p 66 (O'Malley, supporting documents (doc A6(a)), vol 12, p 3892).
606. O'Malley, 'Northland Crown Purchases' (doc A6), p 293.
607. Ibid.
608. Ibid, p 292.
609. Rigby, 'Pre 1865 Te Raki Crown Purchase Validation Report' (doc A53), app A. See also the purchase deeds for the Aotea (Lands at Great Barrier Island), Manaia, Ruaranga, Maungatapere, and Ahuroa and Kourawhero blocks: Craig Innes, 'Northland Crown Purchase Deeds, 1840–1865', resource document commissioned by the Crown Forestry Rental Trust, 2006 (doc A4), pp 161–164, 261, 267, 271–272, 285–286.
610. Johnson to McLean, 24 August 1855, AJHR, 1861, C-1, p 65; O'Malley, 'Northland Crown Purchases' (doc A6), p 296.
611. Johnson to McLean, 24 August 1855, AJHR, 1861, C-1, p 65; O'Malley, 'Northland Crown Purchases' (doc A6), pp 296–297.
612. Johnson to McLean, 10 September 1855, AJHR, 1861, C-1, p 66.
613. O'Malley, 'Northland Crown Purchases' (doc A6), p 297.
614. Kemp to Johnson, 1 November 1855, AJHR, 1861, C-1, p 68.
615. O'Malley, 'Northland Crown Purchases' (doc A6), p 297; Innes, 'Northland Crown Purchase Deeds' (doc A4), pp 271–273.
616. O'Malley, 'Northland Crown Purchases' (doc A6), p 297; land purchase commissioner's reports from this period were presented to Parliament at the Governor's request in 1861: 'Reports of the Land Purchase Department Relative to the Exinguishment of Native Title', 1861, AJHR, 1861, C-1.
617. 'Kaipara', *Maori Messenger/Te Karere Maori*, 31 May 1856, pp 9–12; O'Malley, 'Northland Crown Purchases' (doc A6), p 298.
618. 'Kaipara', *Maori Messenger/Te Karere Maori*, 31 May 1856, pp 9–12; O'Malley, 'Northland Crown Purchases' (doc A6), p 298.
619. O'Malley, 'Northland Crown Purchases' (doc A6), p 298.
620. Johnson to McLean, 8 May 1856, AJHR, 1861, C-1, p 73.
621. Ibid.
622. 'Kaipara', *Maori Messenger/Te Karere Maori*, 31 May 1856, pp 10–11; Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), pp 166–169.
623. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 168.
624. Ibid, pp 168–169.
625. Johnson to McLean, 3 November 1856, AJHR, 1861, C-1, p 74.
626. Ibid.
627. Ibid, pp 74–75.
628. Berghan, 'Northland Block Research Narratives' (doc A39(b)), pp 30, 34; Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (doc A53), app A, p 5.
629. Johnson to McLean, 7 April 1857, AJHR, 1861, C-1, p 76.
630. Ibid.
631. Johnson to McLean, 26 May 1857, AJHR, 1861, C-1, p 78.
632. Ibid.
633. McLean to Johnson, 25 September 1857, AJHR, 1861, C-1, p 79.
634. Johnson to McLean, 30 September 1857, AJHR, C-1, p 79.
635. Ibid; Berghan, supporting papers (doc A39(m)), vol 6, p 3399.
636. Johnson to McLean, 5 October 1857 (O'Malley, supporting documents (doc A6(a)), vol 10, pp 3065, 3067); O'Malley, 'Northland Crown Purchases' (doc A6), pp 309–310.
637. Johnson to McLean, 5 October 1857 (O'Malley, supporting documents (doc A6(a)), vol 10, p 3068); O'Malley, 'Northland Crown Purchases' (doc A6), p 310.
638. Johnson to McLean, 19 November 1857, AJHR, 1861, C-1, p 80.
639. Ibid.
640. O'Malley, 'Northland Crown Purchases' (doc A6), p 309.
641. Johnson to McLean, 16 November 1857 (O'Malley, supporting documents (doc A6(a)) vol 10, pp 3077–3079); O'Malley, 'Northland Crown Purchases' (doc A6), p 311.
642. Johnson to McLean, 22 March 1858, AJHR, 1861, C-1, p 86 (O'Malley, supporting documents (doc A6(a)), vol 12, p 3902).
643. O'Malley, 'Northland Crown Purchases' (doc A6), p 313.
644. Johnson to McLean, 22 March 1858, AJHR, 1861, C-1, p 86 (O'Malley, supporting documents (doc A6(a)), vol 12, p 3902).
645. O'Malley, 'Northland Crown Purchases' (doc A6), p 316.
646. Ibid, p 472.
647. Johnson to McLean, 22 March 1858, AJHR, C-1, p 86.
648. Johnson to McLean, 17 May 1858, AJHR, C-1, p 86; Johnson to McLean, 30 September 1857, AJHR, C-1, p 79.
649. Johnson to McLean, 29 May 1858, AJHR, C-1, p 87.
650. Armstrong and Subasic, 'Northland Land and Politics' (doc A12), p 266; closing submissions for Wai 990 (#3.3.274(a)), p 12; closing submissions for Wai 2059 (#3.3.267), p 8.
651. Armstrong and Subasic, 'Northland Land and Politics' (doc A12), p 266.
652. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 16.
653. Mangakahia Taiwhenua claimants, opening statement (doc E54), p 9; Patrick Hilton (doc I1), p 3.

654. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 20; Henare, Petrie, and Puckey, '"He Whenua Rangatira"' (doc A37), p 579.
655. McLean to Johnson, 18 May 1854, AJHR, 1861, C-1, p 56. This dispute concerned the Sydney merchant Andrew O'Brien's pre-1840 transaction on the Whakahara block in the Kaipara inquiry district: Waitangi Tribunal, *The Kaipara Report*, Wai 674, pp 101–105.
656. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), pp 156–157, 160.
657. Ibid, p 157.
658. Ibid.
659. O'Malley 'Northland Crown Purchases' (doc A6), p 299; Armstrong and Subasic, 'Northland Land and Politics' (doc A12), pp 15–16. In his research report produced for the Kaipara district inquiry, Paul Thomas also cited the Crown's attempts to purchase the Whakahara and Tokatoka blocks as contributing to tensions between Te Tirarau and Ngāti Whātua: Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), pp 159–161.
660. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), pp 159, 171.
661. Ibid, p 168.
662. McLean to Johnson, 3 November 1856, AJHR, 1861, C-1, p 74.
663. Johnson to McLean, 5 December 1861 [sic: 1856], AJHR, 1861, C-1, p 75.
664. Tony Walzl, 'Te Tai Tokerau District Māori Council Mana Whenua Report', 2012 (doc E34), p 283.
665. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 171.
666. Ibid, p 172.
667. Ibid, pp 173–174.
668. The purchase blocks included Tangihua and Maungaru (in the Kaipara district): Daamen, Rigby, Hamer, *Auckland*, p 181.
669. *New Zealander*, 12 May 1858, p 3 (cited in Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 175).
670. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 176.
671. Ibid.
672. Ibid, p 177.
673. Ibid, p 178.
674. Ibid.
675. Ibid, pp 179–180; Daamen, Hamer, and Rigby, *Auckland*, p 181.
676. Matikikuha to Gore Browne, 19 February 1861 (cited in Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 179); Daamen, Hamer, and Rigby, *Auckland*, p 181.
677. Hori Kingi Tahua, Parore, Tirarau, and Hamiora Marupiopio to Gore Brown, 4 April (Walzl, supporting papers (doc E34(a)), vol 1, pp 579–580).
678. Rogan to McLean, 31 October 1861 (cited in Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 181).
679. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 182.
680. Ibid, pp 182–183.
681. Ibid, p 185.
682. Walzl, transcript 4.1.11, Korokota Marae, Mangakāhia, p 166.
683. Armstrong and Subasic, 'Northland Land and Politics' (doc A12), pp 266–267, 269; Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), pp 185–186.
684. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), pp 186–187; see also *Maori Messenger/Te Karere Maori*, 1 July 1862, pp 1–2; Armstrong and Subasic, 'Northland Land and Politics' (doc A12), p 273.
685. 'Arbitration Court', *Te Karere*, 30 March 1863, p 5.
686. Armstrong and Subasic, 'Northland Land and Politics' (doc A12), pp 275–276.
687. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 312.
688. Armstrong and Subasic, 'Northland Land and Politics' (doc A12), p 277.
689. Ibid, p 279.
690. Ibid, pp 279–280.
691. Ibid, p 280.
692. See also Ward, *National Overview*, vol 2, p 137.
693. Claimant closing submissions (#3.3.404), p 54; O'Malley, 'Northland Crown Purchases' (doc A6), pp 457–458.
694. Crown closing submissions (#3.3.404), p 54.
695. McLean, memorandum, 30 October 1854 (O'Malley, supporting documents (doc A6(a)), vol 2, pp 603–604).
696. Ligar, memorandum, September 1855 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 454).
697. C P O'Rafferty, memorandum, September 1855 (O'Malley, supporting documents (doc A6(a)), vol 2, p 716).
698. Ibid (p 717).
699. Ligar, memorandum, September 1855 (O'Malley, supporting documents (doc A6(a)), vol 2, pp 721–722).
700. O'Malley, 'Northland Crown Purchases' (doc A6), p 454.
701. McLean to Private Secretary, 4 June 1856, IUP/BPP, vol 10, p 580 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 456).
702. O'Malley, 'Northland Crown Purchases' (doc A6), p 456.
703. McLean to Kemp, 8 September 1856, AJHR, 1861, C-1, p 11; McLean to Johnson, 9 September 1856, AJHR, 1861, C-1, p 73.
704. McLean to Kemp, 24 October 1856, AJHR, 1861, C-1, p 14.
705. Kemp to McLean, 29 May 1858, AJHR, 1861, C-1, p 26.
706. McLean to Kemp, 28 June 1858, AJHR, 1861, C-1, p 28.
707. McLean to Land Purchase Commissioners, 3 May 1861, AJHR, 1861, C-8, p 2.
708. Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report (doc A53), app A.
709. Craig Innes, 'The History of Mangataraire, Rangaunu, Tapapanui, Toukauri, Wiroa and Whakataha 1–3 blocks, 1865–2015', report commissioned by the Waitangi Tribunal, 2016 (doc A69), pp 95–97, 99.
710. O'Malley, 'Northland Crown Purchases' (doc A6), p 265.

711. See Kemp to McLean, 16 October 1858, AJHR, 1861, C-1, p 31; Smith (for McLean) to Kemp, 4 March 1859, AJHR, 1861, C-1, p 35; O'Malley, 'Northland Crown Purchases' (doc A6), p 265.
712. O'Malley, 'Northland Crown Purchases' (doc A6), p 265.
713. Ibid, pp 348–351.
714. The southern portion, the 29,812-acre Ruapekapeka block would be purchased in 1864 for £3,800 after coal deposits were discovered on the block: O'Malley, 'Northland Crown Purchases' (doc A6), pp 357–358.
715. The Crown eventually completed the purchase of the 29,812-acre Ruapekapeka block in 1864 for the increased price of £3,800 after coal was discovered on the block. Within a short time, Maihi Parāone began appealing to the Government that the deed had incorrectly described the Matairiri and Kaiwaka reserves as Crown land. It was not until 1883, after years of protest and correspondence, that Crown officials finally discovered that the lands claimed by Maihi Parāone had not been included in the Ruapekapeka purchase or the earlier Kawakawa purchase in 1858. However, no action was taken. In 1887, the Whāngārei Resident Magistrate carried out a perfunctory inquiry into Maihi Parāone's claims which O'Malley found failed to even inspect the purchase deed. Upon hearing that his claim was once again rejected, Maihi Parāone wrote to the Governor: 'I shall not forget the matter and relinquish my lands. . . . I shall go on applying for them for ever and ever'. O'Malley noted that it was only Maihi Parāone's death in 1889 that 'brought a stop to the voluminous correspondence he maintained with government officials over his claims to the Ruapekapeka lands': O'Malley, 'Northland Crown Purchases' (doc A6), pp 352, 357–359, 409–508; closing submissions for Wai 49 and Wai 682, pp 70–73.
716. Kemp to McLean, 26 October 1859, AJHR, 1861, C-1, p 39 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 265).
717. O'Malley, 'Northland Crown Purchases' (doc A6), p 265; Kemp to McLean, 26 October 1859, AJHR, 1861, C-1, p 39 (O'Malley, supporting documents (doc A6(a)), vol 12), p 3878).
718. Smith (for McLean) to Kemp, 7 March 1859, AJHR, 1861, C-1, p 35.
719. Rogan to McLean, 12 January 1858 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 460).
720. O'Malley, 'Northland Crown Purchases' (doc A6), p 263.
721. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 244.
722. O'Malley, 'Northland Crown Purchases' (doc A6), pp 337–338.
723. Claimant closing submissions (#3.3.208(a)), pp 11–13, 26–27.
724. Crown closing submissions (#3.3.404), pp 41–43.
725. FitzRoy to Stanley, 16 May 1843, IUP/BPP, vol 2, p 387.
726. Grey to Grey, 15 May 1848, IUP/BPP, vol 6, p 24.
727. Sinclair to Johnson, 22 January 1854, AJHR, 1861, C-1, p 47.
728. McLean to Johnson, 24 November 1857, AJHR, 1861, C-1, p 81.
729. McLean to Kemp, 3 October 1856, AJHR, 1861, C-1, p 12 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 485); Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (doc A53), app A.
730. 'Report of a Board Appointed by his Excellency the Governor to Enquire Into and Report upon the State of Native Affairs', 9 July 1856, AJHR, 1856, B-3, p 4.
731. Ibid, pp 4–8. It is interesting to note that in 1859 Governor Gore Browne, in a dispatch to the Secretary of State for the Colonies, acknowledged that large tracts of land had been acquired in the North Island at prices ranging from a farthing to sixpence per acre, but that 'there still remain many millions of acres we now vainly desire to acquire, which might in those days [1840s] have been bought at a cost too insignificant to be calculated by the acre'. See Browne to Secretary of State for the Colonies, 20 September 1859, AJHR, 1860, E-6A, p 3.
732. AJHR, 1891, sess 2, G-1, p 60.
733. Rogan to McLean, 24 June 1859 (cited in Daamen, Hamer, and Rigby, *Auckland*, p 194).
734. Ibid.
735. O'Malley, 'Northland Crown Purchases' (doc A6), pp 273–274.
736. O'Malley, 'Northland Crown Purchases' (doc A6), p 274; Kemp had previously reported that the price had been fixed at 1s 3d: Kemp to McLean, 8 July 1863 (Turton, *Epitome*, C, p 15).
737. O'Malley, 'Northland Crown Purchases' (doc A6), pp 274–275.
738. Johnson to McLean, 8 June 1857 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 462); Johnson to McLean, 11 February 1858, AJHR, 1861, C-1, p 83.
739. Kemp to McLean, 17 March 1858, AJHR, 1861, C-1, p 25; see also O'Malley, 'Northland Crown Purchases' (doc A6), p 462.
740. Kemp to McLean, 5 August 1855, AJHR, 1861, C-1, p 3.
741. Kemp to McLean, 28 February 1856, AJHR, 1861, C-1, p 4.
742. AUC 310, Land Information New Zealand (O'Malley, supporting documents (doc A6(a)), vol 22, pp 7428–7434).
743. 'Proceedings of the Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 3 August 1860, p 2.
744. Ibid.
745. Ibid.
746. Daamen, Hamer, and Rigby, *Auckland*, p 195.
747. 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, p 24.
748. 'Proceedings of the Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 30 November 1860, pp 1–2 (Armstrong and Subasic, supporting documents (doc A12(a)), vol 1, p 1:129).
749. Kemp to McLean, 7 June 1861, AJHR, 1861, C-1, p 44.
750. O'Malley, 'Northland Crown Purchases' (doc A6), p 408; John Alexander (doc H7), p 37.
751. Five of the owners did not sign the deed but had their names signed by someone on their behalf. The deed provides their signatures in this way: 'Ranga (Na Hone Tana), Wiremu Kauea (Na te Honiana), Hongi (Na Tamhihana Paru), Hone Taua (Na Hone Poti) . . . Tau (Na te Honiana)': Innes, 'Northland Crown Purchase Deeds' (doc A4), p 42.
752. O'Malley, 'Northland Crown Purchases' (doc A6), pp 372–373.
753. Innes, 'Northland Crown Purchase Deeds' (doc A4), p 41.
754. Claimant closing submissions (#3.3.390), pp 23–24; see also Peter McBurney, 'Northland: Public Works & Other Takings: c 1871–1993',

report commissioned by the Crown Forestry Rental Trust, 2007 (doc A13), pp 509–511.
755. John Alexander (doc H7), pp 34–35.
756. Closing submissions for Wai 179, Wai 1524, Wai 1537, Wai 1541, Wai 1681, Wai 620, Wai 1673, Wai 1917, and Wai 1918 (#3.3.393), p 177; see also Popi Tahere (doc N23), p 9.
757. Closing submissions for Wai 1341 (#3.3.377), p 41.
758. Claimant closing submissions (#3.3.390), p 23; see also McBurney, 'Northland' (doc A13), p 509.
759. Claimant closing submissions (#3.3.390), p 23.
760. Crown closing submissions (#3.3.404), pp 39–41.
761. Ibid, pp 36, 39–40.
762. O'Malley, 'Northland Crown Purchases' (doc A6), p 375.
763. 'Report of Royal Commission Appointed to Inquire into and Report upon Claims Preferred by Certain Maori Claimants concerning the Mokau (Manginangina) Block', AJHR, 1948, G-2, p 14.
764. Crown closing submissions (#3.3.404), p 32.
765. 'Petition of Patu Hohaia and Another', 11 August 1926, AJHR, 1926, I-3, p 6.
766. Manuka Henare, Hazel Petrie, and Adrienne Puckey, 'Oral and Traditional History Report: Te Waimate-Taiamai Alliance', 2009 (doc E33), p 371.
767. O'Malley, 'Northland Crown Purchases' (doc A6), p 384.
768. Ibid.
769. Petition 158/1935 (O'Malley, supporting documents (doc A6(a)), vol 7, pp 2368–2369); cited in O'Malley, 'Northland Crown Purchases' (doc A6), pp 384–385.
770. O'Malley, 'Northland Crown Purchases' (doc A6), p 385; Chief Surveyor, memorandum, 2 June 1936 (O'Malley, supporting documents (doc A6(a)), vol 8, pp 2677–2680).
771. John Alexander (doc H7), p 36; O'Malley, 'Northland Crown Purchases' (doc A6), pp 385–386; see also Ani Taniwha (doc O14), pp 22–23; Popi Tahere (doc N23), pp 9–10.
772. Hall Skelton for T A Napia and Wi Anaru Hekeretai to Savage, 3 September 1936 (O'Malley, supporting documents (doc A6(a)), vol 8, p 2665).
773. O'Malley, 'Northland Crown Purchases' (doc A6), p 387.
774. Ibid.
775. 'Report and Recommendation on Petition No 158 of 1935, of Hone Rameka and Others Relative to the Takapau Block (Makau-Manginangina)' (O'Malley, supporting documents (doc A6(a)), vol 8, pp 2467–2468).
776. O'Malley, supporting documents (doc A6(a)), vol 8, p 2470.
777. 'Report and Recommendation on Petition No 158 of 1935, of Hone Rameka and Others' (O'Malley, supporting documents (doc A6(a)), vol 8, p 2472).
778. Ibid.
779. Ibid (p 2473).
780. Ibid; see also O'Malley, 'Northland Crown Purchases' (doc A6), p 393.
781. 'Report and Recommendation on Petition No 158 of 1935, of Hone Rameka and Others' (O'Malley, supporting documents (doc A6(a)), vol 8, p 2467).
782. Shepherd to Native Minister, 1941 (O'Malley, supporting documents (doc A6(a)), vol 8, pp 2464–2465).
783. O'Malley, 'Northland Crown Purchases' (doc A6), p 396.
784. Petition 107/1944 (O'Malley, supporting documents (doc A6(a)), vol 8, p 2610).
785. The commission consisted of Sir Michael Myers, Hānara Tangiāwhā Reedy, and Albert Moeller Samuel: 'Report of Royal Commission Appointed to Inquire into and Report upon Claims Preferred by Certain Maori Claimants concerning the Mokau (Manginangina) Block', AJHR, 1948, G-2; 'Royal Commission to Inquire into and Report upon Claims Preferred by Members of the Maori Race Touching Certain Lands Known as Surplus Lands of the Crown', AJHR, 1948, G-8, p 1.
786. 'Report of Royal Commission Appointed to Inquire into and Report upon Claims Preferred by Certain Maori Claimants Concerning the Mokau (Manginangina) Block', AJHR, 1948, G-2, p 22.
787. 'Report', AJHR, 1948, G-2, p 24; see also Crown closing submissions (#3.3.404), pp 35–36, and O'Malley, 'Northland Crown Purchases' (doc A6), pp 417–418.
788. Crown closing submissions (#3.3.404), p 40. This block was only one of two blocks to be specifically mentioned in the Crown's closing submissions; the other (the Ruakaka block) is discussed in more detail later in this chapter.
789. Vincent O'Malley, transcript 4.1.17, Akerama Marae, Tōwai, pp 507–509.
790. O'Malley, 'Northland Crown Purchases' (doc A6), p 418.
791. Report of Proceedings before the Royal Commission on the Mokau Block, 9 October 1947 (O'Malley, supporting documents (doc A6(a)), vol 7, pp 2442–2443); O'Malley, 'Northland Crown Purchases' (doc A6), pp 419–420.
792. John Alexander (doc H7), pp 33, 37–38.
793. 'Report and Recommendation on Petition No 158 of 1935, of Hone Rameka and Others' (O'Malley, supporting documents (doc A6(a)), vol 8, p 2470).
794. Ibid.
795. O'Malley, 'Northland Crown Purchases' (doc A6), pp 391–392.
796. Crown closing submissions (#3.3.404), p 37.
797. Claimant closing submissions (#3.3.208), pp 12–14, 20.
798. O'Malley, 'Northland Crown Purchases' (doc A6), p 394.
799. Ibid, p 55. Referring to Grey's general explanation about 'real payment', Kemp acknowledged as much, recording that he had been instructed 'to take care to explain to the natives that in selling . . . there was a promise of settlement . . . that in ceding the . . . [land] they would derive very great advantage from these people coming to settle on the land': Kemp, evidence to Smith-Nairn commission, 1879 (cited in Armstrong, 'A Sure and Certain Possession' (Wai 2200 R01, doc A166), p 35).
800. Memorandum by Native Secretary, 25 June 1858, AJHR, 1860, E-1, p 15.

801. O'Malley, 'Northland Crown Purchases' (doc A6), p 466; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 172.
802. O'Malley, 'Northland Crown Purchases' (doc A6), pp 11, 102–103.
803. 'Report of Mr Interpreter Davis's visit to Hokianga', *Maori Messenger / Te Karere Maori*, 1 November 1855, p 6; see also O'Malley, 'Northland Crown Purchases' (doc A6), p 108.
804. Russell to Hobson, 28 January 1841, IUP / BPP, vol 3, pp 173–174.
805. Grey to Grey, 30 August 1851, IUP / BPP, vol 8, p 32.
806. Grey to Wynyard, 2 September 1852 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 50).
807. Dr Donald Loveridge, 'The Development and Introduction of Institutions for the Governance of Maori, 1852–1865', report commissioned by the Crown Law Office, 2007 (doc E38), pp 16, 76.
808. Domett to McLean, 8 August 1853 (cited in Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 103); see also Wood to Sinclair, 3 April 1854 (Turton, *Epitome*, E, p 1).
809. Sinclair to Johnson, 7 November 1853 (Turton, *Epitome*, C, p 55).
810. Grey authorised the insertion of a koha or 'per cents' clause into 12 purchase deeds in Wairarapa during the 1850s, the Crown having indicated to Māori that they would 'derive an ongoing benefit from a fund into which the Crown would put 5 percent of the returns from on-sale of their land': Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 388.
811. Charles Heaphy to Native Under-Secretary, 29 May 1874, AJHR, 1874, G-4A, p 1.
812. Heaphy to Native Under-Secretary, 29 May 1874, AJHR, 1874, G-4A, p 1.
813. Innes, 'Northland Crown Purchase Deeds' (doc A4), pp 187–188.
814. Heaphy to Native Under-Secretary, 29 May 1874, AJHR, 1874, G-4A, p 1; Innes, 'Northland Crown Purchase Deeds' (doc A4), pp 300–303.
815. See, for example, Vincent O'Malley, 'Treaty-Making in Early Colonial New Zealand', NZJH, vol 33, no 2 (October 1999), pp 137–154.
816. McLean to Johnson, 18 May 1854, AJHR, 1861, C-1, p 53.
817. Paora, 14 April 1856, IUP / BPP, vol 10, p 555.
818. McLean to Browne, 20 March 1857 (Turton, *Epitome*, A1, p 57); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 129.
819. O'Malley, 'Northland Crown Purchases' (doc A6), p 466; see also John Barrington, 'Northland Language, Culture and Education: Part One: Education', report commissioned by the Crown Forestry Rental Trust, 2005 (doc A2), pp 23–24, 26–31.
820. Barrington, 'Northland Language, Culture and Education' (doc A2), pp 72–73, 76, 83–84; see also Mary Gillingham and Suzanne Woodley, 'Northland: Gifting of Lands', report commissioned by the Crown Forestry Rental Trust, 2007 (doc A8). We will discuss the gifting of land for schools in the next part of our report.
821. Derek Dow, *Maori Health and Government Policy, 1840–1940* (Wellington: Victoria University Press, 1999), pp 19–20, 26, 41; see also 'Return of Expenditure for Native Purposes, under "Native Purposes Appropriation Act, 1862"', AJHR, 1863, E-8, p 2, for figures expended on medical attendance of Māori in New Zealand, including Bay of Islands (£203 6d), Mangonui (£73 7d), Whāngārei and Kaipara (£93 19s) for 1862 to 1863.
822. Innes, 'Northland Crown Purchase Deeds' (doc A4), p 242.
823. Waitangi Tribunal, *The Kaipara Report*, Wai 674, p 136.
824. 'Auckland Ten Per Cents', AJHR, 1874, G-4A, p 1. Turton listed nine blocks (Turton, *Epitome*, E, p 3).
825. Heaphy to Native Under-Secretary, 29 May 1874 (Turton, *Epitome*, E, p 9); O'Malley, 'Northland Crown Purchases' (doc A6), pp 509–510.
826. Heaphy to Native Under-Secretary, 29 May 1874 (Turton, *Epitome*, E, pp 9–10); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 509.
827. Heaphy to Native Under-Secretary, 29 May 1874 (Turton, *Epitome*, E, pp 9–11); O'Malley, 'Northland Crown Purchases' (doc A6), p 509.
828. O'Malley, 'Northland Crown Purchases' (doc A6), pp 509–510.
829. 'Balance-Sheet of the Public Trust Office for the Year ended 30th June, 1879', 21 July 1879, AJHR, 1879, B-4, p 2; see also 'Balance-Sheet of the Public Trust Office for the Year ended 30th June, 1880', 28 July 1880, AJHR, 1881, B-15A, p 1. The moneys appear to have been invested and earning interest.
830. AJHR, 1899, B-9, p 2; Waitangi Tribunal, *The Kaipara Report*, Wai 674, p 128.
831. O'Malley, 'Northland Crown Purchases' (doc A6), p 510.
832. Waitangi Tribunal, *The Kaipara Report*, Wai 674, p 128.
833. R N Jones to Native Minister, 25 June 1925 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 510).
834. Cited in Waitangi Tribunal, *The Kaipara Report*, Wai 674, p 129.
835. O'Malley, 'Northland Crown Purchases' (doc A6), pp 511–12.
836. Ibid, p 12.
837. 'Confiscated Native Lands and Other Grievances', AJHR, 1928, G-7, p 33.
838. Claimant closing submissions (#3.3.288), pp 43–45; see also Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, pp 374, 388–389.
839. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 389.
840. Ibid, p 391.
841. Waitangi Tribunal, *The Kaipara Report*, Wai 674, p 139.
842. 'Confiscated Native Lands and Other Grievances', AJHR, 1928, G-7, p 33.
843. O'Malley, 'Northland Crown Purchases' (doc A6), p 512; claimant closing submissions (#3.3.288), p 45.
844. Crown closing submissions (#3.3.404), pp 5–11.
845. Crown memorandum (#3.2.2677), p 19.
846. Ibid, pp 19–21.
847. Clarke to Colonial Secretary, 1 November 1843 (Turton, *Epitome*, C, p 154); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 439. Modern estimates indicate that the land required for subsistence agriculture ranges from 0.25 to 10.00 acres per person according to the system of farming, the practices employed, the length of the growing season, and the quality of the soil: 'Subsistence Farming', New

World Encyclopedia, https://www.newworldencyclopedia.org/p/index.php?title=Subsistence_farming&oldid=683457, accessed 13 March 2022.

848. See O'Malley, 'Northland Crown Purchases' (doc A6), pp 440–441, which discusses how Johnson's purchasing instructions changed from having no reference to sufficiency in November 1853 to ensuring that Māori retained sufficient land 'for their own welfare' in May 1854.

849. McLean to Browne, 20 March 1857, AJHR, 1862, C-1, p 356.

850. Claimant closing submissions (#3.3.208(a)), pp 23–24. The data are from Rigby, 'Pre 1865 Te Raki Crown Purchase Validation Report' (doc A53), app B, p 8.

851. O'Malley, 'Northland Crown Purchases' (doc A6), p 442; claimant closing submissions (#3.3.208(a)), p 24.

852. Claimant closing submissions (#3.3.208(a)), pp 24, 26; O'Malley, 'Northland Crown Purchases' (doc A6), p 438.

853. Claimant closing submissions (#3.3.208(a)), pp 25–26.

854. Crown closing submissions (#3.3.404), pp 2–3.

855. Ibid, pp 8–11; see also Vincent O'Malley, transcript 4.1.17, Akerama Marae, Tōwai, p 513.

856. McLean to Colonial Secretary, 29 July 1854, *Epitome*, D, p 21; Crown closing submissions (#3.3.404), pp 12–13.

857. Crown closing submissions (#3.3.404), p 12; Waitangi Tribunal, *The Kaipara Report*, Wai 674, p 51.

858. Crown closing submissions (#3.3.404), p 17.

859. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 281.

860. Ibid, p 208.

861. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, pp 258–259.

862. Ibid, p 223.

863. Ibid, p 235.

864. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, vol 1, p 307.

865. Ibid.

866. See 'Circular Instructions Issued by Chief Land Purchase Commissioner to District Commissioners', 3 May 1861, AJHR, 1861, C-8.

867. McLean to Kemp, 17 November 1855, AJHR, 1861, C-1, p 4.

868. Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (doc A53), apps A–B. As we noted in endnote 715, despite the comparatively large number of reserves promised in the 1864 Ruapekapeka purchase, two of the promised reserves at Matairiri and Kaiwaka were incorrectly described as Government land in the deed. Maihi Parāone sought the return of these lands until his death in 1889: O'Malley, 'Northland Crown Purchases' (doc A6), pp 357–359, 409–508; closing submissions for Wai 49 and Wai 682, pp 65, 70–73.

869. O'Malley, 'Northland Crown Purchases' (doc A6), p 195.

870. See Barry Rigby, transcript 4.1.12, North Harbour Stadium, p 210.

871. Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), pp 50–52. One reserve the details of which survive was Te Hemara's Reserve, which stretched from the south shore of Te Pukapuka to Waiwera and inland to the western boundary of the Mahurangi block: McBurney, 'Traditional History Overview' (doc A36), p 391. Arapeta Hamilton suggested that Te Kawerau Māori in southern Mahurangi were not given sufficient reserves to live on: Arapeta Hamilton, transcript 4.1.12, North Harbour Stadium, p 282.

872. Claimant closing submissions (#3.3.288), p 38; Guy Gudex (doc I14), pp 13, 16; Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (doc A53), app A, p 5.

873. Johnson to Colonial Secretary, 6 January 1854 (Turton, *Epitome*, C, p 57); O'Malley, 'Northland Crown Purchases' (doc A6), pp 278–279.

874. See, for example, Johnson to McLean, 5 October 1857 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 443).

875. Johnson to McLean, 5 October 1857 (O'Malley, supporting documents (doc A6(a)), vol 10, pp 3073–3074); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 443.

876. Grey to Grey, 15 May 1848, IUP/BPP, vol 6, p 23.

877. 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 (Wellington: Waitangi Tribunal, 1997), p 6.

878. Ligar to Colonial Secretary, 10 November 1854 (O'Malley, supporting documents (doc A6(a)), vol 2, pp 681–682); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 446.

879. Ligar to Colonial Secretary, 10 November 1854 (O'Malley, supporting documents (doc A6(a)), vol 2, p 682); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 446.

880. McLean to Colonial Secretary, 29 July 1854 (Turton, *Epitome*, D, p 21).

881. 'Report of a Board Appointed by his Excellency the Governor to Enquire Into and Report upon the State of Native Affairs', 9 July 1856, AJHR, 1856, B-3, p 9.

882. Browne to Labouchere, 23 July 1856, IUP/BPP, vol 10, pp 512–513.

883. McLean to Private Secretary, 4 June 1856, IUP/BPP, vol 10, pp 580–581.

884. McLean to Private Secretary, 4 June 1856, IUP/BPP, vol 10, p 581.

885. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 223.

886. Walter Mantell to Grey, 13 March 1851, AJHR, 1858, C-3, p 12.

887. Johnson to McLean, 22 June 1854, AJHR, 1861, C-1, p 57.

888. Johnson to McLean, 5 September 1855, AJHR, 1861, C-1, p 65.

889. Johnson to McLean, 8 May 1856, AJHR, 1861, C-1, p 73; Johnson to McLean, 10 September 1855, AJHR, 1861, C-1, p 66.

890. McLean for Kemp to Colonial Secretary, 30 January 1855, AJHR, 1861, C-1, p 64.

891. 'Return of all Crown Grants Issued, or in Course of Preparation, to Native Subjects of Her Majesty', 3 July 1861, AJHR, 1861, E-6, p 1; cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 448.

892. Innes, 'Northland Crown Purchase Deeds' (doc A4), p 196; O'Malley, 'Northland Crown Purchases' (doc A6), p 324.

893. Innes, 'Northland Crown Purchase Deeds' (doc A4), p 213.

894. O'Malley, 'Northland Crown Purchases' (doc A6), p 445.

895. Titewhai Harawira (doc I30(a)), p 7.

896. McLean for Kemp to Colonial Secretary, 30 January 1855, AJHR, 1861, C-1, p 64; Johnson to McLean, 10 September 1855, AJHR, 1861, C-1, p 66.

897. Innes, 'Northland Crown Purchase Deeds' (doc A4), pp 285–286.

898. O'Malley, 'Northland Crown Purchases' (doc A6), p 445.
899. Ibid, p 438.
900. Murray, *Crown Policy on Maori Reserved Lands*, p 6.
901. Innes, 'Northland Crown Purchase Deeds' (doc A4), p 7.
902. McLean to Private Secretary, 4 June 1856, IUP/BPP, vol 10, p 580; cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 456.
903. Andrew Sinclair, 12 February 1862, AJHR, 1862, E-10, p 3.
904. *Regina v Fitzherbert and Others*, AJHR, 1873, G-2C, p 3.
905. New Zealand Native Reserves Act 1856, s 15; Murray, *Crown Policy on Maori Reserved Lands*, p 14.
906. McLean's 1849 purchase of the Rangitikei–Turakina block demonstrated well McLean's early approach to Crown purchasing.
907. Johnson to Colonial Secretary, 20 March 1854, AJHR, 1861, C-1, p 48.
908. O'Malley, 'Northland Crown Purchases' (doc A6), p 277.
909. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 191.
910. Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, vol 2, p 277.
911. The Māori text of te Tiriti stated: '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'. The English text of the Treaty stated: 'but 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 treat with them in that behalf.' See Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 346–347.
912. See also 'Report of Commissioner of Native Reserves', 31 May 1876, AJHR, 1876, G-3, p 1, in which Heaphy, with reference to the Hunua block, noted that moneys were made 'available for certain beneficial purposes in connection with the people who had originally sold that land'.
913. O'Malley, 'Northland Crown Purchases' (doc A6(a)), p 466.
914. See, for example, Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 357.
915. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, pp 363–364.
916. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, pp 357–358.
917. Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, vol 2, pp 239–240. The Tribunal listed eight factors relevant to defining 'sufficiency': namely, the population of the tribe, the land occupied by iwi or hapū or both over which they had rights, principal food sources and their location, location of wāhi tapu, the likely impact of European farming practices, the tribe's needs at the time, the tribe's reasonably foreseeable future needs, and the need for land to comprise contiguous blocks.
918. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 3, pp 1218–1222.
919. Waitangi Tribunal, *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims*, Wai 215 (Wellington: Legislation Direct, 2004), p 23.
920. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 258.
921. Ibid, vol 2, p 561.
922. Ibid, pp 592–593.
923. Claimant closing submissions (#3.3.216), pp 11–13, 29–33; see also claimant closing submissions (#3.3.216(a)), pp 4–6.
924. Draft Crown statement of position and concessions (#1.3.1), p 186.
925. Johnson to Sinclair, 6 January 1854 (Turton, *Epitome*, C, p 57).
926. Johnson to McLean, 22 June 1854, AJHR, 1861, C-1, p 57.
927. Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (doc A53), apps A–B.
928. O'Malley, 'Northland Crown Purchases' (doc A6), p 450.
929. Crown closing submissions (#3.3.404), p 46.
930. Ibid, pp 5–6.
931. The Crown gives a purchasing total of 482,115 acres, while technical witness Dr Rigby offered a total of 482,524 acres; see Rigby, corrections to validation reports (doc A48(e)), p 7. See chapter 6 for our figures concerning losses related to old land claims and pre-emptive waiver transactions.
932. Marina Fletcher (doc AA126(b)), p 63.
933. The purchase blocks included Te Kamo, Te Whauwhau, Te Mahe, Tamaterau, Parahaki, Takahiwai, Kaiwa, Whareroa, Kaurihohore, Manaia, Maungakaramea, Ruarangi, Te Mata, Te Tupua, Maungatapare, and Poupouwhenua: Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (doc A53), app A, pp 4–6.
934. Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (doc A53), app A, pp 4–6.
935. O'Malley, 'Northland Crown Purchases' (doc A6), p 296.
936. Ibid, p 333.
937. Ibid, p 186.
938. Crown closing submissions (#3.3.404), p 8.
939. Arapeta Hamilton (doc K7(b)), p 19.
940. Beazley (doc K8), pp 65–66.
941. Crown closing submissions (#3.3.404), p 5.
942. Daamen, Hamer, and Rigby, *Auckland*, p 146.
943. O'Malley, 'Northland Crown Purchases' (doc A6), p 274.
944. Rowan Tautari, 'Report on Land Previously Owned by Te Whiu Hapu', report commissioned by the Waitangi Tribunal, 1999 (doc E6), p 61.
945. O'Malley, 'Northland Crown Purchases' (doc A6), p 465.
946. Erimana Taniora (doc G1), pp 123–124.
947. Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (doc A53), app A.
948. O'Malley, 'Northland Crown Purchases' (doc A6), p 359.
949. This reserve is distinct from that offered to Te Hemara in April 1841: claimant closing submissions (#3.3.288), p 38; Guy Gudex (doc I14), pp 13, 16; Sinclair, 17 June 1862, AJHR, 1862, E-10, p 4.

950. See Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, Wai 201, vol 2, p 679; Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 3, pp 1229–1230; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 2, pp 1025–1027; Waitangi Tribunal, *Te Urewera*, Wai 894, 8 vols (Wellington: Legislation Direct, 2017), vol 8, pp 3761–3763.
951. McLean to Gore Browne, 20 March 1857 (1858, in Turton, *Epitome*, A1, p 58).
952. McLean, journal, 18 December 1858 (cited in Bayley, 'Aspects of Maori Economic Development and Capability' (doc E41), p 55).
953. O'Malley, 'Northland Crown Purchases' (doc A6), p 495.

Page 878: Table 8.1
The figures in table 8.1 are sourced from Crown closing submissions (#3.3.404), pp 5–6.

Page 880: Map 8.6
Map 8.6 is based on an 1859 map of the Mokau–Manginangina Crown purchase (doc A42).