

NATIONAL OVERVIEW

volume i

Professor Alan Ward

Waitangi Tribunal Rangahaua Whanui Series

WAITANGI TRIBUNAL 1997

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

A Waitangi Tribunal publication
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isbn 1-86956-207-0

Edited and produced by the Waitangi Tribunal
Published by GP Publications, Wellington, New Zealand
Printed by GP Print, Wellington, New Zealand
Set in Times Roman

This report was commissioned by the Waitangi Tribunal
as part of its Rangahaua Whanui research programme. Any views expressed or
conclusions drawn are those of the author.

Mr Morris Love
Director
Waitangi Tribunal

25 March 1997

Tena koe

In fulfilment of my commission dated 30 April 1996, I have this week delivered to Mr Dominic Hurley, the senior editor of the Waitangi Tribunal, the three-volume *National Overview* of the Rangahaua Whanui project, commenced by the Tribunal in 1993. Volume i of the overview summarises the chapters in volumes ii and iii. It also contains a section (pt iii) entitled 'Optional Strategies for Dealing with Historical Treaty Claims', which was written in fulfilment of my supplementary commission of 4 November 1996. Volume ii contains chapters on the 20 national themes selected for discussion in the overview. Volume iii contains chapters summarising the main features of land alienation in the 15 districts into which New Zealand was divided for research purposes. An executive summary of some 42 pages is included in volume i.

I would like to thank the Waitangi Tribunal for the privilege of working on this report. It is a report to the Tribunal embodying my historical interpretations of the evidence assembled during the Rangahaua Whanui programme – interpretations that are not necessarily shared by either the Tribunal itself or the Tribunal's administration.

Yours sincerely

Alan Ward
Emeritus Professor of History
University of Newcastle
New South Wales

*The Natives were keenly averse to selling
and it was impossible to purchase by assembled owners meetings,
and therefore individual purchase had to be adopted.*

Memorandum to the Native Minister, 23 March 1921
(ma 31/21, National Archives, Wellington)

THE AUTHOR

My name is Alan Dudley Ward, emeritus professor of history at the University of Newcastle, Australia. I was born and educated in the Gisborne district. I hold an MA in history (first class honours) from Victoria University of Wellington (my thesis being on East Coast Maori trust lands) and a PhD in Pacific history from the Australian National University (my thesis being on the extension of British law and administration in Maori districts). My principal employment since 1967 has been as an academic historian, with particular interest in the advent of the nation state in indigenous Pacific societies and special reference to land tenure and land law. I have published extensively in this area, including the book *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand*. Throughout 1973 and intermittently thereafter, I was a consultant to the Department of Lands in Papua New Guinea, with particular responsibility for facilitating cash cropping on customary (non-registered) land. In 1981 and 1982, I was the director of the Department of Rural Lands in the Republic of Vanuatu. Between 1979 and 1986, I worked with French academic colleagues studying land reform in New Caledonia. From 1987 to 1991, I was a contract historian to the Waitangi Tribunal, writing historical reports in respect of the Ngai Tahu claim and the district Whanganui ki Maniapoto. In 1992 and 1993, I was the chief historian for the Crown Congress Joint Working Party dealing with surplus Railcorp lands. From 1993 to the present, I have been on the advisory group of the Waitangi Tribunal's Rangahaua Whanui research programme in a part-time capacity. From July 1996, I have been engaged full-time on compiling the *National Overview* report for that programme.

ACKNOWLEDGEMENTS

Many people have contributed to the compilation of this report. Particular acknowledgement must be made of the unflagging energy and good humour of my principal research associate, Dr Janine Hayward. Also of research associates Ms Suzanne Cross and Dr Keith Pickens. The authors of many of the various Rangahaua Whanui reports that underlie this overview advised on areas of their particular research. Among the many Waitangi Tribunal staff who supported the project, particular acknowledgement is due to Dr the Honourable Ian Shearer, Dr Grant Phillipson, Ms Jo Ara, Mr Noel Harris, Mr Dominic Hurley, and Ms Kate Riggir.

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LIST OF ABBREVIATIONS

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

DIRECTOR'S FOREWORD

The Rangahaua Whanui project set out to examine on a broad district basis those areas of the country that had not otherwise been closely examined through the Treaty claims process. It also canvassed a range of national themes; these themes apply across districts and a broad understanding of them is required for Treaty claims research. Professor Alan Ward, Dr Janine Hayward, Dr Keith Pickens, and Ms Suzanne Cross formed a small team to provide a summary of the wealth of documents that established the core of the project. The three-volume summary they produced is the *National Overview* of the Rangahaua Whanui project.

It should be noted that the *National Overview* is a report to the Waitangi Tribunal and not a report of the Tribunal. It serves to guide the Tribunal, the Government, and others on the way forward for the resolution of Treaty claims generally. It can guide those who want to get a broad picture of what is still to be resolved in Treaty claims or those who want to gain an overview of claims in a particular region or even throughout the nation. It is not a substitute for the detailed research that is required either to present a claim before the Tribunal or to negotiate a claim with the Government. It does, however, provide good guidance on what that detailed research would need to cover.

The *National Overview* is the logical entry point to the whole Rangahaua Whanui project. Volume i serves as a detailed table of contents for the project. Of course, it goes much further than that, featuring sections on Treaty principles and the major causes of land alienation, a set of broad criteria on breaches of the Treaty, and a discussion on how those criteria might assist in dealing with claims of different types. There is also a section on future strategies for claims settlements. The report reflects the views of the author, which may not be shared by the Tribunal. The issues are raised to assist in the debate over Treaty claims settlements.

Professor Ward's *National Overview* could provide the basis for a detailed debate on directions for the way forward in the resolution of Treaty claims. The outcome of such a debate could be the foundation of a clear vision of what lies at the end of the claims settlement process. If Maori, the Government, and interested parties can agree on a common vision, then the achievement of that vision will be a real possibility. Without such a vision, unrealistic expectations and unreasonable responses will prevail, and there will be little in the way of strategic direction. If the populace has a clearer idea of where Treaty claims are going, they will be far more accepting of them, especially if that vision is shared by their peers. I believe the *National Overview* could be the trigger for that process.

Director's Foreword

The *National Overview* is the flagship for the project as a whole, and I take this opportunity to thank and congratulate the large number of researchers, analysts, writers, editorial staff, and various assistants who have all contributed to the project.

No reira noho ora koutou.

Morris Te W Love
Director
Waitangi Tribunal

CHAIRPERSON'S FOREWORD

Where is the Treaty claims process heading? The Waitangi Tribunal knows of no comprehensive statutory policy to define suitable goals. Nearly a decade ago, it was conjectured within the Tribunal that the re-establishment of tribal groups with a reasonable economic base, upon lines that might have been maintained had original Treaty expectations been adhered to, would represent a reasonable outcome.¹ That led to questions of the principles that might govern the furnishing of relief in proper cases and whether, in terms of the Tribunal's jurisdiction, relativities between tribes are a relevant factor. The Tribunal is not a court and is not called upon to award damages based upon a reckoning of loss as a court does. Being more like a commission of inquiry, it is required instead to recommend the action to be taken to compensate for or remove the prejudice arising from established claims or to prevent other persons from being similarly affected in the future.² The legislation provides little in the way of guiding principles for the proper approach to be taken to the settlement of historical grievances, having regard to the range and incidence of injuries as a whole and the outcomes to be achieved.

Pursuant to clause 5a of the Second Schedule to the Treaty of Waitangi Act 1975 (which enables the Tribunal to commission research and to receive reports on any matter relating to a claim or to the functions of the Tribunal), the Tribunal commissioned a series of district overviews of historical grievances and injuries and a series of studies of themes of national relevance. By these means, it sought to be better apprised of the nature and extent of the claims and the commonality of the issues. This programme, which began in 1993, was the Rangahaua Whanui research programme. The volume that follows is the *National Overview*, which was commissioned to analyse and draw into one report the principal findings of the various district and national theme reports.

These reports have now been filed and are being released for public information. Researchers were asked to consider all likely causes of grievance, because, not unnaturally given the lapse of time, many claims have been generally expressed until the necessary research has been completed. The Tribunal is also conscious of Maori contentions that past inquiries were insufficient to reach the heart of matters. It appears that, if lasting settlements are to be achieved, no narrow legal approach will do and a full inquiry must be made of all matters that are likely to be relevant.

While it was not intended that these research reports should cover more than the main causes of grievances and it was realised that much more would be needed from claimants before claims could be disposed of by hearings, the reports hopefully break the back of much of the basic research required. It has also been

-
1. See Waitangi Tribunal, *Report of the Waitangi Tribunal on the Waiheke Island Claim*, 2nd ed, Wellington, Government Printing Office, 1989
 2. See s 6(3), (4) Treaty of Waitangi Act 1975

Chairperson's Foreword

apparent for some time that protracted and individual claims hearings are not a speedy way of alleviating a problem of national proportions; it would be of great assistance to the Tribunal, and when dealing with Treaty issues generally, if the reports set the ground for independently negotiated settlements or if they helped to generate widely agreed guidelines for the resolution of historical Maori grievances.

This project has been part of a strategic plan to manage a large workload within the restrictions of the Tribunal's legislation and resources. It was apparent that the seriatim examination of claims was advantaging those first heard – to the possible prejudice of others – and was creating distortions in the public perception of the relative importance of claims. These reports now furnish core data for the public and for all claimants contemporaneously. As such, the programme has sought to serve, evenly and fairly, the interests of various claimant groups. The reports should also assist the Tribunal in marshalling claims for hearing and in enabling the Tribunal to consider findings in one district with an awareness of the possible impact on others.

The completion of these reports represents an important milestone in the Tribunal's operations. While the opinions in these reports are those of the authors and not the Tribunal, the Tribunal commends them for study, to indicate the nature and extent of the claims and of the issues to be addressed when considering the claims resolution process.

E T Durie
Chairperson
Waitangi Tribunal

13 December 1996

METHODOLOGICAL NOTE

The Rangahaua Whanui programme was formally launched on 23 September 1993 by a practice note from the chairperson of the Waitangi Tribunal (see app i). The purposes of the programme are set out in that note and in the chairperson's foreword to this report.

The programme was shaped in the early months by a 'mentor group', which included Tribunal members, senior Tribunal researchers, and members of other organisations working in the Treaty claims area. The various research reports then commissioned were supervised by an advisory group comprising the acting research manager and senior academic historians contracted by the Tribunal.

The research reports were of two kinds:

- (a) *National theme reports*: The national theme reports covered issues that arose explicitly or implicitly in many or most of the Treaty claims. These were researched in terms of their general application in the country as a whole, not on a case-by-case basis, although particular cases are examined by way of illustration. Examples of national themes are 'Crown pre-emption purchases' and 'the Native Land Acts 1865 to 1899'. The full list of national themes selected for consideration forms the table of contents of part 1 of this report. The potential list is theoretically much larger, but the themes chosen reflect an early decision of the mentor group to focus on the alienation of land and natural resources and an assessment by the mentor and advisory groups of which issues had the widest general application, as indicated by common historical themes coming through the claims before the Tribunal. Seventeen research reports on national themes have been completed; these have been released or are being prepared for release. Because of staff and funding limitations at the time the project was launched, wholly new reports were not commissioned on raupatu, the Native Land Court in the nineteenth century, and native committees, given the amount of research already available or emerging from claims research, or in view of work being done in other agencies. A cluster of reports on Maori land administration in the twentieth century was kindly funded by the Crown Forestry Rental Trust and carried out under their aegis by a team headed by Dr Don Loveridge following a research design initially formulated by Dr Loveridge and myself. Unfortunately, a report on surveys and survey costs, also being undertaken by the trust, has not been completed at this time. A Tribunal report on purchases under FitzRoy's pre-emption waiver was only partially completed because of the illness of the researcher. On the question of public works takings, the report prepared by Ms Cathy Marr for the Office of Treaty Settlements was largely relied upon, together with Dr David Williams's *Maori Land Legislation Manual*.

Methodological Note

- (b) *District reports:* The district reports examined the effect of various Crown policies in different regions of New Zealand, particularly in respect of land alienation. Fifteen research districts were demarcated, mainly according to natural geographic boundaries and local government boundaries. With the exception of Tuhoe, conventional tribal boundaries were deliberately ignored in this demarcation. (There is good evidence that tribal boundaries as commonly understood are to a considerable extent constructs of post-1840 history in any case, and that hapu and their various interests intersect and overlap.) Given the shortage of staff at the beginning of the project, five districts were not made the subject of wholly new reports: the southern South Island and Taranaki, which were already the subject of Waitangi Tribunal reports; the Bay of Plenty and the Chatham Islands, which were already heavily researched for claims hearings; and Waikato, because the main raupatu claim had already been settled. Twelve district reports have been completed by Tribunal or commissioned researchers. In two districts, Hauraki and the East Coast, claimant research reports have been undertaken according to a research design approved by the Tribunal and have been partly completed.

A *National Overview* of the Rangahaua Whanui programme was envisaged from the outset of the project. I commenced work on it part-time in January 1996, with a research associate, Dr Janine Hayward, and worked on it full-time from July 1996. A draft of all three volumes was completed by December 1996 and has been revised in the first months of 1997. The overview has been written mainly from the data in the various commissioned reports in the Rangahaua Whanui programme as a whole and reflects the depth of work done in the various reports. In cases where district reports are not yet available, work has been done by the *National Overview* team itself to provide such additional data as could be managed within the time available.

Nevertheless, it should be appreciated that the *National Overview* report is a different kind of document from the component reports of the Rangahaua Whanui programme itself. For detailed, fully referenced, discussions of the various issues and districts in the Rangahaua Whanui programme, readers are referred to the various component reports. Summaries of those reports and discussions by the *National Overview* team of themes and districts not covered by separate Rangahaua Whanui reports are to be found in volumes ii and iii of this report: volume ii contains the national themes summaries, volume iii the district summaries.

This volume, volume i, is essentially an interpretive account, surveying New Zealand history from 1840 until approximately the Second World War in so far as it relates to Treaty issues and gives rise to Treaty claims. It is a historical analysis and seeks to explain, in a succinct and accessible way, the origins and most important effects of various Crown actions alluded to, both severally and in relation to one another. In order to keep volume i short, supporting evidence has largely been omitted. In some cases, the various sections of volume i are simply the conclusions of the chapters in volume ii; additional data from the various national theme and district reports is drawn upon only to illustrate the arguments advanced.

Methodological Note

Particular points may be contestable; no historian attempting to survey the whole of New Zealand's colonial history in 12 months can vouch for every detail of what is often contentious ground. Readers seeking fuller substantiation of the arguments are referred to volume ii, where each of the national themes is treated at much greater length, and to volume iii, where evidence of the outcomes in the districts is located.

For the briefest statements of the findings of this report, please refer to the maps and tables on the cumulative alienation of Maori land and to the 42-page executive summary at the front of this volume.

Part iii of this volume, 'Optional Strategies', has been written in fulfilment of a supplementary commission dated 4 November 1996. In the light of the historical evidence disclosed by the Rangahaua Whanui research, I was invited to make some suggestions to the Tribunal as to how the historical claims might best be dealt with. Some of the key points in those suggestions have also been included in the executive summary.

This is a commissioned report to the Waitangi Tribunal. It embodies my considered professional opinions. Those opinions may or may not be shared by the Waitangi Tribunal or the Tribunal's administration.

Alan Ward
March 1997

NATIONAL OVERVIEW

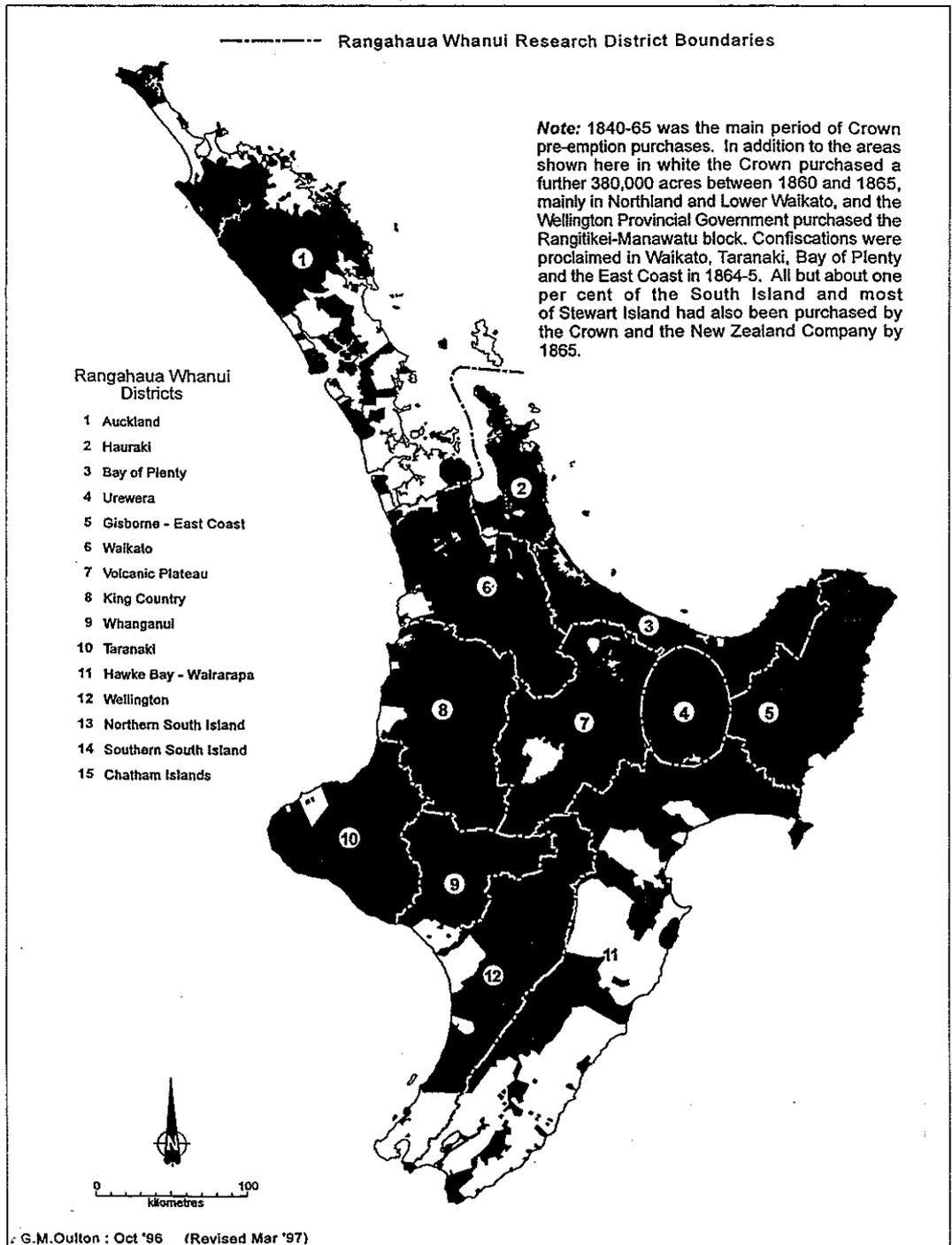


Figure 1: Alienation of Maori land in the North Island at 1860

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

NATIONAL OVERVIEW

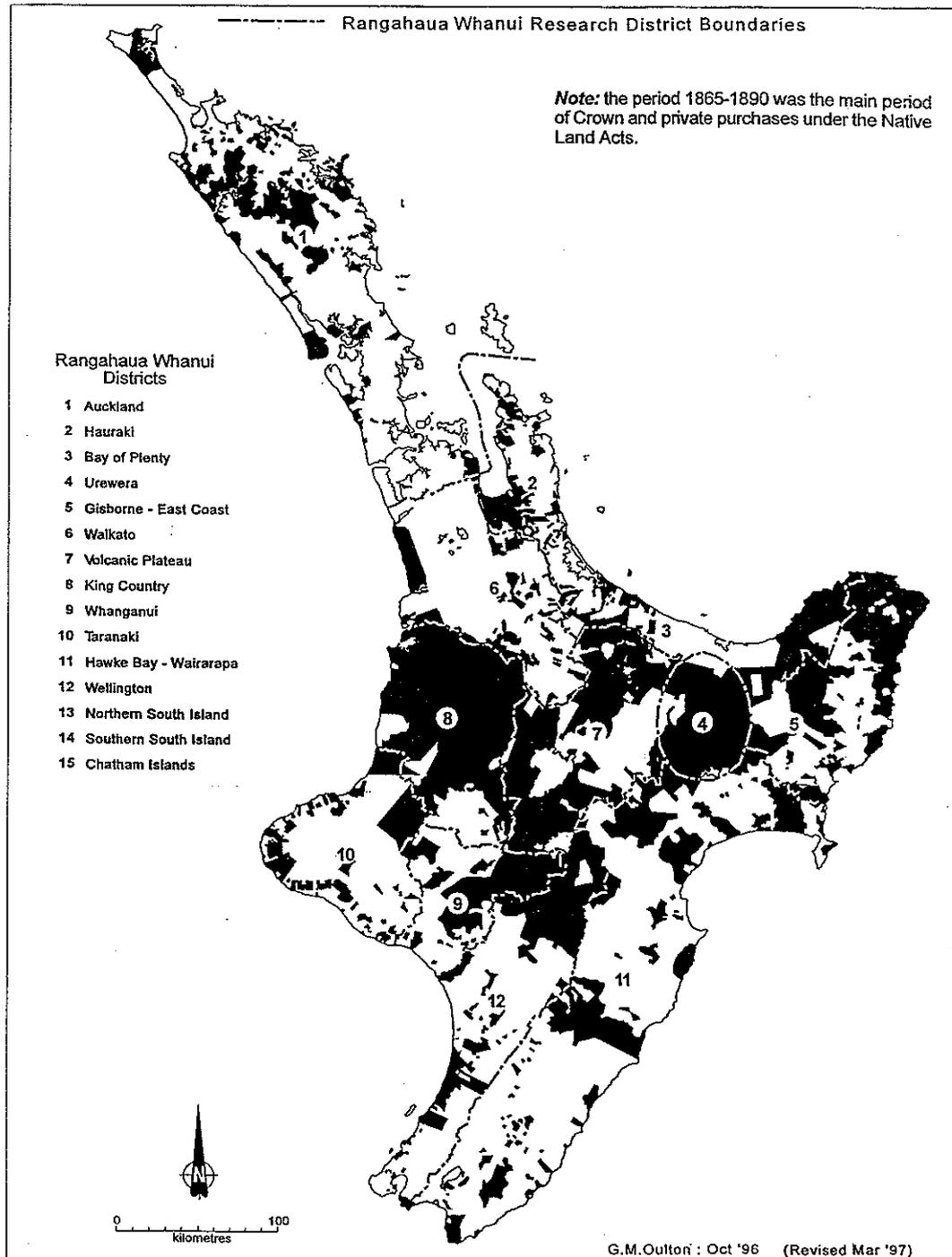


Figure 2: Alienation of Maori land in the North Island at 1890

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

NATIONAL OVERVIEW

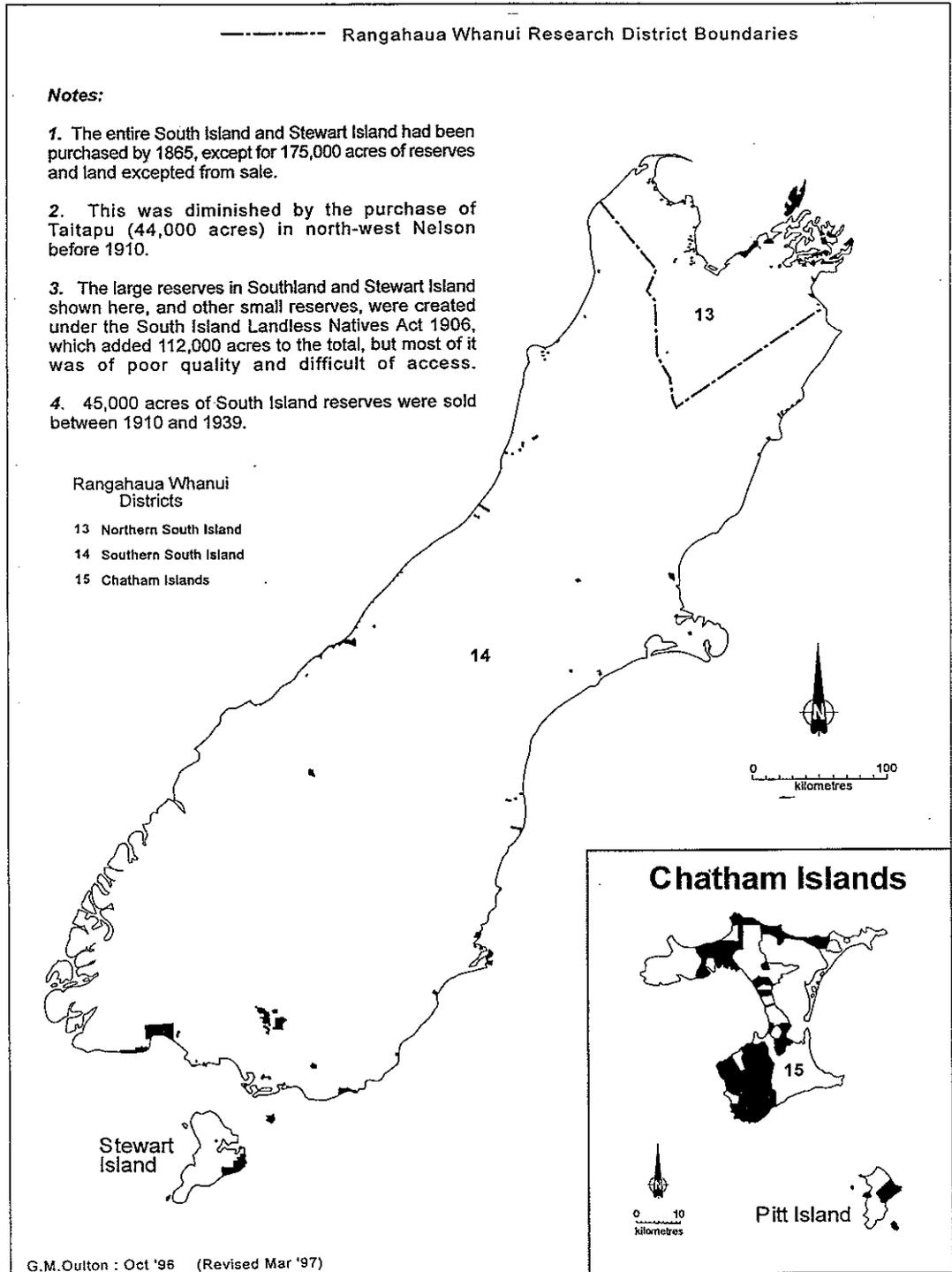


Figure 3: Alienation of Maori land in the South Island at 1910

NATIONAL OVERVIEW

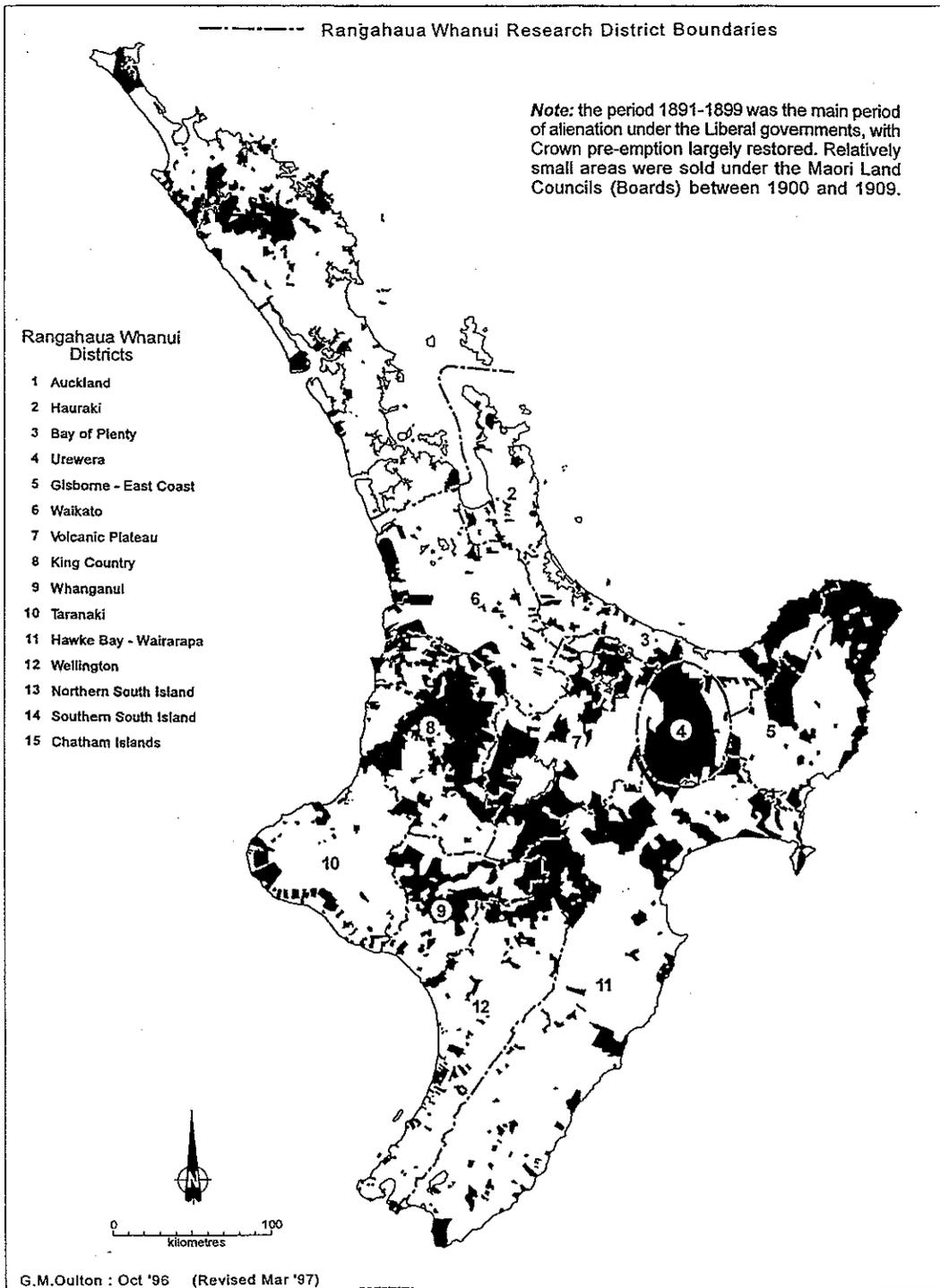


Figure 4: Alienation of Maori land in the North Island at 1910

NATIONAL OVERVIEW

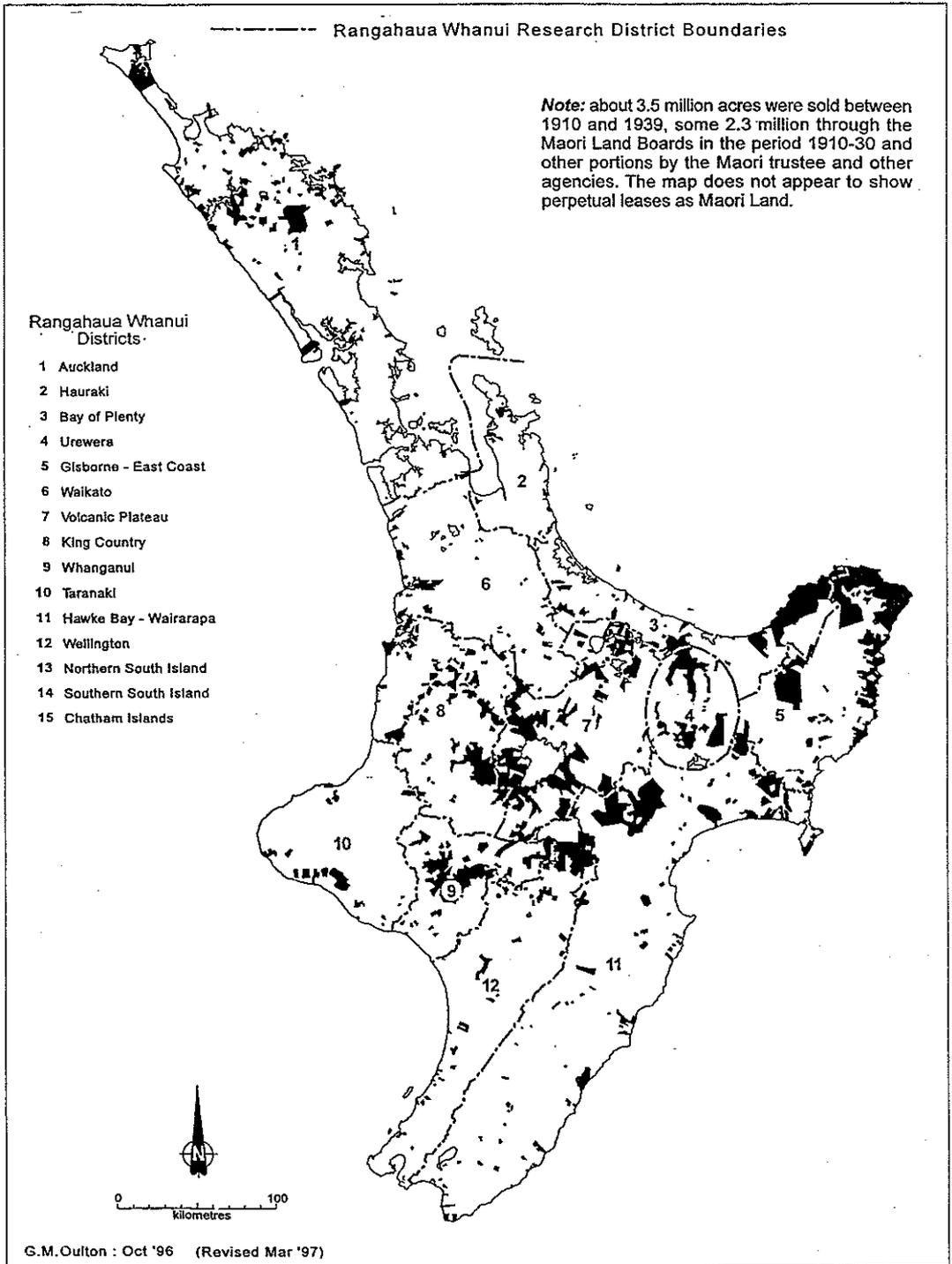
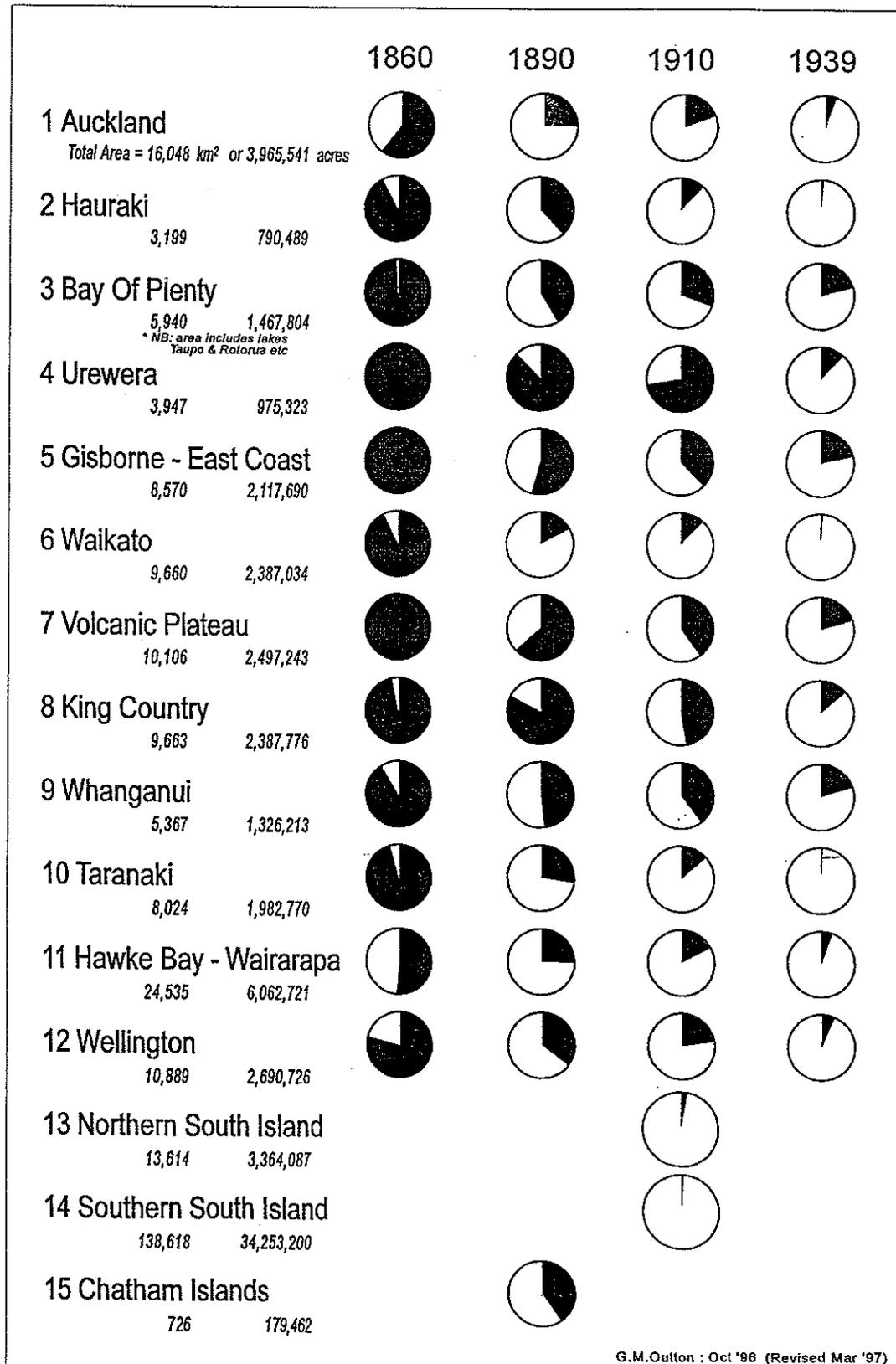


Figure 5: Alienation of Maori land in the North Island at 1939

NATIONAL OVERVIEW



G.M.Oulton : Oct '96 (Revised Mar '97)

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

Total district area			1860			1890			1910			1939		
District	km ²	acres	km ²	acres	%	km ²	acres	%	km ²	acres	%	km ²	acres	%
Auckland	17,000	4,200,784	9815	2,425,378	58	4058	1,002,804	24	3108	768,109	18	884	218,461	5
Hauraki	3313	818,659	2975	735,073	90	1225	302,617	37	386	95,370	12	29	7141	1
Bay of Plenty	5862	1,448,530	5862	1,448,530	100	2464	608,795	42	1835	453,413	31	1223	302,106	21
Urewera	4105	1,014,366	4105	1,014,366	100	3471	857,692	85	2859	706,384	72	471	116,288	11
Gisborne–East Coast	8576	2,119,172	8576	2,119,172	100	4666	1,152,997	54	3262	806,015	38	1832	452,726	21
Waikato	9856	2,435,467	8980	2,218,894	91	1665	411,534	17	1173	289,792	12	133	32,984	1
Volcanic plateau	10,121	2,500,950	10,121	2,500,950	100	6388	1,578,517	63	4067	1,004,919	40	2038	503,568	20
King Country	9890	2,443,868	9358	2,312,292	95	8014	1,980,253	81	4577	1,130,898	47	1315	324,891	13
Whanganui	5415	1,338,074	4910	1,213,328	91	2597	641,781	48	2129	526,005	40	1082	267,256	20
Taranaki	8034	1,985,242	7679	1,897,598	96	2217	547,765	28	1104	272,700	14	81	20,060	1
Hawke's Bay–Wairarapa	24,404	6,030,350	12,686	3,134,675	52	6303	1,557,612	26	4257	1,052,010	17	1408	347,840	6
Wellington	11,020	2,723,097	8622	2,130,552	78	3886	960,371	35	2490	615,180	23	760	187,857	7
Northern South Island	13,614	3,364,087	—	—	—	—	—	—	429	105,981	3	—	—	—
Southern South Island	138,618	34,253,201	—	—	—	—	—	—	909	224,591	1	—	—	—
Chathams	726	179,462	—	—	—	—	—	—	295	72,881	41	—	—	—

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

EXECUTIVE SUMMARY

THE RANGAHAUA WHANUI RESEARCH PROGRAMME

es.1 Themes and Districts

The issues discussed in the following summaries derive from common threads among the 650 or so ‘historical’ claims lodged with the Waitangi Tribunal since 1985. A major purpose of the Rangahaua Whanui research programme was to identify those common threads or themes and research them to a point where an appraisal could be made of various actions of the Crown, in the light of its Treaty obligations, as they affected the various districts and tribes. It is part of the Crown’s own objectives that ‘the resolution process is consistent and equitable between claimant groups’.¹ It is hoped that this research will contribute to that purpose. About 16 research reports on national themes have been completed and are in turn being edited and published by the Tribunal. Similarly, some 12 district reports have been completed. These show the impact of Crown policies throughout the country, according to research districts defined for the programme. The reports are, for the most part, appraisals of various aspects of British colonisation as it affected the control and possession of lands and waters. The summaries in these volumes reflect that focus. Claims relating to other issues besides lands and waters have not been the special focus of the Rangahaua Whanui programme, important though they are, but aspects of them have been referred to in the chapter on rangatiratanga.

es.2 Treaty Principles

By section 6 of the Treaty of Waitangi Act 1975, actions of the Crown in breach of the principles of the Treaty may give rise to claims by Maori. Much has been written about those principles by the Waitangi Tribunal itself, by academics, by lawyers, and by many others. It is not necessary to recapitulate all of that discussion here.² But it is appropriate to refer briefly to perhaps the most authoritative exposition of Treaty principles in New Zealand jurisprudence, namely the decision of the

-
1. ‘General Principles for Settlement of Treaty of Waitangi Claims’, November 1994, in *Crown Proposals for the Settlement of Treaty of Waitangi Claims*, Office of Treaty Settlements, December 1994, p 6
 2. For a collation of some of the main statements of Treaty principles by the Tribunal and the higher courts, see vol ii, app i.

Court of Appeal in *New Zealand Maori Council v Attorney-General* in 1987. On the principles of the Treaty, the president of the court, Justice Robin Cooke, said that:

- (a) '[T]he Queen was to govern and the Maoris were to be her subjects; in return their chieftainship and possessions were to be protected, but . . . sales of land to the Crown could be negotiated.'
- (b) Because there was some inevitable potential conflict between those principles, both parties had a duty 'to act reasonably and with the utmost good faith' towards one another.
- (c) 'The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected government to follow its chosen policy.'
- (d) The Crown assumed a duty of protection towards Maori: 'the duty is not passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable.'
- (e) The Crown has a duty to remedy past breaches: 'the Crown should grant at least some form of redress, unless there are good grounds justifying a reasonable Treaty partner in withholding it – which would only be in very special circumstances, if ever.'
- (f) The Crown had an obligation to consult with Maori in the exercise of *kawanatanga*. Justice Cooke was guarded, however, as to the practical extent of that obligation: 'in any detailed or unqualified sense the duty to consult is elusive and unworkable. Exactly who should be consulted before any particular legislative or administrative step which might affect some Maoris, it would be difficult or impossible to lay down.'

On the matter of consultation, Justice Ivor Richardson added, 'the responsibility of one Treaty partner to act in good faith and reasonably towards the other puts the onus . . . on the Crown, when acting within its sphere, to make an informed decision'.

Although it has not been so much discussed in the higher courts, the Waitangi Tribunal has also evoked, among other principles, the principle of options. That is, the terms of the Treaty give Maori a choice whether to retain and foster custom under article 2 or to assimilate new ways in accordance with their article 3 rights as British subjects. Or, indeed, to blend the two or walk in two worlds. By this principle, choices should not be unduly forced.³

Regard has been had, however, to what might reasonably have been expected of the Crown in the circumstances and the state of knowledge then prevailing. Many aspects of the encroachment of the wider world upon New Zealand were beyond the control of governments. In a Privy Council hearing on the issue of radio and television broadcasting, Lord Woolf also invoked Treaty principles. In the exercise of its duty to protect *taonga*, he said, the Crown 'is not required to go beyond taking such action as is reasonable in the prevailing circumstances'.⁴ Presumably, though, 'prevailing circumstances' should not be taken to the limit of excusing the actions

3. *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed, Wellington, Government Printing Office, 1989, p 195

4. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517

of Crown officials on the basis that they were ill-informed, when they could readily have made themselves better informed, or because to do otherwise would evoke settler objections or frustrate some investor's grand design. The Crown's honour and its Treaty obligations to Maori are presumably above mere electoral popularity, otherwise any action in breach of Treaty principles could be excused simply on the basis of having been driven by current electoral pressures or approved by a vote of the parliamentary majority of the day. How far the constraints of democratic politics, or the cost to the national economy at any given time, must be assumed to prevail in any assessment of 'reasonableness' is perhaps a fine point of jurisprudence, as far as the interpretation of statute law and common law is concerned.⁵

Leaving aside fine points of current interpretations of the law, and turning to the historical evidence, it emerges that, on many issues, the officials and politicians who constituted 'the Crown' in action had policy options available to them and that they debated among themselves (though rarely with Maori) before proceeding. Through that selection of policies and their impact upon Maori, viewed in the light of its own solemn and public undertakings in the Treaty and elsewhere, or in the light of alternatives raised at the time, a historian can appraise the Crown's record without imposing upon the past the assumptions of a later age. The other important measure, however, is what Maori were plainly telling the Crown as to *their* preferences, at and since 1840. The Treaty was made between the Crown and over 500 chiefs; others subsequently joined in the process of building a New Zealand nation state. Where the Crown's actions overrode Maori preferences, through the use of force or the manipulative use of the legal and administrative processes, or where the Crown simply put Maori aside and did not seriously consult with them at all on matters affecting their property and lives, Treaty principles were presumably breached. Especially in the English text of article 2, the Treaty includes very plain statements of respect for Maori 'possession' of lands and other property, until such time as Maori wished to alienate them. In the Maori text, the Crown undertook to respect the 'tino rangatiratanga' of chiefs, hapu, and people ('tangata katoa' in Maori, 'individuals' in English). Modern scholars are agreed that 'tino rangatiratanga' would have implied much more to Maori than the English term 'possession', tending more towards 'self-determination' and 'autonomy'. (Some have used the ambiguous term 'sovereignty'.) Yet settlement, some settlement at least, was legitimated by the Treaty itself. The following summary assumes that, in exercising its overriding responsibility to the whole community, the Crown had a duty to protect, indeed to assist, settlement but *not* at the cost of simply overriding or ignoring Maori preferences, Maori expressions of tino rangatiratanga. On that basis, the common justifications given by officials and settler politicians for aggressive land acquisition and tenure conversion (namely, the promotion of settlement and land development, and the alleged improvement of the lives of Maori) are not considered

5. In 1992, the Solicitor General noted some diversity among the judges as to whether Treaty principles should be taken into consideration in the absence of express statutory reference to them: J J McGrath, 'The Crown's Obligations under the Treaty of Waitangi as at 1992', typescript, Solicitor General's Department, 8 May 1992.

sufficient, of themselves, to constitute ‘reasonable’ proceedings under the Treaty. The Crown’s historical dilemma – that settlement was already establishing itself in New Zealand before the Treaty was signed – will be noted. Nevertheless, the plain meaning of the Treaty is assumed to be that the further advance of settlement should (except in extreme and genuinely unavoidable cases of public need) only have proceeded on the basis of Maori understanding and consent, and with the Crown exercising its Treaty responsibility of active protection of Maori throughout the colonisation.

es.3 ‘Balance Sheet’ or ‘Reckoning’?

It is sometimes commented that, even though Maori did experience historical injury through Crown actions in breach of the Treaty, they also gained countervailing benefits, which offset the injury, to some extent at least. Historically, Maori themselves have constantly weighed the advantages and disadvantages of their relationship with the Crown, sometimes very explicitly. In 1879, for example, an assembly or ‘parliament’ of northern chiefs was hosted by the Ngati Whatua leader Paora Tuhaere and fell to debating the ‘ora’ and the ‘mate’ of the Treaty relationship. One speaker was reported as saying:

It is through the good influence of that treaty that we are able to assemble in this house today and discuss our grievances freely, and that we are protected from attack by people of foreign lands. . . . Secondly, it was through that treaty that the wars between the Native tribes ceased.⁶

The meeting nevertheless went on to list a catalogue of grievances about such matters as the Native Land Acts, road boards, rates, the loss of fishing rights, and the failure of the Crown to consult seriously with Maori since the Kohimarama conference of 1860.

For Maori had rights under the Treaty, and it is these rights that are at issue now, as in 1879. Many of the ‘offsets’ were simply those rights owed to Maori as New Zealand citizens, affirmed under article 3 of the Treaty, and even then granted only imperfectly. Benefits, such as the defence of the realm (to which Maori themselves were to contribute at the cost of great loss and suffering) or the protection and advancement that individuals gained from formal legal equality with the settlers, should be acknowledged, and perhaps have some place in the negotiation of remedy for grievances, but they are mostly beyond the scope of this report.

A historical point of some importance, however, is that some tribes that were not doing too well in the ebb and flow of tribal warfare in the late 1830s, or were situated precariously between powerful neighbours, certainly benefited from alliance with the British or from official discouragement of tribal warfare. The return of Taranaki and Wairarapa tribes in the 1840s to lands that they had had to vacate in

6. AJHR, 1879, sess 2, g-8, p 16

the 1820s or 1830s, for example, owes something to the British presence. But the fact that, wittingly or unwittingly, the Crown contributed to these tribes' recovery of traditional lands hardly justifies any subsequent Crown actions in breach of the Treaty. Moreover, the boot was sometimes on the other foot. The British settlements themselves were at times heavily dependent on the deliberate neutrality or active support of tribes with whom they had become associated – Auckland during Heke's rising, for example, or Wellington, when Ngati Toa were considering some action in the wake of the affray at Wairau in 1843.

es.4 The Historical Foundations of Treaty Breaches

The number and range of Treaty breaches, and of Maori claims, no doubt appear voluminous to many eyes. There are two main reasons why breaches occurred:

- First, the kawanatanga responsibilities of the Crown in shaping a nation state inevitably rubbed up against the rangatiratanga of whanau and hapu, which previously shared sovereignty of pre-1840 New Zealand. Judging the extent and nature of Treaty breaches by the Crown is largely a matter of determining whether the Crown intruded upon Maori rangatiratanga unreasonably, needlessly, and excessively and whether it failed to permit Maori to share with it, as a joint enterprise, the task of nation building.
- Secondly, there is a cluster of historical reasons why the Crown was caught up in breaking the Treaty from the outset. By the late 1830s, the British Government believed, correctly, that colonisation was already under way in New Zealand, that more organised colonisation was about to take place, and that the Maori people were already suffering adverse effects. The British Government also believed, incorrectly, on the basis of incomplete information from people like James Busby, the official British Resident in New Zealand, that the Maori had already been overwhelmed, that much of their land had already been 'sold' to settlers, and that their independence was already 'little more than nominal'.⁷ The British Government therefore interposed itself in order to control and constrain settlers. It did not expect to have to coerce or manipulate Maori to make way for settlement. Rather, it expected to be protecting and rescuing Maori from a tide of settlement. The attitude of officials like Governor Hobson was therefore paternalistic. Wresting control of the land trade from the private settlers was the Government's primary reason for establishing its sovereignty. Maori expressions of concern about their future under the Crown were inconvenient and irritating to Hobson and were dealt with rather perfunctorily at Treaty negotiations.

The Crown's dilemma was compounded by the fact that it had assumed that large areas of land would become the Crown demesne, from which it would provide for further settlement and, very importantly, secure revenue with which to administer

7. Normanby to Hobson, 14 August 1839, BPP, vol 3, pp 85–86

the colony. It was presumed that this land would come from a surplus left over from the reduction to reasonable proportions of the massive New Zealand Company claims or Australian speculators' claims (Lord Normanby's much-cited 1839 instructions to Lieutenant-Governor Hobson reflect these assumptions). Or it would come (as in the view of the next Secretary of State, Lord John Russell) from the 'waste' or uncultivated land, which was not regarded as being in valid Maori possession or proprietorship, unlike village lands and cultivations.

Within months, however, the more thoughtful officials in New Zealand began to realise the profoundly false position they were in; Maori were far stronger on the ground than had been realised and far less compliant than London had been led to expect. The Crown found itself without a substantial pool of demesne land, either for public purposes or to sell to settlers and make revenue. But the British authorities did not feel they could pull out or block further settlement. They came from a world-order where, since the fifteenth century, European colonisers had been over-running indigenous peoples in the Americas, Africa, southern Asia, and Oceania. The authorities did not conceive that the flow of settlement could be stopped. Moreover, they had already agreed to grant a charter to the New Zealand Company. They therefore began to manipulate and press Maori into letting organised settlement expand far beyond the tribes' original expectations, taking control of as much land as they could to further the process. When Maori continued to resist and tried to retain tribal control of land, admitting settlers only on their terms, the Crown began to break the Treaty.

es.5 A Pattern in the Politics of Land

It is a reasonable argument that land was required to accommodate settlement in New Zealand. Settlement was occurring before 1840 and the Treaty itself legitimated its continuance. It is also doubtful whether the Crown could wholly have prevented the unofficial flow of settlement into New Zealand anyway, as each gold rush, for example, demonstrated. Yet the scale and the pace and the manner of settlement were dictated almost entirely to suit settler convenience, at Maori expense.

If there is any one main thread through the Maori attitude to settlement and the Crown's response, it is that, whenever Maori were able to exercise collective control over land alienation at the tribal, or supra-tribal, level, land sales slowed markedly or stopped. The tribal leadership was generally willing to admit settlement within defined areas. Where they were strong enough on the ground, they did not relinquish all rights, even over the settled areas. The settlers, however, with the Crown supporting them, invariably responded by finding ways to overcome, bypass, or undermine tribal or supra-tribal control in order to extinguish Maori customary title and secure the freehold.

This happened in a general way on a number of occasions:

- In the early and mid-1840s, Maori in many of the New Zealand Company settlement areas physically resisted surveys and settler encroachments. The Government eventually responded with force of arms.
- From about 1853, and in gathering strength to the early 1860s, Maori in most districts of the North Island reacted against Crown purchases. The Kingitanga, inter-tribal meetings like that at Manawapou in 1854, and various runanganui throughout the country began to resist sales and to ‘tapu’ the land in order to control land-selling factions. The Government responded by intensifying its practice of enticing some sections of the right-holders to sell, in the hope of inducing others to concur. At Waitara in 1860, it used military force to try to push through a purchase from a land-selling faction. In 1863, when Maori resistance to land selling was starting to lead towards a more general challenge to Crown authority, Governor Grey invaded Waikato.
- It is at this point that the New Zealand politicians and Grey are perhaps most culpable, because they did have the option presented to them by London of recognising the Kingitanga in some form. This alternative was not seriously pursued, because it would have meant ‘shutting up the Waikato’ and other prime areas desired for settlement. Following military occupation, of course, these most desired areas were subject to very large land confiscations.
- In the Native Land Acts of 1862 and 1865, settler governments forged their most effective instrument: the conversion of customary title to a form of title by which each individual named as an owner could sell his or her individual interest. Ministers called this ‘individualisation’, but it was not a true individualisation, in the sense of an individual receiving a small farm, demarcated on the ground (unless he or she was one of a small number of Maori whose support the Government wished to cultivate). It was a pseudo-individualisation, which systematically converted Maori customary land rights into negotiable paper. By the purchase of individual interests and progressive partitioning of blocks, the Crown and private settlers acquired the bulk of Maori land in the North Island. Sir Robert Stout (ex-premier and soon-to-be chief justice) admitted to James Carroll in 1894 that, in the process, ‘bit by bit this Treaty had been violated’.⁸
- The Maori leadership reacted through the Kotahitanga and the Kauhanganui by demanding restored tribal control. This was granted in legislation of 1900, and again new land sales ceased. Unfortunately, leasing slowed as well, and from 1905 settler impatience to occupy the land led to the dismantling of the system of 1900, the facilitation, once again, of sale by individuals or sections of owners, and the partitioning and re-partitioning of blocks.

8. NZPD, 1894, vol 85, p 556

es.6 The Scale and Pace of Land Acquisition

The scale and pace of the land acquisitions is not always appreciated. While it is perhaps remembered that almost all the 34 million acres of the South Island had been purchased by the Crown by 1865 (the northern part as well as the Ngai Tahu rohe), it is less well known that over seven million acres of the North Island was similarly acquired, including 75 percent of Wairarapa, about 50 percent of Hawke's Bay, 55 percent of Auckland, and much of Wellington. Those seven million acres involved Maori populations at least as large as those of the South Island and probably much larger. It is perhaps realised that under the Native Land Acts some eight million acres were acquired between 1865 and 1890, and a further three million acres by 1899. It is less well known that nearly four million acres more were purchased between 1900 and 1930, mostly under the Native Land Act 1909, at a time when many Maori communities had little land left, when the Maori population was known to be stable or growing, and when the Maori leadership had made very clear their wish to retain and farm most of the remaining land and to receive State support to that end. It is at best doubtful, in terms of Treaty principles, whether the Liberals' determined programme of buying Maori land in the 1890s should ever have been launched; it would seem to be a plain breach of the duty of protection to re-launch the programme again in 1910, in the face of the near-unanimous opposition of the Maori leadership before 1900 and in the light of the detailed recommendations of the Stout–Ngata commission of 1906 to 1908. For, even in the districts already too crowded to support reasonable living standards for all Maori, the land purchase process bore on, down to the 1920s and beyond.

When, in 1928, sales at last slowed and Apirana Ngata at last got funds for serious land development by and for Maori, it was too late: very little land suitable for development was left. By 1939, the migration of Maori to the towns had begun.

That is the essence of the long saga of Treaty breaches. The Crown does bear a heavy responsibility in it all. While London controlled policy, it could conceivably have called a halt to the pace and manner of land acquisition. Initially, the Crown felt committed to the New Zealand Company and other European settlement already under way; it therefore engaged in huge land purchases to assist them. In about 1860 to 1863, there was some consideration given to halting settlement, but New Zealand already had a constitution and a settler parliament and the option was not taken. Instead, military power was used to ensure that settler control was established and settler land purchasing could proceed. After 1870, there was the model of Fiji, where (ironically, largely in reaction to what had happened in New Zealand) the British Government rejected most of the settler land claims and returned the bulk of the land to Fijian hands; this was also done in Samoa, in the Solomons, and in Papua New Guinea. By 1865, however, the control of 'Native policy' in New Zealand had been transferred to the settler ministry; 'the Crown' in New Zealand was essentially the settlers themselves and their governments, who were pursuing their self-interest.

es.7 Emphasis on the Individual

The Crown – that is, governments – both before and after 1865, also determined the *manner* of land acquisition, often in defiance of expressed Maori wishes. As mentioned above, the Treaty guaranteed respect for the rangatiratanga of ‘the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof’: ‘ki nga Rangatira ki nga hapu ki nga tangata katoa o Nu Tirani’. Crown policies favoured the chiefs, when they were disposed to sell land, and the individuals. The hapu level, the level where the reciprocal responsibilities of chiefs and individuals were worked out and where the controls on the alienation of land outside the descent group were located, was bypassed or deliberately undermined (at least until the East Coast leaders secured some recognition for the system of incorporation of owners, which is in part built upon hapu or sections of hapu). True, there is an ambivalence in Maori society, a genuine tension between the individual, the whanau, and the wider group, which, when opportunity permitted, resulted in individuals seeking title to property and strengthening their family interest at the expense of their wider group interest. The individual liberties of the West are part of its attraction. Yet, Maori whose individual interests in land were recognised by the State were receiving not just the right they would have inherited as part of the tribal patrimony but an augmented right, a title that included the power to sell absolutely that which they had originally held as part of a tribal patrimony, governed by the checks and balances of Maori law. When they sold, they sold part of that patrimony and their children’s birthright. There is little doubt that this was, and perhaps still is, a matter of shame and recrimination among Maori. Yet, the tribal leadership had struggled, from the Kingitanga and the runanganui of the 1850s through to the development schemes of the mid-twentieth century, to retain land and find a balance of group and individual rights that would preserve valued aspects of the traditional social order while facilitating engagement with the commercial economy. They were not entirely successful, but the persistence of the efforts reveals a continuing aspiration.

That aspiration was continually undermined by the land laws, which made every individual owner’s signature a marketable commodity. As often as the law was amended to strengthen the group’s control and inhibit sales, it was amended yet again to remove restrictions and allow the free sale of undivided individual interests. This was not recognition of customary tenure, with its internal tensions, but a deliberate weighting of the scales in favour of the individual. But because the pseudo-individualisation of title facilitated individuals in selling their interests, rather than in developing family farms, it made a mockery – a hypocrisy – of the oft-repeated assertions that the Government was trying to help Maori to advance economically by taking their land out of tribal title and giving it some form of statutory title.

Nor was it only progressive land loss that ensued. For the knowledge that the land purchase agents were in the field, that Crown or private money had been laid out, was totally inhibiting of Maori efforts to develop land themselves. The process of

buying individual interests was very divisive, setting up tensions in the owner group and distracting communities from serious efforts at development. How could a group organise for sustained development when some of its members were interested in selling, or might become so? Or when there was a near-certainty that the block would be partitioned before long and that few had any confidence that they could determine just where the partition would fall? In such circumstances, it was easier not to try too hard but to succumb to the pressure and sell one's interest, clear some pressing debts, and have something left over to buy clothes for the children or to contribute to a hui. One does not have to look far to find the reasons why Maori sold their individual interests in land.

The flaws and the fallacies of the pseudo-individualisation of customary tenure were pointed out frequently by contemporary observers concerned at its impact on Maori society. It was particularly criticised by the 1891 Commission of Inquiry into the Native Land Laws (the Rees–Carroll commission), which advocated building Maori land tenure round the hapu and elected block committees. The Stout–Ngata commission of 1906 to 1908 proceeded similarly. But this was of itself no panacea; whether Maori communities benefited would depend upon what powers the statute law gave to the hapu and block committees.

es.8 Social Outcomes

The land laws not only led to the massive alienation of land but also contributed to the pauperisation of Maori people. As indicated in the previous paragraph, the land law after 1862 was conducive to the piecemeal sale of land rather than to its development. When opportunities to hold and develop resources were undermined, aspirations lowered, achievement lowered, and living conditions fell. When Maori people lived in rural slums, in miserable health much of the time and lacking educational opportunity, their aspirations diminished and the vicious cycle continued. By the 1920s, Maori had been brought very low indeed. It is hardly surprising that they turned in thousands to a charismatic leader like Wiremu Ratana and to a Labour Government whose policies in child endowment, health, housing, and education showed some promise of enabling people to break out of the vicious cycle of poverty. Migration to the towns offered still more opportunity in the days of full employment after 1945, but that too was at the cost of further dislocation of the Maori social order, as became fearfully apparent when economic recession occurred. To a great extent, socio-economic trends such as urbanisation are world-wide and by no means wholly within the control of governments. Social malaise can occur for many reasons, even among people who retain all their land. Even so, the maladroit tampering with customary land tenure by Pakeha governments, and the persistent buying of individual interests for over half a century, undermined Maori endeavours already begun, divided communities against themselves, and deprived them of the opportunity to develop a rural economic base through farming and forestry, or through leasing and joint venture arrangements, as they had been

doing before 1840 and for some time after. As for urban Maori, they never did get the tenth of the subdivisions promised in early New Zealand Company proposals, or the benefit of a Crown endowment in urban lands as Governor FitzRoy proposed. Hence, they did not gain access to the increased capital value of urban land, which would have given them something like the promised equality with Pakeha in the new society and perhaps helped provide an infrastructure that would have assisted the urban Maori migration.

es.9 Alienation of Land; Loss of Rangatiratanga

The alienation of Maori land, according to the main legislative and administrative regimes, is shown in the maps and tables in the front of this volume. Broadly speaking, they show that the most complete land loss occurred in the South Island (in both research districts of the Rangahaua Whanui programme) and in Auckland and Hauraki. In Taranaki, Waikato, Wairarapa, Hawke's Bay, and Poverty Bay too, Maori were left with little land by 1939. Official statistics of Maori land holding by district are not readily available and this research has relied upon digital calculation from maps created for the 1940 *Historical Atlas* project (curtailed because of the war).⁹ When the 1939 figures of remaining Maori land in each research district are divided by the population of the district (calculated from the closest available census, that of 1936), the arithmetic shows that, on a per capita basis, Maori in the Hauraki district were the most land-short, followed by those in Taranaki, Waikato, then Auckland (see app vii).

Of course, the raw figures say nothing about the quality of land remaining or the distribution between hapu and families. Some individual Maori and some hapu coped with the maelstrom of colonisation, or were favoured, were included in its benefits, and prospered.

The flow of claims to the Tribunal, however, is mainly about the processes that affected the wider family and tribal communities. Not only are they about blatant Crown actions such as confiscation; they are also about the more subtle processes that undermined tribal control of land, and tribal control of engagement with modernity, with the loss of rangatiratanga, the loss of balance, the loss of resources, and the sense of marginalisation and alienation that has followed. The sense of marginalisation and alienation does not show up on maps. It shows up in the statistics of unemployment, social malaise, crime, ill-health, and low educational attainment. But it is argued here (and there is much supporting evidence in the 1891 and 1906 commissions of inquiry) that there is a direct connection between these outcomes and the *manner* of land alienation, as much as the loss of the resource itself.

9. It would be of considerable assistance to researchers if the records of former counties were properly archived and accessioned, because their records of Maori land would assist in calculating the local and district figures.

es.10 Which Treaty Breaches Were the Most Serious?

What then does a comprehensive review of historical experience suggest as being the Crown's responsibility? This report discusses 20 areas of Government actions that feature commonly in Treaty claims alleging breach of Treaty principles and outcomes prejudicial to Maori. Which among these were the most serious and why? What criteria might be suggested for making such judgements?

The Crown's obligations under the Treaty have been defined by the superior courts in terms of the principles of dealing reasonably and in good faith with Maori and of offering them active protection, consistent with the Crown's obligations to the national community as a whole. In other words, as the Waitangi Tribunal has argued, the tino rangatiratanga of chiefs, hapu, and people recognised in the Treaty should be respected by the Crown through adequate consultation and cooperation with Maori and not intruded upon or diminished in the Crown's exercise of its kawanatanga responsibilities, except where it is evidently necessary for the public good.¹⁰

In the light of this, four criteria are suggested for evaluating the seriousness of Treaty breaches:

- (a) *Crown 'acts of commission'*: It is suggested that the most serious breaches of Treaty principles were those where the Crown most resorted to coercion, manipulation or pressure to achieve its objects, without seriously consulting Maori opinion or in opposition to evident Maori preferences (acts 'done . . . by or on behalf of the Crown', in the language of section 6 of the Treaty of Waitangi Act 1975).
- (b) *Crown 'acts of omission'*: Serious breaches also occurred when the Crown failed to carry out its own plain undertakings or commitments to Maori (acts 'omitted' to be done, in the language of section 6).
- (c) *Demography*: The breach is considered to be the greater when it affected more people.
- (d) *Quantity and value of resource loss*: The quantity and economic potential of land or other resources taken in breach of Treaty principles is also a valid measure of the seriousness of the breach.

The suggested ranking of (a) and (b) in this sequence is in terms of Treaty principles and the obligations of the Crown's honour. The ranking of (c) ahead of (d) owes much to the proposition, expressed in many ways in Maori culture and in the claims themselves, that people and relationships are more important than material wealth as such, important though that undoubtedly is for the maintenance of rangatiratanga or autonomy. An oft-quoted whakatauki runs:

*Huutia te rito o te harakeke, kei whea te koomako e koo?
Kii mai koe ki ahau 'He aha te mea nui o te ao?'
Maaku e kii atu 'He tangata, he tangata, he tangata'.*

10. Waitangi Tribunal, *The Ngai Tahu Ancillary Claims Report 1995*, Wellington, Brooker's Ltd, 1995, pp 10–11

*If you remove the heart of the flax, from where can the bell-bird sing?
And if it is asked of me, 'What is the most important thing in the world?'
I will reply, 'It is people, it is people, it is people'.*

Recent discussions of Maori law (cited in volume ii, chapter 1) refer to the mana or true wealth of a chief as being the number of people whose allegiance he can command. The wealth of a community was in its populace. Many statements also refer to the importance of balance and harmony in relationships and to the mutual respect that supports it. The rangatiratanga of chiefs, it seems, relied much upon the ability to maintain harmony, foster cooperation between hapu, and so strengthen the community in human terms. Treaty claims themselves commonly refer to the loss of mana and rangatiratanga, as well as resources, as a result of Crown actions.

The whakatauaki nevertheless tells us that resources are important, but it is the heart of the flax that is cited, the source of growth, rather than its bulk or quantity. The loss to Maori of its most precious resources, those that could have been fostered and could have supported a community's wellbeing, are presumably the most significant.

es.11 The Historical Evidence Assessed in the Light of these Criteria

The following pages will survey briefly some of the main findings of this report in the light of these criteria.

es.11.1 Criterion a, Crown 'acts of commission'

By the first criterion, the worst breaches would be the needless waging of war upon Maori and the seizure (confiscation) of land under military control or occupation. This report has not discussed the various New Zealand wars but they are well covered in published histories. Modern professional history and Waitangi Tribunal findings now generally agree that, whatever the culpability of some Maori (and the killings of Volkner and Fulloon in 1865, for example, were dreadful affairs, for which some modern attempts at justification are specious) they were used as little more than pretexts by the Government for the seizure of large districts. Whole communities were punished for the actions or indiscretions of a few, and the supposed return of land to the 'loyal' Maori was a botch and a confusion in every case. The objective of distinguishing between such categories was futile in the first place, and the machinery set up to handle the process (whether by 'Compensation Court' or by special commissioners) was cumbersome, arcane, and often arbitrary. When land was returned, much of it was soon reacquired by purchase. The recent focus upon raupatu claims in Waikato, Taranaki, and the Bay of Plenty through Government negotiations and in Waitangi Tribunal reports rightly recognises their seriousness.

War and
raupatu

Some points might be noted, however, about war and raupatu elsewhere:

The East
Coast raupatu

(a) In terms of coercion or pressure brought to bear by the Crown, following war, the distinction drawn between raupatu under the New Zealand Settlements Act 1863 and raupatu under other legislation is false. The Mohaka–Waikare District Act 1870 followed and legalised actions initially taken under the Settlements Act; the East Coast Land Titles Investigation Act 1866, and the East Coast Act 1868 underlay demands for ‘cession’ of land by Poverty Bay and Wairoa tribes allegedly implicated in rebellion in 1865, with threats being held out of proclaiming the land anyway. Both of these last districts were occupied by Armed Constabulary and under the authority of local commanders, with authority delegated by Donald McLean as Agent for the General Government on the East Coast. Perhaps more seriously still, as a threat to the local tribes, the offer by the Crown of confiscated (or ceded) land to its Maori allies (as in the Bay of Plenty) evoked ancient fears and rivalries. Moreover, the continued imprisonment without trial of Te Kooti and other prisoners from Poverty Bay and Wairoa while the Government pressed for the cessions invited the catastrophe that overtook the area in 1868 and 1869. The fact that Poverty Bay Maori, themselves compromised by the Crown’s actions and victims of Te Kooti’s vengeance, then agreed to a small cession hardly justifies the immoderate and inappropriate demands of the Crown in the first place (see sec pti.6).

Heke and
Rauparaha

(b) The war in the north with Hone Heke and Kawiti, and in the south with Te Rauparaha, Rangihaeata, and their allies, deserves further consideration. Treaty partners are required to act reasonably towards one another and with the utmost good faith. Heke was concerned about the loss of rangatiratanga as the constraints of kawanatanga pressed upon him, but FitzRoy tried hard to conciliate him by the waiver of Crown pre-emption and other concessions. Heke’s response was highly unreasonable, or so at least concluded the many northern chiefs who assisted the Crown in suppressing his rising. In the south, Ngati Toa and their allies Ngati Tama and Ngati Rangatahi certainly had rights in the Hutt Valley that they were entitled to protect. But the nature and kind of those rights are complex and the Government did attempt long years of negotiation before Grey sent troops into the valley. There was much contemporary opinion that some of the chiefs were not negotiating in good faith, though former Chief Historian Ian Wards and some recent researchers consider that Grey moved his troops in prematurely, just when Maori were making efforts to cooperate. Grey’s purchases of Porirua and Wairau from the rump of the Ngati Toa leadership, following his seizure of Te Rauparaha and others, were made in a military context (see secs pti.3, pti.4).¹¹

Prerogative
powers

More general in effect but also involving the unilateral exercise of British State power was the assumption of prerogative rights under the common law. This

11. I Wards, *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand, 1832–52*, Wellington, Government Printer, 1968, pp 224–258; R Anderson and K Pickens, *Wellington District*, Waitangi Tribunal Rangahaua Whanui Series, 1996

category of actions applies notably in respect of the assertion of radical title to all land and prerogative rights to foreshores and harbours, to navigable waters, and to sub-surface rights (historically linked with gold). In so far as the Crown failed to recognise or to compensate Maori for customary or aboriginal title rights to these resources, it would appear to be in breach not only of the Treaty but also of rights recognised in the common law as qualifications on the Crown's radical title. To consider each of these categories briefly:

- (a) The claim to radical title as a concomitant of national sovereignty underlies the Crown's claim to 'surplus land' arising from the many pre-1840 transactions between Maori and private settlers – those transactions being considered to have extinguished Maori title and created a title in the Crown that allowed it to award some of the land to the settlers and retain some as 'surplus'. (The issues arising are discussed briefly in section pti.2, at greater length in volume ii, chapter 2, and in the Waitangi Tribunal's *Muriwhenua Land Report*.¹²) Whatever the validity of the underlying legal doctrine, the Crown also chose to investigate whether the pre-1840 transactions were bona fide or equitable, and it took statutory power to this end. It is the view of this report that:

Radical title to land

(i) it is greatly to the Crown's credit that it undertook this investigation and disallowed, or caused to lapse, millions of acres of shoddy claims;

(ii) the investigations by the land claims commissions were nevertheless inadequate in many respects, notably in that they reduced all pre-1840 transactions to the single notion of a sale (of exclusive possession) rather than allowing the possibility of other forms of transaction intended by Maori, amounting to leases, joint ventures, or trusts;

(iii) notwithstanding this general doubt over the investigations, some or many of the transactions *were* investigated, modified, and adjusted to the mutual satisfaction of the parties, including Maori;

(iv) the Crown's failure to return more land to Maori or to hold more in trust for their benefit contributed to the undoubted land shortage of some tribes, particularly in the populous areas of the north.

- (b) The Crown's claim to foreshores and harbours has in many areas been reinforced by statutory authority such as the legislation conferring control over these resources on local bodies and harbour boards. But with or without specific legislative authority, the Crown appears commonly to have caused customary Maori rights in the foreshores to be extinguished, without compensation, for harbour development or roading. In some parts of the foreshore, however, aboriginal title rights might still endure. It is debatable, given the Maori traffic around coasts and the disturbed state of some of the districts, together with the European shipping and commerce thronging New Zealand shores, whether those rights in 1840 still amounted to the equivalent of exclusive possession of particular tribes; nevertheless, right up

Foreshores and harbours

12. Waitangi Tribunal, *Muriwhenua Land Report*, Wellington, GP Publications, 1997

to the Treaty, local tribes did assert rangatiratanga over their foreshores and sought to levy harbour dues on European ships – successfully where they were strong enough (for a discussion of the law relating to foreshores, see sec pti.13).

Inland waters (c) As regards navigable lakes, the Crown has acknowledged that customary rights existed and has come to a variety of arrangements to compensate the tribes affected, though how adequately is under consideration in some cases. As regards navigable rivers, the historical evidence is strong that (as with other waters and fisheries) Maori did not consider themselves to have automatically alienated their interests in water when they alienated adjacent land, although land purchase deeds commonly held mention waters and all things on and under the land. There would appear to be a strong argument that, in many cases at least, the same kinds of rights need to be acknowledged or compensated in rivers as in the case of lakes (see sec pti.14). This issue, and the question of which group or groups would be entitled, is currently before the Waitangi Tribunal, notably in the Whanganui River claim.

Sub-surface rights (d) (i) In respect of sub-surface rights, Maori tend to reject attempts to distinguish between minerals they used at 1840 and those they did not. Nevertheless, some resources such as pounamu clearly were taonga at 1840, as was geothermal power at least when it reached the surface, and these appear to be distinct from an undifferentiated sub-surface, which Maori did not enter or mine. Moreover, although the Maori concept of a tribal rohe did not sharply distinguish between land and water (as in foreshores, lagoons, swamps, and rivers), those waters were traversed and used by humans; the undifferentiated sub-surface was not. It appears to be importing a different concept, perhaps owing more to European notions of property and possession than to traditional Maori concepts, to suggest that the unused and unpenetrated sub-surface was owned in commodity terms in 1840 by the holders of the surface rights. On the other hand, in British common law the term ‘land’ included the sub-surface, and it was common in purchase deeds after 1840 to make reference to things under the surface (as well as forests and waters on the surface) as being transferred with the land. More recently, the Court of Appeal in *Tainui Maori Trust Board v Attorney-General* (1989) held that coal-mining rights were ‘interests in “land” and hence subject to the State-Owned Enterprises Act 1986’.¹³

(ii) The assertion of a public interest in the mineral wealth of New Zealand is nevertheless a legitimate expression of kawanatanga. Overseas experience of sub-surface right-holders contracting directly with developers to mine the sub-surface (as also in respect of exploiting forests) has led all too readily to the squandering of the resource, tax evasion, and environmental damage. The Resource Management Act 1991 includes a greater recog-

13. P McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi*, Auckland, Oxford University Press, 1991, p 254, referring to [1989] 2 NZLR 513, 513–515

nition of the interests of the surface right-holders than previously, and it is arguably not in the public interest to promote the further privatisation of the sub-surface (or indeed of surface minerals that were not taonga in 1840). This being said, the Crown would be acting unreasonably under the Treaty if it did not recognise generously the very great disturbance to the land and lifestyles of the surface right-holders created by the exploitation of the sub-surface. Consequently, the surface right-holders have a Treaty right at least to generous payments for access to the sub-surface and to involvement as joint-venture partners in its exploitation wherever possible. In respect of the gold discoveries in Hauraki and Taitapu last century, the Crown in fact did initially qualify its claim to the prerogative rights, if not to the metal itself then in respect of gaining access to it. Subsequently, however, it resiled from this approach and increasingly asserted kawanatanga authority, via the statute law, which diminished the rights of the Maori owners of the surface (see sec pti.10).

A third category of unilateral assertion of Crown right over Maori property is the taking of land for public purposes. A number of points might be noted:

Land for public purposes

- (a) A battery of legislation from 1864 gave the Crown legal authority to take land for public works. The Crown itself has acknowledged that in many cases Maori land was taken in preference to general land. This was because compensation was either not due under the law, or not at the same rate as for general land, or that it could be evaded. In the twentieth century, because of the multiple names on Maori titles, local bodies worked in cooperation with the Maori land boards and the Maori Trustee, who were senior Pakeha officials working within a powerful State-focused bureaucratic culture. They were responsible for a lot of public works takings. If Maori owners were consulted and compensated, it was often after the event. The public need for the land might well have been very real, and in most cases Maori as well as Pakeha probably benefited from the work. Nevertheless, Treaty obligations suggest that even more care than usual should have been exercised to take Maori land only when strictly necessary, not simply as a matter of administrative convenience, and with consultation and agreement wherever possible.
- (b) The option of taking a lease or licence over land needed for roads and public works in England had given way about this time to the taking of full title, and it is perhaps a little ahistorical to expect it to have continued in a new English colony. It was nevertheless still not unknown, and it might have been considered in such matters as ferries, which were in fact being developed by Maori across various estuaries and inland waters in the 1840s and 1850s.
- (c) The fact that local bodies, rather than general government, were responsible for public works takings in a great many cases would not seem to negate the Crown's Treaty responsibility, in that the statutory devolutions of power to

the local bodies were the considered actions of central governments and Parliament.

- (d) A feature of public works that impacted heavily upon Maori lifestyles was the drainage of swamps and alteration of watercourses. These areas were important for fish and wildfowl traditionally and had development potential. The issue has received considerable attention in respect of large lakes, but the question of rights to, and compensation for, the myriad waterways affected by the Land Drainage Acts and related legislation warrants closer consideration (see sec pti.11).

Land tenure
conversion
and land
purchase

Besides the unilateral assertions of Crown authority discussed above, a great deal of manipulation and pressure was involved in the whole programme of land tenure conversion and land purchase. This has been discussed at length in numerous published writings, in Waitangi Tribunal hearings and reports, and in this report. The sequence of purchase, Maori resistance to purchase, and the overcoming of that resistance has been outlined above in section 5 of this summary and has been discussed in detail in the chapters that follow. Of course, Maori were themselves prime movers in many land transactions. But there is overwhelming evidence that the pace and scale of alienation was taken far beyond their considered wishes. The expression 'considered wishes' is used advisedly. Individual Maori and sub-groups of Maori steadily sold their interests over a century or more. Indeed, they pressed for the removal of restrictions on title so that they could sell their land. The motives for this range from cupidity to common need, pressure from creditors, and considered strategies to raise capital and develop remaining land. But Maori leaders, especially when organised in runanganui and supra-tribal organisations such as the Kingitanga and Kotahitanga, consistently opposed land-selling, and the land laws and land court as they were constituted. Maori representatives in Parliament and experienced witnesses before commissions of inquiry also consistently protested. The fact that traditional rivalries and new exigencies impelled many of those same people to use the system is rather beside the point. Among the Crown actions which constituted pressure and manipulation to secure the sale of land were:

Prohibition on
leasing of
customary
land

- (a) The prohibition on direct leasing of customary land from 1840. This obliged Maori who wanted to raise capital from their land to sell to the Crown at the Crown's low prices. Although the Crown seems to have intended that Maori let their Crown-granted land, there was so little of that before 1865 that few Maori could take advantage of it. The Crown's neglect to foster Maori leaseholds and joint venture arrangements, as had been developing in some coastal communities before 1840, and informally with runholders after 1840, meant that Maori could not readily gain access to the increased capital value of their remaining land, although this was regularly stated by officials to be the real payment for the sale of some land in the first place (see sec pti.1).

Doubts of
validity of
customary
title

- (b) The Crown's recognition of Maori possession or proprietorship of 'waste' or uncultivated land was reluctant and incomplete. Earl Grey treated it as Crown 'demesne' in the 1846 constitution, and although Governor Grey

secured a retraction of that view, he and other officials considered that the overlapping and sometimes ill-defined interests of the various tribes did not give rise to a ‘valid’ proprietary title.

- (c) The Crown’s pre-emptive right of land purchase is defensible on the grounds given in early instructions to governors: that it was in the public interest and that it offered protection to Maori from private land-sharks. The Crown monopoly, however, created an enhanced responsibility upon officials to deal fairly and with the utmost good faith with Maori, as Normanby’s instructions to Hobson enjoined. But, as is now generally well known, Crown purchases, especially under Governor Grey and Chief Land Purchase Officer McLean, were highly manipulative. Maori customary tenure was complex, and as the early Protectors of Aborigines pointed out, a purchase involving full and free Maori consent (in Lord Normanby’s phrase) would have to be painstaking and slow. Instead, the Crown officials took advantage of the divisions and complexities of Maori tenure. Open public meetings, involving all interested parties, the traversing of boundaries, and the careful demarcation of reserves (as in the Otakou purchase) gave way to the blanket purchase of interests over huge areas, with the subsequent ‘mopping up’ of groups who missed out in the initial payments. Officials varied their tactics between buying from compliant chiefs, and thereby committing other right-holders, and buying from sub-chiefs in an effort to outflank non-selling senior chiefs – the tactic which led to war in Taranaki (see sec pti.5).

Manipulative
Crown
purchases

- (d) The provisions for direct dealing under the Native Land Acts exposed Maori to a great many pressures:

(i) The kind of court set up under the 1865 Act – a European-style court with a Pakeha judge and a Maori assessor, rather than a panel of Maori chiefs with an official chairman (as under the largely inoperative 1862 Act) – brought Maori into a very adversarial and rather arcane process, in which the determination of title rested ultimately on the judge’s decision about customary tenure. Maori right-holders, and assorted purchasers, lawyers, land agents, and interpreters, frequently made arrangements of greater or lesser equity during adjournments or before the land got to court. Maori were caught up in processes in which the principal rules were made by the Legislature and were required or enticed to enter a winner-take-all contest for absolute ownership.

Pakeha
judges rather
than rangatira
to interpret
Maori law

(ii) The conversion of customary tenure, with its checks and balances between hapu, whanau, and individual, to a listing of names on a certificate of title or memorial of ownership, each owner’s interest being negotiable, exposed the grantees to the full pressures of the market-place. They were inexperienced and commonly indebted. The very process of securing title itself created huge debts for survey and other costs, which were charged against the land. Up to 10 owners were named on titles to blocks passing through the court under the 1865 Act; from the 1873 Act onwards, all

Named
owners
exposed to
risk and
pressure

owners were to be named. The system of direct dealing between Maori and settlers was introduced in the full knowledge that Maori owners would be exposed to a rush of purchasers and their manipulative tactics. Competing Maori claimants were usually caught up with one or other of a number of Pakeha purchasers before the land went through the court.

Safeguards
inadequate

(iii) If customary title did have to be modified to meet the needs of a commercial economy, a whole range of alternatives were not taken up. Governments deliberately refrained from introducing important protections that were advocated by concerned officials and politicians, or they legislated for them but failed to administer them. For example, named owners were made absolute owners, not trustees; individual signatures could be purchased severally, without the prior check of a public meeting of the owners and their kin; dealings before title was awarded were only void, not illegal, until 1883 and then attracted only minor penalties; sale by public auction or tender only was not introduced until 1886, and then only briefly; administrative machinery to set aside a minimum of inalienable land was proposed in 1873 but not implemented, revived again in 1900, and then weakened again in 1909. After 1873, Maori land was not normally able to be sold by mortgagees – a genuine protection, though too late for land sold between 1865 and 1873. The Native Lands Frauds Prevention Act 1870 did introduce other important protections against outright fraud and inequitable dealings, but its implementation was only as good as the ‘Trust Commissioners’ appointed under it, and some of them proved to be very weak reeds. Moreover, a ‘Validation Court’ was set up in 1892 to validate transactions that were technically illegal (for want of a commissioner’s certificate or through some of a host of other possible irregularities). In theory, only transactions that could satisfy tests of equity and good conscience should have been validated, but some of the judges interpreted their role very widely; on the East Coast especially, dubious transactions over many thousands of acres were validated (see sec pti.9).

Piecemeal
acquisition of
individual
interests, and
partition

(iv) The main pressure or manipulation that the statute law authorised, however, was that every individual owner’s interest, whether that interest was defined by the court or ‘undivided’, could be acquired piecemeal and the land partitioned. Moreover, the partitioning of blocks was facilitated in the interests of purchasers. Thus, from 1877 the Crown, as well as Maori owners, could apply for a partition order, and from 1878 ‘any person interested’ (that is, including Pakeha purchasers or agents) could apply. The owning group as a whole could not resist partition once a purchaser had secured some interests. The constant, and often secretive, purchasing of individual signatures was divisive of the group, constantly frustrated group efforts to develop land, and ultimately demoralised whole communities. Under the circumstances, it proved all too easy to succumb to the need for cash and sell one’s interest. Not until the 1890s, when the East Coast chiefs

secured the recognition of a legal personality for the group (in the form of incorporation of owners) was this system in part curtailed (see sec pti.7).

(v) In 1900, with ample land in Crown title and in the face of nationwide Maori protest, new legislation set up the Maori land councils, through which Maori could lease land, rather than sell it, or develop it themselves. In consequence, new land sales ceased, but because Maori were also slow to *lease* land to settlers, the law was amended to include the compulsory vesting of certain categories of land in the councils (renamed boards) and the requirement that boards must sell as much vested land as they leased. Under the Native Land Act 1909, blocks with more than 10 owners in the title could be alienated on the vote of a majority of a meeting of ‘assembled owners’; that majority did not have to be a majority of *all* owners, and proxies could be used (by lawyers and land agents, for example). In 1913, the Maori land boards, which oversaw this process, ceased to be Maori in personnel; they were made synonymous with the judge and registrar of the Native Land Court of the district. Meanwhile the Crown went on buying undivided interests (see sec pti.15).

Maori land boards and ‘assembled owners’

This report takes the view that, taken together, the coercive and manipulative elements in the land law from 1862 on constitute one of the most serious of the breaches of Treaty principles by the Crown. It was more serious even than purchase under Crown pre-emption before 1865, because whereas before then the Maori tribal leaders and runanga could combine to limit selling (and did so throughout most of the North Island by the late 1850s), after 1865 it was almost impossible to stop some individual or individuals from taking a block into the Native Land Court and, once it had gone through the court, to stop individual interests being purchased and the block being partitioned. The rangatiratanga of hapu in particular was undermined in the interests of securing land for settlement, and the land law was deliberately manipulated to that end, above all others.

es.11.2 Criterion b, Crown ‘acts of omission’

The single most important area of breach in the category of Crown ‘acts of omission’ was the Crown’s failure to reserve enough land for the ‘present and future needs’ of Maori and to protect the reserves from subsequent sale. Several features about this issue may be noted:

- (a) The undertakings and policy directives to this end were plain enough, from Normanby’s 1839 instructions to Hobson through successive instructions to governors (or by assurances made by governors to secretaries of state) – ample reserves would be made. The assurances to Maori were also explicit. In almost every large Crown purchase, there were discussions about reserves and promises were given to make them. Sometimes they were marked out. But in a great many instances, the reserves were not protected. They were rarely followed by surveys and Crown grants to the owners – at least not quickly – and in many cases were purchased within a few years of

Confused reserves policy

being made. In 1847, when making the Wairau purchase, Governor Grey very explicitly recognised the need for very large reserves for a people still engaged in a hunter–gatherer economy. But this attitude was rapidly overtaken by an envy of Maori retaining large reserves, which they were letting informally to settlers for grazing and on which they were pursuing a semi-traditional lifestyle. From 1848 on, land purchase officers were strenuous in their refusal of Maori requests for large reserves and made none at all unless Maori pressed for them. Reserves made in the first instance in the Crown purchase period typically amounted to between 3 and 5 percent of the land purchased, but were often much less. With the Hua block purchase in Taranaki in 1854, McLean introduced an arrangement whereby chiefs could use some of the purchase money to buy back under Crown title a portion of the land they had just sold. The system has something of the quality of a confidence trick, though in fairness it was probably seen as a way of stopping the payment being squandered and a way of conveying a legal title. A hundred or so grants went to cooperative chiefs by this and other means, but the total area amounted to only a few thousand acres.

Reserves for
occupation or
reserves for
endowment?

- (b) There was a failure to distinguish clearly between the reserving of land for the occupation and use of Maori and the taking of reserved lands into trust to raise revenue for Maori education, medical care, and general welfare. The New Zealand Company proposed to reserve a tenth of the urban, peri-urban, and rural sections in its settlements for the benefit of the leading families of the tribes who sold to the company. The land was to be vested in the company for Maori, rather than left with them. Presumably, it was intended that Maori would live on some of the sections and others would be let to raise revenue. From 1840, the Crown also began to contemplate taking a tenth of the subdivisions into trust for Maori purposes and FitzRoy explicitly and publicly undertook to reserve, in the Crown, a tenth of the land transferred in the pre-emption waiver purchases authorised in the Auckland district in 1844 to 1846. Crown trustees were supposed to raise revenue from this land for the benefit of Maori. Instructions from Lord John Russell in January 1841 proposed an alternative source of revenue for such purposes; namely, 15 percent of profits from the on-sale of Crown land. In fact, very little of all this came to pass. The company’s proposals, however, were based on the assumption that Maori title would have been completely extinguished before it made its subdivisions, and Russell’s 1841 instructions were based upon the view that ‘waste’ or uncultivated lands formed a huge Crown demesne. Once it was clear that Maori did not consider that they had relinquished rights over more than limited areas, the settlers and officials did not pursue the trust arrangements with any vigour. In Wellington, such company tenths as were made tended to be used for Maori occupation, not for revenue-raising by trustees. In Auckland, Grey took the ‘Crown tenths’ into his general pool of surplus or allowed settlers to purchase them. In Nelson, a quantity of ‘tenths’ were made and, after a hesitant

start, eventually yielded some useful revenue to Maori beneficiaries, but not enough to provide for their needs. Proposals for the use of 15 percent of the land fund by the Maori purposes trust came to nothing. First, the proposal was redefined as relating to the net, not the gross, profits, and what net profits there were were absorbed into the general costs of government. The cost of running the Protectorate of Aborigines was deemed to be (and indeed was, for the most part) a service to Maori. When Grey abolished the protector's department in 1847, he instead made payments to the missionary societies for Maori education and provided some medical care and some assistance to Maori agriculture. From 1852, this was paid for variously by a £7000 allocation in the Civil List (under the Governor's control) and by a comparable amount voted by the General Assembly. By this time, Maori were left with a very limited stake in the growing settlements, either for residence or for revenue.

- (c) Another aspect of the Crown's early reserves policy was that Maori were actively discouraged from letting their urban reserves themselves. Te Atiawa chiefs were stopped at the outset from leasing parts of the Thorndon flats. Maori were not supposed to be economic rivals to the company settlements, and Wakefield was very happy to agree to Otakou Maori taking their reserves down at the Otakou Heads, not in Dunedin. From about 1850, Grey did begin to encourage short leases on the formal reserves, but there were not enough of these in desirable locations to support Maori occupation and leasing as well. When, later in the century, Maori did start to do well from urban rents, as in Greymouth and Rotorua in the 1880s and in the native townships set up in the King Country in the early 1900s, tenants very quickly began to demand the freehold or perpetual leases on low rents. Governments capitulated in every case, amending the law where necessary to allow tenants to buy, or buying themselves and then selling to the tenants. The settlers' economic envy of Maori success, touched with a racist dislike of being tenants of Maori landlords, has influenced the Crown at the expense of its early undertakings to ensure fair Maori participation in the growing wealth of the national community.
- (d) Another feature of reserves administration already alluded to is the extent to which the land was taken out of Maori hands and run for them, not by them. Some of the administrators (Alexander Mackay, Charles Heaphy) were very caring and professional, but they were reluctant to let the beneficial owners too closely into the management of the reserves. Provisions in the Native Reserves Act 1873 for the appointment of Maori co-trustees were allowed to lapse. Then the Native Reserves Act 1882 put the Crown-administered reserves under the Public Trustee (and, from 1920, the Maori Trustee). The law was then increasingly weighted towards the tenants' interests: the Greymouth reserves and some of the remaining Wellington tenths came under perpetual lease at peppercorn rents, as did at least 120,000 acres of the West Coast settlement reserves in Taranaki. With the Public (and Maori)

Opposition to
Maori as
landlords

Paternalism of
reserves
administration

Trustee having the power of sale, significant areas of land passed out of Maori ownership. The East Coast Maori Trust also managed over half a million acres from Wairoa to Tolaga Bay in autocratic fashion from 1902 to 1954, though here the objective was to salvage the land from debt and mortgagee's sales, and that objective was achieved in respect of most of the land. But one of the legacies of the paternalistic systems was that Maori were denied experience in land management. The maladroitness of some Maori today in managing capital stems largely from sheer inexperience and the lack of opportunity for beneficiaries to develop their own mechanisms of accountability. Maori were able negotiators when they set up joint ventures with whalers, traders, and timber merchants in the 1830s and 1840s; much has gone wrong since. On the positive side, the system of incorporated owners, based on the hapu and on a balance of authority between general meetings, elected block committees, and managers (with the Maori Land Court keeping perhaps an overly paternalistic eye on things), allowed Maori some management experience.

Restrictions
on title

- (e) Under the Native Land Acts, the placing of restrictions on titles, rather than the making of formal reserves, was the normal control against excessive or too rapid alienation. The restriction meant that land could normally only be leased for up to 21 years. But restrictions could be removed: first, with the consent of the Governor in Council; later, with the consent of the Maori Land Court. Before the restriction would be removed, the officials were supposed to ensure that proposed purchases were equitable and that Maori had ample other land besides. From 1909, all restrictions were removed from titles and an administrative check by Maori land boards (applying the same kinds of test) was substituted. The system has had a very chequered history. There was constant pressure from the 'free trade' lobby among the settlers to remove restrictions altogether; other sections of officials and settler politicians fought to retain them and relaxed them only sparingly. But generally the restrictions were not sufficiently strong to protect a sufficiency of land for Maori needs and they got progressively weaker as the century wore on. The Maori land boards' checks seem to have been perfunctory and formalistic in many cases. But the officials were often in a dilemma, for there was constant pressure from individual Maori owners to remove the restrictions and let them sell. The reasons for this have been discussed above. In addition, Maori have always disliked paternalistic restraints that put them under bureaucratic controls. Whereas early in the land court period they tended to ask for restrictions on title and complain when they did not get them, the constant need for money, the inadequate returns from leasing (in relation to the numbers of people on the fragmented titles among whom the rents were to be shared), and the belief that they could get better prices for the land on the open market if there were no restrictions (and no Crown pre-emption) led to some collusion between entrepreneurial Maori and the 'free-traders'.

- (f) The real failure in Crown policy though was that discussed in (a) above: simply the failure to categorise a large proportion of the land as inalienable save by fixed-term lease, without any possibility of removal of restrictions. An underlying reason was that early instructions requiring governors to set aside inalienable reserves were directed mainly at Maori residence and subsistence needs, not revenue needs. The Native Land Act 1873 did propose to reserve a minimum of 50 acres per person, for both subsistence and revenue purposes, but the provision was not enforced and Maori were so distrustful of Crown paternalism that they did not voluntarily vest land in Crown trustees. Inalienable ‘papatupu’ or ‘papakainga’ land (residence and subsistence land) was an important category in the legislation of 1900, but it was dropped by 1909, and all Maori land was exposed again to the purchase of individual interests or alienation by meetings of ‘assembled owners’. In any case, the concept of papatupu land, though far from unimportant, was inadequate, in that it did not allow for Maori leasing and joint venture arrangements. The Government did not seem to be able to envisage setting aside large areas for Maori *commercial* enterprise, inalienable save by fixed-term lease, with *no* prospect of removal of the restriction. Settler racial and economic jealousy was simply too strong for that (see sec pti.8).

Inadequate
reserves of
inalienable
land

The other huge area of non-fulfilled Crown promises is frequently said to be in the area of economic advancement and social wellbeing. There is certainly a case to be answered there. Very commonly, the Crown’s inducements for Maori to sell land or to accept a very low price for land included statements about the benefits to follow from the settlement that would ensue. Sometimes education and medical care were mentioned. More often, individual Crown grants, as the basis of economic advancement, were urged upon Maori and sometimes made a part of transactions. In so far as these statements were not made in good faith, or were made in good faith by some officials and then neglected by others, breaches of the Treaty arose. The research in this area is being undertaken in relation to specific claims and has not been a special focus of research in the Rangahaua Whanui programme. This report therefore offers only preliminary reflections:

Economic and
social
wellbeing

- (a) A distinction can be made between loose general assertions by officials and more deliberate undertakings to provide services. The British believed implicitly in the superiority of their civilisation to that of the Maori. If officials told Maori that they would benefit from the coming of settlement (or ‘civilization’) to their district, that would probably, in many cases, have simply been the expression of an axiomatic belief. Moreover, they would have assumed that it in fact happened: settlement did arrive; Maori often profited (sometimes only briefly) from new opportunities to sell their produce or to seek paid employment; residual tribal fighting possibly died down; people could travel freely on the Queen’s highways and visit the towns; and there were protectors and resident magistrates and others to regulate disputes about theft and cattle trespass and perhaps even adultery. Modern life and modern commerce is largely about freedom of movement

and opportunity for the individual, rather than the kinship group, to make choices and accept responsibility for the consequences. Although Maori today, with good reason, point to the disruptive effects of this, the contemporary record contains many statements by Maori showing that they were fully aware of the changing social order, weighed the pros and cons, and were largely supportive of new opportunities and different emphases. (See, for example, the comments from the Orakei parliament of 1879 at section es.3.) There was constant protest over the loss of lands and fisheries and about the absence of a fair share of State power, but Maori in the nineteenth and early twentieth centuries probably complained more about the lack of assistance and opportunity to engage with the modern world than about the inroads of modernity into their old order.

- (b) The other assumption that most British officials and settlers shared was the belief that the basis of economic and social advancement was individual property. It was not only in the interests of land-purchasing that governments sought to individualise Maori land tenure; it was a constantly reiterated theme that Maori advancement would take place only when 'communal' tribal society was broken up and Maori were enabled to develop individual estates. This had been the purpose behind the company tenths for 'the leading families'; it was part of the purpose of the grants of 100 or 200 acres to individual chiefs; allegedly it underlay the Native Land Acts and the individualisation of title to reserves such as Kaiapoi and the Otago Heads. But the land Acts did not usually create individual holdings on the ground – only individual negotiable interests in a multiple title; and the individualised reserves created the first of tens of thousands of uneconomic interests. Governments' main instrument for assisting (or compelling) Maori advancement was a disaster.
- (c) In terms of more material assistance to enable Maori to engage with modernity, the Crown's responsibilities in respect of education, employment opportunities, housing, and medical care are very relevant. They are especially relevant where the statements by Crown officials in land purchases were not simply general expressions of optimism about the expected benefits of settlement but more specific assurances that the Crown would assure their protection and welfare. Such assurances were explicit in the early company settlements, especially Wellington. In the seven years during which Maori were induced to leave their cultivations and pa for the new town and move to more limited and more remote reserves, the protectors and company agents together certainly talked about a trust to be set up to provide for Maori health care and education, or the 15 percent of profits from the resale of the land for the same purpose – but only when the Port Nicholson purchase had been completed (see sec pti.3). As noted above, the trust proposal came to very little. Much of the money voted by the General Assembly from 1856 on went towards the salaries of Maori assessors and the police; this was very important in terms of recognising Maori in local

administration, but it did not secure general Maori welfare or economic opportunities. The development of the native schools system after 1867 was extremely important – an opportunity which Maori pursued eagerly, giving land for the schools. But virtually nothing was done to assist Maori secondary and technical education until well into the twentieth century, when the Labour Government's programmes especially began to meet some of the educational needs of poorer Maori and Pakeha alike. A comparable story can be told in respect of health care. Native Department subsidies for doctors attending Maori were miserable, and even the increased effort through the Maori Councils Act 1990 was under-funded and depended on dedicated individuals to be effective.

- (d) Employment was not seen to be an obligation of the State, and the roading contracts given by McLean in the 1870s were intended more to pacify and open up the country after war than to promote Maori economic advancement. Roads were not in fact well-maintained unless they served settler communities. The issue was of course mixed up with the difficulty that Maori communities had in raising revenue to pay local body rates, other than by selling more land. The rating laws did recognise this to an extent; for example, exempting Maori land unless it was revenue-producing or in the vicinity of a road. Nevertheless, both Maori and local authorities have long been in a dilemma over rating (see sec pti.19).
- (e) The welfare issue is closely linked with the land laws. Once the Crown had conceded that Maori had possessory or proprietary rights to the 'waste' lands, it was as if they then saw Maori as owing something to the settler community rather than the settler community owing something to Maori for having got the land cheaply. This was reflected in the provision under the Native Lands Acts whereby 5 percent of Maori land could be taken for roads without compensation, and other aspects of public works takings that discriminated against Maori.
- (f) The early governors' public undertakings can reasonably be regarded as constituting an obligation to provide Maori with at the very least the full article 3 rights due to New Zealand citizens. Very little can be pointed to in the way of special efforts being made by the State on behalf of Maori before the 1930s, except probably the native schools service, while on the other hand there were a number of serious negative discriminations, such as the failure to include Maori ex-servicemen in rehabilitation benefits after the First World War to the same extent as Pakeha servicemen and the lower rate of unemployment benefit for Maori before 1936. Indeed, if social outcomes for Maori are a measure of the non-fulfilment of Crown promises or implied undertakings, then the condition of Maori in the 1930s is a damning indictment. Maori housing was appalling, and though rehousing programmes commenced before the Second World War, they were overwhelmed by the flood of applications from Maori and had made little progress before they had to be suspended during the fighting. After the war, the Maori Affairs

Department made renewed efforts to improve Maori housing, but Maori were not especially assisted by the general State housing programme. The land development schemes provided some kind of employment, or disguised relief work, for about 5000 Maori before the Second World War, but that was recognised as only a provisional and part solution to a fast-looming problem: the remaining Maori land could not support economically viable communities (see sec pti.17). Given the data compiled by the department from 1930 to 1939, and again after the war, about the Maori situation as regards employment, housing, health, education, and family support, it scarcely needs new research to show that it amounted to a national disgrace. The *proportions* of Maori in need seem clearly to be much greater than for non-Maori, and every district seems to have been affected.¹⁴ Tragically, the situation of Maori in rural slums was at first cited in some quarters in support of negative stereotypes and *against* giving Maori new houses ‘until they learn to look after them better’.

Tino rangati-
ratanga

The third area of non-fulfilment of Treaty undertakings concerns the guarantee of ‘tino rangatiratanga’. The question relates to the extent to which Maori would be recognised as having political or jural authority in their own communities and be able to share in the central governing institutions of the new nation state. On these matters, a number of points can be noted:

- (a) Colonisation revealed the sharp conflict of interest between Maori and settler. Colonisation involves a struggle for the control of valued resources, notably land. Needing land, forests, and fisheries, the Crown and the settlers did not want to include Maori in the institutions of government, *unless* Maori were willing to pay the price of continued alienation of those resources. Whenever tentative efforts to include Maori in State power led to the slowing or cessation of land sales, the power was removed.
- (b) Maori in fact protested early, and continually, about their exclusion from the processes of government, where decisions were made about their property and their lives, usually without even the courtesy of consultation. Heke’s rising was driven by a realisation that power was passing rapidly from the chiefs to the Governor. The creation of settler parliaments in the constitutions of 1846 and 1852 was accompanied by local wrangles over the voting rolls, which showed Maori that they were effectively excluded from Parliament. Thus, Maori began the movements to have a parliament of their own, or perhaps a monarch. The Kingitanga and the Kotahitanga arose from this and were largely directed at stopping land alienation. A more local response was the emergence of tribal runanganui, which also sought to control land (see sec pti.5).
- (c) In 1860, Governor Browne called a great meeting of chiefs at Kohimarama to discuss serious issues, including the Taranaki war. The chiefs greatly welcomed consultation through such a forum and asked that it be continued.

14. Much relevant data is provided in Claudia Orange, ‘A Kind of Equality: Labour and the Maori People, 1935–1949’, MA thesis, University of Auckland, 1977.

But Grey did not want a national Maori assembly to emerge and did not reconvene the meeting. He did seek to make official the various runanga around the country, providing for the salaries of Maori assessors and police and giving them the power to make bylaws. It was hoped that the official runanga would facilitate the sale and lease of land in a manner acceptable to Maori; but when the runanga did not want to be used in this way, Grey and his Ministers lost interest and the system waned.

- (d) 'Native committees' or 'councils' nevertheless remained an issue. After 1865, Maori leaders concerned at the dominance of the Native Land Court began to seek recognition for the committees, for the purpose of determining land titles and managing land, as well as dealing with minor offences and civil disputes in their areas. Some senior officials supported the concept, and in 1872 Donald McLean introduced a Bill to establish the councils formally. The Bill was bitterly opposed by settler politicians and by Chief Judge Fenton of the land court, who were all fearful that Maori would resume control of the land again. McLean was forced to withdraw the Bill.
- (e) John Bryce did secure the passage of the Native Councils Act 1883, but there were only about six councils, covering vast areas, and their authority was confined to making determinations of customary title for blocks coming before the land court. John Ormsby and his colleagues in the Kawhia Committee made good use of their opportunity in determining ownership of the vast Aotea block; other than that, the Act was of little value (see section 20).
- (f) Of great potential importance, however, was the Maori Land Councils Act 1900. This emerged from the ferment of discussion between the Kotahitanga and Kingitanga (together commanding the support of Maori in almost all districts), the Government (headed by Richard Seddon and James Carroll), and the young educated reforming Maori led by Apirana Ngata. The Act at last gave the land councils, with their elected Maori majorities, control over the management of land (as well as authority to advise the court on title). Together with the Maori Councils Act of the same year, dealing with matters of health, sanitation, and the control of alcoholic drink, the law offered Maori a genuine possibility of fostering their tribal autonomy based on the development of their own land. The law was received by Maori in that spirit. Even the Kingitanga came out of isolation to engage with the system, and King Mahuta took a seat in the Legislative Council. The Kotahitanga accepted a motion from Ngata to formally disband. But their hopes were all betrayed. The councils took a while to be elected, and the land was not vested in them and leased at a rate sufficient to satisfy the demands of the settlers and the parliament. By 1905, the Act was amended to deprive the Maori land boards (as they were renamed) of their Maori majorities. By 1907, they were obliged to sell as much vested land as they leased. By the Native Land Act 1909, they became the supervisors more of

land alienation than of land development.¹⁵ By the 1913 amendment Act, the boards were reconstituted to comprise the judge and registrar of the Native Land Court and ceased to be Maori (see sec pti.15). So much for local or regional Maori self-management. In what can only be regarded as a gross breach of faith, the Government had gone back on the undertakings and assurances given to the national Maori leadership in the negotiations leading to the Act of 1900. A most promising development, based on deeply-felt and long-expressed Maori aspirations, was emasculated and made the instrument of a greedy scramble for the last few million acres of Maori land capable of being farmed.

- (g) New Zealand has paid dearly for this. A system of tribal councils, properly resourced, staffed, and encouraged to develop the capacity for both economic and social self-management, would have helped enormously to deal with the problems soon to arise from the Maori demographic resurgence and from economic change. They would have at least assisted with the transition to urban living, although urban Maori have shown their need for new structures, forming new groupings on principles not wholly different from the way rural hapu clusters or communities once formed.
- (h) There was to be yet one more chance to recognise Maori capacities in tribal self-management. This was the Maori Social and Economic Advancement Act 1945. The Act arose from the Maori people's own magnificent War Effort Organisation, formed as the civilian home front behind the Maori Battalion and national defence generally. The Act was intended to give the organisation a peacetime role, helping in the rehabilitation of Maori servicemen and women and handling new needs in employment and social welfare. It was, however, regarded with jealousy by the Pakeha bureaucrats of the Department of Maori Affairs. Prime Minister Peter Fraser had intended that the 'Maori Social and Economic Welfare Organisation' should be 'as self-controlling and autonomous as possible . . . to the full limits of its potential development . . . to a large extent independent and self-reliant', not 'merely another branch of the Maori department'.¹⁶ But the department, and others in Cabinet, were too jealous and distrustful. A pyramid of local councils and tribal councils was put in place, but their attempts to act autonomously were discouraged. The local committees established under the Social and Economic Organisation were required to work through the department's rapidly expanding network of welfare officers and land development staff and were not able to hold the responsibility and release the energies revealed by the War Effort Organisation. When the national 'top' was put on the system in 1962, in the form of the New Zealand Maori Council, it drew away the

15. Because James Carroll and Apirana Ngata were deeply involved in shaping the legislation from 1900 to 1910, their role in the weakening of the land council (board) has come under recent scrutiny. The difficulty is to know how far they were themselves supporters of the changes and how far they had to make concessions at the behest of their own party (the Liberals) in order to retain power against the even more land-hungry Reform Party.

16. Fraser to under-secretary, 21 September 1948, ma 35/1 (cited in Orange, p 192)

authority of the tribal structures rather than complementing and adding to them (see sec pti.20). Admittedly, urbanisation and the individual freedom that went with good wage packets in a time of full employment were already weakening the sense of community and tribal authority upon which the 1945 Act was based. Nevertheless, once again the nation missed a chance. A system of tribal executives, holding real authority as the vehicles for the equitable distribution and management of resources and assisting directly in the shaping of policy at the centre, might have provided a structure capable of mediating the change to a new, largely urban, order, while retaining a vitality of its own.

- (i) As for central government, the Maori members of Parliament themselves complained that they were too few in number to be effective. Great hui such as the Orakei parliament of 1879 noted that the Maori electorates were too vast for the members properly to represent their constituencies. The issue, though, is not as simple as merely increasing the number of Maori members, because it is by no means certain that constructing a national parliament on the basis of communal representation is the most helpful principle or emphasis. Excess emphasis on voting by race or ethnicity has been disastrous for inter-communal relations in some countries overseas. The concept of Maori being predominantly represented through the general roll and the general electorates is also valid, especially if Maori themselves are nominated to winnable general seats. This has been a long time coming, and the wonder is that Maori people at large, and organisations like the Ratana movement in particular, have remained willing to work patiently through the national parliament. The dignity and courtesy that the Maori members have brought to the parliamentary process for more than a century ought to be recognised, and men like Carroll and Ngata have been giants in Parliament, bridging the divide between communities even if in the end they were unable to do more than slow the land-grab. The mixed member proportional electoral system appears to be allowing more Maori representation in central government than ever before.

es.11.3 Criterion c, demography

It has been argued above that an assessment of the extent of Treaty breaches, and consequently of the redress due, should have regard to the numbers of people affected in any district. Estimates of the Maori population of the various Rangahaua Whanui districts at 1840, 1891, and 1936 are given in appendix vi.

- (a) Of the districts defined for the Rangahaua Whanui programme, using the 1936 census, much the most populous districts were those of the north, especially Auckland, and the East Coast districts. Then came the Bay of

Distribution of
population
between
regions

Plenty and the central North Island districts.¹⁷ These proportions will have changed somewhat by now as a result of out-migration, although the effect will be mainly to enhance still more the significance of greater Auckland. It is suggested, however, that in evaluating *historical* grievances it is more appropriate to take the earlier date, before urban migration greatly altered the numbers or proportions in the areas where the injuries occurred. (It should be noted though, that out-migration affected some districts much earlier than 1936.) Some research also suggests that the progress of the Native Land Court, district by district, correlates strongly with population decline, for epidemic disease was spread during long court sittings and cycles of crop production were disrupted.

Per capita
holdings of
land

- (b) Simple population numbers, however, are perhaps less significant than the relationship of land loss to those numbers. If we assess the Maori land remaining per capita in 1939, Hauraki emerges as the most land-short district at 3.5 acres per head, followed by Taranaki at 5.2 acres, Waikato at 5.3, then Auckland at 9.7. These four are in a group considerably worse off in per capita holdings than the next district, Wellington, at 38.2 acres per head.¹⁸ These are very raw figures, derived from dividing the Maori population (as calculated from the 1936 census) into the area of Maori land remaining (estimated by digital calculation from the 1939 map of Maori holdings reproduced on page xxiv). Moreover, the Rangahaua Whanui district boundaries have been drawn arbitrarily for research purposes on the basis of geographic features and local government district boundaries. Different boundaries and smaller districts would produce very different figures, and both the land and the population databases need to be refined. The exercise has been done, however, to show that the extent of prejudicial effect looks very different according to how various factors are weighted. If one takes the proposition that it is not so much the area of land lost, or the manner of its passing, that is most important, but the *outcomes* for Maori, then, on a per capita basis of land remaining as at 1939, the Auckland, Hauraki, Waikato, and Taranaki districts have very strong claims.

17. The table reads, from the largest to the smallest: Auckland 22,426; Hawke's Bay–Wairarapa 8606; Gisborne–East Coast 8449; Bay of Plenty 7671; Waikato 6242; King Country 5744; Wellington 4924; volcanic plateau 4576; Taranaki 3828; Whanganui 2312; southern South Island 2221; Urewera 2105; Hauraki 2056; northern South Island 690; Chatham Islands 303. The figures have been derived from adapting census returns given by counties to the Rangahaua Whanui district boundaries, with some averaging of figures where a county boundary falls across two districts.

18. The full table reads from the lowest to the highest acreage per head: Hauraki 3.5; Taranaki 5.2; Waikato 5.3; Auckland 9.7; Wellington 38.2; Bay of Plenty 39.4; Hawke's Bay–Wairarapa 40.4; Gisborne–East Coast 53.6; Urewera 55.2; King Country 56.6; southern South Island 101.1; volcanic plateau 110; Whanganui 115.6; northern South Island 153.6; Chatham Islands 232.8 (in the case of the South Island districts, the land area estimates for 1910 were used; they had diminished slightly by 1939).

es.11.4 Criterion d, quantity and value of resource loss

On the basis of area of land lost, clearly southern South Island Maori lost the most and lost it earliest. They are closely followed by the northern South Island and Wairarapa–Hawke’s Bay. Of course, the raw figures of distribution say nothing about the quality of the land remaining. Much of the land still owned by Maori in districts such as the East Coast, the Urewera, and the volcanic plateau is mountainous. The South Island per capita holdings are inflated by the land given under the Landless Natives Act 1906, most of which is steep, remote, and inaccessible. By the same token, though, much of the remaining Maori land in Taitokerau has poor quality soil and is not easily developed.

How to
measure
resource
loss?

Then there is the question of the economic worth of both the land lost and the land remaining, and *that* looks different in different decades, as the effects of new technologies or new markets affect the productive potential and the value of the land. Should the value of land be assessed in terms of what it could produce at the time of its transfer or according to its potential as subsequently revealed? Both bases of comparison have their complexities: the kauri-forest lands of the north were probably worth more per acre in the 1840s than most rural lands, while the hapu of Wairarapa and Hawke’s Bay were earning at least as much from informal leasing or ‘grass-money’ than the hapu of north Canterbury and Kaikoura when the land was transferred. But the people who owned the land around the natural harbours and the sites of the growing towns had the most valuable land of all, and their loss, *relative* to the settler community that grew around them, appears the greater. Relative deprivation is often regarded as worse than absolute deprivation. Speaking relatively, rural hapu who kept enough land to farm were not always so economically distant from the settlers who were also milking cows on uneconomic holdings in the vicinity. Urban hapu, on the edge of great wealth but not sharing it, might have felt relatively worse off than their rural cousins, who could at least still usually hunt and fish fairly readily until the 1950s. Or did the urban hapu, despite losing almost all their land, make up some of the ground through their access to employment and education, which their rural cousins did not gain until they migrated to the cities after the Second World War? The measuring of the worth of what was lost and what was retained is perhaps the hardest task of all.

es.12 The Criteria Considered Together

The various criteria in sections es.11.1 to es.11.4 cannot be put together to produce a precisely ranked ‘order of magnitude’ as in a scientific equation. The variables are many and the weighting of them subjective. Even to make tentative suggestions seems foolhardy. Yet neither can the weighing of loss, and of reparation due, be left entirely to the confidential deliberations of the Government and particular tribal negotiators. There is a legitimate public interest in the way injury is measured and the ambit of reparation determined. Some kind of rationale must be presumed to operate and there are good reasons why that rationale (though not the negotiations

themselves) should be as open and public as possible, so that the population at large may share in a debate of great national importance. Moreover, as research reports and Tribunal reports emerge and settlement negotiations proceed, there is an inevitable tendency for tribes, and the Government too, to compare one tribe's historical experiences and current situation with those of others. While each tribe's or district's experience is unique and none is *strictly* comparable with another's, and while the Government may wish to avoid engaging in a discussion of relativities between tribes and districts, this cannot altogether be avoided, because of the common or comparable factors that apply to many tribes. The frequent references in public discourse to 'benchmarks' implies an awareness of emerging precedents and levels of reparation. Furthermore, to talk of assessing claims 'on their merits' does not really mean that each case is treated in strict isolation from others, because 'merits' implies some sense of relativity to presumed standards of right and wrong, of extent and seriousness of breach. This involves comparing one kind of Crown action with another; for example, raupatu with compulsory takings for public works or with failure to protect promised reserves and so on. How seriously each of these issues will be viewed by Maori in each district is a matter for them, and in this sense each case will be unique. Nevertheless, equity requires, and will be increasingly seen by Maori negotiators to require, some common ground as to the weight to be given to common or comparable factors.

What then does a comprehensive appraisal of the historical evidence suggest are the most serious breaches and the prejudicial effects that it is most necessary to remove? This report would argue as follows:

- (a) On the basis of the Crown's actions being most deliberate, and hurtful of most people, the most important issue is the loss of rangatiratanga, or legitimate scope for autonomous Maori action. This has two major aspects:
 - (i) the loss of resources, which underpin autonomy and self-determination at the individual and tribal level; and
 - (ii) the exclusion of Maori from the decision-making institutions that affect their lives and their resources. The establishment or re-establishment of mechanisms of consultation and empowerment will be as important as the restoration of a resource base.
- (b) In terms of the cause of the loss of resources, carried out by manipulative methods that deliberately set aside the considered wishes of the Maori leadership and caused great social and economic disruption to large numbers of people over some 60 years, the purchases under the Native Land Acts can be regarded as the most serious issue. This issue includes the persistence of heavy purchasing of remaining lands, well into the twentieth century, and the various mechanisms employed, such as the form of title created in 1862 and the way partition orders could be secured by purchasers as well as Maori owners.
- (c) Close behind, in terms of the quantity of land lost and the effect on a considerable number of people and districts, were the Crown purchases in the period 1840 to 1865. These purchases were frequently manipulative and

inequitable in themselves, but the Crown's total preoccupation with securing the freehold involved also the denial or discouragement of Maori leasehold and of joint venture arrangements and the coexistence of aboriginal title rights, which Maori did not wish to relinquish or did not believe themselves to have relinquished. This issue also arises in the Crown's handling of pre-1840 purchases.

- (d) Raupatu – that is, confiscation or forced cession after military occupation – was an evident Treaty breach, which drastically affected particular districts and tribes, although the area of land and the number of people affected were much less than were affected by manipulative land purchasing.
- (e) Closely related to (b), (c), and (d) is the Crown's failure to ensure that adequate reserves of land were maintained, either in the possession of Maori or in trust to fund Maori welfare. The 'trustee' role of the Crown, sometimes explicit, always implicit, in the negotiations for land was neglected and overridden by the drive to get possession of the land. The 'individualisation of title', which the Crown promoted, partly in the belief that it would assist or compel Maori to manage and develop their land, was distorted in the interests of land purchasing and reduced to a pseudo-individualisation, which made each owner's signature a marketable commodity but resulted in very few farms being marked out on the land. Apart from the general failure to reserve land, particular forms of reserve-taking affected particular groups of Maori: for example, the disappearance of most of the 'tenths' from the New Zealand Company settlements; Grey's annulment of the 'Crown tenths' in the Auckland pre-emption waiver purchases; the placing of reserves under the Public Trustee or Maori Trustee, where they were put under perpetual lease at peppercorn rents and some were sold; and the amendment of the law to permit the purchase of the leaseholds in the native townships.
- (f) The loss of ownership or control of rights in foreshores and inland waterways is almost as important as the loss of land (if not more so for some groups) and affected Maori everywhere. Given the Treaty undertaking to respect 'fisheries', and the lack of clear agreement that 'waters' were being alienated along with the land, this remains an issue to be addressed, although the Treaty of Waitangi (Maori Fisheries) Act 1992 has addressed it in terms of commercial sea fisheries.
- (g) Public works takings disproportionately imposed upon Maori land affected most Maori communities to some degree. The areas involved were not usually as large as those transferred through land purchasing but commonly affected important pieces of land, and the takings persisted after general land acquisition had largely ceased.
- (h) Issues such as the rating of Maori land and the good and bad consequences of development schemes are complex. Prejudicial effects undoubtedly occurred, but benefits also accrued. More than most, these issues call for a case-by-case consideration.

es.13 Relating the Criteria and Rankings to Districts

Potentially, the Rangahaua Whanui research on themes and issues can be set against the research on the various districts to help form conclusions about appropriate levels of reparation. The districts are large, however, and deliberately cross tribal boundaries; the ranking of the seriousness of injury is also expressed in broad terms, to promote reflection rather than to produce a formula. The themes can, nevertheless, be related in general terms to the districts, to highlight what has been the particular feature of a district's experience, and this has been done in part ii of this volume and in volume iii of the report. Thus, one district might have been most heavily affected by raupatu, another by Crown purchases, and a third by purchases under the Native Land Acts.

Focus on
processes or
focus on
outcomes?

A decision will first need to be made as to whether it is indeed the *means* by which land was transferred that constitutes the main basis of a claim or whether it does not so much matter *how* the land was lost as the fact that it *was* lost. In that case, the *outcome* of 150 years of colonisation, in terms of the amount of land left to a tribe and its current economic potential, might be the most important measure of injury done. The more populous a district in 1840, moreover, the more need the people had of the Crown's active protection. It is not only that people are the most important thing of all, as reflected in the whakatauaki cited above, but that, in Maori culture as well as British culture, generally speaking the more intensively land (or water) was used, the more valuable it was. In that sense, allowing a populous tribe's precious thousands of acres to be lost was a more serious breach than, or at least as serious a breach as, allowing the loss of a less populous tribe's hundreds of thousands. It is the people that are the measure. What was left on a per capita basis again becomes the guide.

It is a principal conclusion of this report that it will be necessary to reappraise, in the light of the historical evidence, the seriousness of Treaty breaches and their impact upon Maori. Judicial proceedings and commissions of inquiry (notably the Sim commission of the 1920s) have established a number of issues as particularly serious and warranting substantial remedy. The raupatu in Taranaki, Waikato, and the Bay of Plenty, and the Ngai Tahu claim, are obviously well established in the historical record and have rightly received early attention from the Waitangi Tribunal and in settlement negotiations with the Crown. But dubious methods of land purchasing and the leaving of tribes with minimal areas of land occurred in other districts as well. Indeed, it was still going on in the twentieth century in the populous districts of northern New Zealand. The upwelling of protest in the 1970s and the host of claims now before the Tribunal came largely from those districts and are mostly about the cumulative effect of the loss of lands, forests, and fisheries as a result of methods that bypassed tribal authority systems and left very little land in Maori hands. On this measure, other districts were affected at least as seriously as those defined by earlier inquiries.

es.14 Future Strategies

It may appear alarming that most of the various themes discussed in this report are considered to involve Treaty breaches, often serious ones. It may be wondered, 'How is all this to be made manageable, both in terms of research and reporting and in terms of the reparation due?' Yet the report has not added any category that is not already stated in Treaty claims. The claims reiterate constantly the loss of resources and the loss of rangatiratanga. All the report has sought to do is to reveal more about the processes that brought these losses about and to try to assess how heavily felt or widespread was the impact of various Crown actions. Hopefully, this will save many people a lot of time in future.

It would certainly be unfortunate if the revelation of the full range of Treaty grievances, whether through the claims, through this report, or through any other means, led the Crown to deny what is fairly self-evident or already amply admitted by former Ministers of the Crown or by earlier inquiries. Much of the vehemence of Maori protest derives from irritation at the refusal of governments, or Pakeha society generally, to acknowledge the extent and nature of avoidable injury that Maori have experienced. The spirit of the Treaty and of the Treaty of Waitangi Act call for a frank and generous acknowledgement by the Government of the range of reasonably demonstrated Treaty breaches and their prejudicial effects upon Maori.

Nor is the research task or the cost of reparation as insurmountable as is sometimes feared. Much will depend upon how Maori claimants and the Government view the task. Some alternative ways of approaching historical grievances have been raised for possible consideration in part iii of this volume, in fulfilment of the writer's supplementary commission of 4 November 1996 (see app iii). These are not recapitulated at length here, but for the purposes of this summary section, some points may be highlighted:

- (a) There was inadequate discussion with the Maori leadership and people in 1983 and 1984 as to how the massive review of New Zealand colonial history (about to be invited by the Treaty of Waitangi Amendment Act 1985, which returned the jurisdiction of the Waitangi Tribunal to 1840) was to be handled or how the redress was to be provided. That review was necessary and has had enormously positive effects in providing a due process for the expression and remedy of Maori grievances. But it also carries the possibility of having highly divisive effects upon Maori communities and of creating new inequities.
- (b) Complete agreement upon principles for evaluating claims and determining levels of redress is unlikely, but a period of reflection and discussion between the Government and the Maori leadership is likely to be very useful in shaping guidelines to secure an equity of outcome between tribes.¹⁹

Lack of wide discussion in the 1980s

Need for wider discussions now

19. The previous round of consultation was unfortunately distorted by the unilaterally imposed fiscal cap. If the restoration of damaged rangatiratanga is one of the necessary objectives, then clearly the fewer unilaterally imposed policies there are, the better.

'Full
restitution' or
restoration of
a capital
base?

- (c) The informed Maori leadership knows full well that the national economy cannot sustain redress based upon 'full restitution' (even if that were measurable with any degree of precision, which it is not). Without relinquishing their right, in principle, to full restitution, Maori negotiators have in practice already agreed to settlements based on the objective of restoring to tribes a sufficient capital base from which to rebuild their economic, social, and cultural autonomy. There is no reason why this basis of negotiation should not be continued.
- (d) More consideration should be given to extending the time period over which the retransfer of capital and assets to tribes should take place:

Staged
settlements

(i) Taken together, the ethos of a 'fiscal cap' (even if it has formally been removed) *and* a limited time-frame for settling Treaty claims would unduly constrain the Government and tribes alike and carry a serious risk of creating new inequities. It would be very sad indeed if the whole process degenerated into the modern equivalent of an 1839 rush for a limited pile of goods on a New Zealand Company ship. Yet time is money too, from the tribes' point of view. The sooner a significant reparation payment is received by a tribe or tribes, the sooner the tribal development programme can be advanced. A large part of the answer may be to reach *agreements* with tribes, say within two or three years, and to pay a substantial proportion of the settlement at that time, with a schedule of further payments to be made over 10 or 20 years, having regard both to what tribes urgently need in order to get started on reconstruction and to what is manageable in the national economy. This is precisely the kind of subject that is an appropriate topic of discussion between the Government and the national Maori leadership.

(ii) From the Pakeha perspective, there is much to be said for spreading the load over a number of years (the New South Wales Parliament agreed in 1983 to levy a portion of the tax base over 14 years to meet Aboriginal land claims). Historically, the Crown and settlers spent the first 100 years in New Zealand getting the land at low, or indeed derisory, prices; it would not be unreasonable to spend some decades in paying a fairer price. An appropriate analogy has been drawn between a foreign debt, to be amortised over time, and an internal debt to Maori.

Restoring ran-
gātiratanga

- (e) (i) Given the opportunities missed and the institutions already damaged or destroyed, the restoration of rangātiratanga can be only a work of time, based on the most widespread and careful discussion between the Government and the Maori people and leadership. But it would help in removing the prejudice if the obligation and goal were plainly accepted by the Crown. There will always be Maori and Pakeha peoples in New Zealand. Their integration with one another in the nation state will be advanced by the appropriate empowerment of Maori at local and regional, as well as at central, level.

(ii) The complexities of modern resource management and inter-group relations create a strong argument for facilitating the growth of local and

district Maori organisations on a more systematic basis than currently exists. Where there are overlapping and possibly competing Maori authorities in a given area – trust board, runanganui, local marae committees, for example – relationships with the Government and the private sector can be confused and confusing, to the possible detriment of Maori enterprises or joint venture enterprises. In this context, current discussions within Tainui on future corporate structures will have wide possible application. These discussions include debate on the elected component of management bodies and whether the elections should be on the basis of adult franchise or by hapu or marae representation. Other possible approaches are to revisit the legislation of 1900 or 1945 with a view to the evolution of regional councils and a national body such as the Australian Aboriginal and Torres Strait Islander Commission.

- (f) The process of researching and hearing the claims could become overly protracted in some respects.

Risk of overly protracted process?
Many issues still require very careful research and hearing

(i) It has not been too protracted so far. On the contrary, the questions at issue in Treaty claims are of such serious and far-reaching implications that they warrant the very careful consideration that they have been receiving through research and Tribunal hearings. Indeed, it is necessary that, in regard to many issues concerning land and water, these processes continue, so that the relationships between Maori aboriginal title right or Treaty right and the received common law and statute law are most carefully worked out for the enrichment of New Zealand life.

(ii) Nevertheless, there is a danger that Treaty claims are becoming hydra-headed, with claims by trust boards or runanganui being accompanied or followed by claims at the hapu, whanau, or individual level. This is partly because the 1985 amendment simply took the 1975 Act, which was drafted for *prospective* application and allowed ‘any Maori’ to bring a claim, and made it *retrospective*. There are some genuine dilemmas here:

But some claims may become hydra-headed

(1) Individual Maori and individual whanau have Treaty rights, and their claims may or may not fit precisely within the wider claims of hapu and iwi. In so far as a proliferation of small-group claims amounts to the declaration of an interest in the land concerned, the lodging of many claims may assist rather than hinder the process of resolution, especially if the claimants then cluster under a larger framework for the eventual hearing or negotiation. But if individual or small-group claims are each to attract the full privilege or entitlement of research funding, legal representation, and Tribunal hearings, the settlement of the large-group claims could well be delayed and the expense of the process would certainly rise.

(2) Delay and cost will also accrue if the large-group claims are worried down to the level of every individual block. To examine the Native Land Court purchases, for example, on a case-by-case basis would not only be very costly in terms of time and money but also very likely prove futile in many instances. The lack of surviving evidence and the

distance of time would make it at least very difficult to decide whether a block was awarded to, or sold by, the ‘right owners’. Given that hapu never were neatly defined groups sitting within neatly defined boundaries, the whole land court process involved a degree of arbitrariness, and it may be better for hapu as constituted now to recognise the overlaps and common interests than to continue the Pakeha game of drawing tidy boundaries and competing with each other. Treaty breaches arise as much in the cumulative effect of land loss, by a variety of means, as in alienations of particular parcels of land.

Broad-brush approach to settlement of issues up to a certain date

- (g) A comprehensive review of the historical evidence therefore suggests that a broad-brush approach would achieve substantial equity in respect of most major issues without highly particularised research. Serious consideration should thus be given to seeking settlements of the major historical issues, on a tribal or district basis, up to a chosen date, while leaving some particular points of grievance outside the settlement for further consideration, possibly by a less expensive process. To elaborate:

A possible divide at 1940?

(i) A suggested possible date is 1940; that is, 100 years after the signing of the Treaty. The principal reason is that by that date the emphasis of Crown policy had shifted from the systematic acquisition of Maori land for white settlement to the development of remaining land for Maori. Not that acquisition had entirely ceased – it had not. There seems to have been a spate of public works takings during and after the Second World War, while the compulsory taking of ‘uneconomic interests’ and compulsory tenure conversion intensified in the 1960s. Nevertheless, the sequence of great bursts of land acquisition, where the transfers were measurable in millions of acres, had come to an end. There was not much good land left, after all. Other reasons for suggesting 1940 are:

(1) The data on the land remaining and the Maori population in the various districts before substantial urbanisation had occurred provide a statistical base by which the outcomes of the historical period of land-takings can be measured, district-by-district or tribe-by-tribe. It would be possible to divide the Rangahaua Whanui districts into sub-districts, for example, complete a survey of land alienation under the various legal and administrative regimes operating in the areas, and assess the outcomes at 1940. If tribes wish to take a ‘broad-brush’ approach of this kind, it would then be feasible to move to settlements of pre-1940 issues on the basis of relatively limited additional research.

(2) Injuries occurring since 1940 have occurred within the living memory of many claimants. Of course, there are kaumatua whose memories go back much earlier than 1940, and the oral tradition from *their* kaumatua stretches back for generations. But any cut-off date will be arbitrary to some extent, and the claims lodged with the Tribunal in relation to particular blocks (as distinct from general losses) tend to be

more frequent for the post-war period because more people now living actually experienced the events.

(3) The picture of the Crown's actions towards Maori from the late 1930s onwards is complicated by the growth of welfare programmes and by some attempts to remedy past injuries. Research has not yet adequately explored these matters. (Relevant issues are alluded to in volume ii, chapter 15, part ii.)

(4) The onset of the Second World War marks a convenient watershed.

(ii) The suggested matters for possible inclusion in a broad-brush settlement package are:

- (1) old land claims and 'surplus land';
- (2) New Zealand Company purchases;
- (3) Crown pre-emption purchases;
- (4) FitzRoy's waiver purchases;
- (5) purchases under the Native Land Acts to 1940;
- (6) alienation of reserves and failure to maintain restrictions on title;
- (7) land taken for survey costs;
- (8) loss of land in the native townships;
- (9) public works takings to 1940;
- (10) loss of land through consolidation and development schemes;
- (11) inadequate compensation paid for gold-mining and access to other minerals;
- (12) takings of land in lieu of rates; and
- (13) alienations by the Public Trustee and Maori Trustee to 1940.

Issues for possible broad-brush approach

(iii) Neither the package as a whole nor any element within the package should be made mandatory upon Maori. Where any of these matters can be shown to apply in respect of a given tribe or district, it should be a matter of negotiation as to what is included in the settlement package and what is left out for further research and deliberation.

A negotiated package

(iv) It is a matter for individuals, whanau, and hapu to decide whether they include themselves within a major tribal negotiation and settlement, whether they include themselves for the most part but reserve for separate consideration a particular issue or claim, or whether they stand outside the tribal claim and pursue an entirely independent claim. The Government, and possibly the Waitangi Tribunal (through its statutory power of mediation), could assist the individuals, whanau, hapu, and wider tribal groupings to meet and make these decisions.

Small groups may cluster under a larger group

(v) The Government could reasonably be expected to give priority to the settlement of large-group claims over small-group claims, in the interest of restoring a capital base to the largest possible number of Maori people in the shortest possible time.

Priority for negotiation with larger groups

Foreshores
and inland
waters require
further
consideration

(vi) Claims in respect of the foreshore and inland waters may not be easily included in a settlement package relating to Treaty claims, because the question of still-enduring rights under aboriginal title has also to be resolved. Neither can they be dismissed until there is broad agreement about aboriginal title.

Post-1940
claims

(vii) Claims in respect of matters arising after 1940 should continue to be received, but consideration should be given to dealing with claims relating to small areas of land through the Maori Land Court and Maori Appellate Court, leaving the Waitangi Tribunal free to deal with issues of wider application.

es.15 In Conclusion

This report is submitted in the hope that the data and historical interpretations provided will assist the Tribunal and other interested parties in the swifter identification of Treaty breaches, the swifter resolution of major historical grievances, and the swifter return of resources to injured Maori communities on an equitable basis.

PART I

THE HISTORICAL EXPERIENCE (BY NATIONAL THEME)

pti.1 The High Price of Crown Protection: Land Transactions, the Treaty, and Instructions to the Governor

In the decades before 1840, Maori chiefs and communities welcomed engagement with the wider world but sought to control its impact upon them. Small groups of Europeans were welcomed among Maori communities, essentially on Maori terms. The recognition of a need to organise at intertribal level, against external dangers, led a number of northern chiefs in 1835 to accept James Busby's proposal to form the Confederation of the United Tribes of New Zealand. The confederation did not, however, function in practice as a government, and it received only qualified recognition from the British authorities.

By 1839, the threat to Maori from large-scale and organised private settlement from New South Wales, England, and France was very real, and the Maori acceptance of some kind of intervention by the British Crown was appropriate in the circumstances. The Treaty of Waitangi recognised the *tino rangatiratanga* of the chiefs, tribes, and individuals, and the joint enterprise of the Crown and the tribes in building a nation state. But the Crown's price for its intervention was extremely high – far higher than was made clear to Maori at the time, probably higher even than many British officials and settlers realised at the time or many non-Maori New Zealanders realise to this day. The recognition of Maori property and non-property rights in the Treaty and in Lord Normanby's instructions to Governor Hobson in 1839 was greatly in advance of what had happened recently in Australia and in European settlements in the Americas. British officials and their missionary advisers genuinely believed that recognition of their '*tino rangatiratanga*' (or 'possession') of land, forests, fisheries, and other valued things and the insistence that they be purchased 'by fair and equal contracts' would afford Maori some protection against a tide of settlement considered to be irreversible.

The introduction of the Crown's pre-emptive right of purchase was thus partly intended to protect Maori from private 'land-sharks'. But it was also intended to give the Crown the power to organise settlement where it wished (rather than where settlers and Maori wished) and to provide a revenue by which the colony would largely be financed. For Normanby's instructions assumed that 'the price to be paid to the natives by the local government will bear an exceedingly small proportion to

the price for which the same lands will be re-sold by the government to the settlers'.¹

This was not considered unjust to Maori, because they were supposed to benefit from the increased value of their remaining lands as settlement and development occurred. Long-term security for that, however, would ultimately depend on Maori retaining a pool of urban and rural land that they could transact in renewable leases, or joint venture arrangements, to gain access to the increased capital value. Yet the Crown interpreted its pre-emptive right as prohibiting the direct leasing of land to settlers as well as the sale of land. Governor Hobson, with the agreement of the Colonial Office, explicitly provided in the Land Claims Ordinance 1841 that leases, as well as purchases, by settlers from Maori were null and void unless investigated and confirmed by the Crown. The Land Purchase Ordinance 1846 prohibited direct leasing as well as purchase (although informal 'grass-money' payments were commonly made by runholders to local chiefs). Even the sale of forest trees and other resources began to be controlled by licence. If Maori were to realise money from their land, they could generally do so only by selling it to the Crown, at the Crown's low prices. This was especially so as organised settlement began to compete with Maori in the growing of food and raising of livestock.

This was the root cause of the alienation of the Maori land in the first 25 years after the Treaty, almost always for less than its immediate, unimproved resale value on the open market. Maori were effectively denied the full capital value of their land. Later instructions, from Lord John Russell to Hobson in January 1841, directed that the Department of the Protector of Aborigines was to be credited with 15 percent of the resale value of the land for the 'health, civilization, education and spiritual care of the natives'.² But Maori never did receive benefits from the land fund in that proportion. It was never clear whether the percentage for Maori would be from gross or net profits, and with land sales languishing in the early years of the colony, the Crown did not make net profits after the cost of administration was deducted. Profits from re-sales went back to general revenue and the cost of running the Protectorate Department (which would have been a charge on the 15 percent) was deemed by officials to be a valuable service to Maori. When Grey abolished the protectorate in 1847, payments were made to mission schools educating Maori, some medical care was provided, and some assistance was given to agriculture – all encompassed within £7000 of the civil list vote under the 1852 constitution, plus a comparable amount voted by the General Assembly. Maori did of course share in the advantages of the growing infrastructure and trading economy, developed largely by private capital investment and skills, but they were not able to participate directly in this through their own capital inputs and involvement in joint ventures, or through assistance in managing their own estates. With very few exceptions, Maori were essentially asked to hand over the land – cheaply – and remain on the margins. They felt increasingly that the Crown was not fulfilling its side of the relationship that Maori had intended when transacting land.

1. Normanby to Hobson, 14 August 1839, BPP, vol 3, p 87

2. Russell to Hobson, 28 January 1841, BPP, vol 3, pp 173–174

The arrangements put in train by the Crown in 1839 and 1840, although offering Maori protection from one kind of threat, therefore unfortunately introduced a systematic process of economic marginalisation and dependency, about which the 600 and more claims before the Tribunal now directly or indirectly complain.

pti.2 Old Land Claims and Crown Surplus

Note: The New Zealand Company transactions are considered in the next section. This section discusses the Crown's handling of the smaller claims, three-quarters of which were concentrated in the north of the North Island.

There were well over a thousand transactions in Maori land by private individuals and companies before 1840. The Europeans considered that they were buying freehold title, but the Maori view of the transactions commonly had more to do with admitting Pakeha into their communities in the expectation of ongoing benefits, without relinquishing rights in the land altogether. Commodity notions of the land trade may have come into Maori thinking in some parts of New Zealand, however, by the late 1830s.

The British Government's intervention in New Zealand was largely to control the land trade and partly to protect Maori from fraud, but it was also to regulate settlement and secure a revenue to run the colony. The intention was to grant only relatively small areas to settlers who had made valid purchases, the Crown retaining the 'surplus' to sell to other settlers. Governors Gipps and Hobson were therefore instructed to proclaim all pre-1840 transactions void until investigated and confirmed by the Crown.

The proclamations to this effect and the Land Claims Ordinances (of New South Wales in 1840 and New Zealand in 1841) setting up the Commissioners' Court were themselves enough to cause a great many of the speculative and shallow claims to be abandoned. Even so, over a thousand claims were lodged, affecting at least 9.3 million acres of land (or over 29 million acres if the larger view of the New Zealand Company's claims is included).

Leaving aside the company claims for consideration in the next section, by 1862 the Crown commissioners had judged 571,000 acres of the approximately three million acres of other claims to be bona fide; 267,000 acres of these were awarded to settler claimants and 204,000 acres were retained by the Crown (which normally limited the settlers to 2560 acres each, intending to sell the rest to other settlers).

The land claims commissioners in the 1840s (Godfrey and Richmond) usually required a minimum of two Maori witnesses to affirm the transactions. Their proceedings were well intended and in good faith – where Maori evidence contradicted settler claims, they preferred the Maori view. All this stands to the Crown's credit and compares well with the handling of settler claims in other parts of the Pacific.

Nevertheless, the adequacy of the Crown's proceedings in respect of the claims that were awarded has been called into question. In addition, it is suggested that the

Crown should not have taken a 'surplus', the original transactions having been between Maori and settlers, not the Crown.

There is no doubt, on the evidence, that the investigations should have been more thorough and admitted more of the Maori view of the transactions. The Land Claims Ordinances focused largely on the relations between the settler claimant and the Crown and did not address in any detail the issue of Maori understandings and how these might be ascertained. Nor did the ordinances deal systematically with such matters as the adequate provision of reserves, the possibility of returning some of the surplus to Maori, or the giving of effect to the trusts for Maori that were at the core of some of the transactions, especially those with the missionaries.

Instructions given to the land claims commissioners partly filled some of these gaps. (For example, they provided for additional payments to the chiefs.) But on one crucial issue, the instructions and the commissioners' proceedings in 1841 to 1843 actually narrowed the inquiry. The ordinances had referred to a variety of kinds of transaction – 'sales or pretended sales, leases or pretended leases, gifts or pretended gifts', and so forth – but in practice, the commissioners were instructed to proceed, and did proceed, as if there were only one kind of transaction – a sale, a conveyance of absolute title, with the Maori customary interest being entirely extinguished.

This approach seems to have been driven by the Crown's need to get a pool of surplus land for revenue purposes and for locating new settlers. But it was fatal to the recognition of other kinds of transaction that would have retained a Maori interest in the land and enabled Maori to participate on more of a 'joint venture' basis in the developing economy and society.

Evidence of the actual inquiries is rather thin, but they appear to have been conducted in a somewhat formulaic way. Maori witnesses were invited to concur that a 'sale' had occurred or that it had not. The commissioners seem to have looked for indications that an adequate price was paid, although what was an adequate price for unimproved land before 1840 is probably an unanswerable question. More serious, however, is the fact that they usually relied heavily on the statements of only two witnesses, who sometimes testified in Auckland rather than near the land. The Protectors of Aborigines were supposed to check on the customary rights of the Maori transactors and report to the Commissioners' Court. They did so in many cases but not in all.

By 1843, the Chief Protector, George Clarke, was very concerned that the complexity of Maori land tenure was such as to call into question the authority of the affirming chiefs to 'sell' the tribal patrimony. Godfrey and Richmond themselves also expressed doubts, and they urged upon the Governor the need for a double check of a protector's report and a physical survey of the land. But there was a great shortage of surveyors, and survey was expensive in bush country. Governor FitzRoy therefore began to issue Crown grants without survey of either the boundary of the settler's grant or the outer boundary of his alleged purchase from Maori. Moreover, settler grantees began to on-sell their grants. This was the source of

much confusion between Maori and settlers and was compounded by the lack of clarity about the boundaries.

Maori nevertheless supported many of the transactions and allowed the settlers quiet possession in a majority of the cases that were finally approved. They still generally had the power on the ground, and they wanted settlers in their vicinity for trade, employment, and access to the wider world. It was probably some years before they realised, in a number of cases at least, that all their transactions would be interpreted by the Crown as absolute alienations of the land. Problems arose if the land was not immediately occupied and someone arrived to take possession only years later. This typically occurred where the Crown had issued 'scrip' (land orders authorising them to take up land elsewhere while the Crown took over their original claims) and then took over their pre-1840 claim. Frequently, the Crown let its interest lapse or took it up years later. In Poverty Bay (which Godfrey and Richmond did not reach), Maori denied altogether to Commissioner Bell (1858–59) that they had sold land to the various traders and others in the district. The traditional view of Maori ownership and control was reasserted.

On the other hand, some of the claims were adjusted very deliberately and carefully, with boundaries defined and marked, additional payments made, and reserves agreed. Most notably, the Manukau and Waitemata Company's claim to the whole of the Auckland isthmus and adjacent harbours was cut down, with the consent of the Ngati Whatua chiefs, to 2000 acres in the township (now the suburb) of Carrington.

A contrasting example is the 80,000-acre Fairburn purchase to the south of Tamaki, agreed between Te Wherowhero and Henry Williams. The land was to be passed to the Church Missionary Society to end tribal fighting in the area in 1836, but with one-third to be available to Maori from the tribes concerned who wished to settle in the block. The land claims commissioners endorsed the arrangement, but Governor Grey neglected to make the one-third grant to the tribes, instead taking the bulk of the block as surplus and paying off Maori objectors.

The surplus land question is secondary to the transactions as such. Maori objected to the Crown's taking of a surplus in a number of cases, which suggests that they viewed the initial transactions as something less than absolute alienations. In other cases, they did not object. It depended essentially on whether the transaction as a whole had been properly discussed, agreed, and surveyed and whether Maori got the benefits of engagement with the settlers that they had intended in the first place. In some cases where the Crown awarded scrip to settler claimants, the claims seem not to have been carefully investigated by the commissioners at all.

Commissioner Bell's investigations from 1857 to 1859 did depend upon survey of the land – a very visible proceeding to Maori – causing some readjustments as it went on. But Bell declined to entertain Maori objections where Maori witnesses had already affirmed the transactions in Godfrey and Richmond's court some 15 years earlier. This placed great weight on the rights of the affirming chiefs and almost certainly shut out some valid objections by other right-holders. McCaskill's claim in Hauraki, for example, has rankled for decades. In general, there never was

a careful inquiry into what powers of transaction a rangatira possessed, although as previously noted, in many cases there was concurrence by Maori communities in the alienation of the land.

It is thus difficult to generalise about the old land claims in Treaty terms. The evidence of real inadequacies in some of the inquiries suggests that each one could bear re-examination. On the other hand, in most cases the surviving evidence is very thin. Moreover, there is no record of Maori objections to many of the transactions. A lot of them do seem to have been adjusted satisfactorily during the 1840s and 1850s, despite the shortcomings in the Crown's proceedings.

In view of the lack of careful investigation into the Maori understanding of the pre-1840 transactions, however, a doubt lies over all pre-1840 transactions. It is presumably because of that general doubt that the Myers commission in 1948 recommended that a general payment be made to allay outstanding grievances. That approach is entirely understandable, although Myers' attempt to reckon the discrepancy on the price due per acre, based on the difference between the area estimated to have been sold and the area surveyed, seems inappropriate, because Maori were not thinking in per-acre prices anyway. In fact, the Government in 1953 took the larger recommended payment of the majority of the commission (even though it was based on a confusion of the scale used to calculate the settlers' grant with prices allegedly payable to Maori at the time) and paid £61,307 in full settlement of claims over surplus land'. Of this, £47,150 was paid to the Tai Tokerau Trust Board and lesser sums were paid to the Whakatohea, Tainui, and Hauraki Trust Boards.³ This payment was made on the basis of much less understanding of the issues than is available now. 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. Such objections would seem to be most valid where the Crown paid off private claimants with scrip and took a large surplus but did not locate settlers on the land in consultation with local Maori. It would therefore seem appropriate to include the old land claims and surpluses as a factor to be considered in the overall outcome of Crown policies, region by region and tribe by tribe, having regard to where most of the land was alienated and where the least development occurred, but to make specific inquiries and specific redress only in cases where persistent Maori protest dating from the time of the Godfrey, Richmond, or Bell commissions appears to have been overridden or overlooked.

pti.3 Surplus Lands in the New Zealand Company's Districts

To its considerable credit, the Crown required that the New Zealand Company's claims had to be investigated by the Land Claims Commission before they would

3. Section 28 of the Maori Purposes Act 1953

be recognised. The Crown held to this position against extreme political pressure from London, invoking the Treaty of Waitangi as part of the basis for doing so. It is from that stand that the company's view of the Treaty as a 'temporary device for amusing and pacifying savages' did *not* prevail, and the Treaty gained some initial stature in the life of the colony. It is also to the Crown's credit that, in principle at least, it acknowledged the right of Maori to retain their pa and cultivations within the company's general purchase area.

There is also some justification for the Crown's view that the company had acquired some rights (a 'partial purchase') within the area where it had made agreements with some of the chiefs and landed settlers. The numbers of settlers arriving in Port Nicholson in 1840 and 1841, their aggressive occupation of Lambton Harbour and the Hutt Valley, and their claims on the Wairau, however, created considerable potential for violence. The Crown authorised the company to 'complete' the purchases commenced by the 1839 deeds and negotiate Maori consent to the settlement of further portions of the land as a means of peacefully resolving the problem. But only some of the chiefs had consented in 1839, and then only over limited portions of land. Rather than regarding the 1839 deed as void, thus requiring a fresh start, the Crown acknowledged a 'partial purchase' over a very large area once some chiefs had 'admitted the sale' (in the words of Governor Gipps' instructions to Governor Hobson). This placed the resident Maori hapu in a difficult situation. Mostly, they had to accept the additional 'compensation' payments (made at 1839 land values or less) and the reserves. It is clear that many did so with great reluctance and would have preferred not to have agreed to such minimal payments and minimal reserves as they received.

The Crown bound itself very publicly into the efforts to induce Maori to make way for settlement, with promises that pa and cultivations would be respected and a tenth of the surveyed subdivisions be set aside as an endowment trust for Maori education and medical care, along with some of the funds from the on-sale of lands (or some combination of these). The matter was complicated by the disinclination of Maori to leave their cultivations (which were on the land most desired for settlement). This left insufficient land for the tenths as well, and the various categories of reserved lands became confused and conflated. Further, Maori were not permitted to lease their land in competition with the company.

The shift in 1842 and 1843 from an *investigation* by Commissioner Spain of what land had been sold to an *arbitration* of money payments to Maori to relinquish the areas awarded to the company (except for pa and cultivations) is also problematic. Admittedly, it was very difficult to determine what were the customary rights to land in the complex tribal situation in Cook Strait and therefore very difficult to determine who had sold what. But it is also unclear whether Maori had fully consented in advance to a binding arbitration (with Sub-Protector George Clarke Junior acting on their behalf).

Grey's use of military force in the Hutt Valley and elsewhere in 1846 is also problematic. Certainly, the Crown had negotiated patiently for many years with Ngati Toa and allied groups occupying the Hutt Valley, and Grey had some legiti-

mate concern for the security of the Pakeha settlements. But Maori had legitimate concerns for their settlements too, and leading historians consider that the advance of troops on land recently vacated by Ngati Rangatahi (and the looting that followed) put Grey in the wrong in the conflict that then escalated.

The 1846 and 1847 agreements in London between the company and the Crown led to large areas being granted to the company or purchased and retained by the Crown, with only small proportions being retained by Maori. Thus, the Otakou purchase (1844) and subsequent grant to the company (1846), the McCleverty awards by which Maori relinquished most of central Wellington, the Porirua purchase and subsequent grant to the company (1847), the huge Wairau purchase (1847) and grant (1848), and the ‘completion’ of the Whanganui purchase (1848) all resulted in Maori getting much less than a tenth of the land as reserves. Nor did the Crown retain a tenth as an endowment to fund Maori purposes. There was some kind of Maori consent to each of the transactions (and sometimes very clear agreement and the explicit marking of external boundaries and the boundaries of reserves, as in Otakou and Whanganui). But the progressive enlargement of the Crown’s holdings, and the *proportional* diminution of the Maori interest, had the effect of leaving Maori on the margins of the settlements when the initial undertakings by the company and Crown were that the leading families (at least) would benefit along with the settlers in the growing towns.

The Crown’s assertion of radical title to the land, and prerogative rights to the foreshore, also resulted in town planning, public reserves takings, and harbour works without serious consultation with Maori being carried out or adequate monetary compensation, if any, being made.

As in the other old land claims, the Crown’s protection of Maori from unregulated private settlement, although real, came at a very high price.

pti.4 Pre-emption Waiver

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

FitzRoy’s waiver of Crown pre-emption in March 1844 was clearly in accord with Maori wishes at the time. Direct sale to private settlers enabled the vendors, at least in theory, to seek the best prices the market could offer. Initially, with an average land price of 16 shillings an acre, Maori seemed to do reasonably well, although they did not receive the one pound per acre that FitzRoy had thought should be a minimum price when he first proposed the waiver. The average of two shillings an acre (or 1s 3d an acre according to another source) paid under the October 1844 proclamation is, however, probably not a lot better than Maori had been getting from the Crown in its more generous moments (although average prices are very hard to determine). The pre-emption waiver purchases raised, for the first time, the question of whether the Crown should have required the private purchase of Maori land to be by public auction, with an upset price. As it was, the chiefs generally

made private deals with individual Europeans who approached them. It is not clear whether the rest of the hapu had much to do with the arrangements.

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

The checks made by the Protectors of Aborigines on whether the correct Maori parties were selling seem to have been fairly perfunctory. Most sales, however, took place in and around Auckland and were by the Ngati Whatua chiefs. A potential problem arose over sales in the Mount St John and Remuera areas of the city. Portions there had been held by Tainui tribes following Tainui's assistance in restoring Ngati Whatua to Tamaki–Makaurau after the Ngapuhi incursions. Ngati Whatua had not wanted to sell any more of Remuera, and the decision of the Tainui chiefs to sell seems to have contributed to a flow of sales in the area. But all groups cooperated in the boundary marking, and no subsequent protests are recorded.

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

The Crown's taking of a very substantial surplus (possibly 48,200 acres of the 97,427 acres alienated under the general waivers, according to Bell's 1863 figures, but only 16,427 acres according to the 1948 Myers commission) raises other Treaty issues. The recorded objections of the Ngati Whatua chief Paora Tuhaere and the obstruction of surveys in the Ihumatao area are evidence of some Maori dissatisfaction. Maori notions of sale still held connotations of transacting with 'my Pakeha' and of having some ongoing relationship with the settlers and with the land. The Crown was not supposed to be a part of the deal. That is what pre-emption waiver means. For the Crown to change the rules under Grey, without consulting Maori, is questionable in Treaty terms. On the other hand, unlike the pre-1840 purchases, the waiver purchases were being made after the establishment of British sovereignty and under British law.

The Crown's taking of considerable surpluses remains problematic for other reasons, however. The practical consequences for Maori would have been different if some of the surpluses (or the Crown tenths) had been used to assist Maori

enterprises in some way. But by the end of the waiver period, the Maori people of Auckland in particular had lost almost all their land except the Orakei reserve block. This was a far cry from the 1839 Crown and New Zealand Company proposals to ensure Maori a share of the economic growth and rising capital value of the towns.

pti.5 Crown Purchases to 1865

It is to the credit of the Crown that, after some seven years of hesitation, it recognised Maori property rights under the Treaty to uncultivated or so-called 'waste' lands, as well as to cultivated and settled land. This recognition was partly the result of understanding by local officials (starting with Busby at the Treaty negotiations) of New Zealand realities and their defence of them against the self-interested and ideological position taken by the New Zealand Company and its powerful political backers in England. It should be recognised, though, that Governor Grey and his colleagues in New Zealand might not have so readily resisted chapter 13 of the Constitution Act 1846 (which required that 'waste' land be registered as Crown demesne) without their sharp appreciation of Maori strength on the ground. Moreover, Grey's rejection of the 'waste land' theory was heavily qualified by his assertion of the view that Maori rights in land were so intersecting, confused, or inchoate as not to be really 'valid' proprietary rights. In consequence, although Maori interests in land had to be extinguished by purchase before the Crown could assert beneficial title, Grey's land purchase policy (like that of his chief land purchase commissioner, Donald McLean) was characterised by sweeping 'blanket' purchases, purporting to extinguish Maori interests across vast areas.

The truly damning evidence of Crown purchase methods before 1865 is the war that began at Waitara and then spread to most of the North Island. The Government's policy in Taranaki in 1859 and early 1860, however, was not wholly new. During Grey's first governorship and during McLean's management of the Native Land Purchase Department, Government officers in all districts had taken systematic advantage of the complexity in Maori land tenure between various hapu whose interests intermingled or between the smaller groups in residence and the 'overlord' chiefs whose mana extended across a number of hapu. The relative ease with which they could do this arose in part from the fact that Maori themselves were uncertain as to the authority of rangatira in this new activity called 'selling land'. Chiefs were expected to speak for their communities. But Maori witnesses before Commissioner Spain in 1843 were themselves divided on whether the consent of 'overlord' chiefs bound the lesser or 'resident' chiefs in the various villages within New Zealand Company purchases.⁴ Officials in fact worked through whatever grouping or level seemed most likely to lead to a purchase. There were usually some chiefs willing to sell, for a variety of reasons. Sometimes they represented wider

4. See the analysis of the evidence of Te Atiawa chiefs in Duncan Moore, 'The Origins of the Crown's Demesne at Port Nicholson, 1839–1846' (Wai 145 rod, doc e4), pp 206–217, 246–268.

community opinion but very often they did not, and by negotiating with them, and above all by making advance payments to them, the Crown officials set up very strong tensions in the society or exacerbated existing ones. The 1856 board of inquiry was well aware of Maori *reluctance* to sell for a variety of reasons: Te Heuheu and the interior chiefs were reluctant because of their fear of a loss of 'nationality'; Arawa because they did not consider they had a surplus anyway; and Poverty Bay because they were doing well out of growing wheat and trading it to Auckland and had no need or wish to sell land. The board was also aware of the hazards and injustices in the Native Land Purchase Department's methods, and it recommended a series of improvements to the procedures. There is little evidence to show that these were carried out. Serious fighting occurred among Maori in Taranaki and Hawke's Bay in the 1850s. The land purchase commissioners would sometimes leave highly sensitive areas for a time but would keep negotiating in other areas, quite explicitly hoping that pressure and working through client chiefs would cause resistance to crumble. Once they were confident that they had a deal with some influential leaders, they would try to push through a survey or make an announcement of the deal as a completed purchase, immediately putting the still resisting groups at a disadvantage. The resisters then felt obliged to participate for fear the land would be sold from under them.

Maori had a sharp awareness of what was happening and began, in tribal runanga or supra-tribal arrangements, to resist the sellers, especially the compliant chiefs, who had used the mana they had acquired in traditional ways to sell land absolutely (where previously they had authority only to make conditional transfers of rights over it). Maori were generally restrained in their methods of opposition to sales with which they had not fully concurred, but interruptions to surveys were very common. The officials' normal response was to halt the survey, negotiate further, perhaps make an additional payment, and alter a boundary or mark out a reserve. Almost never did they accept that the sale had not occurred once one section of the owners had taken a payment and signed a deed. The difference in Waitara was that, instead of negotiating further, the Governor sent soldiers to support the survey after Te Atiawa had non-violently resisted it. The other new aspect of policy at Waitara was the deliberate decision to set aside the authority of the senior chiefs like Kingi to express the views of the wider tribal community – an authority that McLean had found very useful to support at other times and places. The use of elderly and senior chiefs in Hawke's Bay and South Auckland was blatant. On this point, the private correspondence of McLean and his staff makes unpleasant reading: they knew that many of these chiefs were dependent on them for a succession of payments or gifts, but they despised them even as they were using them. Chiefs like Wiremu Kingi of Te Atiawa, a friend of the British and supporter of settlement within limited confines, would not be bought when it came to the essential tribal lands. So, in the end, he was attacked.

It has been commonly asserted, both contemporaneously and since, that the officials should have made a thorough prior investigation of customary ownership before they secured deeds of sale and made payments. Otherwise, all interested

parties could not have been identified or consulted and their prior agreement to the purchase secured. The criticism is essentially a valid one: advance payments and public announcement of a purchase should not have been made without investigation and marking of the land. That, too, was part of the fault at Waitara. But Maori land tenure was so complex in many areas that, with the best will in the world, officials would not always have been sure that they had identified all the owners, even if they spent months at prior investigation. This is largely because, amid the whole complex of kinship ties and different kinds of rights and interests, the concept of being an 'owner' could not become real and meaningful to Maori until the land at issue was defined – in the act of purchase itself. This is what was wrong with all proposals for *Domesday Books* and the like in advance of purchase. In Fiji today, although almost the entire country has been covered by a land commission and the land awarded to *mataqali* (roughly equivalent to Maori hapu), when development actually takes place on the ground, officials virtually have to start again and investigate title: they cannot rely simply upon the group names or genealogies collected by the commissioners, although these are helpful. The people did not tell the commissioners everything, and anyway the balance of rights has evolved over time.

What might have been practicable was to say that a specific area was 'under negotiation'; that was in fact commonly done and it did bring forward many interested parties. But until the land was physically marked upon the ground, Maori themselves could not be sure whether they were entitled to be involved. The physical boundary marking would have been expensive, especially if lines had to be cut, and it would have taken time, but it would have been a much more genuine way of buying or of bringing forward interested parties and getting their prior agreement to a contract of sale. Many persons involved in the 1856 board of inquiry recognised this. But it was almost never done: it was too expensive and too time consuming, and both the Government and the settlers were hungry for huge areas of land, where even physical walking of the boundaries was difficult. So officials generally relied on a 'good sketch plan'; they got their sales in many cases but they created a host of problems about boundaries and reserves and protests from owners of rights who had not been aware in advance of the sale. This is somewhat short of the full and free consent that Normanby's initial instructions to Hobson required.

Underlying the officials' rough and ready methods lay their conviction, articulated in London and essentially accepted by Governor Grey and other senior officials in New Zealand, that Maori did not really have 'valid' proprietary title to the uncultivated lands. The very fact of intersecting Maori interests reinforced the officials' view that they were buying Maori *rights*, inchoate and precariously held, not proprietary *titles*. They commonly said so, even in negotiation with Maori, and offered them, in return for relinquishment of all their vague claims, clear proprietary titles under Crown grant, together with the prospect of employment, trade, and development associated with the settlement.

Moreover, Maori, to a degree, accepted this reasoning. Maori law did emphasise relationships between gods and chiefs, chiefs and people, and all of them with the

land, rather than the European-style property titles. These values were modified, but not wholly displaced, by new perceptions deriving from the money economy. There were obvious attractions to a group in having a clear title to a reserve, or to a chief in having an individual farm, especially as Maori were constantly told that increased value and a host of commercial advantages would flow from it. But not all Maori by any means considered that their customary rights were inchoate and precarious: that depended very much on the local state of power and politics. Often it was those tribes relatively small in number in relation to a vast rohe that were most inclined to sell – Ngai Tahu, for example, and sections of Ngati Kahungunu in Wairarapa and Hawke's Bay, the latter recently returned from an exile to which they had been forced by the musket wars and perhaps still feeling insecure. Ngati Whatua in Auckland and Kaipara also were inclined to sell, welcoming the British alliance against powerful old adversaries among Waikato and Ngapuhi. Settlers and officials took this to be an indication that, the more association with settlement the Maori had, the more content they were; it was the remote interior people who were organising against selling. Thus, the 1856 board of inquiry asserted:

The price with them is a secondary consideration. If they can make up their minds to sell, it is a proof that they are impressed with the necessity of the new order of things which has been introduced, and to which they know they will ultimately have to conform; or, that seeing advantages to be derived, they, by the sale of land, court its influence. More or less, every transfer of land may be looked upon as a national compact, and regarded as binding both parties to mutual good offices.⁵

This summary, while not wholly wrong, is simplistic and complacent. Certainly, Te Hapuku and others had sold largely for the motives suggested, but Maori were not wholly oblivious to price. By the mid-1850s, price was becoming less and less a 'secondary consideration'. More importantly though, the 1856 board was correct in suggesting that Maori saw land sales as a 'national compact', binding both parties to mutual good offices. The officials were thus exposed in their own terms to the Maori dissatisfaction (to say the least) if the mutual good offices were not in fact demonstrated to Maori by the Government.

Disillusionment among Maori land sellers was indeed widespread by the 1860s, and this was partly because the British did not honour their undertakings to survey out reserves and issue Crown grants. Very little of this detailed administrative work was in fact done during the scramble to make the bulk of Maori land available for settlement. In this respect, the Crown very markedly failed to honour its undertakings. There was indeed a persistent fundamental ambivalence about what the reserves were for in the first place. Many had no restrictions on alienation at all, and were bought within a few years of the initial purchases. Reserves, then, were secure neither for Maori themselves to farm nor as an endowment for fixed-term leasing by which Maori could gain access to increased capital value.

5. BPP, vol 10, p 514

The percentages of land reserved from sale (whether or not Crown granted) varied widely but were not high. Nor was the slight proportion of reserves necessarily related to a sense of Maori retaining ample other land still in customary title. About 99 percent of the South Island had been alienated by 1865, the remaining one percent being divided between reserves for Maori residence and trust administration. Over 75 percent of the Wairarapa district had been alienated, about 3 percent of that being reserved. About 55 percent of South Auckland was alienated, and 3 percent of that reserved. Of course, when very large areas are concerned, as in the South Island and Wairarapa, one to 3 percent could represent a considerable number of acres. Given that the Maori populations were often quite small (numbering at most 1000 in Wairarapa and probably between 750 and 900 according to Paul Goldsmith⁶) that meant that in terms of acres per head Maori were deemed still to have a considerable patrimony. Even in a relatively populous district like Kaipara, where an estimated 57 percent of land was alienated by 1865, the reserves plus unsold land amounted to 376 acres per head.⁷ But this says nothing about the quality of the land remaining nor about the distribution of it among the various hapu. For example, although 45 percent of South Auckland lands was still in Maori ownership at 1865, much of that was in the Hunua and Kaimai Ranges and not readily suited to farming; much of the land remaining in Maori hands in Taitokerau (Northland) was of poor quality and is still difficult to farm today.

As is well known, when the British Government had intervened in New Zealand, it was aware that the Maori people were already suffering demographic decline from European contact and was firmly convinced that the continued decline and extinction of Maori was likely if not inevitable. By the early twentieth century (and, in some cases, well before then), officials became aware that this was not so, but in fairness to the officials before 1865, the evidence available, such as Fenton's 1859 census, confirmed the Maori population's decline. In that context, the officials could well have assumed, without seriously examining the situation, that most Maori had ample land yet available to them for their 'present and future needs'. In that Maori themselves, in asking for reserves, tended to insist most strongly on reserves giving access to mahinga kai – especially inland and coastal waters – officials often assumed that they had done the essential thing for Maori needs. Maori also requested the reservation of stands of timber, and this was sometimes granted. The forests in their unsold lands were also still important to Maori as sources of birds, pigs, and plant material, and while alienated lands remained uncleared, unfenced, and undrained, they too offered some facility for the hunting and gathering side of the Maori economy.

But none of this seriously involved Maori in the emerging modern economy, as was at least implicitly part of the duty of active protection assumed by the Crown in the Treaty and explicitly and repeatedly offered to the Maori by officials negotiat-

6. P Goldsmith, *Wairarapa*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first draft), 1996, p viii

7. R Daamen, P Hamer, and B Rigby, *Auckland*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first draft), 1996, pp 207, 213

ing for land purchases. The primary reason for this is that the Crown still saw the Maori as competitors, and the immediate focus of the competition was the leasing of land for stock pasturage. From the mid-1840s, Maori began to do well out of grass-money (rents) from the pastoralists. But the Crown had opposed direct leasing as it had opposed direct purchase from the outset; it was intended to be covered within the 1840 proclamation of the Crown's pre-emptive rights along with other forms of land alienation because (a) the Crown wanted to give the settlers the freehold they so passionately desired and (b) the Crown needed the revenue from the on-sale of land purchased from Maori. Hobson took steps in the Native Land Commission Ordinance 1841 to ensure that leases were included in the forms of alienation declared void unless confirmed by Crown grant; Grey ensured that the Native Land Purchase Ordinance 1846 debarred the private leasing of customary land, and he and McLean launched prosecutions against the run-holders in order to pressure the Maori in Hawke's Bay and Wairarapa to sell. A huge avenue of potential development through leasing or (in modern terminology) joint venture arrangements was simply closed off.

According to proposals by Grey in 1850, Maori were supposed to be able to lease reserves for which they had Crown-granted titles. But they were not, in fact, allowed to retain very large reserves where leasing could be developed: after the Kemp purchase, Ngai Tahu requested a coast to coast reserve along the Waimakariri Valley, but this was denied by Mantell; Canterbury Ngai Tahu got only their miserable 10 acres per head and Wairarapa not much more in the blocks sold.

McLean promised many reserves, but they were usually modest at best in size, and the promises were often unfulfilled; Maori rarely got Crown granted reserves. Early reserves, such as the New Zealand Company 'tenths' in Wellington and Nelson, were mostly administered (or maladministered) by trustees.

Yet even in respect of the South Island, the evidence shows that the settler politicians and officials never doubted that Maori still had ample land left and never questioned their own assumptions or examined the evidence of what Maori actually had. In 1864, for example, William Fox, trying to allay concerns of the Aborigines Protection Society about the confiscation policy, asserted that:

a quantity [of land] much larger per head than the average occupation of Europeans in this [North] island, is proposed to be set apart for them, on a graduated scale according to rank and other circumstances.⁸

During the debate on the Native Lands Act 1862, the official speakers frequently asserted that, of 29.6 million acres in the North Island, 22.6 million remained in Maori hands. They put it this way rather than that seven million acres had been acquired. Other speakers reiterated the persistent belief that Maori did not have valid title to land other than their cultivations and settlements. In short, the settlers were still envious of Maori landowners, seeing them as having a dog-in-the-manger

8. Fox to Bishop of Waiapu, 4 July 1864, AJHR, 1864, e-2, p 78 (cited in Gilling, 'The Policy and Practice of Raupatu in New Zealand', pt a, p 29)

attitude over land that settlers could benefit from and use more productively. This attitude in fact persisted well into the twentieth century.

Nor did the Crown take a substantial percentage either of land or of funds from re-sale to endow Maori development. Grey sold the 10 percent that FitzRoy had reserved from the pre-emption waiver purchases. The 'Auckland 10 percents' and 'Wairarapa 5 percents', from the profits of resale of the Crown purchases in the districts, supposed to be for schools, hospitals, and general development, petered out, and some were used for footling payments to chiefs to keep them compliant. The Native Reserves Act 1856 represented a belated attempt to make the formal reserves productive, mainly those in Wellington, Greymouth, and Nelson, but they were not added to. Maori got a little help with medical care and flour mills from the £7000 civil list arranged in 1852, plus a similar amount voted by Parliament, but this mostly went to salaries of Maori assessors and police; it did not contribute to general development. One might ask whether, in an age of laissez-faire and self-help, it is reasonable to expect the Crown to have done more to promote Maori economic development, but measured against the spirit, if not the letter, of Russell's 1840 and 1841 instructions (requiring a substantial endowment for Maori purposes), it all fell pathetically short. Not only did the Crown not actively assist Maori in these respects, but if Maori tried to help themselves, by organising their own runanga or the Kingitanga or through direct leasing or other economic ventures, they were angrily and ruthlessly undermined rather than allowed to stand in the way of the Crown and the settlers securing the title to the great bulk of the land. The £2000 educational fund from the Stewart Island purchase and G S Cooper's suggestion that reserves be entailed for a generation lest the chiefs sell them were belated and feeble recognitions that a problem existed. They show that ideas about helping Maori were not lacking, but they were not systematically and generally applied.

Why did Maori not bargain harder? Why did they continue to sell, often for very low prices? The various motivations for selling have been discussed, along with the customary reasons why non-sellers had difficulty in controlling sellers. Prominent among the reasons for selling was the ongoing aspiration among many Maori to engage with modernity – to leave behind or substantially curtail the traditional constraints of kinship and common property rights and develop land for themselves and their specific families or communities. Some chiefs articulated this as their reason for not joining the Kingitanga.⁹ The staggering non-success of such modernising endeavours in other parts of New Zealand did not deter others, elsewhere, from trying as well. H T Kemp, when Native Secretary of New Munster, took a census of his district in 1850 and 1851 and reported the disarray and decline of the village of the chief Ngairo in Wairarapa within a year of selling,¹⁰ but soon all the Wairarapa chiefs were offering land.

Another reason for selling was that many Maori had still not realised that 'sale' meant total loss of association with, or control over, the land. They knew by now

9. A Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand*, Australian National University Press, 1974, p 88

10. H T Kemp, statistical return, 15 April 1850, BPP, vol 7, pp 238–239

that the Pakeha were there to stay, often in considerable numbers. But chiefs often hoped still to be associated with the clusters of settlers they invited in to their rohe by selling land and to have some say in the developments that took place. Officials indeed encouraged this, and land selling chiefs often did have roles as assessors, and were given agricultural equipment or breeding stock to start farming. The line between 'selling' in the European sense and bringing in some Pakeha friends and allies in the Maori sense was still a blurry one.

Part of the reason for accepting low prices, minimal reserves, and little else was the lack of countervailing advice. Grey had got rid of the Protectorate Department in 1846, just at a time when it was showing a real understanding of emerging problems and some vigour, sometimes, in defending Maori interests. The contrast between the Otakou purchase of 1844, with the protectorate present, and later purchases, such as Porirua, Wairau, and the Kemp purchase, is striking. Paul Goldsmith has drawn attention to the way in which the missionary Colenso acted as some constraint on the Wairarapa land sellers until he 'sinned' and fell from influence.¹¹ And Dean Cowie has referred to the restraining influence of the Reverend Samuel Williams in Hawke's Bay, although McLean eventually ignored him.

The pressures of the money economy were very difficult for chiefs to resist. Mana depended to a large extent on having modern lifestyles, and this required cash. Moreover, by the end of the 1850s Maori up and down the country were caught in debt traps; threatened with prosecution for unpaid debts, they were then inclined to take more advances from Government officers on the remaining land. A cycle of dependency was developing. By 1858, as plans for direct purchase developed in the settler assembly, Maori began to accept advances from private traders and store keepers against their land.

This whole network of economic dependency, together with the growing realisation among Maori that 'sales' meant loss of control over the land, caused a wave of repudiation by the late 1850s – repudiation not only of land transactions but of the authority of British officials and legal structures that directly impinged upon Maori rangatiratanga or autonomy. The Kingitanga and runanga movements did not yet reject the Queen's sovereignty (or at least that was a minority view within them) but disillusionment with the promise of Waitangi, of an alliance with the Crown that would see Maori as mutual beneficiaries with the settlers of land development, was widespread. A policy of reserving land more generously, giving it clear title and developing lease terms that were fair to both landlord and tenant would have given Maori a very different image of the Crown's role. The surprise is not that Maori in many parts of the country resisted land sales and encroaching Government authority but that others still hoped that alliance with the Crown would yet be fruitful and continued to sell. In 1862, F D Bell, referring to the growing disaffection among Maori, stated in Parliament:

11. Goldsmith, pp 33–34

this arises simply and naturally from the one great mistake we have made, in always trying to give them the least price they would accept for their land, in order that we might ourselves get the greatest profit we could by sale. If you had said at the commencement that the Crown would obtain the Native land on a plan to secure the advancement of the race, as was specially done by the United States in one case a few years ago where a large sum – if I remember right more than £100,000 – was obtained and invested for the benefit of a particular tribe – you would have no distrust or dissatisfaction in the Native mind; but by always buying from them on the pretence that you wanted land for the purpose of colonization, without making provision – at least in the North Island – for their own improvement, you have at last brought the Natives to believe that your real object is to impoverish and degrade them.¹²

Although he had ulterior motives for making his statement, Bell had fairly accurately summed up the outcome of 22 years of Crown purchasing.

pti.6 Raupatu

Within weeks of the invasion of Waikato in July 1863, the Government introduced legislation authorising the confiscation of large areas of land with a view to (among other things) locating military settlements in the conquered districts. The legislation was first used in Waikato and Taranaki, then in the Bay of Plenty.

While the passing of the New Zealand Settlements Act 1863 seems to have been a lawful exercise of the powers of the Crown, the confiscations based on it appear in many respects to have been unlawful, in that they did not conform to the requirements set out in the legislation.¹³ In the late 1860s, when different legislation was put in place to allow for confiscations along the East Coast, it was used not to effect confiscations directly but as a way of forcing Maori to agree to ‘cessions’ of land. In any case, in view of the amount of pressure brought to bear, these policies involved clear breaches of the Treaty.

Confiscation was originally advocated as a way of punishing rebellion, of ensuring peace and security by military settlement, and of paying for the war by selling off surplus confiscated land. Initially, it was proposed to confiscate only limited areas in pursuit of these objectives, but the extent of the confiscations grew, and the reasons for confiscation multiplied as well. It was a logical extension of the original proposal to argue that large-scale confiscation was a necessary requirement if the Crown’s authority was to be extended over, and accepted by, Maori everywhere. Then confiscation became a way of effecting tenurial and social reform, by obliging Maori to accept land returned under individualised Crown grants in place of customary tribal titles. This also required very extensive confiscations. Provincial rivalries and private advantage also influenced the way in which the confiscations were implemented.¹⁴

12. NZPD, 1862, p 611

13. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wellington, GP Publications, 1996, pp 128 ff

A key element in all the confiscation legislation and proceedings was the way in which Maori were divided into either loyal or rebel categories, at the Government's discretion. In effect, rebels were those who could not prove to the Crown's satisfaction that they were loyal, and the word could thus mean both those who had simply resisted the Crown's aggressive and illegal acts and those who had more actively engaged the Crown's forces. But 'rebel' could also mean the relatives, hapu, or tribe of anyone who was not loyal. In Taranaki, Waikato, and elsewhere, it meant primarily supporters of the Maori King. At Opotiki and Hawke's Bay and along the East Coast generally, it often meant supporters of Pai Marire. In some places, it seems that 'rebel' simply meant people who owned land that the Government wanted. Very few of the many who were defined as such during the 1860s were, in the strict sense of the word, rebels, and for historians the word has become a convenient way of identifying Maori who, for one reason or another, were the subject of confiscation proceedings. By the same token, 'loyal' did not necessarily mean unqualified support for the Crown; indeed, it seldom seems to have done so. Nor, in any event, did loyalty, however defined, confer immunity from confiscation.

The New Zealand Government at first suggested to the Colonial Office that confiscation would be a mild form of punishment involving some kind of due process to distinguish those actually in rebellion. In fact, in Taranaki, Waikato, and some other places, the extent of the confiscations was excessive to the point of vindictiveness. Along the East Coast, there seems to have been, even by the standards of the day, little real excuse for the takings that occurred. Nor is there any sound basis in Treaty terms for distinguishing between the East Coast raupatu and the others simply because they were carried out under different legislation and involved (at Wairoa and Poverty Bay) an act of cession by the tribes. In both cases, a great deal of pressure was brought to bear. The imprisoning in the Chathams of Te Kooti and other Pai Marire from the Wairoa and Poverty Bay while the Government pressed for the cession of land was to prove utterly disastrous to the district. Maori efforts to cooperate with the Government by agreeing to the cession after Te Kooti's escape and attacks on the district were ill-rewarded. The confusion over the return of most of the ceded land (as in other confiscation areas) led to ongoing discontent and demoralisation. This almost certainly contributed to the sales of lands in the 1880s in this district, as in others where confiscations occurred. Again, in this respect, there is no essential difference between the 'cessions' and the 'confiscations', although the actual areas finally retained by the Government on the East Coast were much smaller than in Taranaki and Waikato.

It was understood from the outset, both in the New Zealand Legislature and in London, that the land of innocent or 'loyal' Maori would be included along with that of 'rebel' Maori in the confiscation districts. 'Compensation Courts' were set up under the New Zealand Settlements Act 1863 to hear applications by Maori to have their land returned to them. The very idea of separating 'loyal' from 'rebel'

14. H M Mead and J Gardiner, 'Ethnography of the Ngati Awa Experience of Raupatu' (Wai 46 rod, doc a18), p 107; V O'Malley, 'The East Coast Confiscation Legislation and its Implementation', report commissioned by the Crown Forestry Rental Trust, 1994, pp 63 ff

was futile in view of the way Maori communities were caught up in what in fact began as a series of British military incursions into their districts. The Pai Marire faith began entirely peaceably in about 1862 and, for most of its adherents, remained so; the confiscation of land for involvement with 'Hauhauism' was confused with the punishment of persons involved in the killings of Volkner and Fulloon and those who allegedly abetted them.

In any case, the Compensation Court was legalistic, slow, and cumbersome at the best of times, and often badly administered. The process of hearing claims involved interminable delays. By the end of the 1860s, only about 6 percent of the Taranaki confiscations were the subject of Compensation Court awards. The legislation had to be amended to extend the time and to admit claims too arbitrarily excluded by the primary Act or by the court's rules. Because of the difficulties with the Compensation Court, the Government resorted to a variety of ad hoc practices to distribute the land. These included the 1867 meeting of Governor Grey and Ministers with some tribal leaders at Tauranga to make broad decisions about the disposition of the land; the investigation and awards of land in the confiscation block by commissioners over the next 20 years; a similar investigation and distribution of Ngati Awa land about Whakatane by Commissioner J Wilson; the disposition of land in the Waikare–Mohaka confiscation under Donald McLean and the ratification of the arrangements in the Mohaka and Waikare District Act 1870; the confused arrangements of the Wairoa (northern Hawke's Bay) confiscation under the East Coast Land Titles Investigation Act 1866 (as amended in 1867); and the protracted and confused arrangements respecting an initial million-acre cession at Poverty Bay under the East Coast Act 1868, mostly carried out by the Poverty Bay Commission. Many of these arrangements lacked the 'due process' of a Compensation Court, and some claimants considered themselves prejudiced by that. This may be so, although whether the disposition of the land was by commissioners or by the court, it had prejudicial effects. Land awarded to 'loyal' Maori or (under later legislation) to surrendered 'rebels' was often not their own customary land. It was commonly returned under pseudo-individualised titles, sometimes freely negotiable, sometimes under restriction. The confusion and disarray caused by the fighting, by the confiscations themselves, and by anomalies in the return of land frequently led to the negotiable titles rapidly being bought by the Crown or private purchasers. The restrictions on title were progressively removed, and the land sold, during the remainder of the nineteenth century, although some was retained until purchased between 1910 and 1930 under the Native Land Act 1909. The important point to make is that, although the Crown officially returned a large proportion of the confiscated land, the initial confiscation and the subsequent arrangements made respecting the land contributed substantially to the rapid alienation of most of it anyway.

Claims that were simply abandoned by the Crown (in favour of dealing only with a much smaller block), as was the case with most of the initial Poverty Bay cession and parts of the eastern Bay of Plenty confiscation, fared better, remaining in Maori customary ownership until investigated by the Native Land Court. In Taranaki,

however, although the Compensation Court process ceased in about 1870, the Crown did not abandon its claims to the whole of the confiscated district. In the early 1870s, McLean made payments known as ‘takoha’ to leading men in the district to smooth the way for the survey and sale of the land by the Crown. But this only confused the issue of the status of the land, and reserves for the numerous Maori population were not made. By the end of the 1870s, Te Whiti, Tohu, and their people were challenging the whole confiscation from Parihaka. Although reserves were then allocated by the West Coast Commission, the forcible dispersal of the Parihaka community and arrest of Te Whiti and Tohu, and the placing of the land under the Public Trustee (through whom most of it was put under perpetual lease for a peppercorn rent and a considerable amount was sold) amounted to a second confiscation.

A numerical summary of the raupatu follows. Bear in mind that precise acreages were often not determined at the time and have sometimes remained in dispute to the present day. Some figures have had to be based on partial returns of one kind or another. Where alternative calculations are possible, they have been provided. If compensatory payments were made pursuant to the recommendations of the Sim or any other commissions, this fact has been noted. An attempt has also been made to identify the amount of returned land that was alienated within a short period of its return.

Waikato*	
Proclaimed:	1,202,172 acres
Retained by Crown:	887,808 acres [†]
Returned:	314,364 acres
Compensation:	£22,987 [‡] Waikato–Maniapoto Claims Settlement Act 1946; Waikato Raupatu Claims Settlement Act 1995

* AJHR, 1928, g-7, p 17

† The Sim commission thought that deductions would eventually have to be made to this figure for an area of 13,974 acres that was before the Native Land Court in 1928 and also to represent the £22,987 that had already been paid in compensation: AJHR, 1928, g-7, p 17.

‡ Reported by the Sim commission as having been previously paid: AJHR, 1928, g-7, p 17. This was possibly compensation made by the Compensation Court.

Taranaki	
Proclaimed:	1,199,622 acres [*]
Retained by Crown:	984,947 acres [†]
Returned:	214,675 acres [‡]
Re-acquired by lease (in 1912):	138,510 acres [§]
Re-acquired by purchase (Crown and private by 1974):	141,394 acres [¶]
Left by 1974:	81,299 acres
Compensation:	Taranaki Maori Claims Settlement Act 1944

* Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wellington, GP Publications, 1996, p 107

† Includes all land acquired by purchase or confiscation. Proclaimed area less area returned by West Coast Commission.

‡ Land returned by West Coast Commission: *The Taranaki Report*, p 12. This may need to be adjusted upwards to include lands reserved from blocks said to have been purchased. The Sim commission reported that 256,000 acres were returned: AJHR, 1928, g-7, p 11.

§ This was the land that while owned by Maori was under the control of the Public Trustee and was leased to Europeans. Market rents were not charged, and Maori owners consequently received a much reduced benefit. Reacquired by lease appears to be a substantially accurate description of the status of the land in question: *The Taranaki Report*, p 12.

¶ *The Taranaki Report*, p 286

| *The Taranaki Report*, p 286. This total represents the balance of the reserves made by the West Coast Commission and the residual of the lands reserved from purchased blocks.

Tauranga [*]	
Proclaimed:	290,000 acres
Compulsory sale:	93,188 acres [†]
Confiscated:	196,812 acres
Retained by Crown:	49,750 acres
Returned:	147,062 acres [‡]
Re-acquired by purchase (private, by 1886):	49,243 acres [§]
Re-acquired by purchase (Crown, by 1886):	4957 acres [¶]

Tauranga*	
Left by 1908:	42,970 acres [†]
Compensation:	Tauranga Moana Trust Board Act 1981

* AJHR, 1928, g-7, p 19

† Stokes, 'Te Raupatu o Tauranga Moana', p 146; O'Malley and Ward, p 41

‡ AJHR, 1886, g-10, p 1; O'Malley and Ward, p 41

§ AJHR, 1886, g-10, p 1

¶ Ibid, p 7

| O'Malley and Ward, p 91

Eastern Bay of Plenty–Opotiki*	
Proclaimed:	448,000 acres
Retained by Crown:	211,060 acres
Returned:	230,600 acres
European claims:	6340 acres

* AJHR, 1928, g-7, p 21

Eastern Bay of Plenty–Opotiki (Whakatohea)	
Rohe:	491,000 acres*
Confiscated:	173,000 acres [†]
Retained by Crown:	151,000 acres
Returned:	22,000 acres
Left by 1908 (returned):	20,290 acres [‡]
Left by 1908 (other):	15,159 acres [§]
Total left by 1908:	35,449 acres [¶]
Compensation:	Finance Act (No 2) 1946

* AJHR, 1928, g-7, p 21

† AJHR, 1921, g-5, p 27

‡ AJHR, 1908, g-1m, p 1

§ The Stout–Ngata commission reported a total holding for Whakatohea, including the 20,290-acre Opape reserve, of 35,449 acres. Other lands held apparently totalled 11,959 acres, leaving a shortfall of some 3200 acres, if the total holding of 35,449 was correct.

¶ AJHR, 1908, g-1m, p 1; 1921, g-5, p 27

Eastern Bay of Plenty–Opotiki (Ngati Awa)			
Rohe:	107,120 acres [*]	Rohe:	194,120 acres [†]
Confiscated:	107,120 acres	Confiscated:	194,120 acres [†]
Retained by Crown:	29,250 acres	Retained by Crown:	29,250 acres [†]
		Returned to Arawa:	87,000 acres [†]
Returned:	50,321 acres	Returned:	50,321 acres [†]
Granted:	27,549 acres	Granted:	27,549 acres [†]

* AJHR, 1928, g-7, p 21

† Alternative figures counting the disputed 87,000 acres as Ngati Awa land.

Hawke's Bay (Mohaka–Waikare)	
Proclaimed:	270,000 acres [*]
Previous Crown purchases:	18,156 acres [†]
Retained:	52,050 acres [‡]
Returned:	199,794 acres
Re-acquired by purchase (Crown by 1931):	92,735 acres [§]
Left (by 1931):	107,059 acres

* D Cowie, *Hawke's Bay*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), September 1996, p 101. One contemporary estimate was 340,500 acres: see AJHR, 1871, c-4, p 2.

† J Hippolite, 'Raupatu in Hawke's Bay', p 46. Boast says that a block called Mangaharuru, area unknown, had also been previously acquired: Boast, 'Esk Forest Claim', doc j1, p 2.

‡ Cowie, p 112. Boast, p 2, gives 45,623 acres.

§ Boast, p 45

Hawke's Bay (Wairoa)	
Cession block:	250,000 acres [*]
Retained by Crown:	42,738 acres [†]
Returned:	157,000 acres [‡]

Hawke's Bay (Wairoa)	
Re-acquired by purchase:	146,080 acres [§]
Compensation:	Section 29 of the Maori Purposes Act 1949

* AJHR, 1871, c-4, p 2

† Hippolite, *Wairoa*, pp 37, 39

‡ Ibid, p 42

§ Ibid, p 44

Poverty Bay*	
Cession block:	1,000,000 acres [†]
Retained by Crown:	56,000 acres [‡]
European claims:	1200 acres [§]
Returned:	780,000 acres
Compensation:	Section 58 of the Maori Purposes Act 1950 [¶]

* V O'Malley, 'The East Coast Confiscation Legislation and its Implementation', report commissioned by the Crown Forestry Rental Trust, 1994

† A rough estimate. A tally of the lands retained or returned gives 837,200 acres.

‡ O'Malley, p 168

§ Ibid, p 128

¶ Ibid, p 171

pti.7 The Native Land Court

The purpose of the Native Lands Acts of 1862 and 1865 was to convert Maori customary rights in land to a title under the received law and to authorise direct dealing between settlers and Maori for the land. The Native Land Court established by the 1862 Act was essentially a panel of chiefs under the chairmanship of the local resident magistrate. The 1865 Act, however, replaced this with a court comprising settler judges and one or two Maori assessors. Under Chief Judge Fenton, the court developed formal rules, including the refusal to accept evidence not presented in court. An individual Maori or group could therefore claim the land and oblige others to attend or lose any opportunity to be named in the title.

Prior dealings in land were no longer illegal and sections of Maori right-holders were usually exposed to the blandishments of private and Crown land purchase agents before the land blocks were taken through the court. The high costs of survey, court fees, legal expenses, and travel and living costs associated with attending the court directly or indirectly became charges on the land. The debt traps

associated with claiming or defending rights to land contributed to its rapid alienation.

The form of title created by the 1865 Act required that blocks should have no more than 10 owners and should be under 5000 acres. In fact, partly because of the cost and delay involved in surveys and partly to facilitate dealing, the court awarded blocks of any size to 10 or fewer owners. Since they were named as absolute owners, not trustees, the persons in the title could sell their interests severally, and commonly did. The '10-owner system' thus effectively deprived many hundreds of other right-holders of their land.

Restrictions on alienation were put into some of the titles from 1867 but not systematically. Maori petitions and criticisms of fraudulent dealings increased and open scandals associated with land purchases in Hawke's Bay led to a commission of inquiry in 1873. The outcome was a new Act, the Native Land Act 1873, which required the court to list the name of every owner in a block on a memorial of ownership. Each owner now had to consent to an alienation, but once a majority of signatures had been obtained, purchasers could apply for the partition of the block. The piecemeal purchase of signatures, followed by successive partitions of the land, became the normal practice of land acquisition for the next half century or more.

Although alienation was somewhat slower under the 1873 Act than under the 1865 Act, it was possibly even more disruptive of Maori society. Where the chiefs named under the 1865 Act were disposed to act as trustees, and resolutely resisted the pressures to sell, the blocks could remain in Maori hands and perhaps be developed. But under the 1873 Act, every owner's signature became a marketable commodity. It was virtually impossible for tribal leaders to prevent interests being sold and partitions being set in train. Settler hostility to 'tribal communism' underlay the so-called individualisation of title in the 1865 and 1873 Acts, but it was generally only a pseudo-individualisation, for it rarely resulted in an individual farm being demarcated on the ground. The succession of intestate interests was awarded to all children equally and further fragmented the titles. No single legal personality to enable the multiple owners to manage the land was instituted until the incorporation of owners was provided for in the 1890s.

For these reasons, it was extremely difficult for Maori to organise and embark upon the sustained development of the land. With land purchase agents always active, communities became divided and demoralised. It was much easier to succumb to the pressure of debt and sell one's interest than to try to farm the land. Even the leasing of land (which was almost as common as the selling of it in some districts in the initial years of direct dealing) gave way to selling, largely because owners could not pay tenants for improvements on the land or for restocking it – at least not without selling other land. The consequence was the continuing sale of individual interests and a form of pauperisation.

Actions that might have prevented the worst effects upon Maori (such as strictly prohibiting dealings prior to the making of court awards, selling by public auction only, and using salaried surveyors attached to the court) were suggested by disinterested persons such as the former chief justice, Sir William Martin, but were

not accepted by the Government or Legislature. The Native Lands Frauds Prevention Act 1870 required the certificate of a trust commissioner that transactions were equitable and not in contravention of any trusts, but the Act was administered unenthusiastically and some trust commissioners were negligent or worse. The 1873 Act required that district commissioners be appointed as officers of the court to set aside reserves of at least 50 acres per head (which Maori communities could hold under customary law if they wished), but this provision was bitterly opposed by Chief Judge Fenton, no alternative funding was provided to administer the system, and it fell into abeyance. Power of sale of Maori land was prohibited from 1873 and mortgaging stopped altogether in 1878. Nevertheless, the practice of advancing credit to Maori, whether for the purpose of putting land through the court or for general purposes, remained a constant pressure on them to sell their interests.

It is fair to add that many Maori were themselves resistant to restrictions being imposed upon the titles because of the bureaucratic processes involved in their removal and the sense that they were no longer in control of their own land. This also resulted in Maori not supporting the Native Land Administration Act 1886. In this law, John Ballance did make an effort to empower block committees and have the land sold or leased through public auction, but the requirement that the committees had to hand the land over to official district commissioners for subsequent management proved unacceptable to Maori. The Act nevertheless contributed to the improved legislation of 1900.

Over all, the period 1865 to 1899 saw the transference from Maori to Pakeha hands of most of the land and the control of the North Island. The principal instrument of that transfer was the Native Land Court, just as the legislation of 1862 and 1865 had intended. During that period, about 11 million acres were transferred to Pakeha ownership under the Native Land Court. Dr Michael Belgrave's figures for Auckland district suggest that about two-thirds of this land was transferred by Crown purchases and one-third by private purchases. The Crown monopolised purchase in the central North Island while private purchasers dominated the East Coast districts. Approximately, a further 3.8 million acres were acquired by confiscation, about 2.4 million acres being retained and perhaps a million more acres being returned and subsequently repurchased. Of the approximately eight million acres remaining in Maori hands in 1900, about a third was marginal land and another third was leased.

In the various research districts of New Zealand defined for the Rangahaua Whanui programme, alienations under the Native Land Acts (and land repurchased after confiscation and nominal return) to 1899 were in the order of the figures given in the following table. Small amounts were purchased in the South Island and the Chatham Islands, although almost all the former had been acquired before 1865. (These figures have been digitally calculated from maps in the 1940 *Historical Atlas* project, now held in the Alexander Turnbull Library in Wellington.)

The greatest impact of purchases under the land court was felt in the Auckland, Hauraki, Gisborne–East Coast, volcanic plateau, King Country (after 1890), Hawke's Bay–Wairarapa, and Wellington regions, although there was no district

District	Alienations to 1899 (acres)	District	Alienations to 1899 (acres)
Auckland	1,200,000	Volcanic plateau	1,500,000
Hauraki	600,000	King Country	1,200,000
Bay of Plenty	700,000	Whanganui	700,000
Urewera	300,000	Taranaki	700,000
Gisborne–East Coast	1,300,000	Hawke’s Bay– Wairarapa	2,100,000
Waikato	1,000,000	Wellington	1,500,000

Alienations under the Native Land Acts to 1899

that did not experience some impact. In Waikato, Taranaki, and the Bay of Plenty, considerable areas of the confiscated land returned to Maori by the Compensation Court or commissioners were soon repurchased. The districts left with least Maori land in 1900 (besides the South Island) were Auckland, Hauraki, Waikato, Taranaki, Poverty Bay, Hawke’s Bay–Wairarapa, and Wellington. These included districts with the heaviest concentrations of Maori population.

An obvious product of the alienations and the manner in which they were carried out was the growth of Maori protest, which was such that by 1895 the Kotahitanga movement could achieve a reasonably effective boycott, for a year, of the Native Land Court. The Kotahitanga, the Kingitanga (Kauhanganui), and the emergent Young Maori Party led by Apirana Ngata joined forces in a demand for new land laws that would return to Maori committees, representative of hapu and districts, control of both the determination of title and the management of the land, together with a cessation of sales in favour of leasing lands for settlement.¹⁵ Notwithstanding the individual involvement of many of the same men in sales of land, this protest, itself the culmination of a dozen regional movements and hundreds of individual petitions and protests, is hard to gainsay.

In fact, political and official bodies had repeatedly not denied but *concurred* with what Maori were saying. A succession of Ministers, such as J C Richmond (1866–68), McLean (1868–76), Sheehan, and Grey, then Bryce and Ballance, had admitted the validity of many Maori protests about excessive and inequitable alienations. So, too, had commissioners inquiring into the land laws, such as Haultain in 1871, C W Richmond in 1873, and above all Rees and Carroll in 1891. All had expatiated on the ‘evils’ and ‘abuses’ of the system. Again and again, governments had tampered with the land laws, until they were a maze and a confusion, impossible to negotiate and an arena for speculators and lawyers possessed of capital rather than small farmers seeking secure titles. The system was a trap for inexperienced Maori, who became caught in a tangle of expenses for surveys, court fees, and lawyers’ and

15. See Stout–Ngata survey, AJHR, 1907, g-1c (cited in Loveridge, p 14)

agents' fees – all charged against the land. On the determination of titles through the Native Land Court, the Rees–Carroll report was utterly damning. T W Lewis, the Under-Secretary of the Native Department for more than a decade, told the commission:

The whole object of appointing a Court for the ascertainment of Native title was to enable alienation for settlement. Unless this object is attained the Court serves no good purpose and the Natives would be better off without it, as, in my opinion, fairer Native occupation would be had under the Maoris' own customs and usages without any intervention whatever from outside.¹⁶

As Lewis said, the kind of title created by the Native Land Acts served the purpose of land alienation, not land development. Every Maori owner's signature became a marketable commodity. According to Rees, improvement and tillage of the land remained at least as uncertain a proposition for any owner under land court titles as under customary law:

If a man sowed a crop, others might allege an equal right to the produce. If a few fenced in a paddock or a small run for sheep and cattle, their co-owners were sure to turn their stock and horses into the pasture. That apprehension of results which paralyses industry casts its shadow over the whole Maori people.¹⁷

Rees and Carroll themselves reported on the promotion of false testimony by the court procedures:

The Natives, being compelled to enter the arena of the Court and contest the title to land, which they could with ease have settled in their own runangas, learned to look upon our method of getting land as merely another form of their old wars. Formerly they fought with guns, and spears, and clubs; now, to accomplish the same end, the defeat of opponents and the conquering of territory, they learned to fight with the brain and the tongue. As in the olden times all means were fair in war, so, pitted by our laws against each other in Courts they held all stratagems to be honest, all testimony justifiable, which conduced to success . . . So utterly unreliable have many of the Maoris become during late years that it is now the fashion amongst some of them not only to spoil the living, but to plunder the dead. Fabrication of spurious wills has, in the words of several witnesses, like the false swearing in the Native Land Court, 'become a fine art'. Natives who, speaking in their own runangas, will testify with strict and impartial truth, often against their own interests, when speaking in the Native Land Court will not hesitate to swear deliberately to a narrative false and groundless from beginning to end.¹⁸

Another 'insider' view came from Native Land Court Judge George Barton. Referring to pressure brought to bear by influential land purchasers, he said:

16. Report of Native Land Laws Commission, AJHR, 1891, sess 2, g-1, minutes of evidence, p 145

17. Ibid, p 1 (cited in S Daly, *Poverty Bay*, Waitangi Tribunal Rangahaua Whanui Series, 1997, ch 6)

18. Ibid, p xi

No one who has not made the endeavour can appreciate how difficult it is for a Native Land Court Judge, without status, without even the protection which publicity of the Court proceedings gives to other Judges – to resist the influences brought to bear upon him.

... A judge subjected to such obstacles and to such influences, not to mention others not alluded to here, must at last in sheer despair let things slide rather than court his own destruction by futile resistance to frauds and wrongs of powerful persons.¹⁹

Efforts at reform all stopped short of producing necessary protections and security for Maori. Proposals to limit the issue of credit to Maori were not adopted and restrictions on the sale or mortgage of land were applied with some success in some laws (for example, section 17 of the Native Lands Act 1867) and in respect of some places, and were upheld by some Ministers or commissioners but not others. Amendments to the laws in the late 1880s especially made the removal of restrictions relatively easy. In that context, much land long deemed inalienable, and meant to be for a tribal patrimony for the future, began to be alienated. Safeguards such as the Native Lands Frauds Prevention Act 1870, or the system of district officers created by the Native Land Act 1873, were administered in a lack-lustre fashion and not at all in some areas. There was almost no enforcement of the minimum area of land to be retained by Maori for future needs, nor a taking up by the Crown of an endowment for Maori purposes, as envisaged in some of the instructions to governors of the early 1840s. Measures to ensure that Maori got a fair price, such as sale or lease by public auction, suggested by prominent men like Sir William Martin in 1865 and 1870, were not adopted (except in Ballance's inoperative 1886 Act). Dealings with land before it passed through the court were not illegal until 1883 and even though made illegal then by Bryce (on penalty of a fine) the prohibition was not strong enough to check the trade, and in any case the restriction did not bind Crown agents. Most Maori blocks were subject to some kind of advances or contracts of sale before they got to the court.

How much responsibility do Maori themselves bear for this morass?

- (a) There is no doubt whatever that many Maori were willing sellers, engaging eagerly in the land trade and living well for short periods. Others did so less willingly, being caught in a sequence of debts, partly created by the costs of securing land titles themselves. The habits and necessities of consumer spending and the cultural imperatives of hospitality caused many to grow dependent on advances on land sales, resulting in a steady erosion of the tribal patrimony.
- (b) It is evident too that, long after the 1873 Act required the names of all owners to be entered on the memorials of ownership, many of the chiefs continued to ensure that only their names went on the titles of land blocks. Part of the reason was no doubt the chiefs' self-interest and their desire to secure their status in the new kinds of land title as in the old. But part of the

19. AJHR, 1893, g-3, p 19 (cited in K Orr-Nimmo, 'The East Coast Maori Trust', report commissioned by the Crown Forestry Rental Trust, 1996, p 58)

intention of the more responsible chiefs (like the Ngati Maniapoto leaders who did not want to go below hapu title) was to stop the uncontrollable loss of land that began with the pseudo-individualisation, which required the listing of all names.

- (c) Then there was the constant flow of requests from Maori for the Government or the court to lift restrictions put on alienation, and their reluctance to put land under official trustees or commissioners of reserves at all. Maori (with good reason) distrusted official managers and did not like being treated paternalistically. Was it then largely their own fault that, even when they wanted to, they did not allow governments to restrict more of the titles and prevent the land being frittered away?

The answer that the Maori leaders themselves constantly gave was that they wanted not paternalistic controls but rather to ‘deal with the land as we wish’. What that meant, however, was not a piecemeal dissipation of individual interests. What it meant was a restoration of the collective, lineage-based authority of the traditional system, with reciprocal rights and obligations of chiefs and people. And this, the settler parliaments and governments consistently declined. Almost all plans for returning the adjudication of title and management of the land to runanga were rejected. The Native Land Court of 1862 (a panel of chiefs chaired by the local resident magistrate) was changed to Chief Judge Fenton’s style of court under the 1865 Act. McLean’s Maori Committees Bill of 1872 was not proceeded with; only the sprawling and largely powerless committees created under the 1883 Act were allowed. True, Ballance’s Native Lands Administration Act 1886 gave more place for block committees, but the committees then had to hand the land over to Pakeha officials for subsequent dealings, and Maori declined to do that. Only in 1893 (with the Mangatu No 1 Empowering Act) and 1894 (with section 122 of the Native Land Court Act) did the law support the system of incorporation of owners and elected block committees that the East Coast and central North Island chiefs had been seeking. As for the Government’s resumption of the purchase of individual interests after the repeal of Ballance’s 1886 Act, Major Ropata Wahawaha in the Legislative Council cut through the Government’s tendentious claims:

do not say, or pretend to say, that these clauses [in the Native Land Court Act 1888] do fulfil that [Maori demand] and that they do return to the Maoris the mana of their land.²⁰

In 1894, in a debate in Parliament with James Carroll, who had referred to Maori land rights under the Treaty, Sir Robert Stout, former premier and future chief justice, stated:

It was quite correct what the Honourable Member had said – that bit by bit this Treaty had been violated. Of course, the lands had not been taken away from the Maoris without compensation; but he believed, if they had adopted the Committee system which was provided for in the Act of 1886, they would have had greater

20. NZPD, vol 43, p 230

control over their lands than they now possessed, or were likely to possess under what was called the individualising of their titles.²¹

This was a not inaccurate summary of the previous 35 years' experience.

Given this level of understanding among many of New Zealand's leading politicians, why did they not do more about protecting Maori land and rangatiratanga? Basically, they stopped short of every measure that would prevent the freehold of New Zealand's undeveloped land transferring to settlers' hands. This was partly because both individual settlers and governments needed the increased capital value of the land. Most immigrants had left situations of tenancy or labouring employment and come to the colony expecting to get land and become farmers in their own right, building a property in which their investment of labour and capital would be secure and would be able to be passed to their children. There was also a raw level of racial prejudice; few European immigrants were prepared to be tenants of people they called 'the Natives'. This attitude was constantly expressed in the daily press and taken up by settler leaders. In the 1886 election, H A Atkinson, several times the Premier, bitterly attacked Ballance's Native Land Administration Act because it proposed Maori leaseholds as well as freeholds:

I say that no more land should be left to the Natives than is sufficient to provide them with an ample living. That the rest should be bought by the Crown at a fair price . . . I'll never be a consenting party to see a large class of Maori landlords set up in this country.

Ballance, the first leader seriously to support Maori leasing since Grey's 'new institutions' of 1862, said that he would not support the setting up of a 'Maori aristocracy' in New Zealand (any more than a Pakeha one) but that he would prefer Maori landlords in New Zealand to absentee white landlords living overseas (of which in fact there were a great many).²² But Ballance also vigorously pursued the freehold in the opening up of the King Country, indeed hypocritically saying in Parliament that he was going quietly in negotiations with Ngati Maniapoto leaders in order that their suspicions would be disarmed and they would offer the freehold.²³ The Government in fact needed large land blocks to resell in order to offset loans for the main trunk line and other major projects. That was the purpose of the Crown monopoly in the area (via the Native Land Alienation Restriction Act 1884). Most of New Zealand's capital works from 1840 to 1900 were in fact funded through sales of Maori land; Maori members of Parliament were well aware of this, and they opposed the Railway Loan Bill in 1882 (as they opposed most of the land Bills) but they were too few in number to be very effective.

The other main reason for the sluggishness of parliamentarians in reforming the Maori land laws was their fear of upsetting titles. In respect of a partition concerning the Maori Land Court's decision on the Maungatautari block, the 1887 to 1888

21. NZPD, vol 85, p 556

22. *Waikato Times*, 1 April 1886

23. *Wanganui Chronicle*, 14 January 1886

Native Affairs Committee of Parliament (in an unfortunately undated minute) observed:

If the discontent of the Natives left out is to be weighed (without a legal rehearing) there is no title in the country worth the paper it is written on. That there has been a great deal of injustice and a miscarriage of justice with regard to Court titles seems to be beyond dispute but the evil would be multiplied many fold if the Government set itself to override the law and to indirectly or directly review titles.²⁴

In 1886, when Ballance had, in the Native Equitable Owners Act, legislated to allow the court to hear applications from Maori excluded by the 10-owner rule of the 1865 Act, there were objections to the cost of re-litigating the multitude of cases involved. One member suggested that a parliamentary committee should look into each case. Another, S Locke, suggested that compensation should be paid from colonial revenues, rather than re-litigating each case and restoring land rights²⁵ – essentially the approach that 100 years later is being taken under the Treaty of Waitangi Act 1975.

Notwithstanding, therefore, the biting criticisms of very senior political leaders and officials, governments tinkered with the existing system, rather than radically reforming it. The settler demand for freehold land was very strong, and the Maori population was still believed by many to be declining (although others, including senior politicians and officials, believed that it was stable). Having in previous decades frustrated and undermined repeated Maori efforts, under independently minded and perceptive leaders, to secure the control and use of their own land rather than have it converted to negotiable paper titles, the settlers then held Maori in contempt for the resulting outcome, as disillusioned leaders who had engaged optimistically with the Government after the wars struggled to regain some sort of place for their people in the new system. The late nineteenth and early twentieth centuries were a period when settler racism was probably more virulent than it had been at any other time. But the leaders of the Kotahitanga and Kauhanganui, East Coast leaders who been developing the system of block committees and incorporated owners, Maori members of Parliament like James Carroll (who were highly skilled in the processes of government and law), and new leaders like Apirana Ngata were about to have another attempt at controlling the remaining 7.5 million acres of Maori land (see sec pti.15).

pti.8 Reserves and Restrictions on Alienation

Formal equality of Maori with settler in the new nation state depended upon their having the free choice of which of their lands to retain both for their own residence and for farming and commercial development. ‘Free choice’, however, is not a

24. NA Wellington, le1/1887/8

25. G Phillipson, ‘The Ten Owner Rule’, report commissioned by the Waitangi Tribunal, 1995 (Wai 65 rod, doc 23)

concept that easily applies in a situation where people without capital other than their land and inexperienced in a money economy encounter the enormous pressures of modernisation. Two major issues arise in respect of the Crown's responsibilities: first, did the Crown have a duty to ensure that, at the very least, Maori were able to retain land they had expressly indicated a wish to retain; secondly, over and above that, did the Crown have a duty to ensure that Maori retained adequate lands for their present and future needs, even when they were prone to sell it, for one reason or another?

The making of formal reserves after the purchase of Maori lands was meant to serve a number of purposes. It was largely related to the objective, enjoined in Normanby's 1839 instructions to Hobson and later instructions, of ensuring that Maori had land for their present and future needs. But there was no careful consideration, at least before the drafting of the Native Land Act 1873, of what those needs might be and how much land would be required to meet them. From the outset, there was confusion over whether reserves were (on the one hand) mainly for the residence and occupation of Maori, or for their own farming and commercial ventures, or were on the other hand to be vested in trustees, as in the New Zealand Company tenths scheme, as an endowment to create revenue for Maori education, medical care, and religious instruction. Some reserves did end up under the administration of trustees; others were simply nominally excised from purchases and were themselves purchased within a few years or eroded gradually by successive partitions.

The other mode of trying to ensure that Maori retained adequate land was to place restrictions on the titles. This was done, to a greater or lesser extent, under the Native Lands Act 1862 and its successors, and it normally took the form of a restriction on leasing for up to 21 years only. In governments' view, the purpose of the restriction on title was not so much to reserve the land indefinitely but to put some restraint on sales until the Maori owners had become more experienced in the modern economy.

In practice, the distinction between these systems was not clear. Formal reserves amounted to about 54,000 acres of land (according to a return under the Native Reserves Act 1882) and tended to be more enduring. Restrictions on title, which were much more generally used, could be removed by the Governor in Council (until 1882) or by the Native Land Court. By the Native Land Act 1909, most restrictions on title were abolished, but there were statutory requirements in the Act itself that were designed to prevent Maori vendors from becoming 'landless' and that had to met before the alienation of any Maori land could be approved by the Maori land boards.

What was not contemplated by the planners of the colony in 1840 was that Maori should themselves become lessors, in competition with the settlers. Early Maori efforts to let Wellington properties were discouraged. For their part, Maori were reluctant to hand property over to be administered by trustees. In the event, the New Zealand Company tenths formally came under the ineffectual administration of trustees appointed under the Native Trust Ordinance 1844, while the McCleverty

awards (for which Maori exchanged many of their interests in Port Nicholson) remained Maori land. In practice, the chiefs let some of either category, informally, for short terms.

During the period of Crown purchases, reserves were usually kept to a minimum by the land purchases commissioners. As is well known, in the Ngai Tahu purchases Mantell and others denied Maori requests for very large reserves, sufficient both for Maori farming ventures or to lease to settlers, and left them a miserable 10 acres per head on average. Much the same thing happened in the purchases in the northern South Island and in many of the huge purchases in Hawke's Bay and Wairarapa under Donald McLean. The concept of a large tribal patrimony was not sustained by Crown policy. Nor did Maori secure a substantial place in the growing towns, as the New Zealand Company negotiators had originally promised. Partly because Maori had their own ideas on the disposition of the former villages and cultivations in the towns, the settlers' and official objective soon shifted towards getting them out of the towns altogether – a policy that persisted even to the compulsory acquisition of remnants of the Orakei reserve in Auckland as late as 1947.

Under the Native Reserves Act 1856, commissioners of native reserves brought some order into the administration of the remaining company tenths, which began to yield some revenue. The 1862 amendment Act did not require formal vesting of reserved lands in the Crown. The Greymouth reserves then came under the commissioners, but distrustful of the Crown, Maori did not generally use the system.

The sweeping purchases made by the Crown under pre-emptive right before 1865 did not lead to the creation of an extensive pool of reserved land. Very often, 'reserves' were simply lands exempted from an initial purchase and were commonly bought by the Crown within a few years without being either surveyed or made the subject of Crown grants. In terms of the initial instructions to governors to ensure that Maori retained sufficient land for future needs, this was a serious breach of the Crown's obligations. But the administrative machinery of the colony was fairly rudimentary, and very little of it was spared to formalise Maori reserves. There were, however, about 67 Crown grants made to individual chiefs who had taken a leading role in the big land sales, together with 61 Crown grants for urban and peri-urban sections in the first settlements.²⁶ These were made partly in consequence of the strong ideology in favour of individual titles, but the fact that they went only to chiefs gives them something of the quality of bribes or rewards for cooperating with land-selling. They contributed to the reaction that was developing in the Kingitanga and in runanga around the country against the sale of land by chiefs.

Under the Native Land Acts (and in respect of much of the land confiscated and returned), restrictions in the title against sale and mortgage were the normal mode of ensuring that Maori retained adequate land. But some Ministers were lukewarm about applying restrictions, and Chief Judge Fenton of the Native Land Court was

26. AJHR, 1862, e-10

ideologically opposed to them. Lands passing through the court under section 17 of the Native Land Act Amendment Act 1867 had the best chance of being restricted from sale and mortgage. ‘Trust Commissioners’ appointed under the Native Lands Frauds Prevention Act 1870 and ‘District Officers’ appointed under the Native Land Act 1873, who were supposed to ensure that Maori retained adequate land for their future needs, were largely ineffectual.

Paradoxically, it was the Native Department staff, and some of the commissioners appointed to administer confiscated lands, who were most conscientious in checking on Maori needs before they recommended that restrictions be removed. Throughout the 1870s and early 1880s, they frequently resisted the requests of Maori themselves to be allowed to sell the land. In the 1870s, Alexander Mackay (in the South Island) and Charles Heaphy (in the North Island) worked to protect reserves from alienation and won considerable confidence from the Maori beneficiaries. Heaphy managed to get additional land formally leased or put in trust.

The deep ambivalence in Maori attitudes to reserves and to restrictions on alienations remained, however. Basically, Maori resented Crown paternalism and having to go through officials to deal with their own land. This is a major reason why more land was not put under the Native Reserves Acts or restricted. Nevertheless, Maori did commonly ask for restrictions to be put on their titles given through the court. This was done in respect of about 1.8 million acres out of approximately 14 million acres that passed out of customary tenure via the Native Land Court and the commissioners who dealt with confiscated lands. At the same time, Maori leaders also asked Crown officials for protection from the pressure and the temptation to sell land to pay debts. Officials generally supported this view, while also approving requests for the removal of restrictions when Maori owners appeared to have ample other land or proposed to use the proceeds of the sale to buy general land elsewhere.

In 1882, Bryce introduced a new Native Reserves Bill, vesting the formal reserves in the newly created Public Trustee. He joined other speakers in expressing the view that the decline in the Maori population had been halted and that the population might soon increase, and he congratulated himself on the 1882 Bill, saying that it would go a long way to maintaining ‘an inheritance of land for them in the country which at one time solely belonged to them’.²⁷ His Bill did provide for the leasing of some reserves by public tender on fixed terms and with rent reviews.

Maori members were as suspicious as ever about the administration of reserves by officials, citing cases of sale. Their fears were justified. By 1887, the Crown had given way to lessees’ pressure to grant perpetual leases, at peppercorn rents (without periodic revision), for many of the reserves vested in the Public Trustee, especially the Greymouth reserves. By 1892, the perpetual leases were extended to the west coast settlement reserves and thereafter to the older reserves, such as the remaining Wellington tenths created after the arrest of Te Whiti and the dispersal of the Parihaka community. Moreover, the Public Trustee was given the power of sale

27. NZPD, vol 42, p 652

over the west coast settlement reserves. This management of reserves so markedly in the interests of settlers rather than the Maori beneficial owners is an evident breach of Treaty obligations. Of the 222,696 acres of west coast settlement reserves vested in the Public (later Maori) Trustee, 141,394 acres were subsequently sold to the Crown or to lessees.²⁸

From 1888, legislation made it progressively easier to remove restrictions on title. From this date, many reserves made in earlier years (including some of the tenths and South Island reserves) were sold and restrictions on the titles of Maori land passing through the court were quickly removed. This action was mainly a function of the desire to acquire land for settlement, which was supported by successive governments, conservative and liberal, at least until 1930. A common justification was that Maori were not using the land (which overlooked the problems created by the pseudo-individualisation of title).

In the Native Land Act 1909, all restrictions on title were removed. Maori land could be alienated freely, subject to restrictions in the Act itself, which required Maori land boards to check that, among other things, Maori were not being left 'landless'. Some 3.5 million acres were sold under the 1909 Act, much of it land that had been under restriction from the 1860s or later.

The whole question of reserves and restrictions on title reflects the difference between the view of Maori as individuals having full control over their property (including the right to sell it) and that of Maori as inheritors of a tribal patrimony, much of which (at least) should, in the light of the Crown's duty of active protection, have been preserved. Maori themselves were not entirely consistent in their thinking or their actions on this most fundamental issue, but the Crown overwhelmingly favoured the former view (and took full advantage of the land-selling individuals or majorities), while the Maori leadership, through the Kotahitanga and other movements, strongly supported tribal control. The preferred Maori model, as expressed by leaders on the East Coast from the late 1870s and by the Kotahitanga and related organisations in the 1890s, was not to create titles based on individual owners in the first place (and then try to restrict them) but rather to create a tribal title with individual rights of occupation or lease for Maori villagers or farmers, and for the tribe, as a body corporate, to lease land to, or engage in joint ventures with, settlers. Government efforts that made gestures in this direction (such as the provision for setting aside substantial areas of papakainga land in the Native Land Act 1873 or the Maori Land Administration Act 1900) soon broke down, although the principle of incorporation of owners was adopted from 1894 and many of the development schemes from 1928 onwards were organised around descent groups.

It is also relevant to note that several witnesses to the Commission of Inquiry into Native Land Laws in 1890 (T W Porter, E Harris, Wi Pere, Hamiona and Mangakahia) expressed the view that simply setting apart reserves was of little benefit to Maori; they required assistance with the use of the land, which meant assistance

28. *The Taranaki Report*, p 286

with title questions, grants or loans for fencing and stocking, and technical advice.²⁹ This was not in fact seriously attempted until the 1920s.

Whatever the objectives espoused by the Crown in the 1840s, the outcome was that, by 1939, Maori had manifestly not enough land for their needs. No tribe had an adequate patrimony for both residential and commercial purposes. Maori had a very limited place in the property and commerce of the towns, few areas of special access to mahinga kai, and only a small portion of former wahi tapu formally reserved.

pti.9 The Validation Court

The confusion of Native Land Acts and other legislation governing the transfer of Maori land resulted in numerous titles being flawed and incomplete, especially those commenced under legislation that was subsequently repealed. Settler complaints about the restrictions led to the appointment of commissioners (one of whom was to be Maori) under the Native Land Amendment Act 1889 to investigate transactions and to validate them if, in the commissioners' view, they had been entered into in good faith and were not contrary to equity and good conscience.

The first commissioners, Edwards and Ormsby, investigated a claim to Whatatutu 1 block in Poverty Bay and considered it bona fide but found non-compliance with requirements of the Native Land Act 1873, such as absence of interpreters' signatures on deeds or blank spaces on deeds to be filled in when individual owners were located and agreed to sell. They considered the transaction to be beyond their powers to validate. In *Poaka v Ward*, a case taken on appeal in 1890 by the Maori owners, the Court of Appeal ruled that, even though the 1873 Act had been repealed, the restrictions on titles created under that Act remained and the formalities for the removal of them had to be completed, including obtaining the signatures of all owners before a partition could proceed. In the circumstances, the 1890 Commission of Inquiry into Native Land Laws (the Rees–Carroll commission) recommended that legislation be passed to better address the problem. At least one witness to the commission, T W Porter, a former land purchase agent who had worked for the Edward–Ormsby commission, came to doubt the merits of many of the transactions. 'I have seen cases where the Natives have been very considerably wronged,' he said.³⁰

The validation of titles became a major plank of Liberal Government policy. The Native Land (Validation of Titles) Act 1892 empowered the Native Land Court to inquire into transactions on the application of any person concerned. If the court found that the transaction was fair and reasonable and not contrary to equity and good conscience, that the Maori owners had been paid, that any non-compliance with procedures for the removal of restrictions or other irregularities was inadvertent and without intent to evade the law (an impossible category to prove), and that

29. AJHR, 1891, g-1, pp 12ff

30. Ibid, p 12

the Maori owners had not been prejudiced, it could grant a certificate recommending to Parliament that the transaction be validated. The Act was strongly opposed by Maori members, who saw it as meeting the grievances of settlers but not of Maori.

Judge George Barton presided over a number of cases in Gisborne in 1893, and he certified 7359 acres for validation under the 1892 Act. Included in these cases were the claims of one F J Tiffen, who had made purchases from only some of the owners in a memorial of ownership, in breach of the 1873 Act. Barton chose to treat the purchases, admittedly unlawful, as bona fide, and he recommended validating the partition and grant that Tiffen had sought in the block concerned.

Barton later retracted his broad interpretation of the Act, which favoured the validation of transactions that might have seemed in 'equity and good conscience' from the purchasers' point of view but were clearly illegal in the light of *Poaka v Ward*. The Minister introducing the Act in 1892 had stated clearly the Government's intention not to validate the illegal transactions of powerful people trying to evade the law. Barton nevertheless still believed that Tiffen's claims should be validated, and he recommended wider powers for the court. The Tiffen case shows the inherent difficulty in deciding whether a deficiency in a transaction was merely 'technical' or whether it involved a serious breach or evasion of laws, which (inadequate though they were) were put in place to protect Maori.

Parliament recognised the difficulty to some extent, and the Native Land (Validation of Titles) Act 1893 repealed the 1892 Act. It set up a special court, the Validation Court (which nevertheless comprised Native Land Court judges for the most part) and formulated a new proviso before a flawed transaction could be validated: the claimant would have to show that the contract would have been binding on the Supreme Court if it had been made by Europeans and was equitable, was fully understood by the parties, and was for a sufficient price. Siân Daly believes that the Act made it easier for illegal transactions to be validated in that it allowed the setting aside of a host of special provisions pertaining to Maori land only – the extra protections that had been provided because of the particular features of Maori titles.³¹ Her evidence of proceedings before Judge Barton shows that a series of transactions was validated even though they did not comply with the statutes in force at the time. Barton considered that the transactions were not contrary to equity and good conscience and were made with the full understanding of the contracting parties. This is an exceedingly doubtful proposition in respect of the New Zealand Settlement Company's purchases in the early 1880s and the subsequent mortgages to the Bank of New Zealand.

The Validation Court operated mainly in the Poverty Bay and East Coast district. The number of cases heard and the acreage affected are difficult to determine without a complete search of the minute books, but the *Appendices to the Journals of the House of Representatives* returns show some 77 cases over the period 1893 to 1899, affecting several hundred thousand acres of land. Many of these cases related

31. Daly, sec 6.4.2

to blocks acquired by the New Zealand Land Settlement Company that had passed to the Carroll–Wi Pere Trust in 1892, following the failure of the company and the commencement of forced sales by the mortgagees (the Bank of New Zealand Estates Company). Judges Barton and Gudgeon approved the bringing of many more blocks – totalling up to 120,000 acres – into the trust to serve as additional security for the mortgages to the Bank of New Zealand. Commonly, this followed agreements reached by Carroll and Wi Pere with the former Maori owners of the land (or some of them), but occasionally Maori objectors appeared in court, although their objections were not sustained. Judge Batham, from 1897, declined to bring more lands in, because he considered the whole enterprise unsound.

Katherine Orr-Nimmo has made a study of the Carroll–Wi Pere Trust and its successor, the East Coast Maori Trust. The second chapter of her report discusses at length the role of the Validation Court in the involvement of more and more of the blocks acquired by the New Zealand Land Settlement Company to support its mortgage. She comments:

The process was usually the validation by the court of a voluntary agreement made between Maori owners of a block and the trustees. Frequently a minimal amount of evidence was taken. Because the Court operated largely through the validation of voluntary agreements, the judges did not have to give grounds for the equity of their decrees. The advent of Batham, who had reservations about the extent of the jurisdiction given by the 1893 act, marked the end of easy validations for the trustees. Once Apirana Ngata appeared in the court, arguing on strictly legal grounds against applications to validate alleged agreements relating to various Ngati Porou blocks, the trustees' efforts at enlarging their trust came to an abrupt end.³²

The Validation Court judges had very great power in the district, and their varying responses make an interesting commentary on their assessment of equitable transactions. In 1899, Judge Batham returned some lands to Maori that had been the subject of dealings before they passed through the Native Land Court. After the formation of the East Coast Maori Trust in 1902, the Validation Court oversaw the distribution of charges between the various blocks in the trust, but independent accounting advice was also sought.

The Validation Court operated also in the Auckland area in respect of 11,385 acres and in Wellington, Thames, Taranaki, and Whanganui in respect of an estimated 1790 acres (the reports do not always give acreages, and this is possibly an under-estimate).

Claims by settlers for the validation of their purchases were the subject of both Maori objections in court to particular partitions and several petitions to Parliament about the process as such. It is an inherently dubious proposition that illegal transactions should be subsequently validated, especially if Maori objections have been set aside. Arguably, if Maori owners objected at all to the transactions, which were after all illegal, they should not have proceeded. Certainly, Batham considered that 'the intended scope of the Validation Court has been far exceeded in respect of

32. Orr-Nimmo, p 132

the Carroll–Wi Pere Trust'.³³ By the Native Land Act 1909, the Validation Court was abolished and its powers transferred to the Native Land Court.

pti.10 Goldfield and Other Mining Policy and Legislation

This summary draws largely upon a report prepared by Dr Robyn Anderson for the Waitangi Tribunal Rangahaua Whanui Series.³⁴

In applying the Crown's right to minerals within New Zealand after 1840, the Government initially modified the royal prerogative in part recognition of the guarantee made to Maori under the Treaty of Waitangi, respecting Maori desires to withhold from mining certain lands still under customary title. A minute of the Executive Council at the time of the first gold discoveries in the Coromandel states:

Although the Crown is entitled to all gold wherever found in its natural state the Council is unanimously of the opinion that it would be inexpedient to attempt fully to enforce Her Majesty's Royal Prerogative Rights in the case of gold found on Native land because it would be impossible to satisfy the owners of the particular land in question – or the Natives of New Zealand generally that such a proceeding on the part of the Government is consistent with the terms of the Treaty of Waitangi which guarantees to them the undisturbed possession of their lands, estates . . .³⁵

The Government thus did not in principle acknowledge either a diminution of the royal prerogative in respect of gold or a Maori right to the gold. Essentially, it decided to negotiate access agreements with the owners of customary land, in exchange for payments related to the number of miners entering the land and a share of the miners' licence fees. The Patapata agreement of 27 November 1852 between Acting-Governor Wynyard and chiefs of the Marutuahu tribes opened the way for mining in the Coromandel. The Taitapu rush of the early 1860s in the northern South Island was also based on an agreement between the Crown and local tribes.

The Government of course considered itself under no obligation to negotiate with Maori in respect of mining on Crown land, sub-surface rights being deemed to have passed to the Crown on purchase of the surface rights. (From the mid-1840s, this was commonly stated in purchase deeds.) The Gold Fields Act 1858 regulated mining on Crown land.

As early as the 1850s, however, pressure mounted from miners to open up more land held under customary title. While the Government continued to acknowledge the restrictions the Treaty placed on the application of the royal prerogative and often assured Maori that their rights would be protected, it very soon not only

33. Confidential memo, ma i 1907/816 (cited in Orr-Nimmo, p 57)

34. R Anderson, *Gold Mining: Policy, Legislation, and Administration*, Waitangi Tribunal Rangahaua Whanui Series, December 1996

35. 'Extract of Minutes of Executive Council', 19 October 1852, dispatch 121, encl d, g8/8 (cited in Anderson, p 13)

attempted to bring land within the State's mining jurisdiction (to appease miners' demands) but also refused to relinquish the control and management of the fields to Maori, as they had requested. Instead, Maori were paid a percentage of the revenue generated by mining, which was initially reasonable but diminished over time.

Despite Maori continuing to offer the Government reasonable cooperation in its efforts to open up further fields for mining, the Government's kawatanga authority was increasingly asserted over Maori attempts to maintain tino rangatiratanga over land on which gold was mined. The formal agreement in 1862 with local tribes in respect of mining on the Taitapu reserve in the northern South Island included a clause empowering the Governor to make rules and regulations for the goldfield without further Maori consent – a power that led to a loss of control by Maori over the land and, eventually, to its sale. On the Coromandel, the Government had difficulty in enforcing Maori rights against miners' demands, and the actual collection and distribution of revenue left much to be desired.

The Gold Fields Act of 1866 and its amendments began to extend the Crown's power unilaterally to regulate mining on leased land and land subject to mining agreements (as well as upon Crown land). A controversy over the tidal foreshore at Thames (which, by the Gold Fields Act 1868, had to be negotiated for by the Crown) was followed by the Thames Sea Beach Act 1869, which established Crown pre-emption over the area.

From 1870, the Crown began actively to purchase Hauraki land likely to be gold-bearing, by the usual tactics of buying undivided individual interests in land that had passed through the Native Land Court. This was contrary both to the spirit of earlier agreements and to the wishes of large sections of the owners. The requirement that a majority of Maori owners consent to the mining of their land (whether customary or under Native Land Court title) was, however, maintained until 1910, when it was dropped by amendment to the Mining Act.

Although the Crown can argue that it had no *legal* obligation to acknowledge Maori Treaty rights at all, in the 1850s and 1860s it in fact did so, and the progressive diminution of Maori rights, which the Crown had initially acknowledged in respect of access to gold-bearing land, has elements of bad faith. Moreover, the disturbance to Maori surface rights by mining was severe, and equity alone suggests that it should have been amply compensated by a generous share of mining revenue. The most serious impact of the goldfields administration was in Hauraki. The powers exercised by the Crown also contributed to the alienation of the Taitapu reserve.

In respect of Hauraki Maori, the McCormick commission of the 1930s made a recommendation in favour of substantial compensation for the maladministration of mining revenues due to Maori.

Although the 1858 Act and the agreements with Maori had referred only to gold, silver and other minerals were in fact mined on customary land in the Coromandel. In agreements virtually imposed upon Maori at Ohinemuri in 1875 and Te Aroha in 1881, the Government ensured that it took rights to all sub-surface minerals, including kauri gum in the case of Ohinemuri. As well, in 1877, the Mines Act took

care to define ‘mining purposes’ as including ‘obtaining gold, or any metal or mineral other than gold’.³⁶

Special legislation from 1891 regulated the Crown’s right to coal. In the 1950s, bauxite, uranium, steel, and geothermal power were the subject of special legislation, asserting either the Crown’s ownership of the resource or its sole right to extract it.

Exploration for petroleum on the East Coast in the 1930s resulted in the Petroleum Act 1937, which nationalised the resource, against the protest of Apirana Ngata, who asserted a Treaty right to the sub-surface on behalf of Maori:

Did the Maori know there was oil under their lands when they signed the Treaty of Waitangi in 1840? No. Nor did they know there was gold or coal under their land, or that the timber that grew on their lands had a greater value than for making canoes and carvings for their houses, and so on. Is the argument now, that, because the poor savage was ignorant of these things that have been made possible by pakeha, he is to have no benefit or advantage from them today? If so, it will not hold water.³⁷

In 1991, the Crown Minerals Act identified petroleum, gold, silver, and uranium to be Crown property, but persons exploiting it under the Act had to have regard to the principles of the Treaty.

In respect of sub-surface resources other than gold, in a recent finding in the *Ngawha Geothermal Resource Report*, the Waitangi Tribunal found that:

the Crown’s obligations to manage geothermal resources ‘in the wider public interest’ must be constrained so as to ensure the claimants interest in their taonga is preserved in accordance with their wishes.³⁸

The Tribunal has also affirmed a ‘development right’ in respect of resources that Maori were using in 1840, meaning the right to use lands, forests, and fisheries in new ways, taking advantage of new technology after 1840 as before it. Thus, the *Ngai Tahu Sea Fisheries Report 1992* acknowledged that Maori could expect a ‘Treaty development right to a reasonable share of the [resource]’ – in that case, fisheries at great depth or hundreds of miles offshore.³⁹

The application of the ‘taonga’ principle (together with the ‘development right’ principle) to sub-surface resources that Maori were *not* using before 1840 is problematic. On the one hand, Maori did not apparently use gold, petroleum, or coal, nor did they ‘mine’ the sub-surface to any great depth. On the other hand, they did use the ‘upper’ sub-surface for geothermal waters, ochre, and a variety of stones utilised for implements and ornaments. Moreover, as Ngata’s statement implies, Maori had a holistic view of the rohe they controlled, not sharply distinguishing

36. Anderson, p 113

37. NZPD, vol 249, p 1044 (cited in B White, ‘The McKee Oilfield’, report commissioned by the Waitangi Tribunal (Wai 143 rod, doc m17), p 9)

38. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, Wellington, Brooker and Friend Ltd, 1993, p 137

39. Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992, p 303

surface and sub-surface any more than they distinguished a sharp boundary between land and sea or lagoon. Rangatiratanga and kaitiakitanga extended throughout the rohe.

Attempts to resolve this issue by the logical extension of one set of these arguments or the other is less helpful than seeking a reasonable balance of kawaranga and rangatiratanga Treaty principles. It is arguably not in the public interest to encourage the further privatisation of the sub-surface. On the other hand, the Crown would be acting unreasonably in Treaty terms if it did not generously recognise the very great disturbance to the land and lifestyle of surface right-holders created by the exploitation of the sub-surface. The common law definition of 'land' includes the sub-surface (see sec es.11.1 and vol ii, ch 10). Consequently, the surface right-holders have a Treaty right at least to generous payments for access to the sub-surface and to involvement as joint-venture partners in its exploitation wherever possible.⁴⁰ Moreover, the *manner* of the Crown's access to the sub-surface (via the acquisition of rights to the surface) ought to have strict regard to Treaty principles. Thus, in respect of the geothermal resources at Ngawha, the Tribunal found that the Crown had 'acted in breach of article 2 of the Treaty in not ensuring that the owners willingly and knowingly alienated Parahirahi c block and the hot springs taonga located on the block'.⁴¹ In this sense, too, the manner of the Crown's access to the gold reserves in Hauraki and Taitapu showed less than scrupulous regard to the Treaty obligation of active protection of Maori interests.

pti.11 Public Works Takings

As early as late 1848, roads and public reserves were laid out in Port Nicholson (and possibly other New Zealand Company towns) before the purchase of the land from Maori was complete. Governor Hobson claimed authority under the Municipal Corporations Ordinance 1842, but this seems properly to apply only when Maori title had first been extinguished (see vol ii, sec 3.7).

Generally, Maori land was not taken for public works purposes before 1862, most roads being made on purchased land. The Native Land Act 1862 allowed the Governor to take for roading 5 percent of land *purchased* from Maori.

The Public Works Act 1864 gave the Government the first specific legislative authority to take both customary and Crown-granted Maori land for public works.

40. It should be noted that the governments of Papua New Guinea and Vanuatu both carefully re-examined the principles by which sub-surface rights would be managed, given the very strong assertion of claims by the villagers who held the surface rights. Both opted firmly for a continuance of the British legal inheritance, while negotiating generous shares of compensation (or 'royalties') for both the local district governments and the villagers. It might be suggested that the war on Bougainville demonstrates the injustice of the State's denial of private ownership of the sub-surface. In the opinion of this author, this would, however, be a misconception. The Bougainville provincial government was happy with the arrangement in the 1980s, as were the village elders. The rebellion on Bougainville was launched by a group of young and ambitious men discontented with the distribution of the revenue within the local community and jealous of the elders.

41. *Ngawha Geothermal Resource Report 1993*, p 74

This was in a war context and the majority in Parliament overrode concerns voiced about Maori Treaty rights. The Native Lands Act 1865 empowered the Governor to take, without compensation, up to 5 percent of Crown-granted land (whether alienated or not) for roading.

Thereafter, a battery of legislation intruded upon Maori customary rights. The Immigration and Public Works Act 1870, and the Public Works Act 1876 gave central and local authorities considerable powers to take land and to control or direct waters, and no compensation was payable for the taking of water (effectively involving the drainage and modification of streams and swamps). Railways legislation also extended the Government's powers relating to roading. Section 24 of the Public Works Act 1882 authorised the Governor in Council to take any Maori land without complying with any of the normal procedures specified in the Act. This was in the context of Maori resistance to roading in Taranaki.

The Land Drainage Act 1893 and the Swamp Drainage Act 1915 encroached on Maori fisheries. The Public Works Amendment Act 1903 provided that land could be taken for scenery preservation purposes under public works provisions. The Public Works Act 1894 allowed for 5 percent of customary land to be taken by the Governor in Council without compensation. Numerous special purposes Acts were passed relating to specific public and private developments.

Maori increasingly complained that the law bore more heavily on their land than it did on general land. Moreover, the confusion of laws (only some have been mentioned here) made it easy for the Government or local authorities to take Maori land and to delay or evade paying compensation. The multiple ownership of Maori titles caused the authorities to rely heavily on compulsory procedures, rather than to negotiate agreements with Maori owners.

It was widely understood (and freely admitted in Parliament by the Minister of Works in 1888⁴²) that Maori land was generally taken in preference to European land for public works and for lesser rates of compensation. Even so, governments appeared unwilling to constrain local authorities in this regard. The Public Works Act 1928 had different, and weaker, provisions for paying compensation for Maori land than for general land.

In the twentieth century, and well into the 1970s, local bodies tended to take Maori land for public works, relying on notifications through Maori land boards (up to 1953) and the Maori Trustee. Maori owners themselves may not have received notification or confirmation until well after the event.

The Public Works Act 1981 radically revised the previous legislation, recognising many of the previous impositions upon Maori and introducing the 'offer-back' system for land no longer required for public purposes. For a comment on the Office of Treaty Settlements' August 1996 document entitled 'The Crown's Policy on Treaty Claims Involving Public Works Acquisitions', see appendix vi.

42. NZPD, vol 61, p 609

pti.12 Surveys

The question of surveys cannot readily be separated from the issue of land purchasing and the operation of the Native Land Acts. Maori did not initiate surveys before 1865. They were interested in the physical marking of corners and key points, but the cutting of continuous lines was an alien concept and purchasers, normally the Crown, usually accepted the cost of survey. From 1865, however, Maori were caught up in the trouble and expense of surveying if they wanted to assert or protect their interests in the Native Land Court. Any claimant or group of claimants, often prompted by a purchaser, could bring a claim. The 'objectors' (who might in fact be the customary right-holders) were obliged to bring their own evidence to court. Sometimes they went to the expense of hiring their own surveyor as well. Survey costs were usually made a charge on the land, and all the owners had to bear their share, even if the survey had been initiated or even carried out without their knowledge or consent.

As time went on, Maori themselves, of course, saw the need to define their interests for the purpose of farming or other developments. The movement to subdivide land into whanau interests sometimes derived from disputes and arguments over the distribution of rental income or proposals for the development of the land. But the requirement to survey the land, and the kind of survey, more commonly served the interest of the Crown and private purchasers. The law facilitated the constant partitioning of blocks for piecemeal purchase, following the acquisition of a sufficient number of undivided interests. This was itself a divisive and underhand practice much of the time, and the survey charges involved, which were often very high, especially in steep bush-clad country, added to the cost of it. Lacking other revenue, Maori commonly had to acquiesce in the charging of land if they wished to secure titles or defend their interests against other applicants. In the twentieth century, the various agencies controlling Maori land, such as Maori land boards and the Maori Trustee (and the owners themselves), continued to load the land with survey costs when it was often uneconomic to subdivide at all.

It is very difficult to determine how much individual blocks were charged and what would have been a fair charge given the variability of the terrain, but charges in the range of 20 to 50 percent of the volume of the block were typical. The issue is best seen in relation to the legislative requirements for converting Maori customary tenure to Crown grants – that is, the Native Land Acts, including the provision whereby one claimant could oblige all other right-holders to engage in the Native Land Court hearing or be omitted from the title – and to the subsequent alienation of most of the North Island, plus some South Island reserves, after 1865.

To pursue the issue at a tribal or district level would require a systematic search of former Department of Lands and Survey files and Maori Land Court records. Evidence is likely to be sporadic in respect of the areas of private purchase, such as Hawke's Bay between 1865 and 1875, although it is known from the Hawke's Bay commission of 1873 and the Rees–Carroll commission of 1890 and 1891 that survey costs bore very hard on Maori claimants and contributed significantly to

land alienation. More precise information will be available in the areas where systematic Crown purchasing was carried out, such as in the Rohe Potae after 1890 and the volcanic plateau in the twentieth century, when the taking of survey liens over the land was virtually part of the strategy of acquisition.

pti.13 Foreshores

What follows is largely a summary of a report prepared by Dr Richard Boast for the Waitangi Tribunal Rangahaua Whanui Series.⁴³

pti.13.1 Definition

The seashore, foreshore, or sea beach (in legal parlance, these are generally synonymous terms) is that portion of the realm of England that lies between the high-water mark of medium high tide and the low-water mark, but it has been said that all that lies landward of the high-water mark and is in apparent continuity with the beach at the high-water mark will normally form part of the beach, and it has been held on special facts that ‘foreshore’ means the whole of the shore that is from time to time exposed by the receding tide.⁴⁴

pti.13.2 The importance of the foreshore

The tidal zone was important to Maori because it was a source of food; not only sea food but also birds. In *In re Ninety Mile Beach*, it was submitted that the beach area was a place of recreation as well.⁴⁵ It is certain that the beaches were important as walkways or highways, by which coastal Maori travelled from one part of their domain to another. In some districts, they also served as battlegrounds. For all these reasons, but especially because of their value as food resources, the possession of, and access to, foreshores was a jealously guarded right. Where there were many claimants, these rights could be, as they were with respect to desirable areas of land, complex, overlapping, and contestable.

pti.13.3 Maori rights

There is no doubt that before 1840 Maori had rights over the foreshore, in the same way that they had rights over the land inland of the foreshore. From time to time since the establishment of the Maori Land Court, Maori customary rights to the foreshore have been conceded or confirmed by the court, although to particular foreshores rather than to the totality of the foreshore as such. This does not necessarily mean, however, that aboriginal title rights do not exist in the foreshore.

43. R P Boast, *The Foreshore*, Waitangi Tribunal Rangahaua Whanui Series (first release), November 1996

44. *Halsbury's Laws of England*, 4th ed, vol 49, p 187 (cited in Boast, p 6)

45. *In re Ninety Mile Beach* [1963] NZLR 461

Maori rights to foreshore fisheries continued after 1840 and were to some extent recognised in statute law, although not as exclusive possession.⁴⁶

As far as the Native Land Court is concerned, Maori claims to sections of the foreshore were, in fact, considered provable on the same basis as claims to land: proof of descent, exclusive or dominant use, customary management or control. If there was a difficulty to be surmounted before a certificate of title could be issued, it arose from two sources: the common law assumption that the foreshore was Crown property and Chief Judge Fenton's view that a tribe had to prove exclusive possession before he would award title.⁴⁷

pti.13.4 The position of the Crown

For Maori, there was no difference between the ownership of land, the possession of inland fishing sites, and the control of foreshore areas. These were all forms of tribal property, governed by customary practices. It was the Pakeha who drew a distinction between the ownership of land, which was conceded to be Maori property, and the ownership of the foreshore, which eventually came to be considered Crown property.

There is some evidence that initially the Crown considered the foreshore to be Maori property, which had to be bought and paid for like any other property. In 1874, referring to the earliest alienations of Maori land, McLean stated that:

it had been held that when the lands were ceded, all the rights connected with them were also ceded such as rivers, streams and whatever was on the surface of the land or under the surface. Almost all the deeds of cession contained a clause to that effect.⁴⁸

It is true that many of the early deeds do contain wording that seems to indicate that lakes, rivers, and seashores were part of the property that was being acquired, although, as Boast points out, often the 'the language used is somewhat allusive and imprecise, making it far from clear exactly which water bodies are being referred to'.⁴⁹

An earlier statement by J Mackay, however, supports the opinion that during the first few decades of settlement the foreshore was not automatically considered to be Crown property:

I believe the general custom with the Native Land Purchase Department, respecting lands between high and low water-mark, has been to consider that when the Native title is extinguished over the main land, then any rights which the Natives have over the tidal lands have ceased . . . I am not aware of any cases having arisen in which the

46. For discussion, see Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992, pp 154–183

47. A Ward, 'Overview', report commissioned by the Waitangi Tribunal (Wai 27 rod, doc aa26), p 18

48. NZPD, vol 16, p 853 (cited in Boast, p 30)

49. Boast, p 30

Government have required to make use of tidal lands previous to the extinguishment of the Native title over the main land.⁵⁰

Moreover, there are instances where the Maori Land Court had indeed granted foreshore titles and the Crown had gone around afterwards to buy them up.⁵¹ In the *Kauwaeranga* judgment of 1870, however, Fenton came out strongly against foreshore titles: ‘evil consequences . . . might ensue from judicially declaring the soil of the foreshore . . . vested absolutely in the natives’.⁵² Thereafter, the court seems generally not to have granted titles of this kind, although the question of whether it had the right or the power to do so still remained, as did the question of whether the foreshore was Maori customary land. In 1872, the Crown invoked a section of the Native Lands Act 1867 in order to suspend the operation of the Maori Land Court in the Auckland district in the portion of the province ‘situated below high water mark’.⁵³ This was to prevent any possibility of the court issuing titles to the foreshore around Thames, where gold had been discovered. The implication is that the Government did recognise that the court had the power to investigate foreshore claims and issue titles. If so, this can only have been on the basis that the foreshore may have been found to be customary land. When Crown counsel advised the court of the proclamation suspending its operation with respect to foreshore claims, he said that the claims had been:

deferred, not refused; and that the Government have not the wish, as they have certainly not the power, to deprive the natives of any just rights they have to the foreshore.⁵⁴

Further research may be needed on this point, but if Mackay and, in particular, McLean were confused as to the nature of the early land alienations vis à vis the foreshore areas, then it is likely that no one did.⁵⁵ For the moment, at any rate, the preliminary data suggest that, during the early decades of settlement, up to perhaps as late as the mid-1870s, the Crown did not consider that it owned the foreshore until Maori title to the adjacent land above the high-tide line had been extinguished. It may also have been considered necessary to include in the sale deeds a reference to the fact that the foreshore was part of the alienation. This appears to be the sense of the explanation McLean provided to Parliament in 1874.

pti.13.5 Statutes affecting the foreshore

The Harbours Act 1878 (revised 1950) provided that no part of the foreshore was to be granted or given away other than with the authority of a special Act of Parlia-

50. AJHR, 1869, f-7, p 6 (cited in Boast, p 31)

51. Boast, p 33

52. Cited in Boast, p 32

53. *New Zealand Gazette*, 1872, vol 187, p 347 (cited in Boast, p 33)

54. Cited in Boast, p 33

55. For a discussion indicating the confusion surrounding the ‘ownership’ of the foreshore, see Ward, pp 22–23.

ment. Boast comments that there was no indication at the time that this legislation was intended to do away with Maori claims to the foreshore and nothing in the Act seemed to prevent an application of this sort to the Maori Land Court.⁵⁶ On the other hand, the underlying assumption must surely have been that the foreshore was not Maori land. No reference to compensation for Maori was raised in the Act.

The Native Lands Act 1909 made it clear that customary title did not prevail against the Crown; Maori had to convert customary titles into Crown titles if they wished to obtain the protection of the law. Could the Maori Land Court issue titles to the foreshore? In a series of cases over the next 50 years this point was argued in the courts.

pti.13.6 Twentieth century

Whatever the position may have been in the nineteenth century, by the early twentieth century the Crown's position on the foreshore was that the Crown had owned the foreshores since 1840, according to common law.

In 1916, a Crown law opinion stated that 'the limits of Native customary titles are high water mark'.⁵⁷ In 1917, another opinion attempted to limit customary rights even above the high-water mark:

Native title is not universal. It is not true that the whole of New Zealand . . . is necessarily the subject of Native title except so far as such title had been extinguished by cession . . . or otherwise . . . There may be areas of land in which no Native title can be shown to exist, No Man's Land . . . If no claimant can prove his title it is not Native land at all.⁵⁸

Government thinking was also based on the assumption that customary titles had no legal standing in themselves; they became enforceable in law only when given statutory recognition, and the standard way for this to occur was via a Crown grant issued under one of the Acts relating to native land and following an investigation of title by the Maori Land Court. The inference is that, if no title to the foreshore had been issued as a result of this process, then no valid title existed. There was also an official belief that Maori custom did not permit the ownership of large bodies of water, essentially because an idea of this kind was beyond Maori conception:

The larger the water . . . the more probable it is that Native custom did not recognise it as part of the land but as distinct from the land just as the sea is and not the subject of exclusive possession and ownership like the land. . . . Natives on the shores of Lake Taupo did not think that they owned the Lake anymore than Natives on the shores of the sea thought they owned the Pacific Ocean.⁵⁹

56. Boast, p 34

57. Salmond to Under-Secretary of Land, 28 August 1916, copy on H 29057 (cited in Boast, p 39)

58. cl 174/2, NA Wellington (cited in Boast, pp 39, 83)

59. Cited in Boast, p 40

On the other hand, the Crown submitted, the smaller the area of water, the more likely it was that Maori would have regarded it as incorporated into the adjacent land and so covered by the same customary title.

The Crown also drew a distinction between land (and water) and fishing rights, based, it was claimed, on the distinction made in the Treaty of Waitangi: the right to fish did not involve ownership of the water, or of the land under the water.

In the end, of course, the Crown had to make its case in the courts. By the 1930s, it appeared that the Crown's legal advisers were becoming less and less certain that the courts would uphold the Crown's position. In 1932, the Crown Law Office prepared an opinion on a case involving the Northland foreshore. It was considered that the argument of the claimants – which was that, while the foreshore might be vested in the Crown, it was still customary land – had some merit. It was also considered likely that the claimants could establish a customary title to the satisfaction of the Maori Land Court. In short, 'the Crown had little hope of success in the present case'.⁶⁰ That the Crown was in a weak legal position seemed to have been the consensus with respect to other foreshore cases as well.⁶¹

According to Boast, the Crown kept this assessment to itself and continued to assert in the courts that the foreshore was, by common law, vested in the Crown.⁶² In the case of Awapuni Lagoon (1928), the Maori Land Court appeared to accept this argument. In the long drawn out case of the Ngakororo mudflats (1926–41), however, the Maori Land Court decided in favour of the Maori claimants: the area was found to be Maori customary land. This decision was reversed by the Native Appellate Court, but not on the grounds advanced by the Crown. The Maori Land Court could issue title to foreshore land, but it had to be on the basis of a convincing claim. In the case before it, the appellate court concluded that the applicants had not proven their claim to the degree of 'particularity required'.⁶³ The Herekino case (1941) followed the same course as the Ngakororo case: a decision for the Maori claimants in the Maori Land Court was reversed by the appellate court, but this time on the basis that the area involved was accreted land and, as such, outside the jurisdiction of the Maori Land Court.⁶⁴

pti.13.7 Ninety Mile Beach

In 1957, the Maori Land Court accepted arguments by Maori that Ninety Mile Beach was customary land. The matter was then referred to the Supreme Court to determine whether the Maori Land Court had the power to conduct title investigations with respect to the foreshore. The Crown argued that the Maori Land Court had never had jurisdiction: the foreshore had been Crown property since 1840. The Supreme Court thought that this might be an 'acceptable' argument but decided the

60. Cited in Boast, p 42

61. Boast, pp 41–43

62. Ibid, pp 43–44

63. Cited in Boast, p 60

64. Boast, p 61

case on the basis that sections of the Harbours Act 1950 and the Crown Grants Act 1908 effectively prevented the Maori Land Court from issuing foreshore titles. That was the situation at that time; what may have been the case in the past was not the concern of the Supreme Court.

The dispute was then taken to the Court of Appeal. The Maori submission was that the Maori Land Court existed to investigate customary titles. If it were possible to make a case for customary titles to the foreshore, then the Maori Land Court would have jurisdiction. Additionally, while the Harbours Act was a difficulty, it was contended that the legislation was in itself insufficient to deprive Maori of their property rights. The Crown case was the same as before. English common law had applied in New Zealand since 1840, and under common law the foreshore was vested in the Crown.

While the Court of Appeal decided for the Crown, it did not entirely accept the Crown's argument that the Maori Land Court had never had jurisdiction over the foreshore. Nor did it follow the same line that had been taken by the Supreme Court. If Maori were to be deprived of rights over the foreshore by legislation, the legislation would have to state that explicitly; such an outcome could not be simply inferred from legislation, like the Harbours Act, that had been passed for some other purpose entirely. There had to have been an 'express enactment': Maori could not be deprived of their customary rights incidentally, by a 'side wind'.⁶⁵ The Court of Appeal, however, held that the Maori Land Court had, since 1865, investigated all the Maori land along the coast. This overlooked the fact that many coastal areas were alienated before the advent of the Maori Land Court. Moreover, if the Maori Land Court, in issuing titles to these blocks, had not stipulated that the foreshore was included in the title, then Maori rights to this area must be treated as having been extinguished. The Court of Appeal accepted that in the past the Maori Land Court had been able to deal with foreshore claims; this can only have been on the basis that the foreshore was, or could be, customary land. But the court also seemed to have a belief that the foreshore was Crown property – unless the Maori Land Court had explicitly decided otherwise.

The Court of Appeal had said that Maori rights could not be done away with in an indirect way, simply by the application of general law. Yet the court held that Maori rights to the foreshore had been extinguished. Boast says that the court's arguments (cited in the previous paragraph) on this point are 'not tenable' and that it is unlikely that a contemporary court would accept that Maori property rights in the foreshore had been abolished in the manner accepted by the Court of Appeal. Lastly, Boast warns not to lose sight of the factual problems of the case. He says, 'The Court of Appeal constructed its analysis on a factual supposition – that is, that all the coastal blocks must have been investigated at some stage by the Native Land Court – which is quite incorrect.'⁶⁶

65. The opinion of T A Gresson, *In re the Ninety-mile Beach*, p 477 (cited in Boast, p 68)

66. Boast, p 69

pti.13.8 Harbours and lagoons: a case study

The Waitangi Tribunal had reason to consider the ownership of the Te Whanganui-a-Orotu Lagoon (Hawke's Bay) in 1995. The claimants contended that they had never knowingly or willingly relinquished their tino rangatiratanga over this taonga and that the Crown was in breach of the principles of the Treaty in vesting the lagoon in the Napier Harbour Board by statute. On the other hand, the Crown contended that the lagoon was included in an 1851 purchase or, alternatively, that it was vested in the Crown through the 'arm of the sea' legal rule, whereby areas of water that form part of the sea are the property of the Crown.⁶⁷ On these matters, the Tribunal concluded, first, that the sellers had no reason to believe that Te Whanganui-a-Orotu was included in the purchase and that, while the Crown had believed it was included, there was not the necessary 'meeting of minds'. Secondly, on the matter of whether Whanganui-a-Orotu was an 'arm of the sea', the Tribunal concluded that the lagoon contained large quantities of fresh water and a very restricted link to sea water, which distinguished it from harbours like Manukau. It was therefore not possible to accept the Crown's presumption that Te Whanganui-a-Orotu was part of the sea, which meant also that the bed of the lagoon was not, as a matter of common law, vested in the Crown.⁶⁸

pti.13.9 The current position

It appears to be the situation that no New Zealand court has ever entirely accepted the Crown's submission that it owns the foreshore by virtue of the common law. In particular, in *In re Ninety-Mile Beach*, the Court of Appeal did not accept that this was the position.

The legislation that currently operates with respect to the foreshore area – the Conservation Act 1987, the Foreshore and Seabed Endowment Revesting Act 1991, and the Resource Management Act 1991 – does not explicitly vest the foreshore in the Crown, and it seems doubtful that the (now repealed) Harbours Act 1950 would be construed by any latter-day court as having extinguished Maori customary title over the foreshore. In short, the Crown's claim to the foreshore seems to have no statutory basis.

The argument advanced by the Court of Appeal in 1963 – that Maori Land Court investigation of titles to the adjacent land extinguished Maori titles to the foreshore unless the foreshore was specifically included in the certificate of title – seems tenuous if not 'simply wrong'.⁶⁹ If it is wrong, then any unmentioned foreshore areas remained customary – that is to say, Maori – land. They did not somehow 'revert' to being Crown land – unless, of course, the Crown's assertions about the application of the common law are in fact correct.

The best claim the Crown has to foreshore land appears to be the one advanced by McLean in 1874: namely, that the Crown purchased the foreshore when it

67. Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, Wellington, Brooker's Ltd, 1995, p 204

68. *Ibid*, pp 205–206

69. *Ibid*, p 69

purchased the coastal blocks. In Boast's opinion, 'it makes . . . sense to think of the Crown as owning today those areas of foreshore which it clearly and unambiguously purchased by pre-emption era deed of cession',⁷⁰ or where it expressly extinguished customary title by statute. If these areas could be identified, then by implication all the remaining foreshore area could be assumed to be Maori customary land. However, while investigations of titles might be made in the usual way, provided it was accepted that the jurisdiction of the Maori Land Court extended below the high-water mark, any attempt to do so would almost certainly lead to a revisiting of the legal ground covered by the Court of Appeal in 1963. This would be a long, expensive, and probably divisive process. On the other hand, attempts to pursue the matter via the ordinary courts, perhaps on the basis of prescriptive rights, would seem to be blocked by a 1993 amendment to the Limitation Act 1950. This prescribed that action to recover Maori customary land must be begun within 12 years of the date 'on which the cause of action accrued'.⁷¹

It appears to be the case that, while the validity of the Crown's title to the foreshore is uncertain, no easy avenue of legal redress is available to Maori. The best way forward may be for some kind of negotiated settlement to be reached, to be followed by legislation of some kind.

This legislation would deal with the matter of ownership and with the issues of management. As Boast points out, ownership and management are two different things, and the reality seems to be that, no matter who owns the foreshore, the Crown will manage it. In Boast's view, management laws can reduce the 'rights of ownership to an empty shell'.⁷² Given the management regime currently in place, it seems to be Boast's opinion that to return foreshore lands on a piecemeal basis would serve no conceivable purpose and be of very little practical benefit to Maori. Maori views have yet to be ascertained.

In respect of sea fisheries, there is little doubt that inshore fisheries were effectively under the control of the hapu adjacent to them and to their kin. The 200-mile economic zone recently recognised by the law of the sea is attributed to New Zealand as a nation state, rather than as an extension of the development right of adjacent hapu (which could hardly be said to be 'adjacent' to fisheries 200 miles out and several miles deep). Offshore fisheries would seem therefore appropriately to be at the disposal of the Government for the benefit of the whole New Zealand community or to sections of it, as is exemplified in the grant to New Zealand Maori in the 1992 Sealord settlement.

This report has not had time to encompass seabed issues as distinct from foreshore issues. A preliminary view would be that, where aboriginal title rights existed at 1840, they were protected both under common law and by the Treaty. Their most usual expression was likely to have been fishing over rocks and reefs, well offshore and locatable only by fishing families who knew the bearings. In terms of Fenton's position in the *Kauwaeranga* judgment, they would have merited recognition as

70. *Te Whanganui-a-Orotu Report 1995*, p 31

71. Cited in Boast, p 28

72. Boast, p 71

fisheries and an easement would have been granted, possibly exclusively to the user family, but not 'title to the soil'.

It would be the view of this report that, as in offshore fisheries of a more general kind, so also with the general seabed below the low-water mark: rights to it appertain to New Zealand as a nation state by operation of international law. A development right in 'adjacent' hapu, based on improved technology since 1840, might be valid but can scarcely be seen as an exclusive right.

pti.14 Inland Waters

There can be no question as to Maori Treaty rights in respect of inland waters, whether as fisheries in the English version of the Treaty or 'taonga' in the Maori version. Maori invariably lived close to either the sea-coast or inland waters, and commonly had access to both. Ancestral and spiritual associations with inland waterways, as with mountains, were key determinants in Maori tribal identity.

In the colonial period, the Crown was reluctant to recognise such rights as being real or compensable. Governments either assumed prerogative rights in respect of larger bodies of water or applied the principles of riparian rights in respect of smaller streams, lakes, and swamps, which were considered to have passed with the land when it was purchased. Maori did not share these views. In many cases, they had little or no idea that in 'selling land' they were also giving up rights to streams and swamps on the land, although they were commonly referred to in the Crown's purchase deeds. In the Ngai Tahu investigations, there is strong evidence that Maori expected to have continued access to these resources, even as settlers cultivated crops or grazed stock on the land. In the litigation that arose from the late nineteenth century in respect of lakes, and in settlements made in respect of Lakes Taupo, Rotorua, Horowhenua, Waikaremoana, Omapere, and Rotoaira, there appears to have been a recognition of Maori rights to lake beds and lake fisheries, and the principle of negotiating for such rights seems clearly to have been established. At common law, the water itself appears to remain a common property resource with various restraints upon its use.

In respect of rivers, the *ad medium filum* presumption has been discussed by the Waitangi Tribunal in the *Mohaka River Report 1992* (where the purchase deeds to the land seem, in some instances at least, to extend to the banks and not to the middle of the river)⁷³ and is currently being considered in respect to the Whanganui River. In its *Te Whanganui-a-Orotu Report 1995*, the Tribunal regards lagoons and wetlands as taonga.⁷⁴

Loss of mahinga kai and damage caused by development works to rivers regarded as fisheries and wahi tapu are complained of in many claims. Certainly, the public works legislation and related legislative provisions affecting swamp drainage and the diversion and control of streams, together with the principle of riparian

73. Waitangi Tribunal, *The Mohaka River Report 1992*, Wellington, Brooker and Friend Ltd, 1992

74. *Te Whanganui-a-Orotu Report 1995*

rights, caused Maori rights to be increasingly overridden after 1870. Wittingly or unwittingly, countless drainage and diversion schemes affected the waterways, as did countless acts of pollution. For such acts, compensation was rarely thought to be payable. In hindsight, the economic returns from much of this effort were limited. Maori farmers were probably more inclined to leave swamps and eeling streams intact.

In that the Crown generally treated the ownership of non-navigable streams and swamps as passing with the title to the land, the issue of rights to such waterways is bound up with any settlements made in respect of the land. However, some explicit regard should be had both to the specific ecological and other associations that Maori undoubtedly had to inland waters and to the flora and fauna that they supported. Undoubtedly, the loss to Maori of their rights to waterways has been very heavy over the past 150 years of settlement – heavier in some respects than the loss of land. These rights are of the utmost importance to a people whose existence was as much bound up with water as with land, and the loss of customary rights, with little or no negotiation and compensation except in respect of major lakes, does not sit well with Treaty obligations. The question of public access to waters is, however, of the highest importance to the community generally, whether the owners of adjacent lands are now Maori or Pakeha. In settlements yet to be reached, such public rights will have to be protected through the upholding of the Queen's chain or another mode of access. To some degree at least, this need not be incompatible with respect for, and the restoration of, Maori customary fishing and other rights, and Maori involvement by right in controlling authorities, in recognition of customary mana over inland waters. Joint management arrangements of this kind are increasingly common in both Canada and the United States.

pti.15 Maori Land Administration, 1900–30

The period 1900 to 1930 (or more particularly the period 1910 to 1930 when the provisions of the Native Land Act 1909 were applied) was a time of very rapid land alienation, rivalling that under the Liberal Government in 1891 to 1899. Some 4.5 million acres were acquired by the Crown and private purchasers between 1900 and 1930 (about 3.5 million acres being acquired between 1911 and 1930). About three million acres were leased between 1900 and 1930, many of them subsequently freeholded. Some two or three million acres of this land were alienated through the Maori land boards and some 1.2 million acres through other processes, including about 600,000 to 750,000 acres of Crown purchases of blocks with fewer than 10 owners, which did not require a board's ratification. Over 250,000 acres were also purchased in Urewera, prior to 1921, before Crown acquisitions in the area were included in board returns (see vol ii, sec 15.9.7).

The rate of alienation was high – over 250,000 acres a year during the heaviest period of purchasing between 1911 and 1915. Although the legal and administrative structures were supposed to help Maori retain and develop their land and sell

only that which was surplus to their needs, there was relatively little development in fact, owing to the complexity of titles, fragmentation of the land into uneconomic holdings, and lack of development capital. After 1909 (or even after 1907 or 1905), the system operated mainly to facilitate the alienation of the land for Pakeha settlement. As Dr Don Loveridge comments, in respect of alienation through the Maori land boards:

it is very difficult . . . to see how the interests of Maori were served by a land administration system which facilitated the permanent alienation of more than two million acres of their land within 20 years.⁷⁵

The campaign of almost all the national Maori leadership before the 1900 legislation was to stop the further sale of Maori land altogether, restore the administration of land to Maori hapu, and alienate land only by leasing. But new sales commenced under the 1905 and 1907 Acts (with elements of compulsion), and in the Native Land Act 1909, the barriers to piecemeal acquisition were all but dropped, with dramatic results, while Maori themselves were virtually excluded from the 'Maori' land boards. From 1913, the land boards comprised only the judge and registrar of the district Maori Land Court. The Native Land Act Amendment Act 1913 also gave the Crown the power to acquire any interests in Maori land, including lands vested in trust, and undivided interests in blocks with multiple owners. Mr Parata (the member for Southern Maori), commented on the legislation: 'all along the line the Natives have been robbed, and the government is proposing to make robbery of the Maori easier by this legislation'.⁷⁶

pti.15.1 The extent of alienation

The purchase of close to half of the remaining Maori land (more than half of the readily usable land), at a time when the Maori population was beginning to grow rapidly again, raises even more acutely than before the question of the Crown's obligations to Maori under the Treaty. There can be no doubt that in the 1890s (as in the late 1850s) the principal Maori leadership was opposed to any more land selling whatsoever. The protests, petitions, and alternative laws proposed by the Kotahitanga movement and by the Kahunganui of the King movement vehemently argued that too much Maori land had already been purchased, that the Maori people were threatened by this, and that the Crown purchases should stop. Statements of Maori members of Parliament reflected the same concerns. Members like Hone Heke (Northern Maori) were adamant that 'the balance of the land which remains to us is not sufficient for our maintenance and support and for the maintenance and support of our descendants'. Heke believed that four million farmable acres

75. D Loveridge, *Maori Land Councils and Maori Land Boards*, Waitangi Tribunal Rangahaua Whanui Series, 1996, p 56

76. NZPD, vol 167, p 811 (cited in J Hutton, "'A Ready and Quick Method": The Alienation of Maori Land by Sales to the Crown and Private Individuals, 1905-30', report commissioned by the Crown Forestry Rental Trust, 1996, p 20)

remaining in 1900 amounted to not more than 50 acres a head: 'And let us suppose that the Natives are beginning to increase in any one part of the country: what are they going to live on?'⁷⁷

In response, Carroll, Ngata, and their allies put in place the 1900 legislation, proposing to define inalienable papakainga lands and to permit voluntary leasing to settlers of most of the remainder via the Maori land boards. It soon emerged, however, that Maori were in no hurry either to lease or to sell. There were many good reasons. Stout and Ngata listed several, including the objection of Maori owners to being 'deprived of all authority and management of their ancestral land', their anxiety that the new policy 'was only another attempt to sweep into the maw of the State large areas of their rapidly dwindling ancestral lands', and the fact that Maori still considered direct negotiation to be more attractive. Moreover, the titles of much of the remaining land were contentious. 'So long as the title was in an abeyance and they were immersed in the joys of litigation, the settlement of the country could wait,' noted Stout and Ngata somewhat petulantly.⁷⁸

Settler impatience with the slowness of Maori to vest land in the boards led to a number of provisions for compulsory vesting and then to the 1909 Act, which allowed direct dealing by both Crown and private purchasers and required only a cursory check against 'landlessness'. Settler demands, and what was considered by successive governments to be the national interest, overrode the aspirations expressed by Maori leaders around 1900. But there is evidence also in support of Dr Loveridge's view that leaders like James Carroll believed that holding land in an undeveloped state did nothing for Maori. When he introduced the 1909 Act, Carroll did so on the basis that it was returning to Maori communities, via block committees (which Carroll likened to traditional runanga), the power of decision over their land, including the right to alienate it. In short, he claimed to be recognising rangatiratanga, not weakening it. The old rationale that it would benefit Maori themselves to alienate land they were not farming was believed by Carroll himself and possibly by Ngata too.

But Carroll and Ngata had a clear preference for leasing, not selling; they struggled against the settler drive for the freehold and the settler resentment of 'Maori landlordism'.⁷⁹ Another difference between the settler politicians and the Maori leaders was their attitude towards multiple title. Men like Seddon and McKenzie harped away about 'putting a stop' to Maori 'communal' life, the 'non-subdivision of land, and the communal titles which forced them into idleness, carelessness and neglect'.⁸⁰ William Herries also persistently pressed for individualisation of tenure. On the other hand, Carroll and Ngata (East Coast leaders as they were) supported the system of block committees and incorporation of owners, partly because that recognised, to some extent, the traditional rangatiratanga of

77. NZPD, vol 114, p 514 (cited in Hutton, p 19)

78. See Hutton, p 13

79. T Brooking, 'Busting up the Greatest State of All: Liberal Maori Land Policy', pt v, vol 26, no 1

80. NZPD, vol 144, p 511 (Seddon)

descent groups in respect of land and partly because much remaining Maori land was unsuitable for subdivision into small holdings anyway.

pti.15.2 Assembled owners

How equitable and representative was the system of dealing through block committees and meetings of assembled owners in any case? Recent writings are divided on the question. Messrs Butterworth and Young are inclined to accept to a considerable degree Carroll's claim that the power granted in 1909 did return to Maori runanga a collective control of their own lands: it 'gave rangatiratanga a legal recognition' and was 'a very important provision because it was at these meetings that the tribal leaders could exercise their influence to stop the improvident sale of land'.⁸¹ Richard Boast is sceptical: 'The collectivity here being, however, [in the 1909 Act] not any of the natural units of Maori society but the accidental and artificial one of block owners.'⁸²

Who were these block owners? In the great blocks held by incorporated owners on the East Coast, they commonly included whole hapu living on or near villages that had grown out of traditional kainga. The public block committee elections, supervised by the Maori Land Court, reflected the dynamics both of Maori whanau and hapu relationships and of factions within them. Moreover, as G V Butterworth and H R Young say, the tribal leaders in many areas seem to have kept a pretty tight control over alienations. More recently, the success of the Puketapu Incorporation in the King Country or the Mangatu blocks on the East Coast and much of the property once administered by the East Coast trust testifies to the value of incorporation under strong leaders.

The meeting of assembled owners provision, however, commonly meant that the owner group as a whole was not consulted. By section 343 of the 1909 Act, decisions of such meetings were deemed carried if the owners voting in favour owned a larger share of the land, by value, than those who voted against. Only five persons constituted a quorum, and proxy voting was allowed. Unrepresentative or irresponsible block committees and meetings of assembled owners therefore had power under the 1909 Act to alienate the land of the community, provided they could get a majority by value of those who managed to assemble on the night. Giving meetings of assembled owners full power to deal with the land, even by sale, may be seen as a part-fulfilment of Treaty rights; but it also bypassed the need for a full consensus of the owners (or even a clear majority of the owners) and ignored or overrode the wishes of owners not present at crucial meetings.

There is the added complication that not all sales of Maori freehold land were foolish or ill-considered: there were, and are still, many parcels of Maori land, fragmented by partition over many decades and almost useless in economic terms on their own, that could well be grouped with other lands. Ngata's drive for consolidation of title reflects this. So, too, do many individual decisions of block

81. G V Butterworth and H R Young, *A History of the Department of Maori Affairs*, p 67

82. P Spiller, J Finn, and R Boast, *A New Zealand Legal History*, Wellington, Brooker's Ltd, 1995, p 161

committees or trustees, who could sell a fragment to a Pakeha farmer who wanted to add it to adjoining land, while the Maori vendors could buy general land to improve their own estates. This is the period when the ownership of general land by Maori starts to become significant, though usually in quite small areas. It is thus difficult to say that every sale of Maori land was prejudicial in its effect, notwithstanding its contribution to the totality of Maori land loss.

Yet the sheer scale of the alienations makes it incredible that all or even most of the land sales were beneficial in their effect, leading to purchases elsewhere or to wise investments of the price paid. That was the theory, or the politicians' justification, for what was being done. In practice, Maori were selling in the twentieth century for the same reasons as in the nineteenth: they needed revenue and, notwithstanding the developing plans for assisting Maori farming, the familiar problems of confused and fragmented title encouraged sale. By now, too, the fact was that the land would support only a few commercially viable farms. Owners could normally hope for at most small dividends. Meanwhile, the usual personal debts pressed upon them. The pressures and temptations to sell were therefore enormous.

The system of proxies at meetings of assembled owners was also abused, with lawyers representing the purchasers of Maori land collecting the proxies, attending meetings of assembled owners, and outvoting those owners who attended and opposed the alienation. Maui Pomare said in debate that a private purchaser could 'pocket a lot of proxies, cram the meeting with owners who wanted to sell – to sell to him – and he got the land'.⁸³ A trade developed in proxies among competing purchasers. Herries tried to improve the proxies system in 1913 by requiring the intention of the giver of the proxy to be written on the form before the meeting, but this did not necessarily stop a buyer rounding up proxies in his favour. In 1916, Herries admitted that 'a certain amount of abuse had crept in with regard to proxies under earlier regulations'.⁸⁴ But one must doubt whether the situation had really been remedied, and in any case about one million acres of land had already been sold.

The processes of notification of dealings with Maori land under the boards were also inadequate. The law generally required only putting a notice in the *Kahiti*. In 1916, Herries admitted 'that there was a chance of abuse' in giving the owners no notice of meetings where their land might be sold. Indeed, he tacitly admitted that there had been abuses but claimed that the problem had been rectified and that there was 'now' no very serious complaint. But, by 1916, over half the land that was going to be sold under the 1909 Act had been sold.⁸⁵ In any case, doubts must remain about the adequacy of the *Kahiti* notices. Herries thought the owners would 'probably' hear of the meeting if they did not read the *Kahiti* themselves. No doubt some Maori were avid readers of this journal, looking for any mention of blocks in

83. NZPD, vol 167, p 408 (cited in Bennion, p 12)

84. NZPD, vol 177, pp 737–738

85. Ibid (cited in T Bennion, 'Maori Land and the Maori Land Court, 1909–1953', Waitangi Tribunal Rangahaua Whanui Series, unpublished draft, September 1996, p 14)

which they had interests, but they were almost certainly a minority, perhaps a very small minority. With the increased fragmentation of title through succession and the increased mobility of the population, many Maori simply never heard of advertised meetings of land boards or assembled owners. They joined an increasing mass of people who felt that the whole thing was beyond them, and were thus inclined to consent to the sale of their interests when buyers or their agents sought them out.

pti.15.3 Partitions

The system of partitioning out alienators' shares of a block imposed a serious burden upon Maori groups trying to retain land. They constantly had to show a completely united front to prevent partition. The ease with which the Crown, in particular, could secure the partition of the block (through the land boards), as in the nineteenth century presented a remorseless pressure, which effectively discouraged efforts to develop land, and instead, as before, encouraged land selling among sections of the owners. It was also a secretive process. As Pomare said 'while the Maori is having his breakfast the Judge is partitioning without his knowledge.'⁸⁶

Bennion suggests that the power of meetings of assembled owners to hold on to the land was largely illusory. Meetings were called at the request of one owner (or seller) and 'the mere fact of a meeting being held was almost a guarantee that some land would be purchased and pressure placed on the remaining estate which, if the partition was a significant one affecting fertile areas in the block, made it less economic as a consequence'.⁸⁷ The only way to avoid sale, some Maori concluded, was never to assemble.⁸⁸ Partitions could, however, bear very hard on those who did not turn up to meetings and help shape the decision. Even their homes and gardens could be affected.⁸⁹ 'Innumerable petitions' flowed into the Maori Appellate Court about the partitions.⁹⁰

pti.15.4 Leases

The tendency for leases to lead to sales of the freehold has been noted by several analysts. This was partly because, as Loveridge noted, the boards did not enforce the creation of sinking funds from rents received, to pay for the improvements at the end of the lease, as the 1909 Act envisaged.⁹¹ There remained also, as always, the inability of Maori to raise adequate finance to restock the land once the lease expired. The Crown's buying of undivided shares in blocks exacerbated the problem, as mentioned above. The 35,000-acre Waipiro block in the Ngati Porou rohe was a celebrated case in point.⁹²

86. NZPD, vol 167, p 386 (cited in Bennion, p 112)

87. Bennion, p 18

88. Ibid, p 21

89. Ibid, p 19

90. Ibid, p 20

91. Loveridge

92. NZPD, vol 190, pp 156–157 (Ngata) (cited in Bennion, p 22)

pti.15.5 Checks on landlessness

The available evidence casts serious doubt on the adequacy of the processes for checking on Maori landlessness. Ngata and others complained in 1907 that no machinery had been provided to enforce the minimum acreages to be retained by Maori according to the 1905 Act.⁹³ The provisions of section 373 of the 1909 Act requiring the Crown to ensure that no Maori would become landless (in terms of the definition in the Act) was weakened by subsection (3), which provided that a breach of the condition would not of itself invalidate the transaction.⁹⁴ A clause in the 1913 amendment Act (s 91) provided that the ‘landlessness’ provision of the main Act did not apply if the land being sold would not, in any event, provide sufficient support to the Maori owner, and where another form of income would be an adequate alternative. (This probably explains why the Waikato–Maniapoto board approved some transactions while noting that the vendor would be landless.⁹⁵) In respect of private purchases, the onus was on the purchaser to show that the Maori he was purchasing from was not landless. ‘It is his business to find that out,’ said Herries in 1916.⁹⁶ This opened a window to sharp practice, and it is difficult to see how, without making their own independent checks, the boards could be sure of the facts alleged.

Dr Loveridge doubts that the checks required before confirmation of land boards could have been adequate in view of the sheer number of transactions passing through them or through the Native Land Purchase Board. John Hutton, who studied the Waikato–Maniapoto board in some depth, considers that the 1909 Act created a huge load of work for the boards which were given few additional resources. He notes that there is little evidence in the minutes of the Waikato–Maniapoto board of examination of the reasons behind the sales. Although a check was commonly made that alienators had land elsewhere (a requirement to be supplied by the Native Land Court staff), there was little evidence of checks being done on the land’s quality, the revenue it yielded, the debts it carried, or the needs of the heirs – the family of the alienator. With a steady schedule of meetings, and upwards of 30 applications for alienation to be considered at each meeting, ‘it is difficult to see how the board could have properly gauged whether or not the sale was not “contrary to equity or good faith or to the interests of Natives alienating”’.⁹⁷

Hutton’s analysis suggests that boards rarely declined to approve an alienation. The most common reason for declining was under-evaluation of the land concerned. The submission of deeds with the purchase price to be entered later was also a ground for rejection.⁹⁸ The dilemmas of the nineteenth century remained as sharp as ever: Maori groups and individuals wanted to control the alienations of

93. NZPD, vol 140, pp 142 (Ngata), 387 (Fraser)

94. Hutton, p 36

95. J Hutton, ‘The Operation of the Waikato Maniapoto District Land Board’, report commissioned by the Crown Forestry Rental Trust, 1996, pp 16–17

96. NZPD, vol 177, pp 737–738

97. Hutton, ‘Waikato Maniapoto District Land Board’, pp 16–17

98. *Ibid*, pp 18–28

land with minimal interference by boards and Government officials, largely because they wanted cash in hand. Some wanted it for development purposes, some for consumer spending, many to pay off debts. Bennion cites the case of a Wairarapa chief who:

at one time had no fewer than three motor-cars running. He was living upon his capital, and today he is heavily in debt all over the place, and continually representations are made to the Native Land Court, when sitting at Greytown, to permit this man to sell even the last remnant of his property in order to pay his debts. Judge Gilfedder, to his credit it be said, has declared that he will not make the transactions of the Native Land Court a method of paying the debts of Natives, and he has set his face against these men doing anything further to dispossess themselves.⁹⁹

The root of the dilemma is of course that governments had created the possibilities for individual Maori to secure an interest in the title and to alienate that interest in what had been a tribally controlled patrimony.

pti.15.6 Relation of boards and court with the Government

Hutton is in no doubt that the Maori land boards were agencies of the Crown: 'The Board was created by the Crown and followed Crown policy.'¹⁰⁰ Bennion notes that the boards were not under the direct administrative control of the permanent head of the Native Department, and they had power to govern their own proceedings. But the Government's legal advisers (such as John Salmond) argued that the Government could intervene very directly in the boards' decisions:

when it really mattered the government in reality had control over the boards . . . not only were they in their internal operations variously agents for Maori, trustees for Maori and sometimes it seems, agents or more directly servants of the Crown, but the legislative changes such as the 1913 legislation and legislation after 1934 were to alter their external relationships, further complicating their internal responsibilities and duties. And while the land court remained somewhat more distant from government simply because it was a court, in the period until 1932 when some further distinction was made, the court virtually was the board, and it was also very much tainted with the confusion over roles and status.¹⁰¹

In Tairāwhiti, Judge Jones was for many years a Native Land Court judge, the president of the Maori land board, and a district land registrar, a not unusual situation apparently.

Efficiencies in administration were gained in one sense by this conflation of roles in one person, but possible conflict of roles or even of interest certainly existed. Bennion notes evidence that boards assisted Government land purchase officers with cash advances at times, acted administratively to facilitate leasing, and

99. Bennion, p 32

100. Hutton, 'Waikato Maniapoto District Land Board', p 33

101. Bennion, pp 26–27

became caught up in ambivalent roles in the distribution to Maori of revenues received (indeed, they commonly sought the under-secretary's direction). The trustee aspect of the boards' role appears to have suffered under the pressure of their other duties.¹⁰² Bennion cites a letter of resignation from the administrative officer of the Ikaroa board in 1918 listing a range of matters suggesting carelessness in handling the interests of Maori owners of land for which the board was responsible. In 1932, the National Expenditure Commission noted that 'the functions of the Maori land boards have so changed in recent years that they are in reality branches of the Native Department, and this should be recognised'.¹⁰³ This was a reference to the boards' role in development schemes, but it reflected an earlier tendency.

The arguments of Native Minister James Carroll that the 1909 Act returned the power of decision to local Maori runanga via the 'meeting of assembled owners', or of William Herries that Maori were free to sell or not sell as they pleased, are only partly valid. The machinery provisions of the 1909 Act favoured partition and piecemeal alienation by simple majorities of owners who happened to assemble (not of the totality of owners). Though some communities remained united and opposed to sales, the system was open to manipulation, especially through the use of proxy votes. The Crown was not bound by the assembled owners provision and could still buy individual interests and secure a partition with relative ease. The checks and control of Maori landlessness by the land boards were limited. The pressures to sell the freehold rather than to lease were strong, as were the temptations of the boom in prices around the First World War. The impact of the process was especially severe in the populous areas of the north, where people were selling their interests in a struggle for simple survival and had few possibilities for other kinds of income.

At bottom was the issue of whether individual Maori or sections of Maori should ever have been given the power to alienate the freehold of what had been a tribal patrimony. In the light of the almost unanimous demands of the Maori leadership before 1900 and the limited areas of land still remaining in Maori ownership, a strong case can be argued in Treaty terms that, even if it was the wish and inclination of individuals and small groups to sell the freehold, the duty of active protection of the Maori people at large meant that sales of the freehold should have been approved very rarely, if at all, after 1900, and then only on the basis of full hapu involvement. The period 1905 to 1910 was very late in the day for governments to be launching a new campaign to acquire the freehold of Maori land. Even though it was not yet clear that the Maori population was fast rising, it was certainly known to be stable. Many precious acres, saved from the great periods of land buying in the nineteenth century, were acquired between 1910 and 1930. When Ngata finally secured finance to launch the development schemes from 1928, there was precious little good land left on which to start them. By 1938, it was realised that the Maori people could no longer be supported on rural lifestyles alone.

102. Bennion, p 28–30

103. AJHR, 1932, d-4a, p 400, para 37

pti.16 Native Townships

The Native Townships Act 1895 was a component of the Liberal Government's land policy, which was strongly focused on providing land for settlement. Its intention was to promote security of tenure for settlers starting to cluster on Maori land at significant communication points or likely centres of tourism, and to secure for settlers a major stake in tourism and hotel revenue at such places as Pipiriki and Te Puia Springs and at key locations on the main trunk railway.

The Act gave the Governor the power to proclaim any area of up to 500 acres as a native township, whether or not the land had passed through the Native Land Court. The area was to be laid out in streets, allotments, and reserves. Every urupa and every building occupied by Maori at the time of the proclamation, together with a selection of allotments, was to be reserved for the Maori owners, the total not to exceed 20 percent of the town. All streets and public reserves were vested in the Crown, and all other allotments were vested in the Crown, 'in trust for the Native owners', to be leased, by public auction or tender, for terms of up to 21 years with a right of renewal for a further 21 years. Incoming tenants were to pay for the improvements made by previous tenants.

The taking of a compulsory power to vest the land in the Crown for these purposes, instead of relying on negotiation with, and the agreement of, the Maori landowners, meant that the latter were eventually cast into a secondary role. There was, nevertheless, a measure of consultation and agreement in a number of cases; Maori too saw the value of the Crown's involvement in the development of the townships and their amenities, and they hoped for a flow of revenue from leased sections. Indeed, Maori themselves took the initiative in setting aside lands and petitioning for townships at Kaiwhata in Wairarapa; Ohutu on the Mangawhero River; Parata, near Waikanae; and Turangarere, near Taihape. The impulse that had first led Maori, before 1840, to promote clusters of settlement on small and defined areas of land, while retaining substantial control over the process, was still very much alive. In 1902, James Carroll sought to strengthen Maori involvement by means of an amendment to the Act to bring the townships under the ambit of the Maori land councils, which at that stage were predominantly Maori organisations. Several townships (for example, those in the King Country) were launched in the next few years with full Maori cooperation.

Many of the townships languished, however. The Crown was reluctant to put in significant capital, and private investors wanted either perpetual leases or the freehold. In the Native Townships Act 1910, the Government succumbed to their pressure and granted their demands. It also began to buy up the lands itself for resale or to grant long leases to the settlers. Disillusioned by the poor returns, Maori were in many cases inclined to sell, so townships such as Te Kuiti, Taumaranui, and Otorohanga were largely alienated. On the East Coast, Maori were less inclined to sell (although Te Puia was sold under the assembled owners provision of the Native Land Act 1909 by less than an absolute majority of the owners). Roads and reserves were taken without compensation.

The question of an appropriate form of tenure to attract private investment (especially to remote locations) is a vexed one, and the failure of some of the townships cannot wholly be attributed to the Crown's mismanagement. Nevertheless, the impatience of governments, their willingness to resort to a degree of compulsion, and their support for settlers wanting the main development opportunities deprived Maori both of full legal ownership and of genuine involvement as partners in the control and development of the towns. (In the event, the Crown and settlers made poor use of their development opportunities in many cases.) The native townships represent another example of genuine joint-venture opportunities being missed in the development of New Zealand, and of the familiar tendency to reduce the Maori landowners to a secondary role or to exclude them altogether rather than involve them fully in the administrative responsibilities and commercial risks involved in development – in other words, rangatiratanga translated to modern conditions.

pti.17 Development Schemes

Land development schemes became the dominant feature of Maori policy in the 1930s and 1940s and remain significant in some rural areas still. They arose out of the coming together of two initiatives led essentially by Apirana Ngata: the consolidation of fragmented Maori holdings, left after decades of land purchasing and successive partitions, into viable farms and the campaign, dating back to 1900 or earlier, to have State finance made available to assist Maori to develop their own land. Various consolidation schemes had got under way in the 1920s, but they were greatly handicapped by the perennial problems of the owners' lack of capital and the need for adequate administrative and legal structures through which to manage the capital and the land and promote sustainable development. Carroll and Ngata had, in principle, secured some limited access to loan funds in the 1905 and 1907 Acts, and some limited finance began to trickle through from the Native Trustee and the Maori land boards in the 1920s (see secs pti.15, pti.18). The issue became increasingly urgent in the 1920s, with impetus being given by the needs of the Maori returned soldiers. But the concept of Maori land development got its first serious start in 1928, when, as Native Minister, Ngata secured £250,000 for the purpose.

The schemes were launched largely on the basis of Ngata's hopes of making Maori rural communities economically viable and culturally secure. Considerable funds were made available and many Maori were employed in the basic work of clearing and fencing the land. After Ngata's loss of office in 1934, and especially under the Labour Government from 1935, stronger efforts were undertaken to make the schemes profitable, or at least cost efficient, although they also continued, in the early years at least, to provide work for many unemployed Maori.

A principal concern relating to the development schemes is the degree of consent that owners of the land were able to exercise. Much land was put in by the owners

themselves, inspired by leaders such as Ngata and Te Puea. A considerable amount of land, however, was committed to the schemes by decision of the administering authorities – the Minister, the Maori Trustee, or the Maori land boards – with doubtful levels of consultation with the owners.

Funds were also committed to the schemes and charged against the land by the administering authorities without full consent. In Gould's view, some of the schemes were 'required to bear a burden of development costs beyond that which might have been considered prudent'.¹⁰⁴ Much of this was Maori money – undistributed funds held by the trustee or the land boards. The State, however, did put in considerable funds, commencing with the £250,000 voted in 1928. Strictly speaking, these funds were all loans charged against the 130 or so schemes to which they were applied. The State eventually wrote off a lot of its debts. Some rates and survey liens were also written off on consideration of Maori agreeing to commit land to the schemes. Further research would be required to determine how much of the funds came from consolidated revenue and how much from Maori funds in trust. After the repayment of loans, however, there was often little cash return from the schemes either for the 'unit' – the farmer and his wife and children who got up before dawn to milk the cows – or for the beneficial owners of the land.

Consolidation schemes and development schemes confused the underlying pattern of hapu interests. Some of the schemes were based on a thorough discussion with, and the full consent of, the parties at the time, some were not. The question of priority between the farmer and the beneficial owners was never adequately resolved; most units never got a secure lease to pass to their heirs or to encourage them sufficiently to invest their own capital and labour on making improvements. Commonly, 'strangers' were put on the land rather than one of the owners themselves. In a recent study of Taitokerau schemes, Aroha Harris argues that:

there were, inevitably, 'certain ambiguities and contradictions' in the supervision process. While the Department 'wanted farmers to become independent of a very protected environment into which the Department itself had placed those farmers in the first place' it also wanted 'to dictate the nature of the independence that it wanted farmers to achieve, that is, an independence brought on secure tenure, orderly land titles, and high productivity.

Despite advocating self-reliance, initiative, and confidence in Maori farmers, the department would only allow farmers to show limited initiative:

This ambiguity had the Department performing a delicate balancing act, giving Maori farmers a measure of control over their farming activity but within an environment that imposed restrictions over stock, cream cheques and household spending. In many cases, Maori farmers experienced that balancing act as an overbearing Government patronising and lack of faith in Maori farmers, up to the point that they were treated as little more than employees of the Department.

104. A Gould, with G Owen and D Tuuta, 'Maori Land Development, 1929–1954: An Introductory Overview with Representative Case Studies', report commissioned by the Crown Forestry Rental Trust (in association with the Rangahaua Whanui programme), Wellington, 1996, p 85

Furthermore, Harris argues that many in the department:

harboured a negative attitude towards Maori farmers, basically believing that Maori people were simply incapable of being good farmers . . . the promise of equity, financial reward and farming way of life was a long term incentive ‘generally unsuited to the Maori temperament’.¹⁰⁵

A certain insensitivity towards cultural values and the problems of Maori communities was also manifested among some farmer supervisors, for whom considerations of economic efficiency were no doubt paramount.

The dilemmas of owners’ rights and the department’s interests were illustrated by the Ranana scheme in 1951. At that time, the scheme had a debt of £19,514, and the owners were calling for the return of their lands. During the 20 years of development, they had received nothing in the way of rents or dividends for the land they had given up. A representative of the owners, H Marumaru, believed that the owners should receive something for the use of their lands from either the department or the occupier. If they received nothing, they felt that they should get their land back. Others were questioning why fully developed areas within the scheme were still under the auspices of the department and had not been released. A compromise could not be reached; the department allegedly ‘wanted owners to lay aside all concern for their family interest’, despite the fact that many wanted their children to farm their land rather than amalgamate it with other blocks.¹⁰⁶

Even when the department retained control, it was not always able to return land in a good financial order, despite the boom years of the 1950s and 1960s. When the Te Haranui scheme in Taitokerau was returned to the owners in 1982, not only was the property in a bad state (the housing, the fencing, the forestry project, the pasture), but they inherited a debt of \$304,134 that was not of their own making.¹⁰⁷ In the Ngati Tuhekerangi scheme in Taranaki, the land went into the scheme with unpaid rates as the only debt; when the land was returned, the debt was greater than the Government valuation.

Other complaints about the schemes are that people were displaced by them and lost use rights; that people were virtually obliged to relocate; that the employment of professional managers to make schemes profitable meant that owners did not acquire necessary skills; that the Crown (the trustee), the department, or the board bought out shareholders and became a major owner itself in some schemes; and that uneconomic shares were compulsorily converted.

It would be easy to conclude that the development schemes were largely a waste of time and money.¹⁰⁸ Yet such a conclusion would be too sweeping. Many factors operated to make it impossible for Ngata’s high hopes to be realised – factors that

105. A Harris, ‘Maori Land Development Schemes, 1945–1974, with Two Case Studies from the Hokianga’, MPhil thesis, Massey University, 1996, pp 152–153

106. D Tuuta, ‘“Something Definite Must be Done’: The Ranana Development Scheme, 1930–1962’, case study in Gould

107. Harris, p 121

108. Bennion, p 65

were not necessarily able to be appreciated in 1928. The most important was that there simply was not enough suitable land left to support a class of Maori small holders in reasonable prosperity even before the schemes started. For over a century, successive governments (including the governments of 1910 to 1928) had pushed ahead with the purchase of Maori land before finance and technical support had been brought to bear on any serious scale to assist Maori farmers. Most of the Maori land that remained was high country, suitable only for extensive farming. It would have been foolish to bring that land out of existing tenures and attempt to subdivide it. Moreover, rich lowlands of the west coast settlement reserves were locked up in perpetual leases under the Maori Trustee. Related to this was demographic and social change. In 1928, it may have just been possible for Ngata and his supporters to believe that the development of the remaining land could support most of the Maori people in rural lifestyles, but few could doubt even then that Maori numbers were increasing rapidly; in 1939, it was obvious that the land could no longer support them all. Ngata himself was of course a visionary; he hoped that rural Maori communities could be revitalised around their kainga and marae. In fact, he succeeded in this to a remarkable degree. But he envisaged rural community lifestyles being supported by a mixture of farming, cultivating food, and seasonal labouring; this was a lifestyle that not all Maori desired. They, like most New Zealanders, wanted to live in reasonable comfort rather than struggle on marginal farms; they wanted well-paid jobs, good housing, and other opportunities in the towns. The booming post-war economy made this possible, and the often very hard, precarious, rural lifestyles, with their uncertain future for the children, began to be abandoned.

The efforts of the departments then to take over more control of the schemes, amalgamate the small farms, and create efficient units more suitable to modern farming methods and more responsive to changing market conditions were therefore not wholly inappropriate, even from the point of view of Maori owners themselves. Even so, to see the land sold outside the ambit of the beneficial owners, and even sold to Pakeha, was taking efficiency too far. As Ngata had commented, it seemed increasingly as if the schemes were being run for the benefit of the national economy, rather than the beneficial owners.

Therefore, in many cases, Maori communities now tend to look back on the schemes with a sense of bleakness and frustration. Often, especially in the early years, they had committed land voluntarily and with high hopes. Later, they found that other land was being committed to many of the schemes without much consultation. By the 1980s, there often seemed to be little to show for the effort. Under those circumstances, the exclusion of the owners from the control of the land and the eventual alienation of some of it are seen as a grievance, and they feature in a number of Treaty claims.

There was, no doubt, bad planning behind many of the schemes. The New Zealand goal of a numerous and prosperous small farming society had always been a utopian one, as Dr Miles Fairburn has eloquently pointed out.¹⁰⁹ As well as Maori, a great many Pakeha soldier settlers suffered from being put on uneconomic

holdings over the years and being directed by bureaucracies. That trend persisted even after the Second World War. Many of the farms that have survived have done so only through being amalgamated with neighbouring farms. Ngata was not wrong in assuming from the outset that farms could only be one part of an income stream for a rural Maori community. On the other hand, the swiftness of the demographic, social, and economic changes after the Second World War was probably greater than governments could anticipate. The boom years after the Second World War helped small farms throughout the nation; the necessity to readjust afterwards ought perhaps to have been foreseen, but the complications of British entry into the European Community and the oil crisis could not have been predicted.

There is also the point that in many schemes the outcome was by no means wholly unsatisfactory. There were about 136 schemes operating by 1939, with assistance going to over 2000 individual farmers and many thousands of contract workers receiving employment at the height of the development programme. Some of the owner-farmers and occupiers-lessees are still working on development scheme farms, having survived many vicissitudes and adjustments.

It is therefore premature to conclude negatively about the development schemes overall and generally. They were a belated effort to help Maori become farmers, in many cases on their own land. There was certainly ineptitude in planning and excessive paternalism in management. Some schemes were evident failures and led to land loss. How far this should be considered to be the consequence of mismanagement by the Crown and how far a result of general circumstances working against the schemes is a judgement that it is not possible to make without a detailed investigation of each particular case. Unlike other Crown policies (such as the concerted efforts to overcome evident and expressed Maori resistance to land selling), it is not appropriate, in the author's view, to conclude negatively on development schemes as a whole; each would need to be looked at for its particular features, for the balance of profit and loss to the communities concerned, for the amount of capital and land that Maori had put in, and sometimes lost, and for the amount of capital that the Government had put in, sometimes to the advantage of the community.

pti.18 The Maori Trustee

The office of the Maori Trustee was created in 1920 and took over from the Public Trustee the management of important estates such as the west coast settlement reserves and the Mawhera (Greymouth) leases. It was also involved in land development and the provision of mortgage finance to Maori farmers. Neither the Public Trustee nor the Maori Trustee nor their administrations exercised their responsibilities consistently in the best long-term interests of those Maori whose land and revenue was vested in them. The alienation of land, large capital expenditure with

109. M Fairburn, *The Ideal Society and its Enemies*, Auckland University Press, 1989

little return, the charging of lands with high levels of debt, problems surrounding the collection and distribution of rents, land valuations, and the maintenance of lease covenants, and inadequate consultation with beneficial owners in respect of all these matters indicate a dubious record of protection of Maori interests. The difficulties the trustee faced in all aspects of his administration have to be acknowledged, but it seems that considerations of general efficiency and the interests of tenants came before the interests of the beneficial owners in many areas of the trustee's operations. In their recent study, Schmidt and Small find, for example, that the trustee's office pursued inconsistent policies in the valuation of improvements in the west coast settlement reserves, as regards compensation for improvements and setting appropriate rents.

Responsibility for setting the main aims of the trustee's administration rests with the Government. The trustee was obliged both to carry out the legislative directives concerning Maori land under his administration and to serve the interests of the Native Department. This was patently clear in the legislation of 1887 and 1892, which shifted first the Greymouth tenants, then the west coast settlement reserves to perpetual leases. It was also apparent in the amalgamation of the Native Trust Office with the Department of Native Affairs under the Native Land Amendment Act 1932. It is doubtful whether the trustee could have gone against Ministers' directives in order to protect his clients' interests; the conflict of roles was simply too strong between the Maori Trustee as an agent of the Crown and as a trustee for Maori owners.

This conflict becomes apparent, for example, in the matter of compensation for public works takings. Given the fragmentation of titles through succession, the interests of Maori whose land was compulsorily acquired were numerous and often 'uneconomic'. It was convenient for the Crown and local bodies to deal with the Maori Trustee in giving notice of land taking and compensation. It was commonly left to the trustee's office to find the potential payees or to use the funds for general Maori purposes until claimants came forward. Similarly, with regard to the non-payment of rates, it was a convenient device to have the Maori Trustee meet the charges and even sell the land, if necessary, to recover the debt.

The whole question of uneconomic interests and their compulsory extinguishment also implicated the Maori Trustee. Under the Maori Affairs Act 1953, the trustee was required to purchase interests in intestate estates below £25 in value and resell them to other individual Maori or to incorporations. The Maori Reserved Land Act 1955 extended this power to uneconomic interests in reserved lands. The Maori Affairs Amendment Act 1967 increased the trustee's role in respect of compulsory conversion of uneconomic interests, now defined as under £100. The question of uneconomic interests is a vexed one, itself arising out of the Native Land Acts and the succession rules of the court. But compulsory powers of extinguishment, such as those given to the Maori Trustee until 1974, infringed Maori rights to land (which were valued for many more reasons than economic ones) and contributed to the upsurge of protest after 1967.

pti.19 Rating

The rating of property to pay for social services is a reasonable exercise of *kawana-tanga*, legitimated by article 1 of the Treaty. However, Maori lacked capital other than their land, and they made a valid point that rates charges, especially in respect of customary land, amounted to a compulsion on them to sell land. The usual argument that rates are a reasonable device to oblige people to develop land and make it yield revenue does not obtain with the same force when land is in multiple title without a single legal personality and is not able to attract credit from either the private market or the State. The legislative provisions that rated Maori land only when it was leased, or developed and yielding a revenue, are therefore more appropriate, in Treaty terms, than rates on Maori customary land or undeveloped land. There is also the problem that Maori, in remote areas especially, saw little in the way of services for their rates. The exempting of certain categories of Maori land from the payment of rates and the levying of other lands at half the usual rate were, therefore, reasonable attempts by the Legislature to recognise the particular situation of Maori, but arguably did not go far enough. The valuation of remaining Maori land at market rates, when most of the land is under restriction and not marketable, is an issue warranting consideration. Given all the problems of title and credit, and the very small amount of Maori freehold land left by the 1920s, and given also the compulsory taking of a percentage of Maori land under public works legislation, it can certainly be stated that no Maori land should have been sold up by the Maori Trustee or any other agency for the non-payment of rates and that rating should have applied only to land from which significant revenue was being made.

Detailed research in local body records, Maori Trustee files, and Maori land board files held in district offices around the country would be necessary to determine, with any precision, the actual takings of Maori land for non-payment of rates. It is doubtful whether that degree of research would be cost-effective. There would be many *more* instances where demands for payments of rates would have contributed to the pressures to sell land, but these would be impossible to determine with accuracy now.

If a judgement is to be made as to whether the demand upon Maori for rates, historically, is considered to have been excessive, in terms of the balance of Treaty principles (that is between the Crown's duty of *kawana-tanga* and its duty of active protection of Maori land rights), the judgement is probably best made through an appraisal of the legislation, and, if possible, its application in a given district, and an appraisal of the extent of services provided in a claim area, with a view to factoring in the quantum of reparation on a district-by-district basis.

pti.20 Tino Rangatiratanga: Maori in the Political and Administrative System

The British Government knew by late 1837 that white settlers were entering New Zealand from New South Wales, and it was informed of the plans for systematic colonisation from England by the New Zealand Association under Edward Gibbon Wakefield. It believed that the flow of colonisation would not be stopped and that the British colonists would demand the right of self-government. Given the examples of North America and Australia, the British authorities believed that the best protection they could offer the Maori was not to set up a system of separate development on reserves, where Maori law would prevail, but to promote the 'amalgamation' of Maori into the same framework of law and administration as the settlers. The recognition of tino rangatiratanga in the Treaty was intended by the British mainly to refer to the local authority of chiefs in relation to their communities, especially in respect of land, forests, and fisheries.

Maori certainly assumed that much more was intended by the Treaty guarantee of tino rangatiratanga and were increasingly resentful and suspicious of the encroaching authority of the Governor. The British had not thought through, or discussed with Maori, the relationship between central authority and chiefly or tribal rangatiratanga, although in practice there was cooperation in the management of minor crime and civil disputes. Most northern chiefs still envisaged a relationship with the Crown, however, and did not support Hone Heke's rising in 1844 and 1845. In the Cook Strait region, land issues led to military confrontations.

Meanwhile, the settlers were indeed pressing for self-government. The 1846 constitution, which created the provinces of New Ulster and New Munster, excluded Maori from the vote by means of a language test in English. Governor Grey, however, secured the postponement of the provisions for elected assemblies. The 1852 constitution was introduced with an elected national parliament: the qualification for the vote was the possession of individual property of a certain value, which excluded all but a few Maori.

The wrangles over the nominations and the electoral rolls alerted Maori to the shift of power towards the settler assembly. They responded by launching the movements for a Maori King, or a separate Maori parliament, or for district runanganui. Cooperation with the Governor was nevertheless envisaged, along with continued affirmation of the Christian gospel and the law.

In 1856, a settler ministry took office, responsible to the majority in Parliament. Grey had reserved Native Affairs as the responsibility of the British Governor and the Imperial Government. But he did not declare 'Native districts', as provided for in the 1852 constitution, trusting instead that the involvement of chiefs as assessors and police assisting the resident magistrate would promote the 'amalgamation' of the two peoples under one law.

The emergence of the Kingitanga, however, seemed to many British officials to challenge the Queen's sovereignty. From the settlers' perspective, it meant that the greatly desired lands in Waikato and elsewhere were not going to be sold. For this

reason, they opposed any recognition of the Kingitanga, although London toyed with the possibility in 1861 and 1862. Responsibility for Native Affairs was transferred to the settler ministry in 1862, and Grey aligned with the settlers. He did not call together a national assembly of chiefs such as Governor Gore Browne had assembled at Kohimarama in 1860. Maori remained without representation in Parliament, or a consultative assembly, as policy began to be made increasingly by the General Assembly. This was most evident in the passage of the Native Land Act 1862, which began the conversion of Maori customary tenure into a form of individual interests, separately negotiable, and initiated direct purchase by the settlers.

Grey, meanwhile, had sought to work around the Kingitanga by setting up local or district councils (runanga). It was hoped that these might facilitate land transactions, but when they did not, the Government lost interest in them. After war resumed in Taranaki in 1863, Grey sent the army into Waikato as well.

Maori were subject to a battery of legislation after 1863, much of it punitive. The franchise was, however, extended to adult Maori males in 1867 and four Maori seats in Parliament were created. This was never seen as adequate representation by Maori, and the movement for a separate Maori parliament was revived by the late 1870s.

Proposals were also revived for local Maori councils to take over the determination of titles from the Native Land Court and to manage land, principally by leasing. For 30 years, these proposals came to very little, because the settler parliament did not want a rival to the Native Land Court, under which land was steadily being alienated. In 1900, however, the Maori Land Councils Act set up a system of councils with Maori majorities, in whom land could be vested for leasing. The Kotahitanga movement and the wider Maori leadership hoped that these might lead towards a genuine measure of local Maori self-government. But with only about four million acres of arable or pastoral land left, Maori were slow to vest the land, and by 1905 the national parliament had again begun to dismantle the Maori land councils. Eventually, in 1913, the councils were made synonymous with the Native Land Court – the district judge and registrar of the court also constituting the Maori land boards of the district, with power to oversee sales and leases under the Native Land Act 1909. The most promising attempt thus far at giving expression to rangatiratanga at local and district level was abandoned.

Officially, Maori rangatiratanga was recognised only in the four Maori seats and in assessorships of the land court. Even the resident magistrate system, under which chiefs had participated in the local administration of law, was dismantled in 1893. The native schools and the land incorporations beginning to emerge under the legislation of 1894 were among the few other formally recognised opportunities for Maori participation in the institutions of the new society.

The examples of James Carroll, who was highly successful in the political arena, and of Apirana Ngata and others emerging from the village schools, church boarding schools, and the universities nevertheless encouraged Maori to continue working with the mainstream. The ongoing tradition of allegiance to the Crown and

belief in the compact made at Waitangi led Wiremu Ratana's movement to contest the four Maori seats and to press for the Treaty to receive standing in domestic law. The land development schemes launched by Ngata were probably seen by many local communities as a form of self-determination, though their early promise faded in many cases.

The Second World War brought a new opportunity to recognise Maori rangatiratanga. The Maori War Effort Organisation, which supported the Maori Battalion, won respect and admiration from the Prime Minister, Peter Fraser. But the Maori Social and Economic Advancement Act 1945 failed to offer Maori the scope for continued initiatives that Fraser and Tirikatene, among others, had hoped for. The Maori Affairs Department had become the controlling authority over the land and lives of Maori, and the local Maori committees were obliged to work through it rather than independently. Meanwhile, Maori were moving to the towns.

At the central level, Maori rangatiratanga has had some (though inadequate) recognition through the Maori members of Parliament and, since 1962, the New Zealand Maori Council especially. At the local level, the rangatiratanga of chiefs and tribes was not fostered. On the contrary, through the pseudo-individualisation of land titles, it was systematically undermined. The history of Maori relations with the State is that the hopes and promises of 1840 were not fulfilled. The Maori people's own institutions were not recognised in any lasting way, but neither were Maori admitted to more than subordinate roles in the new order. Urbanisation has created new needs and new opportunities. The whole question of tino rangatiratanga is ripe for new initiatives. Indeed, they will be necessarily entailed in the return of resources under Treaty settlements, and the structures being evolved by Tainui and Ngai Tahu will no doubt be studied closely.

PART II

THE HISTORICAL EXPERIENCE (BY RANGAHAUA WHANUI DISTRICT)

These comments are drawn from an appraisal of the reports prepared on the various Rangahaua Whanui research districts and research prepared for claims before the Waitangi Tribunal. They are the author's assessment of the more prominent or unique impacts of Crown policies in respect of each district. Fuller summaries are provided in volume iii of this report.

Readers should consult the tables and maps at the front of this volume for an estimate of the acreages and percentages of land remaining in Maori hands at given dates.

ptii.1 District 1: Auckland

Except for the Hauraki district and the confiscation-affected districts of Waikato and Taranaki, the Auckland region, the most heavily populated of the Rangahaua Whanui research districts, has been left the least Maori freehold land available on a per capita basis in the North Island, exceeding even the landlessness of the South Island Maori.

The region was most affected by early settlement, over three-quarters of the old land claims being located in the region, which was much desired for its timber and its harbours. This is the district where aspects of the old land claims and surplus land question are felt most strongly. The location of the capital at Auckland put special pressure on the land in that vicinity. Approximately 82 percent of land granted to private individuals from pre-1840 transactions was granted in the Auckland district, along with 95 percent of the land claimed by the Crown as 'surplus'. By 1850, most of the accessible land of Tamaki-Makaurau and South Auckland had been purchased; with some doubts as to whether all Maori had grasped the European sense of sale until late in the period. Early undertakings to make generous reserves were subsequently overridden or neglected, and Grey sold the 'Crown tenths' that FitzRoy had reserved, mainly for Maori purposes, in the pre-emption waiver sales of 1845 and 1846.

By 1860, some 42 percent of the district had been alienated. Crown land purchase officers before 1865 acquired some 1.6 million acres of the district, including most of Kaipara and South Auckland – the greatest single period of land transfer in the district. An estimated further 100,000 acres were taken in confiscations in South Auckland under the New Zealand Settlements Act 1863.

Dr Michael Belgrave's analysis shows that, following the establishment of the Native Land Court in 1862, by 1890, 1,603,813 acres of land in Auckland and Northland had passed through the court and, by 1908, only 13 percent of that remained in Maori hands.¹ In the light of the 1891 census figures of 9542 for the Auckland district (three times greater than that of any other Rangahaua Whanui district then, as now), for the Liberal Government to launch a major land-buying campaign in the Auckland district was irresponsible. The Crown and private purchasers together acquired some 230,000 acres in the district between 1891 and 1910.

Even more serious, however, in a district where Maori were very short of good land, was the continuance of purchasing into the twentieth century. In consequence of extraordinarily short-sighted policies, about half a million acres of land were alienated in this district from 1910 to 1930, leaving only about 218,000 acres of Maori freehold land in 1939 – the lowest percentage remainder of any district in the North Island other than Hauraki and the confiscation districts of Waikato and Taranaki. With the 1936 census showing a Maori population in the district of about 22,400 (with few, as yet, living in Auckland city), there were at that date fewer than 10 acres per head remaining.

At the same time as governments were making gestures (largely ineffectual) about landless Maori in the South Island, up in the north they were pursuing policies that rendered about one-quarter of the whole Maori population equally landless. In terms of the Treaty duty of active protection, the fate of the Maori people of the Auckland region stands, perhaps, as the most glaring breach of all.

ptii.2 District 2: Hauraki

Hauraki also experienced the full range of impacts of colonisation. The investigation of pre-1840 transactions (old land claims) left one lasting grievance in particular; namely, McCaskill's claims at Hikutaia, which were inadequately investigated by Commissioner Bell before awarding the land to the purchaser in 1862.

Crown purchases before 1865 involved land purchase officials in buying individual interests or sectional interests in an effort to undermine wider tribal authority – a precursor in effect of the policy attempted at Waitara in 1859 and 1860. The purchases left few reserves.

Hauraki tribes were also affected by raupatu, in that they had interests in the Katikati and Te Puna forced purchases (of land confiscated and nominally returned) and in the eastern side of the Waikato confiscation (East Wairoa block). They were affected also by the Crown's assumption of control of the foreshores (the tidal flats being of major importance to the Hauraki tribes' ecology) and the dredging of rivers and drainage of wet-lands, for which they received minimal compensation.

1. M Belgrave, 'Auckland', report commissioned by the Waitangi Tribunal, ch 10

The distinctive issue in Hauraki, however, is the impact of the Crown's policy on gold-fields. Maori sought to accommodate mining by entering into agreements with the Crown in 1852, which allowed for miners' rights and the leasing of land. The Crown, however, under pressure from mining companies and unable (or unwilling) to control rushes on new strikes, pressed constantly for the freehold beyond the limits of the previous agreements and purchased minority interests at first. Crown officials did not disclose to Maori the value of the land for the gold and other sub-surface minerals. Mining legislation also overrode the spirit and terms of the early agreements.

There was heavy purchasing of land under the Public Works and Immigrations Acts of the 1870s, again under the Liberals in 1891 to 1899, and in 1911 to 1930 under the Reform Government. By 1910, only about 12 percent of the traditional rohe of the Hauraki tribes remained in Maori ownership, and by 1939 the figure was down to about one percent.

ptii.3 District 3: The Bay of Plenty

District 3, the Bay of Plenty, was heavily affected by the dual process of confiscation followed by the removal of restrictions on the alienation of land not confiscated or confiscated and returned.

In the western Bay of Plenty, about 214,000 acres of the best land around Tauranga was declared confiscated under the New Zealand Settlements Act 1863. Of this, a 50,000-acre block was retained and the Katikati–Te Puna block (93,188 acres) was acquired in what amounted to a compulsory purchase. In the eastern Bay of Plenty, following the killings of Volkner and Fulloon, some 480,000 acres were confiscated and about 100,000 acres returned.

The confiscations fell somewhat indiscriminately across a number of tribes in each area, and although land was supposed to be returned to 'loyal' Maori, there was considerable confusion about the allocations. (For example, land was returned to 'Ngaiterangi' as a collective name in the western Bay of Plenty, to the apparent disadvantage of groups who were not Ngaiterangi.)

Efforts were apparently made by the commissioners controlling the distribution of the confiscated land to ensure that all hapu had sufficient residential land and that reserves were made inalienable except by 21-year lease. Even so, the distribution was very uneven and some hapu were left with only a few acres per head. Moreover, from about 1880, restrictions on alienation began to be lifted (first by the Governor in Council and later by the Native Land Court). Under the Native Land Court Amendment Act 1888, restrictions could be removed by a simple majority vote of owners. Under the Native Land Act 1909, virtually all restrictions were removed, apart from a limited check on 'landlessness', and fair price, by a Maori land board. The issue of the removal of restrictions is a most serious one, affecting most Maori freehold land and raising the serious dilemma of how much paternalistic control to

introduce in the statute law to replace the tribal control that operated over customary land.

In the event, by 1900, several hundred Maori in the Tauranga district were defined as landless in an official return. In the central and eastern Bay of Plenty, too, reserved lands, and lands that had not been confiscated, were steadily alienated, including considerable areas taken under the Native Land Act 1909. For example, Te Arawa around Te Puke today retain only 6.4 percent of that district (12,500 acres out of 199,000 acres). Much of that was sold to the Crown in the nineteenth century and to private purchasers under the 1909 Act.

These later alienations were especially serious for those communities already land-short owing to confiscation; the continuance of land acquisitions at a time when the Maori population was again increasing sharply raises the questions of the Crown's Treaty obligation of protection.

ptii.4 District 4: Urewera

District 4, Urewera, illustrates the continued tendency of governments to deal with sectional interests for the purpose of purchasing land, rather than with multi-hapu authorities.

Tuhoe were still resisting surveys in their territory, with arms, in the early 1890s. Settlers, however, were pressing for the right to prospect for gold and governments were unhappy at the continued independence of Urewera from administrative control. Tuhoe were themselves willing to make a controlled engagement with the wider world, and James Carroll negotiated with them the Urewera District Native Reserves Act 1896.

By this Act, a general committee elected by some 33 hapu in the district, rather than the Native Land Court, was to determine hapu titles; land alienation, by lease, was to be done through the general committee. But defining discrete blocks hapu by hapu was not easy in the situation of intersecting hapu interests that existed throughout much of the region, and the Native Land Court was eventually brought in to hear appeals.

The general committee under Numia Keruru was persuaded by Ngata in 1908 to negotiate for the sale of some blocks to pay for survey costs. About the same time, however, the Government began to treat with Rua Kenana for the purchase of sectional interests, without going through the general committee. The Urewera Amendment Act 1909 (passed under Carroll) began the process of bypassing the committee, and the Native Land Amendment Act 1916 (passed under Herries) retrospectively validated the purchase of individual interests.

Systematic purchasing of individual interests began in 1910. By the end of that year, the land agent Bowler had acquired interests amounting to approximately 252,000 acres, and by 1921 he had acquired 518,000 acres, the equivalent of two-thirds of the reserve. This included flat land near Ruatoki as well as valuable timber blocks.

The general committee was apparently not able to accommodate the normal rivalries between hapu and leaders, but the Government's resort to the old system of buying individual interests, rather than assisting corporate Maori development of the district, represented a continuation of the usual acquisitive and divisive processes launched in 1865. The opportunity was largely missed for a new approach in the last main area where tribal autonomy remained substantially intact and tribal development of tribal lands remained a real possibility.

A major consolidation scheme was launched in Urewera in 1921. The Crown wanted to consolidate its scattered interests into whole blocks. Tuhoe were asked to contribute £20,000 (in land) for roading to the interior villages. Tuhoe were quite divided on the consolidation scheme, but support was apparently given because of the prospect of individual, surveyed, small farms along the roads. In the event, the Crown veered the scheme towards the securing of title of the Waikaremoana block for conservation and scenic purposes, as well as the good timber blocks at Te Whaiti, eventually acquiring some 137,224 acres more than its 345,076 acres of interests, as given in official returns up to 1921. The interior roads were not in fact made. In 1958, Tuhoe accepted £100,000 compensation for this and for the faulty location of their blocks in the Whakatane and Waimana Valleys.

ptii.5 District 5: Poverty Bay and the East Coast

Maori of Turanganui-a-kiwa (Poverty Bay) and the East Coast fell victim to the Anglo-Maori wars. Almost none of their land had been alienated before 1865. They had made numerous transactions with traders, missionaries, and early settlers before and after 1840 but declined to regard these as sales and resisted the presence of the Queen's magistrates and land claims commissioners in order to maintain their own control.

In 1865, sections of the tribes aligned with the Pai Marire faith, whose emissaries had entered the district after the killing of the Reverend Carl Volkner at Opotiki. The Government exploited old tribal rivalries to strengthen its own position. Pressed by the Government to surrender arms (partly under the threat of bringing their former adversaries the Ngati Porou into the district), the Poverty Bay tribes fortified a pa at Waerenga-a-Hika. The pa was taken in a week, but the local tribes were treated as rebels. They were pressed to cede a large area of land under threat of confiscation, the Government meanwhile keeping Te Kooti and other local men prisoner on the Chatham Islands. 'Friendly' Maori and Pakeha alike suffered in Te Kooti's subsequent escape and raids on Poverty Bay in 1868 and Tolaga Bay in 1869.

Much land was then ceded in Poverty Bay, and although much was also returned, it was returned with great confusion as to who was rebel and who was loyal, with Ngati Porou and Ngati Kahungunu, allies of the Crown, receiving interests (eventually commuted for money). The Rongowhakaata tribe in particular appears

to have received poor recognition from the awards of the Poverty Bay commission in 1873, although the precise distribution of this land has yet to be determined.

There is no good ground for regarding the forced cession in Poverty Bay as fundamentally different in character from confiscations elsewhere, although it took place under different legislation.

The East Coast north of Poverty Bay was also disturbed and divided over Pai Marire in 1865. Although Ngati Porou had generally remained aligned with the Anglican Church and the Crown, their whole rohe was declared confiscated under the East Coast Land Titles Act 1866, and they were being pressed to cede land as late as October 1868; the Government withdrew the demand when it sought Ngati Porou help against Te Kooti after his November 1868 raid.

Amid the confusion, the early settlers secured titles to their lands from the Poverty Bay commission, or leases, which eventually became purchases, from the divided hapu. The Crown also bought significant areas, employing the usual methods of buying undivided interests (sometimes before the land passed the court) and removing restrictions on alienation when necessary. About 300,000 acres of Poverty Bay and East Coast land were caught up in the dealings of W L Rees's and Wi Pere's New Zealand Land Settlement Company. Legally flawed transactions of this company, and other large purchases in the area, were legalised by the Validation Court in the 1890s – a proceeding of doubtful equity, since many Maori right-holders were unaware of the sale or mortgage of the blocks concerned in the first place.

Almost all of Poverty Bay and about 325,000 acres of the Ngati Porou rohe, both populous districts, had been acquired by Crown and private purchase by 1908. It should be noted, however, that the East Coast trust lands and Mangatu blocks, taken under a statutory trust after the confusion of the Rees–Wi Pere dealings, were returned to Maori, debt-free and developed, after the Second World War.

The use of compulsory powers to vest land in the Crown for native townships is also an issue on the East Coast, especially in respect of Te Puia Springs, which was eventually sold to the Crown under the assembled owners provision of the Native Land Act 1909.

ptii.6 District 6: Waikato

The main Treaty breach in the Waikato region was obviously the Government's attack on the Waikato in July 1863 and the raupatu that followed. There are, however, other issues exempt from the Waikato Raupatu Claims Settlement Act 1995.

Important land claims include the Crown purchases before 1865. The district defined as 'Waikato' for the Rangahaua Whanui programme includes about half of the region between the Waikato River and the Manukau Harbour (commonly called South Auckland). These purchases were made with a few chiefs in each instance. The boundaries were very loosely described and the prices were very low. Few

reserves were defined. Only on survey, years later, was the land defined with any clarity and more payments made to the right-holders. While this may have accorded quite well with the intentions of the small number of transacting chiefs in the 1840s who wanted to enter into relations with the Governor and his associates, other Maori were dragged along in their wake. Except for the bushclad ranges, most of 'South Auckland' had been sold by the early 1850s. The reaction of the middle Waikato tribes in 1854 to the transactions of lower Waikato kinsmen was to 'tapu' the land across the Mangatawhiri – an early manifestation of what became settled Kingitanga policy.

After the war and confiscations, the Native Land Court became very active in the eastern side of the district (from Piako towards the volcanic plateau) and notably in the Patetere block of about 290,000 acres, where the usual practice of piecemeal acquisition and partition ensued. The tribes outside the raupatu area were severely affected by these processes. According to the Stout–Ngata commission's 1909 report, only a tenth of the district remained in Maori ownership, with only about 28,000 acres that could be considered surplus to the owners' occupation requirements. Waikato claimants have also raised the issues of rights to the river itself and to the western harbours.

ptii.7 District 7: The Volcanic Plateau

This district shows the problems commonly associated with purchases under the Native Land Court, where the interests of a percentage of the owners were acquired and blocks purchased over time through a series of partitions.

Otherwise, the district gave rise to particular issues associated with its special features – the great mountains, lakes, and geothermal activity. The alienation of the Rotorua town land is a complicated story. The township land was leased initially under the Thermal Springs Act 1881 for good rents, then the lessees began to default on their payments during an economic downturn. The role of the Crown in what followed requires closer examination; Maori, having incurred debts against reasonably anticipated lease revenue, eventually sold to the Crown (which had established a pre-emptive right of purchase over the whole district). It is arguable that Maori should have been given greater protection in what was a Crown-initiated scheme, thereby enabling them to participate much more in the development of the thermal resource. Ngati Whakaue did, however, accept £16,500 compensation in 1954 by way of settlement.

Much land has been committed to the Tongariro National Park and other scenic reserves in the district. Much of this was gifted by Maori themselves. Other portions were acquired by compulsory process, with compensation being paid (at what levels is not known). The Wairakei purchase illustrates the baneful effect of conducting covert dealings with one group of claimants before the land went through the court – a typical feature of land purchase at the time.

The recognition of Maori rights to Lake Taupo and the Rotorua lakes proved highly controversial, with settlements being agreed in the 1920s and subsequently adjusted. Some issues apparently remained unresolved.

Some hapu in the district have very little land left, and the question of an equitable share for Maori in one of the most resource-rich areas of the country is at issue, with current focus on securing equity in exotic forests.

ptii.8 District 8: The King Country

The essence of the Treaty issue in the King Country or Rohe Potae is the effort made by the Maori leadership to undertake a cautious and controlled engagement with the Government and settlers, and the way that that process got out of control as a result of Crown policies.

Ngati Maniapoto, Ngati Tuwharetoa, and upper-Whanganui tribes were hosts to Waikato tribes from the Kingitanga after the British invasion of the Waikato until the early 1880s. But the bringing of applications to the Native Land Court by groups on the margins of the King Country made continued isolation hazardous. Encouraged by the Government to consider leasing rather than selling land, the tribal leadership, notably under Wahanui, Taonui, and other Ngati Maniapoto chiefs, agreed to admit surveys for the main trunk line. Ngati Maniapoto sought to group the five main iwi of the area in one external boundary survey, with the determination of title and the management of the land to be carried out by tribal committees. Various tribes, however, made separate applications to have their titles determined, which the Government accepted, in contradiction of its arrangements with Wahanui and the Ngati Maniapoto chiefs. The result was a series of hearings in respect of huge blocks such as Waimarino, Tauponuiatea, and Aotea. But Government agents, again in violation of assurances given to Wahanui and others, had already started dealing for individual, undivided interests in the block, followed by applications for partition made in the usual way. The King Country thereafter exhibits the familiar story of piecemeal alienation of the land, at a rate and at an extent that the tribal leaders did not initially desire. Even so, more land was retained in Maori ownership in this district than in any other until the early twentieth century (some 47 percent remained in 1910).

At this point, settler pressure for land and irritation about what was sometimes called 'Carroll's blot' (because of the Native Minister's 'taihoa' policy and support for leasing) led to a new round of legislation, crowned by the Native Land Act 1909, which facilitated alienation through the Maori land boards (themselves becoming synonymous with the Native Land Court judges and registrars after 1913) and through meetings of 'assembled owners'. There were, as always, willing sellers in Maori communities – especially those needing capital for development or to pay debts – and the legislation favoured dealings by individuals where there were fewer than 10 owners in the title and by bare majorities of assembled owners if there were more than 10. (Native Minister Herries acknowledged the abuses in the use of

proxies at meetings of assembled owners, although whether these occurred in the King Country cannot be determined from the current evidence.)

Another illustration of the Crown's undermining of Maori control was the way in which the Maori owners of land in native townships at Otorohanga, Te Kuiti, and Taumarunui, which were launched on the basis of fixed-term leases, were obliged, under amendments to the law in 1910 and 1919, to concede perpetual leases and, eventually, the freehold of the town sections.

By 1939, Maori retained only 13 percent of the King Country.

ptii.9 District 9: Whanganui

Settlement at Whanganui began on the basis of New Zealand Company purchase deeds of 1839 and 1840. In pursuance of the Crown's agreements with the company in 1840 (resulting in a charter issued in January 1841), the company began surveying the Whanganui block, but its claim was disputed by Maori. Commissioner Spain found in 1844 that 'a partial purchase' had been achieved, and he awarded 40,000 acres to the company on condition that an additional £1000 was paid to those who had not received a share of the payment in the first instance and that reserves were made to the tribes' satisfaction. Maori were still resisting the surveys in 1846. In 1848, however, Donald McLean succeeded, through very careful negotiations, in reaching agreement over the question of reserves, allowing Maori important eel and manga fisheries at Okui, near the Whanganui settlement. The £1000 was accepted, the reserves (within and without the original 40,000-acre zone) publicly marked, and the deed signed. The area acquired by and for the company was over 86,000 acres and increased to about 110,000 acres in 1850 when Maori accepted a back boundary marked by natural features (including the Whangaehu River) rather than surveyed boundaries. Although the sale proved much larger than the Spain award, the evidence indicates complete Maori agreement to the transfer of the larger area. Nothing was stated in the agreement about the river, however. In 1863, the chiefs of the hapu concerned relinquished the Okui fisheries for £35.

Crown purchases up-river began in 1868. They were made from particular groups of owners and continued despite an iwi-wide effort to control alienations, launched by a series of large hui held at Putiki in 1871 and involving tribes from the length of the river. The Crown's disinclination to accept a Whanganui runanganui contrasts with its policy towards Te Arawa. Similarly, Major Kemp's 'trust' in the 1880s to try to deal with the run-holders in the Murimotu and Waimarino districts was opposed by the Crown. The common Crown practice of making advances on land before it had gone through the court shaped the alienation of the upper Whanganui, including the 490,000-acre Waimarino block in 1886 (with 454,189 acres awarded to the Crown).

Meanwhile, the upper Whanganui lands that fell within the King Country were being surveyed for the main trunk railway. Initial participation by Whanganui with

the Ngati Maniapoto and other tribes on a general Rohe Potae boundary contrasted with separate applications made to the court by chiefs of Whanganui and other tribes. These applications were accepted by the Government, which was controlling the opening of the interior through restored Crown pre-emption under the Native Land Alienation Restriction Act 1884.

The Government also made use of public works and scenery preservation laws to acquire land along the Whanganui River. Pipiriki was acquired under the Native Townships Act 1895.

Whanganui therefore illustrates the tendency of the Crown to take advantage of, or indeed to promote, tribal divisions, in contrast to the tendency of Maori from the length of the river to try, from time to time at least, to act as one. Paradoxically, the 1848 purchase by McLean, a past-master at divide-and-rule tactics, appears almost a model purchase.

ptii.10 District 10: Taranaki

The purchases by the New Zealand Company, and succeeding efforts to ‘complete’ those purchases, were based on Commissioner Spain’s judgement that the *resident* Maori, still left at Ngamotu, gave genuine consent to at least some settlement at New Plymouth and the surrounding district. The extent of that district, and the entitlements of the absentee right-holders, have been discussed in the Waitangi Tribunal’s *Taranaki Report: Kaupapa Tuatahi*.²

The dominant issue in Taranaki was obviously the military attack on Te Atiawa and associated tribes in support of the Waitara purchase, which was attempted on the basis of a narrow and incorrect understanding of Maori customary land rights. This was followed by the confiscation or forced purchase or both of most of the district.

While (contrary to some historical interpretations) it seems that Te Whiti (to his credit) was challenging the whole confiscation by systematic non-violent protest rather than merely passively protesting about reserves, the wholesale arrests and deportations, suspension of habeus corpus, and forced dispersal of the Parihaka community were also a massive breach of Maori Treaty rights. Some 51,000 acres were reserved for Maori occupation within the west coast settlement reserves, but most of the fertile and important district – some 120,000 acres – was granted to settlers for peppercorn rents under a system of perpetual leases. To then sell the freehold of some 50,000 acres of it was truly rubbing salt into the wounds of Taranaki. Belatedly, the Government is now arranging to wind down the perpetual-lease system.

2. Waitangi Tribunal, *Taranaki Report: Kaupapa Tuatahi*, Wellington, GP Publications, 1996

ptii.11 District 11: Hawke's Bay–Wairarapa

A notable feature of the early colonial history of the Hawke's Bay–Wairarapa district was the Crown's refusal to permit or encourage Maori leases being given to pastoralists. Payments of rent or 'grass-money' to Wairarapa chiefs by early run-holders began in the mid-1840s, but the Land Purchase Ordinance 1846 interpreted the Crown's pre-emptive right under the Treaty narrowly: the ordinance made all kinds of dealings in relation to land between Maori and private settlers not only void but illegal. The threat of prosecution of the Wairarapa run-holders was used by Governor Grey and Donald McLean to induce Maori to sell the freehold to the Crown for very low prices. Before 1862, despite the obvious advantages of leasing when compared with the Crown's low purchase prices, Maori could not begin to think seriously of further developing a leasehold system on customary land because such a system had been made illegal.

Crown purchases in Wairarapa and Hawke's Bay before 1865 were at first conducted with open and public discussion, and the boundaries of the purchase and reserves were clearly marked. Very soon, however, the purchases degenerated into covert arrangements made with the chiefs, often in Wellington, with very loose descriptions of boundaries and no surveys or permanent physical boundary marking occurring. Neglect to make reserves, and the subsequent purchase of supposedly inalienable reserves soon after the main purchase, were features of the Crown officials' proceedings. Purchases made from sections of the customary right-holders in an effort to undermine the resistance of the non-sellers created extreme tensions in Maori communities and led to fighting in Hawke's Bay in 1857.

After 1865, Hawke's Bay and parts of Wairarapa not yet sold were the scene of some of the worst of the scramble for Maori lands under the pseudo-individualisation of title through the Native Lands Act 1865. Full advantage was taken by purchase agents of the indebtedness of chiefs named in the titles, and the Crown was slow to respond by limiting the alienability of the lands. The conversion of customary tenure into fully negotiable paper titles (with each owner's signature a marketable commodity), the manipulation of the inexperienced chiefs, and the acquisition of the tribal patrimony were a kind of legalised spoliation, conducted under a system introduced by, and dishonourable to, the Crown.

About 75 percent of Wairarapa had been acquired by 1865 and some 82 percent by 1886. The Maori population was relatively small, but its losses are comparable to those of the South Island tribes in that very few individuals had sufficient land left to engage seriously in commercial farming.

In Hawke's Bay, the tribes were able to lease legally after 1865, and some 460,000 acres were still under lease in 1891. But the system of awarding absolute and fully negotiable title to only 10 owners in each block led to the serial purchase of each owner's signature and the loss of much of the tribal patrimony. The open scandal that arose, followed by the Hawke's Bay commission of inquiry, resulted in the Native Land Act 1873, under which all the owners' names were listed in titles. But pressures of debt (whether incurred for development purposes or for basic

subsistence needs), together with land agents' constant pestering for the signatures of individual title-holders (followed by the partition of the blocks) undermined Maori efforts at farming. The drive to secure the freehold from 1892 to 1899 (under the Liberal Government) and from 1910 to 1928 (under the Liberal and Reform Governments) left Hawke's Bay Maori confined to limited reserves by 1930. The Government's periodic efforts to make larger reserves (as reflected in the Native Land Act 1873) were not pursued with determination and invariably broke down.

The district also experienced confiscation (at Mohaka–Waikare and at Wairoa) and the forced cession of land (as in Poverty Bay). Most of the river flats in northern Hawke's Bay (Wairoa) had been acquired by purchase or confiscation or cession by 1870. Considerable areas of the Wairoa district were caught up in the activities of the New Zealand Land Settlement Company of W L Rees and Wi Pere and in the tangled web of Maori land law created by governments after 1865. In the 1890s, some of these acquisitions, which were legally flawed, were legalised by the Validation Court set up by the Liberal Government. It is unlikely that all Maori right-holders were aware of, or willing parties to, the alleged alienations in the first place.

ptii.12 District 12: Wellington

At the heart of the Treaty issues in the Wellington district are the New Zealand Company purchases. The concern is that Colonel Wakefield signed the deeds in 1839 with chiefs of Ngati Toa and Te Atiawa, whom he regarded as 'over-lord' chiefs, and then proceeded, after 1840, to 'complete' the purchases with 'resident' groups considered to be bound by the agreement with Ngati Toa and Te Atiawa and by the settlers' possession of some land. The Crown essentially supported this arrangement, Commissioner Spain and Acting-Governor Shortland in 1843 shifting the nature of their proceedings in the Land Claims Court from a process of inquiring as to whether Maori title had been extinguished to one of arbitration, to which they considered Maori were bound by their consent to the Crown's intervention in their disputes with the company. The subsequent 'releases' of 1844 (for limited additional 'compensation') and the McCleverty awards of 1847 saw the tribes relinquishing important lands in Wellington and the Crown giving to the company many of the 'tenths' promised in 1839 for the benefit of Maori. A process of marginalisation, rather than full inclusion, of Maori in the growing settlement had been commenced. In 1841, and again in fulfilment of the Loan Act 1847, the Crown waived pre-emption in favour of the company over much larger areas than Spain's arbitrated award, resulting in Grey extinguishing Maori title over some 209,000 acres in Wellington and the Hutt Valley (using force of arms to overcome resistance by Ngati Toa and their allies) and repurchasing (for the company) the Porirua and Wairau districts while Te Rauparaha and others were under arrest and Te Rangihaeata was in refuge.

Crown purchases to 1865, and later purchases under the Native Land Court, show the familiar themes of taking advantage of divisions between ‘sellers’ and ‘non-sellers’, of creating inadequate reserves and subsequently purchasing supposedly inalienable land, and of constantly eroding hapu control by the purchase of individual interests followed by partition under the Crown’s pseudo-individualisation of Maori customary land rights. By 1910, some 23 percent of the district remained in Maori freehold title, and by 1939 the figure was only 7 percent.

A particular feature of the Rangitikei–Manawatu and Horowhenua purchases in the central part of the district is that, in deciding the balance of customary right-holding in those blocks, the Native Land Court vacillated as to whether its determination should be based on the situation as at 1840 or as at the time the case was heard. There was also the question of the relative rights of tribes that had occupied the area for hundreds of years and those that had been there only since the musket wars (and sometimes since only shortly before 1840). Depending upon the stance taken in regard to these issues, some or others of the tribes concerned had their rights diminished by the Native Land Court proceedings.

ptii.13 District 13: The Northern South Island

The northern South Island, a district of nearly 3.4 million acres, had entirely passed out of Maori hands by 1865, except for about 7000 acres of reserves (plus Taitapu and Rangitoto–D’Urville Island, which were subsequently sold). The scale of the loss and the minimal reserves left make the alienation of the district comparable with that of the southern South Island.

The means of alienation were also comparable. The New Zealand Company’s 1839 deeds (with the ‘over-lord’ chiefs) were accepted by the Crown as ‘partial purchases’, to be completed by additional ‘payments upon settling’ made to the ‘resident’ chiefs by Captain Wakefield and then ‘compensation’ payments awarded by Commissioner Spain. Some resident groups accepted these reluctantly and under considerable pressure. The Crown did regard the Wairau district as having to be purchased afresh, but while Te Raurapaha and others were under arrest and Te Rangihaeata was in refuge, Grey purchased the district from Ngati Toa chiefs with scant regard for the interests of several other tribes in the three million acres concerned. McLean followed this with other ‘blanket purchases’ from 1848 to 1860, including the eight million acre Waipounamu purchase (which extended down to Kaiapoi). Reserves in the purchases were but a tiny proportion of the whole, and some of these were purchased soon after they had been made. The Taitapu reserve, the only large reserve to survive after 1865, was acquired in the aftermath of the discovery of gold; while at first making a genuine attempt to protect Maori from the consequences of a gold rush and give them a share in the revenue, the Crown subsequently exercised its powers under the Goldfields Act, putting the land effectively beyond Maori control and leading to its eventual sale.

Maori lost almost all their land in this district in a very short span of years and for prices that were nominal in relation to the harbours, valleys, resources, and huge area of the region. By the 1890s, many Maori there were officially regarded as landless.

ptii.14 District 14: The Southern South Island

The southern South Island has been discussed comprehensively in the Waitangi Tribunal's *Ngai Tahu Report 1991*,³ which this report has not had occasion to review. However, evidence of penetration of the area by settler claimants (such as Wentworth and others from New South Wales, as well as the French) possessing the capacity and the will to back their claims with force suggests that Ngai Tahu's 'exclusive possession' of all lands and offshore waters in the tribal rohe had become problematic by 1840. Alliance with the Crown was a sensible strategy for the Ngai Tahu chiefs, but as is well known, the Crown abused its opportunity by making huge 'blanket purchases', which were as loose in some cases as the pre-1840 private claims it had caused to lapse. The failure to make adequate reserves was a breach of instructions to governors from London and of Governor Grey's and Lieutenant-Governor Eyre's instructions to subordinate officials.

Perhaps most seriously, however (and this is true also for other parts of New Zealand), was the Crown's failure adequately to convey to the transacting chiefs exactly what was being transferred in the purchases and what was being retained. The contrasting interpretations of the 'mahinga kai' clause in the Kemp purchase are a particular case in point, but the issue goes beyond that.

Serious too (and also relevant in other parts of the country) was the Crown's continued payment of derisory prices and its refusal to allow South Island Maori the opportunity to develop a leasehold system on much of their land from the informal grass-money payments beginning to be made to run-holders.

ptii.15 District 15: The Chatham Islands

The central issue in the Chatham Islands is 'the 1840 rule'; that is, whether the Native Land Court should have awarded the bulk of the land to Ngati Tama, Ngati Mutunga, and Te Kekerewai Maori, who arrived from 1831 and overlaid the Moriori, who had occupied the islands for hundreds of years. In this instance, as in others elsewhere in New Zealand, the rights of conquerors were considered paramount (that is to say, worth 97 percent of the land in this case) and the rights of previous occupiers were worth very little (3 percent of the land in terms of the court's awards in 1870).

3. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991

This view involves an interpretation of Maori and Moriori custom that gives little weight to a long association with the land and great weight to a short occupation, powerful and dominant though the later arrivals were. The marks of long occupancy and the requirements of *ahi ka roa* (rather than *ahi ka as such*) will no doubt be considered by the Waitangi Tribunal in the claim currently before it (Wai 64).

The evidence has shown that the Native Land Court was not entirely consistent in its practice. In the Himatangi judgment, for example, the court tended to be guided by the situation obtaining at the time the case was heard, rather than by the situation at 1840, a situation later reversed in a judgment on a small portion of Ngati Raukawa land.

These are clearly matters of the greatest importance throughout New Zealand, as is the Crown's responsibility in creating a court properly able to assess Maori custom. Maori criticisms of the court after 1865 (as an essentially Pakeha institution not able to assess adequately the complexity and subtlety of custom) are well known. Nevertheless, whether any panel of Maori judges would have found differently in respect of the Moriori claims had they, not Judge Rogan, been sitting in 1870 is another matter.

The question of the kinds of title the court could award is very much the responsibility of the Crown. The titles awarded to Ngati Tama and Ngati Mutunga in 1870 were highly negotiable and most of the land was leased then sold.

In Treaty terms, the Crown also had some responsibility in respect of meeting the socio-economic needs of remote peoples, like those of the Chatham Islands. This concerns less the question of freeing Moriori from 'slavery' than the question of ensuring the Queen's new subjects minimum liberties when the Crown was finally in a position to intervene. (In the writer's view, 'slavery' is a poor translation of the traditional Maori treatment of conquered peoples. Maori apparently used terms like 'mokai', or simply 'nga tangata', a nice irony on the careless usages of the term 'tangata whenua' that have sprung up around the country in recent years, almost always in exaggeration of one's own claims and diminution of someone else's. The English term 'slavery' has rather different connotations from those of Maori institutions, being no less brutal in the short term but rather different in the longer term.) Certainly, after about 1865, when the Crown had the capacity to impose its will on most of New Zealand (except for the mountainous interior) it might have done more for the Moriori than see them relieved of most of their land.

PART III

OPTIONAL STRATEGIES FOR DEALING WITH HISTORICAL TREATY CLAIMS

ptiii.1 Commission

The following chapter is offered in terms of my supplementary commission from the Waitangi Tribunal dated 4 November 1996, which (having regard to new evidence emerging from the Rangahaua Whanui research programme about the nature of historical grievances and Treaty breaches expressed by Maori, and in the light of my historical experience) invites me to suggest in my report 'some optional strategies about how the historical claims might best be dealt with' (see app iii). The discussion that follows derives from my reading of the historical evidence for many of the claims and some of the Tribunal's own statements on approaches to remedy, and it makes some reference to Canadian and Australian experience.

ptiii.2 Role of Rangahaua Whanui

This survey of the main kinds of historical grievance, and their impact upon various regions of New Zealand, is intended to set out a comprehensive historical context against which claims can be appraised. It is hoped that against this context the various factors that might contribute to an assessment of the merits of claims will become clearer and that, consequently, more equitable settlements can be achieved nationally. Given the very recent disclosures of research, it would not be surprising if preconceived pictures of historical injury to Maori shifted somewhat: for example, few in New Zealand, historians included, know very much about twentieth-century Crown policies and their impacts, though they commonly feature in claims. Even though the phrase 'on their merits', used, for example, in the coalition parties' press release of 6 December, probably indicates a desire on the part of the Government to avoid comparing one claim or grievance or area with another, the concept of 'merits' implies inevitably some sense of 'relative merits'. It would seem to be appropriate to take stock of current research findings and look at the total picture.

ptiii.3 Prejudicial Effects

Section 6(3) of the Treaty of Waitangi Act 1975 reads:

If the Tribunal finds that any claims submitted to it under this section is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.

Assuming that the Tribunal will want to exercise its right to make recommendations, or that claimants will want it to, what kinds of prejudicial effects do claimants allege they have experienced as a result of Crown action or have been found by the Tribunal to have experienced?

- (a) The overwhelming majority of claimants complain of the loss of land and other important resources, such as forests and inland and coastal fisheries, and of the consequent loss of tribal and individual mana. They complain of the Crown's failure to leave Maori with enough land either for personal use or for economic development.
- (b) They also refer, at least in general terms, to the means by which land and other resources were acquired without their full foreknowledge, understanding, and consent. These processes included outright confiscation, the passing of laws without their consent, the making of arcane bureaucratic decisions, and the dubious activities of land purchase agents operating under laws that favoured secretive dealing in land held under various forms of pseudo-individualised title.
- (c) They refer also to the social and economic *effects* of the loss of land and other resources, such as loss of opportunity, economic marginalisation, social confusion, and the dispersal of tribal communities.

The claims thus go well beyond property as such. They commonly refer also to the lack of consultation with Maori in the making of policy and to the bypassing of tribal authority in favour of individual dealings. Complaints are commonly made of a lack of respect by the Crown for tikanga or for the tino rangatiratanga guaranteed by the Treaty, and the frustration of Maori aspirations for self determination. Cultural and spiritual values are also frequently mentioned, sometimes in connection with the way educational, health, and social services are delivered.

Care must be taken to try to distinguish how far these outcomes stem from unavoidable effects of the trading and money economy (dating from well before 1840) that are beyond the power of the State to control. The analysis in the Rangahaua Whanui project has striven to keep this in mind, but the research, for the most part, substantiates the truth of the claims. Maori throughout the country have been reduced to near landlessness and have been economically marginalised by the deliberate actions of governments. They have been manipulated by various Government strategies, played off against one another in the land purchase processes, and seen the considered wishes of their leaders ignored and their institutions subverted if they stood in the way of the settlers' hunger for land. The situation of Maori by

the mid-twentieth century was a travesty of their situation at 1840. They retained only vestiges of their former lands and tino rangatiratanga. Their formal legal equality, as individuals, with the settlers was of course extremely important and has provided avenues of advancement and satisfaction for a great many Maori. But it has not provided the basis for the Maori people as a whole, or in their tribal communities, to maintain their balance and engage with the modern economy and the modern state as they had intended in 1840. This realisation became the dominant one for the increasingly educated, increasingly urbanised, but also increasingly unemployed, younger, post-war generation. It was that perception, as well as an awareness of specific injuries, that underlay the explosion of protest from the late 1960s. Maori people were fed up, not only with the sense of being left on the margins of a Pakeha-dominated economy but with still being ignored or patronised while other people were making decisions affecting their property and their lives.

It was these feelings that Mr Koro Wetere was presumably referring to when he introduced the Treaty of Waitangi Act Amendment Bill in 1985 to address ‘the mounting tension in the community’ arising from outstanding grievances.

ptiii.4 How then Should the Prejudice be Removed?

The Waitangi Tribunal addressed the issue of reparation for loss of land in the *Report on the Orakei Claim* of 1987.¹ It noted three possible approaches:

- (a) The making of full restitution in monetary terms based upon assessment of ‘damages for injuries, loss of use and missed development opportunities’.
- (b) The return of land still held in public ownership.
- (c) The ‘restoration’ of the injured community (rather than full restitution) by ensuring ‘the retention of a proper tribal endowment’ (the Tribunal then referred to a fuller explanation of this in chapter 8 of its *Report on the Waiheke Island Claim*²).

It is perhaps appropriate to reconsider each of these in turn.

ptiii.4.1 Full restitution

The monetary value of full restitution is extremely difficult to calculate because of the enormous number of variables that could have affected the land and the people if, for example, the Crown had not purchased the land before 1865, or if it had not been caught in the morass of Native Land Acts subsequently. *Some* settlement would have given added value to the land and brought trade, employment, new commodities, and new experiences; that is why Maori communities wanted it in the first place. Just what might have emerged if Maori and private settlers had arranged

1. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 3rd ed, Wellington, GP Publications, 1996

2. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Waiheke Island Claim*, 2nd ed, Wellington, Government Printing Office, 1989

matters themselves without the Crown's intervention is ultimately unknowable, but as chapter 1 of the historical survey argues (vol ii, ch 1), the indications in the late 1830s are that it would *not* have been altogether satisfactory to Maori. The 'lost opportunities' might in fact sometimes have turned out to be disasters. The dynamic forces at work in the Pacific from the late eighteenth century were not wholly within the control of either Maori or the Crown, and were never likely to be.

Another issue relevant to the full restitution approach is how much the loss should be regarded as being offset by the benefits of participating in the national economy and national infrastructure. It can be argued, with much truth, that the systems of law that allowed for the cheap acquisition of Maori land meant that Maori paid disproportionately for the cost of national development. That development, however, was also created by huge inputs of capital and skills from other sources. The public transport systems, health services, national defence forces, and so on benefit all New Zealanders and, from one point of view at least, can be viewed as part payment for the land. Individual Maori might have benefited from the opportunities even as their communities were suffering. The debate is thus probably about disproportionate contributions from Maori or disproportionate returns to Maori in the building of the nation state. It is about undue pressure brought upon Maori to part with land and the breach of public undertakings by the Crown on behalf of Maori.

But perhaps the main obstacle to a full restitution approach is simply that (assuming Maori would have retained and successfully developed their lands and resources but for Crown interventions) the cost of it is too vast to be supported by the national economy. Claimant leaders indeed often acknowledge this to be so, without resiling from their moral and legal right, in principle, to full restitution. Practicality – the desire not to damage the economy in which they themselves wish to take a much bigger place – suggests that another basis of redress must be found.

ptiii.4.2 The return of land still held in public ownership

The return of land still held in public ownership is another source of redress. It is indeed being used as an element in agreed settlements thus far and in the 'land banks' and 'protection mechanisms' put in place by the Government in recent years. There are difficulties, however, in how far public land can be the basis of redress. Too much constraint on the Crown to realise the capital value of land in the market place impinges on the economy or can lead to a devaluing of the land itself, partly defeating the objective in view. Some public lands – parks and beaches, for example – are too highly valued by the community at large to be available for transfer. Nevertheless, there are numerous situations where the reversioning in Maori communities of title to parts of the conservation estate or parklands and their involvement in management will help satisfy the deep-seated cultural needs of those communities, even if it does not assist their economic needs. There are many models of co-management.

ptiii.4.3 Restoration of a tribal endowment

The Orakei report's third alternative – the restoration of a tribal endowment or economic base – is probably the most practicable alternative. As the Tribunal has noted, if full payment for the past is not possible, providing for the future may be. Reparation for this purpose can, as in recent settlements, involve a mix of land, money, and interests in publicly owned resources. The Tribunal noted that, had the Orakei community been able to retain the freehold of the pool of the reserved land that Paul Tuhaere and the Ngati Whatua leaders of the 1860s intended (before the titles were individualised under the Native Land Acts and acquired piecemeal), the tribe would have been able to become reasonably prosperous from rental income as Auckland city grew – much as had been intended, apparently, in Lord Normanby's instructions to Governor Hobson in 1839. Many other examples comparable to Orakei can be given: all tribes made requests for substantial reserves and were promised them – indeed, sometimes had them marked out and Crown granted. Yet their supposedly inalienable status was subsequently changed, and these reserves were often alienated. Settlements now could aim to recreate, to a reasonable level and in the context of new and modern forms of property as well as land, what unwise policies and laws in the past have destroyed.

ptiii.5 Is the Purpose of Reparation only Economic?

The Tribunal's comments on Orakei refer mainly to economic goals but imply more than that. The goal is the restoration of a tribal community. The community cannot seriously function as such without community-owned resources to manage and deploy. But with a substantial capital base, the community can embark on a variety of business enterprises; develop the tribal estate; preserve tribal knowledge, marae, and other central facilities; and perhaps assist community members with special needs in respect of education or housing.

There is, however, a strongly held view among Maori that matters such as housing, education, and health are article 3 rights due to them as to all other New Zealanders and that Treaty claims settlements should not be eroded for such purposes or be used to reduce the Government's obligations to provide for these needs. Indeed, if additional special needs are identified in Maori communities – needs that are created by having to bridge cultural divides in order to gain the skills necessary to deal with the modern world – these too should arguably be met from regular funding, not from reparation for historical injury.

The question of Maori customary cultural values and needs perhaps touches upon both sources of funding. The preservation of Maori language and culture should presumably be a responsibility of the regular education and media programming budgets; not an optional extra for Maori but part of the heritage of all New Zealanders, acquired in what was clearly a bicultural society in 1840. The neglect of this area in the past, however, is frequently mentioned in Treaty claims, either

directly or as a by-product of the loss of the community land base. In this sense, it may need to be given additional recognition in the costing of reparations.

Decisions about the objectives of Treaty settlements therefore must consider whether the Crown's obligations derive from a view of the Treaty articles as relating essentially to property rights – the 'possession' guaranteed in the English version of article 2 – or whether they derive from a fuller sense of the principles of the Treaty, as elaborated in recent jurisprudence and involving the obligations Treaty partners have towards one another – including, on the part of the Crown, the duty of active protection of Maori rangatiratanga and taonga.

ptiii.6 Tino Rangatiratanga and Appropriate Levels of Ownership and Control

ptiii.6.1 Tino rangatiratanga

As has been noted, the majority of claims refer directly or indirectly to the loss of tino rangatiratanga, which the Crown promised to respect in 1840 but subsequently undermined; nineteenth-century Maori organisations referred to the goal of mana motuhake. The Waitangi Tribunal, and many modern Maori writers, have discussed the content of tino rangatiratanga. A range of meanings in English is given, centring around the concept of self determination or autonomy – one's right to be recognised as entitled to control one's own proper sphere, within the framework of the new nation state, and to be a partner with the Crown in that nation state. The trusteeship role of rangatira over their communities is also noted. How far Treaty settlements will address these concerns and seek to re-establish tino rangatiratanga where it has been undermined in the past is a matter for most serious consideration. The return of money and land obviously provides a necessary economic base from which tino rangatiratanga can be exercised. The right to control the restored resources, with minimal interference from the Government, seems to be an essential part of the process. Tino rangatiratanga, including its trusteeship elements, implies accountability by the tribal leaders to the claimant group rather than to the State, and efforts are obviously being made to form the appropriate legal personalities that would permit that accountability and allow the expression of the group's customary, as well as modern, values.

ptiii.6.2 Levels of society

The Treaty recognises tino rangatiratanga at several levels of society: 'ki nga Rangatira ki nga hapu ki nga tangata katoa'. The English version refers to 'Chiefs and Tribes of New Zealand and to the respective families and individuals thereof'. Arguably, therefore, the matter of payment of reparation should have regard to the proper functioning of each of these levels of Maori society. Clearly, claimant groups have much discussed the issue and, in particular, perhaps, the relationship of constituent hapu to the umbrella organisations, such as trust boards, that have

pressed claims and negotiated with the Government, often very successfully. Maori society always had the capacity to create multi-hapu structures, or iwi, by drawing upon deeper whakapapa links. It is entirely appropriate that they should wish to do so again for specific purposes, such as resourcing and managing Treaty claims and Treaty settlements. Just as the Kingitanga and various runanga emerged in the nineteenth century to try to retain Maori land and rangatiratanga, so they work in the late twentieth century to restore it.

ptiii.6.3 Appropriate structures

The question of which levels of Maori society should negotiate settlements and receive and manage assets is, of course, essentially a matter for Maori to determine. Though it should be noted that, in recognising particular groups or levels as the legal entities with whom they are agreeing settlements, governments will greatly influence the future of those groups and their constituent parts. The laudable desire to press ahead with settlements and restore resources – and hence greater self determination – to Maori communities should be tempered by the need to allow, or indeed to facilitate, Maori communities to come to their own considered decisions about structures, on the basis of wide discussion and consensus.

There remains the difficulty that, despite the best endeavours of Maori leaders and the Government alike, suitable structures for receiving and managing resources simply may not easily emerge on a consensual basis in some cases. Instead, factional divisions and rivalries may intensify, in the first instance at least. That situation may stand in the way of transferring wealth back to various districts of New Zealand that desperately need it to relieve unemployment and social malaise. Funding for these purposes can, and indeed should, be provided as an article 3 right rather than through historical Treaty claims. Nevertheless, the settlement of historical Treaty claims appears to be an important avenue of assistance, not only because of the funds that are made available but also because of the psychological boost that comes from a frank acknowledgement by the Crown of wrongdoing in the past and from the sheer practical necessity imposed upon communities of having to organise to receive and administer funds.

It should be recognised that most of the Maori structures above the level of hapu clusters are post-colonial in any case. This is true even for the select list of major iwi that were identified by early anthropology and early administrative processes and came to be drawn on maps from the mid-nineteenth century on. Modern anthropology shows how entities such as ‘Ngati Kahungunu’ or ‘Ngapuhi’ did not exist as coherent functioning groups (at least with their present boundaries) in the early nineteenth century, although they did have a number of important ancestors and marriage relations which gave them a potential coherence. Groups of relatively non-associated hapu and iwi gained coherence by the creation of trust boards in the 1920s and 1940s specifically to receive recompense or revenue from interim settlements of historical Treaty claims. The various hapu and iwi for whose interests the trust boards were formed have endured all along and have emerged with renewed

vigour in recent years. But a case can still be made that, if wealth is to be delivered to districts such as Hawke's Bay, Wairarapa, Northland, or Poverty Bay, similar structures to trust boards, embracing several hapu or, indeed, several iwi in a given district, should be created under the aegis of a framework statute to get on with the job. Nothing succeeds like success (as Ngai Tahu and Tainui have shown from the mid-nineteenth century to this day) and it may be that some 'temporary' or 'non-traditional' structures could again find themselves playing a creative and lasting role for the wellbeing of their communities.

ptiii.7 Indigenous and Non-indigenous Sources of Value

ptiii.7.1 Regional interests

One of the aspects of the discussion about appropriate levels of society concerns the disposition of interests in Crown assets such as forests or dams. Hapu on whose former lands these assets have been built are inclined to argue that the asset should return to them in particular. The wider iwi group managing the claim, however, hopes or expects that the asset will be available for the benefit of them all. At its worst, the prospect of the return of Crown forests has threatened at times to descend into a greedy competition, benefiting a small section of society. Where the resource is an indigenous resource – a native forest, for example – the specific traditional claim is understandable, although forests were not usually demarcated traditionally into specific hapu holdings. Where the asset has been created since 1840, it is very hard to see why it should be regarded as belonging to the specific group that once held that land. The asset was not traditional wealth, waiting to be developed; it was created by the labour and planning and capital of the national community, and ought therefore to be available to the Government, on behalf of the national community, to use in national strategies of reparation. Certainly, there is an argument, on the basis of restoring the tino rangatiratanga of hapu, that the hapu cluster on whose traditional land the asset now stands should be given special recognition in future benefits and future management, but to give some hapu now the whole of the 'windfall' benefits that flow from the accident of their land being chosen for State developments would carry the risk of creating new inequities in place of old ones.

ptiii.7.2 National interests

The argument can be extended nationally. A good case has been made for recognising specific local and hapu interests in respect of inshore fisheries – a traditional right never fully extinguished or compensated for in most cases, at least before 1992. But the offshore fisheries out to the 200-mile economic zone derive not so much from the development right of adjacent hapu (they never were 'adjacent' to fisheries that far out or that deep) but from the rights of the New Zealand State under international law. They may thus be seen as appropriately available for the

benefit of all New Zealanders, or all Maori, within reparation arrangements such as the Sealord agreement. Similar arguments can be mounted in respect of other national assets, such as geothermal or electric power systems, whose construction and functioning goes far beyond the point at which bores are driven or dams built.

ptiii.7.3 National consultative bodies

In this context, there is a case for national Maori opinion, as well as tribal opinion, to be consulted and mobilised for both policy-making and management roles.

The question of an appropriate vehicle or vehicles whereby this might occur is obviously a matter of ongoing concern to Maori. The New Zealand Maori Council and the Maori Congress are in different ways widely representative, though not completely so. The Maori members of parliament, augmented greatly in number under the mixed-member proportional system, will also represent Maori views in the Legislature and on its policy committees. The Treaty of Waitangi Fisheries Commission has been created to hold and manage particular assets on behalf of the national Maori community. From time to time, the idea of extending the fisheries commission model to hold and manage other assets and to deploy revenue from them for the benefit of local Maori groups has been canvassed.

The Aboriginal and Torres Strait Islander Commission (atsic) in Australia, elected from 11 regional councils by adult franchise, has sometimes been mentioned as having features that could be applied in New Zealand. One of the noticeable features of atsic is that it has enabled dynamic new leaders to emerge in Aboriginal Australia better able than some of the more self-appointed leaders of the past to deal with the vast new tasks required by the Mabo decision and the Native Title Act. Another is that the mechanism for accountability established in the atsic legislation enables Aboriginal communities to call leaders to account for mismanagement – a function that they perform with considerable vigour and that should be interpreted as a sign of health rather than malaise within atsic. In this regard, a structure like that created by the Maori Social and Economic Advancement Act 1945, with local elected ‘native committees’ sending representatives to regional ‘tribal executives’, once functioned well and could conceivably be reviewed as a possible foundation for a national Maori organisation.

The fact that most Maori are now urban people was of importance as early as 1962, when the New Zealand Maori Council Act replaced the 1945 Act; it is now clear that, if that change reflected an assumption that Maori were ceasing to be a tribal people, the assumption was premature if not wholly wrong. The very way in which Treaty claims are brought and negotiated shows how strong is the sense of tribal identity. Moreover, tribal identity reaches into the urban areas. There are, nevertheless, many Maori in the cities and towns who know their whakapapa vaguely and do not seek to activate a tribal affiliation. Although the cultural resurgence is likely to intensify rather than diminish tribal identification, Maori will also organise across tribal lines to meet urban needs or pursue national goals. New urban groups can emerge along the lines of new hapu, which traditionally formed

from segments of existing hapu grouping around strong leaders. Where such groupings persist and exercise the trusteeship functions appropriate to rangatira-tanga, no doubt they will secure recognition among the wider Maori community. A sharp antithesis of rural and tribal versus urban and non-tribal does not seem to be appropriate.

ptiii.8 Treaty Claims Settlements in the Context of Treaty Policy Generally

Efforts at resolving historical Treaty claims are of course taking place in the context of Treaty policy generally. Just how the claims are viewed affects how far the efforts to settle them serve the wider goals of Treaty policy. If claims are seen as essentially property issues, relating to the acquisition of Maori land or other property through confiscation, undue pressure, or neglect to apply even the minimal protective provisions of the statute law, then they can be viewed as specific wrongs. Rectification or reparation for them can also be in property terms – that is, in land or in partial compensation for land loss. That is indeed how claim settlements are currently proceeding, for the most part.

The implications of such an approach involve looking back to the past, identifying the wrong, and, through the compensation paid, closing off that wrong. This leads to a focus on particular claimant groups and to the privileges that formal registration of a claim in the Tribunal can attract – such as the legal aid provisions and funding for research – which in itself is likely to strengthen the group concerned.

There are some risks in such an approach in that one group may be deemed the principal claimant in an area and others ‘cross claimants’ (a situation alarmingly reminiscent of nineteenth-century Native Land Court procedures, where the first applicant became the claimant and the others became ‘objectors’). This risk has of course been apprehended by the Tribunal, which seeks to ensure that all parties with customary interests in an area are heard and the nature of their interests clarified. There are advantages in such a public process being gone through, even if the claimant groups eventually negotiate directly with the Crown. Even so, the need for mediation between overlapping interests is emerging and is likely to have to be addressed more deliberately.

The emphasis of Treaty policy at large, on the other hand, is with evolving future relationships rather than past historical experience. It includes the relationship of Maori with the Crown, with local government, and with various non-Maori groups and organisations. The question of Maori tino rangatiratanga in relation to all those is at issue. As indicated above, a powerful thread running through most claims is that Maori have long resented both being shut out of decision-making affecting their resources and their lives and having their wishes overridden for the convenience of white settlement rather than from some clearly defined national necessity. Removal of the prejudice now would seem therefore to involve more than simply

agreeing on a quantum of monetary reparation. Arguably, regard should also be had to the future involvement of Maori in the decision-making processes (at least in so far as returned property is affected in future) and also their place, by right, on local and regional authorities. The objective is sometimes spoken of as the 'empowerment' of Maori, not just the making of monetary payment for wrongs. The national side of this demand seems to have been significantly advanced through the increased number of Maori representatives in the national parliament, but there too part of the representation of Maori is ensured through the Maori seats and the Maori electoral roll. The place of Maori in local and regional authorities having responsibilities that affect Maori resources seems to require more explicit consideration.

It should be noted in this context that recognition of Maori interests is not addressed to the satisfaction of Maori by the repetition in legislation of clauses about 'having regard to Treaty principles' or general requirements to consult Maori opinion. The legal obligation is all too often discharged simply by posting off a letter or memorandum to some over-worked secretary of some local group – where it might languish amid a hundred other such letters. There is no substitute for direct and appropriate Maori representation on responsible bodies.

On the other hand, it may be thought that this kind of consideration is loading the claims settlement process too heavily – that the important immediate objective is to get substantial wealth promptly transferred back to Maori in part reparation for its wrongful acquisition in the past, but not to confuse that goal with wider Treaty purposes. Moreover, it may be assumed that the very fact of possessing significant economic resources will itself ensure that Maori will eventually be major players in any decisions affecting that property, and wider issues in their region. The matter is one for consideration, but it is perhaps appropriate to raise a warning note that no certain guarantees can be given about the economic future, and safeguards about the best management of property and about alternative strategies to promote ongoing Maori participation in the economy generally may well need to be built into the structures for recovering and administering Treaty settlements.

ptiii.9 Overseas Models

Overseas, notably in Canada, claims settlements involve a whole range of matters, including grants of money and land; shares in resources such as sub-surface minerals, forests, and oil; major roles in the conservation of natural resources; and the devolution (or recognition) of administrative and judicial powers in tribal territories. The totality of such measures is intended to further the claim of indigenous communities to an inherent right of self determination or of 'sovereignty'. These are very large questions, going well beyond reparation for specific historical wrongs in respect of property.

The Canadian experience has been increasingly studied by Maori community leaders and academics; opinion about its relevance to New Zealand appears to be divided. Maori also hold to concepts of inherent right and aboriginal title, both

predating the nation state and with aboriginal title being recognised by common law as well. The progress of Canadian and American ‘first nation’ claims, on the basis of various treaties and the constitutional recognition of inherent right in Canada, suggests possible models to Maori. On the other hand, the peculiar history and geography of North American communities, their isolation in portions of a vast continent, and their particular ethnic and linguistic identities do not compare readily with the relatively small New Zealand islands, where Maori and non-Maori have mixed and intermarried for 200 years. This mixing has created a very distinctive situation in New Zealand. Maori have complained over the years, with much justification, of the heavily assimilationist tendency of British policy in New Zealand. But (in the author’s view) the legal separation of indigenous and immigrant communities in North America, or worse still the absurd creation of a separate group of Métis, contrasts very poorly with the access Maori have had to mainline institutions and the freedom they have to choose their own identification rather than have it imposed upon them. The desire to recover a much greater degree of autonomy to protect Maori society and culture against an assimilationist tide is one thing. To create a system of semi-distinct legal and constitutional polities is another. In this context, it might be noted that the words ‘nation’ and ‘sovereignty’ as used in North America are highly ambiguous, and while they have a certain emotional value and appeal, they have not been particularly useful in the negotiation of practical arrangements for North American First Nations (or for Australian Aboriginals either), in contrast to the advances made by simply negotiating contractual arrangements (which the North Americans call treaties). Moreover, while North American First Nations might have made advances in their distinct rural localities in recent years (previously, most reserves were miserable semi-prisons), the situation of their members in the great cities of North America has scarcely been advanced at all. If anything, the legal-jural situation of many groups of Indian, Inuit, and Métis in, say, Toronto, vis-à-vis one another, as well as vis-à-vis Canadians of British or French origin, is one of real confusion, which can offer little or nothing to New Zealand by way of useful example.

ptiii.10 Timing

In the end, we come back to the Treaty of Waitangi and to the articulation of the Maori–non-Maori relationship around the concepts of *kawanatanga* and *tino rangatiratanga*. The meaning and practical import of these is the central issue for all New Zealanders. It has received and will continue to receive the widest possible discussion. The evolution of a coherent Treaty policy generally must continue to be a primary task of the Government and Maori, both joined in an ongoing process that needs strong Government initiative. How far the more specific objective of the settlement of historical Treaty breaches is made to depend on that discourse (and how far it should be kept distinct) is a matter for immediate consideration. That there should be a relationship is desirable; but it is likely to be thought undesirable

that the working out of that relationship should overly delay the settlement of historical claims and the return of resources into the hands of Maori communities.

In practice, thus far, Maori negotiating groups are signing agreements in respect of specific historical injuries and (except to some extent in the Sealord agreement) saving their aboriginal title rights and Treaty rights in a more general sense. This practice is likely to continue to commend itself. It enables the main historical grievances to be resolved, while not requiring closure on the situation of groups in wider Treaty terms, including the ongoing review of economic and educational or other disadvantages, or the consideration of specific new historical issues, which might emerge more clearly in the light of later evidence.

ptiii.11 Staged Settlements

One aspect of Canadian experience that merits serious consideration is the staging of settlements over a number of years. This does not appeal greatly to most Pakeha, who, after 150 years of relative inactivity, want the historical claims resolved, swiftly and finally. There is the possibility, however, that moving *too* swiftly may jeopardise finality. Treaty settlement processes generally, and this report too, amply demonstrate the complexity both of history and of Maori society. It is not always easy to tell that all the issues have been squarely addressed, the injured parties correctly identified, and the extent of their injury (and hence their share of reparation) correctly gauged. Nor is it possible to guarantee that the damage done in the past will be rectified (even to the limited extent agreed) by a one-off settlement. Canadian settlements define a list of socio-economic goals, rather than a property settlement alone. Their settlements envisage periodic payments, or the progressive transfer of assets, and a review of progress at intervals of five or 10 years. This approach deserves much more serious discussion than has yet been carried out in New Zealand. It is still possible by such means to *agree* on a settlement that resolves the historical grievances, while spreading the *implementation* of it over a number of years. The monitoring of it, perhaps by an authority involving the wider Maori leadership as well as by the Government, would have to guard against anomalies arising in the use of resources transferred – anomalies that, with the best will in the world, cannot always be foreseen in the year of the settlement itself.

In so far as the Canadian method involves social, administrative, and judicial arrangements as well as economic ones, it may be felt, however, that they are more a matter for Treaty policy generally than for Treaty claims policy (especially historical claims settlements), but the two are connected and the relationship deserves serious consideration. In other words, staged settlements of historical grievances can take place within a wider context of evolving Treaty policy.

ptiii.12 Funding for Treaty Settlements**ptiii.12.1 Lack of public debate**

There has also been very little serious public debate about the funding for Treaty settlements, both in terms of the overall level or in terms of the appropriate quantum for a particular group of claims.

It is widely acknowledged that the Crown proposals of December 1994 were seriously flawed in that they declared several major matters, including the 'fiscal envelope' of \$1 billion, to be non-negotiable even before they were put to Maori communities. Sheer self-respect, let alone the claim to Treaty partnership and tino rangatiratanga, obliged Maori to reject the proposals and to decline formal discussion of them, even though elements within them were recognised as being not without value to the process. Few in New Zealand would not want to see practical realism brought into the level of funding of settlements; no thoughtful Maori wants to undermine the economy from which they seek more effectively to benefit. But the Crown's 1994 approach was scarcely the way to win their cooperation.

Nor is it clear how the Crown and Maori negotiators are arriving at the levels of settlements agreed thus far. Confidentiality is obviously necessary while the negotiation is in progress, but just why one group is deemed entitled to a settlement of \$170 million and another, of about the same number, to a much lesser settlement remains obscure, although there are no doubt good reasons. Confidentiality in negotiation does not mean that the principles or bases of settlement must remain obscure. Indeed, there is an increasing need for more transparency in the objectives and principles to be realised before other tribes will commit themselves to settlements.

ptiii.12.2 Spreading the load

Pakeha New Zealanders, who form the tax-paying majority that ultimately foots the bill, may admit the justice of the process and believe that reparation is due to Maori for some historical injuries at least, but they are inclined to resent being asked to bear the whole cost in their own generation. Present Government aims of redressing all major historical grievances by the year 2000 put the load on one tax-paying generation over a mere five years since the Tainui settlement (or eight since the Sealord agreement of 1992). This perception is not entirely valid, however, since the provision of redress in the form of improved lands and shares in resources, such as exotic forests, draws upon the inputs of previous generations who have had the use of the land. Moreover, the making of payments to Maori in Treaty settlements generally means a reallocating of resources within the New Zealand economy, a form of regional development, not a loss to the national economy at all. Nevertheless, the costs of settlements are debited to the Government's accounts at the time they are paid over.

Consideration might therefore be given to the advantages of the Canadian system of staged settlements, with levels of funding (adjusted for inflation) projected ahead

for 10 or 15 years, or to the systems of the New South Wales and Australian Federal Governments. The New South Wales Aboriginal Land Rights Act 1983 established a fund by allocating 7.5 percent of the state land tax for a period of 14 years. This fund was calculated to reach a certain level and could be used by Aboriginal groups both to purchase land on the open market and to develop it, together with some Crown lands that were handed over.

The Federal Government's Land Fund Act 1995 works on somewhat similar principles and aims to create a fund of about \$1.5 billion over 10 years. Depending upon the time at which funding was drawn down, it could become self-perpetuating.

These are simply some examples of how the load might be spread, with defined targets for a defined period of years, thereby ensuring that the whole settlement funding process is not undisciplined. Obviously, the allocations would have to be designed to meet New Zealand needs and conditions. It might also be noted that, depending upon which portions of the tax base are drawn upon, Maori taxpayers would also be contributing.

Some queuing for the receipt of settlement moneys will be inevitable, because of the time taken to hear claims and for recipient groups to organise. This, too, should assist in spreading the load across a term of years.

ptiii.13 Broad-brush or Specific Approach to Claims?

ptiii.13.1 Categories of claims

The 650-plus claims lodged with the Waitangi Tribunal can be divided into two broad categories:

- (a) Highly specific claims, perhaps from an individual or a whanau, relating to the taking of a specific piece of land by a specific action of a Government agency.
- (b) Claims by representative bodies, such as trust boards or runanganui, about the cumulative loss of land and rangatiratanga over the tribal rohe by general Crown policies and processes, such as Crown purchases or purchases under the Native Land Court.

The question arises as to whether these should be dealt with in the same way.

Where possible, for the purpose of investigating them expeditiously, claims have been grouped on a district or tribal basis for Tribunal hearings and Government negotiations. The Rangahaua Whanui research programme has proceeded both on the basis of generic 'national themes', which run through a great many of the claims, and by district research to show where the Crown policies made themselves felt. It is evident that certain actions of the Crown (for example, pre-emption purchases or tenure conversion and sale under the Native Land Acts) affected a great number of districts in broadly similar ways, as discussed above. It would be possible to take a generic approach to these, ascertaining by research simply that the great majority of Maori in a given district were affected by some or all of those

policies, and, without further detailed research, allowing a quantum of settlement for that kind of injury. More specific claims in respect of specific blocks could await more detailed research and negotiation. Provided agreement was reached on the level of settlement, the main historical claims could be deemed to be satisfied. That kind of approach would correspond in part to the way in which South Africa currently divides claims into historical issues, which require a policy approach based on certain agreed principles, and claims within living memory, which are dealt with as legal claims involving damages and, possibly, full restitution. It is unlikely that New Zealand would want to go fully down that road; in a sense *all* Treaty claims before 1975, or perhaps before 1985, are seen as historical. Nevertheless, the more recent grievances are capable of being evidenced more precisely as affecting particular families or hapu; the further back one goes, the more general the impacts of Crown action, although there are particular issues and injuries to small groups that can be identified as well.

ptiii.13.2 The broad-brush approach

It is arguably in the interests of all parties to take a broad-brush approach where possible. First, it would ensure that reasonably substantial reparations can be made to Maori communities promptly – before more of the present kaumatua generation die. Secondly, it would save enormously on the costs of litigation and further research. Thirdly, it would minimise the tendency of Maori to compete with Maori and would instead provide an incentive for hapu and iwi to come together to build a future.

In this context, it should be recognised that research about whether or not the Native Land Court or Government commissioners awarded a block to the ‘right owners’ may prove to be ultimately unproductive in most cases. Basically, this is because customary relations between people and land never did involve a single, discrete hapu sitting within neatly defined boundaries. Hapu were dynamic entities with overlapping memberships. Usually, sections of several hapu occupied land in complex, constantly changing ways and with rights scattered through each other’s principal territory. Any definition of hapu territory as a territory discrete from that of the next hapu required mutual concessions on each side (as the 1856 committee of inquiry recognised and as the Urewera commission found in practice at the beginning of this century). Native Land Court determinations involved some rough determinations of this nature, with greater or lesser degrees of consent from the interested parties. Sometimes, the court got it wildly wrong, especially when the judges acted on the assumption that the members of some group were the ‘owners’ and the other groups had no rights at all. On the other hand, where the court allowed Maori to draw up their own lists of owners, those lists probably reflected a better balance of customary right holding (*provided*, that is, that the land purchase agents had not already rigged or skewed the result). Some of the worst injustices were corrected in re-hearings, or by a statutory response to a petition; others were not. To revisit them all now, at the cost of much time and expense, would no doubt improve

the outcome in a number of cases, but in many other cases the evidence is now too thin to permit very much alteration about which one could be confident that better justice was done. Hapu have continued to evolve, intermarry, wax, and wane over the years; it is probably more constructive to encourage that process to continue (in urban areas too) while getting to grips with the future than to revisit the fine details of the past in order to try more exactly to determine the situation as it was then.

An extension of this argument is that it does not even matter much whether Maori lost their land by crudely conducted Crown purchases, by sales under the Native Land Court, or by the authority of the Maori land boards or the Maori Trustee. The important point is that they lost it, most Maori communities being landless or nearly so by 1930 and needing land more than ever to support a burgeoning population. In 1920, the Secretary of Maori Affairs calculated that 19 acres per head remained in Maori title, much of it of poor quality. It might be possible to draw up a scale of heinousness, so to speak, according to the degree of pressure or divide-and-rule tactics brought to bear on Maori to alienate land, and then to seek to allocate settlement moneys according to that scale. The more relevant issue, however, might be how many people were injured by the outcome, and how much, and what kind of land was left, rather than how much land was lost. This is another way of asking how intensively Maori used the land they lost and how they were situated on what was left. For a tribe of, say, 2000, intensively cultivating the river valleys or fishing and bird catching in precious swamps, the loss to them of a thousand acres of such resources might be more serious than the loss of several hundred thousand acres of more remote land that was visited relatively rarely. That is why the loss of relatively small areas of land in the twentieth century was so serious; it was often the land most important to Maori, land held back from earlier sales. That is also why having to concede the freehold or perpetual lease of reserves in the towns, and of the native township sections, was serious; it cost the tribes access to the increased capital value of urban land, which, according to early British policies, was supposed to be the main form of payment to Maori for the loss of their broad acres.

For all these reasons, a case can be made for a broad-brush settlement strategy for the main historical claims. Reparation could be paid in favour of a tribal community or district, based on a quantum allowed for the main modes of land alienation and having regard to the number of people affected and the amount and kinds of land and other resources they had left. A weighting could be given for the loss of especially valuable resources and other exceptional features. Indeed, this process already seems to have been adopted in negotiated settlements, although the principles upon which it is based have not been made clear.

ptiii.13.3 Opportunity should be provided for all claims to be heard

All this being said, however, there is no doubt that most claimant groups will wish to be heard in respect of their claim by the Tribunal or by the Government or by both, and they should be given ample opportunity to be so heard. A broad-brush approach that leaves people with the sense of matters of special concern not having

been voiced and considered would defeat one of the major purposes of the legislation. All issues of serious concern need to be deposited. Many of them are very likely to fit within categories of breach that have already been acknowledged and, once established to the satisfaction of the Tribunal to have occurred, can be grouped together for reparation without further ado. Others, including specific takings of particular lands, may have to be discussed separately. In a sense, this kind of categorisation has already been made, with, for example, the Waikato raupatu claim being the object of settlement and the Waikato River and harbour claims being held over. There appears to be no difficulty in principle about this strategy, but care will be needed not to close off discussion too soon on particular matters of deep concern to a claimant group.

ptiii.14 Criteria for Assessing Seriousness of Injury

An appraisal of historical evidence, such as that provided in the three volumes of this report, shows that some actions of the Crown were more obvious breaches of the Treaty than others, being more swift and sudden in their impact or affecting more people. Some criteria have been suggested in the executive summary as to how these historical injuries might be appraised. The suggested criteria are:

- (a) The extent to which the Crown has resorted to coercion, manipulation, or pressure to achieve its objects, without seriously consulting Maori opinion or in opposition to evident Maori preferences.
- (b) The extent to which the Crown failed to carry out its own plain undertakings or commitments to Maori.
- (c) The number of people affected (demography)
- (d) The quantity and economic potential of the land or other resources lost.

ptiii.14.1 Applying the criteria to the historical evidence

Although inevitably subjective to a degree, an attempt has been made in the executive summary to appraise the historical evidence and to assess and rank the seriousness of Treaty breaches in the light of these criteria (see secs es.4–es.10).

The main general conclusion drawn is that, judged on the basis of which of the Crown's actions were the most deliberate and hurtful of most people, the worst breach has been the destruction of rangatiratanga, or legitimate scope for autonomous Maori action. This has two major aspects:

- (a) The loss of resources underpinning autonomy and self-determination at the individual and tribal level.
- (b) The exclusion of Maori from decision-making processes affecting their lives and their resources.

More specifically, among the most serious causes of injury:

- (a) In respect of the loss of resources and the destruction of the tribal level of rangatiratanga, the purchases under the Native Land Acts can be regarded as

the most serious issue, affecting most people over the longest period of time. In that the Legislature instituted the conversion of customary tenure, with its various checks and balances, into a form of pseudo-individualised title, under which every title-holder's signature became a marketable commodity and the ease of partitioning blocks sidestepped the objections of non-sellers, the Crown instituted, and sustained against the considered wishes of the Maori leadership, a process that led to the landlessness or near landlessness of Maori in most parts of New Zealand and caused great social and economic dislocation for more than a century. The retraction of the self-management machinery instituted under the Maori Land Councils Act 1900 and the purchase of some 3.5 million more acres of Maori land under the Native Land Act 1909, at a time when the Maori population was known to be stable or increasing, were two of the most serious manifestations of this policy.

- (b) Close behind, in terms of quantity of land alienated and effects upon considerable numbers of people and districts, were the purchases in the period of Crown pre-emption, 1840 to 1865. Apart from being manipulative in ways that were eventually to lead to war, the Crown's preoccupation with securing freeholds, to the almost total exclusion of leasehold and joint-venture arrangements, contributed heavily towards the systematic marginalisation of Maori.
- (c) The confiscation, or forced cession, of land under military control drastically affected particular tribes and particular districts.
- (d) The Crown's failure to ensure that adequate reserves of land were left with Maori, inalienable except by fixed-term lease, and to itself take sufficient land under trust to endow Maori health, education, and welfare services, are breaches closely related to the three matters aforementioned.
- (e) For many Maori communities, the loss of ownership or control of rights in foreshores and inland waters is almost as important as the loss of land rights.
- (f) Public works takings disproportionately affected Maori and commonly resulted in lower compensation payments than were made to Pakeha landowners (or, in many instances, no compensation payments).

ptiii.14.2 Some fundamental choices of approach to historical injury

(1) *Assessing the process of land alienation or assessing the outcome of the process?*

It will be a matter for primary consideration as to whether it is the *means* by which land was lost that constitutes the main basis of a claim or the *outcome* of that process. What may matter to claimants is not that land was lost through manipulative purchases or public works takings or raupatu but that it was lost and that, by 1930 or 1945, very little was left. The choice of approach taken will affect the way in which research and negotiations then unfold. An appraisal of outcomes can

proceed quite swiftly, based on statistical evidence at a chosen date. There would be no need to pursue detailed research on exactly how things happened, if it were accepted that processes of alienation all involved some kind of Treaty breach, to a greater or lesser degree – a judgement that might be able to be made on the basis of Waitangi Tribunal reports to date and the national theme chapters in this report. An approach based on outcomes also implies that the quantity or worth of the land and resources left is a more important consideration than the quantity or worth of the land and resources lost. It is also relevant to consider whether this should be measured on a per capita basis or on an aggregate basis. Given that people matter more than things (even land) in terms of the Crown's duty of active protection, a per capita basis would seem to be the more equitable way of measuring the outcome. As demonstrated in the executive summary, the Rangahaua Whanui district where Maori had the least land on a per capita basis in 1939 was Hauraki, followed by the confiscation-affected districts of Waikato and Taranaki, followed by Auckland (see sec es.11.3).

(2) *The value of what was lost cannot be ignored*

It is unlikely that any group, recalling what lay within its rohe in 1840, will agree to see that wholly discounted in any appraisal of Treaty breaches. Yet the valuation of such resources would be very difficult. Not all acres were of equal worth in the Maori or the Pakeha economy. Remote land, though important in the hunter-gatherer economy, was probably not as precious as land that grew kumara. Good access to the sea or lakes and lagoons (like the waters themselves) was highly valued. With the advent of the Pakeha economy, land that grew wheat quickly became important, then the grasslands where stock could be pastured. Good timber land was always valuable, although a lot of it was burned before it was realised just how valuable. With the growth of the urban economy, land in or near towns gained value, while land distant from towns declined in value, relatively speaking, and supported fewer and fewer of the populace. How to measure these things is extremely complex, and values change for reasons not necessarily inherent in the land itself but because the values of the world around change. Probably it is still true to say that the loss of remote back-block land was less serious than the loss of cultivable land near ports and settlements. Apart from land of spiritual and cultural significance, it may not be possible to say much more than that.

(3) *Broad-brush or detailed research?*

Apart from outcomes, many claimants may still wish to examine closely the way in which the land was transferred. They might even wish to pursue this on a block-by-block basis. It is possible to do this, up to a point, depending upon the extent and quality of the surviving evidence. Dr Michael Belgrave's study of the Auckland district included each block's date of alienation, area, and price. It took nearly a year, with research assistance, and enabled certain correlations with the legal and administrative regimes in force to be made. More detailed histories of alienations, identifying vendors and the degree of consultation with them, would take much

more time and would be fairly expensive. Where there are competing or intersecting claims, there will probably be duplication and legal costs. Because hapu were not discrete entities sitting behind neat boundaries, the outcome of competing or adversarial processes may not be conclusive and is certainly likely to be unsatisfactory to at least some of the parties. There is also the risk that claims (and the associated research, legal, and hearing costs) will become hydra-headed as intersecting hapu, or even whanau, want to pursue their particular view of the history of a land alienation and its prejudicial effect. The imperatives for this can be very strong, especially if the hapu or whanau does not feel that its experience or viewpoint is adequately encompassed in the claim as it is being pursued by a trust board or runanganui. Yet to pursue this process too far will certainly be costly and may delay settlements. How far the research and legal costs of individual and small-group claims should be funded in addition to a large-group claim covering the same land area is a matter for consideration.

(4) *A middle course?*

A possible way through some of the dilemmas is to treat some matters with a broad-brush approach and leave others for more finely detailed inquiry. Such a division could be made by date *or* by theme *or* by a combination of both. It would be feasible, for example, to take a particular date and treat all or most issues arising before that date on the broad-brush basis, leaving matters since that date for more specific inquiry. Alternatively, the outcomes of particular themes, such as Crown purchases or purchases under the Native Land Acts, could be assessed statistically, and negotiations carried out over them on broad-brush terms, leaving other themes (such as rights in rivers and foreshores) for detailed consideration.

(5) *A division at 1940?*

A likely practicable date to use to divide claims between a broad-brush and a detailed approach is 1940. This date suggests itself because by that time (or a few years earlier) the Crown had ceased pursuing policies that led to the systematic alienation of millions of acres of Maori land and, for the most part, had shifted to a policy of assisting Maori to develop remaining land. This is not to say that Maori land was not still being acquired. Indeed it was, largely by public works takings and tenure conversions, which eroded important portions of the remaining Maori estate. But the era of the systematic acquisition of the bulk of Maori land for Pakeha settlement was virtually over. The outcomes are measurable statistically at 1939 or 1940, before Maori urbanisation was well advanced. Other reasons for suggesting 1940 as a dividing point are:

- It marks a round 100 years since the Treaty was signed.
- The advent of welfare policies, land development, urbanisation, and so forth had not yet greatly clouded the issue.
- The year 1940 divides claims fairly well between those within living memory and those that are more truly 'historical'. Of course, there are numerous kaumatua whose living memory goes back well before 1940 and a living oral

tradition that goes back to 1840 and beyond. There is a tendency for claims relating to particular pieces of land to cluster more thickly around postwar events, however, and the people who experienced those events and remember them personally are much more numerous. All such divides are to some extent arbitrary and, if broad-brush strategies are to be pursued at all, there is a good case for a 1940 divide. Alternative candidates for dividing points might be 1934 (marked by the new Native Affairs Act), 1945 (marked by the end of the war and by the Maori Social and Economic Advancement Act), or 1975 (marked by the Treaty of Waitangi Act).

Whichever of these dates is chosen, settlement should proceed quickly, on the basis of existing research and further statistical evidence as to outcomes, and according to nationally agreed guidelines as to the weighting to be given to such factors as isolation and the economic potential of the resources remaining (in addition to their quantity).

More detailed research and Tribunal hearings could continue on more recent matters, although consideration should be given to settling small claims through other agencies, such as the Maori Land Court, leaving the Tribunal free to examine questions of principle having wide application.

(6) *Division according to themes*

The themes or issues that might be included in a ‘package’ for broad-brush research and negotiation are:

- (a) old land claims and ‘surplus land’;
- (b) New Zealand Company purchases;
- (c) Crown pre-emption purchases;
- (d) Governor FitzRoy’s waiver purchases;
- (e) purchases under the Native Land Acts to 1940;
- (f) alienation of reserves and the failure to maintain restrictions on title;
- (g) land taken for survey costs;
- (h) loss of land in the native townships;
- (i) public works takings to 1940;
- (j) loss of land through consolidation and development schemes;
- (k) inadequate compensation paid for gold-mining and access to other minerals;
- (l) takings of land in lieu of rates; and
- (m) alienations by the Public Trustee and Maori Trustee to 1940.

Themes that might not lend themselves so easily to inclusion in the package (but which should nevertheless be considered for inclusion) are the areas where aboriginal title rights are most likely still to obtain; namely, rights to the foreshore (including the tidal foreshore and inshore seabed) and inland waters.

ptiii.14.3 How should these matters be decided?

The loss of rangatiratanga has been an ongoing theme throughout this report and has been identified as the most serious of Treaty breaches, in respect of both resource loss and exclusion from the decision-making process. The restoration of tino rangatiratanga will be the work not of a year or a decade but of generations. Yet a significant step can be made immediately by involving Maori communities and the Maori leadership much more fully in the shaping of strategies for the resolution of Treaty grievances. There was consultation between the Government and Maori before 1985 about the *principle* of returning the jurisdiction of the Waitangi Tribunal to 1840 but not much consultation about how the outpouring of claims (foreseeable to anyone with a reasonable knowledge of New Zealand history) or the payment of reparation would be managed. There was consultation in 1994 and 1995 over the Crown proposals for Treaty settlements, but it was greatly distorted by the unilateral imposition of a non-negotiable fiscal cap. Genuine consultation and recognition of rangatiratanga can scarcely take place when key matters have been declared non-negotiable in advance. It would not be untimely if the wider Maori leadership were now to be seriously consulted on how to manage the ever-growing number of Treaty claims and the findings of the outpouring of historical research to this point.

The Waitangi Tribunal could play a leading role in such deliberations because of:

- (a) its responsibilities under the Treaty of Waitangi Act;
- (b) its considerable experience to date;
- (c) its ongoing role in hearing issues that have yet to be explored fully in terms of Maori views of what actually happened and in terms of Treaty jurisprudence; and
- (d) the likely increasing importance of its role as mediator between intersecting Maori groups as well as between Maori and the Crown.

Individual Maori, and individual whanau and hapu, have rights under the Treaty and under the Act to depose their claims and be heard. They may or may not wish to include their claims under the umbrella of a wider claim. Yet the pursuit of individual and small-group claims should not unduly delay the settlement of large-group claims, which it could, because of competition for scarce research resources and the time of the Waitangi Tribunal. The Government could reasonably be expected to give priority to the settlement of large-group claims before small-group claims, in the interests of restoring a capital base to as many Maori people as quickly as possible.

That principle would operate as an incentive to individuals and small groups to cluster under the umbrella of large groups. A percentage of the value of any settlement could conceivably be retained for a staged transfer to small groups, if subsequent research determined that they warranted reparation in addition to that made over in the large-group negotiation and payment. These are matters both for discussion with the wider Maori leadership in terms of strategy and for the Maori leaders and communities of a given district when negotiation and settlement in their community or district is at hand.

APPENDIX I

PRACTICE NOTE

WAITANGI TRIBUNAL

CONCERNING

the Treaty of Waitangi Act 1975

AND

Rangahaua Whanui and the claims as a whole

PRACTICE NOTE

This practice note follows extensive Tribunal inquiries into a number of claims in addition to those formally reported on.

It is now clear that the complaints concerning specified lands in many small claims, relate to Crown policy that affected numerous other lands as well, and that the Crown actions complained of in certain tribal claims, likewise affected all or several tribes, (although not necessarily to the same degree).

It further appears the claims as a whole require an historical review of relevant Crown policy and action in which both single issue and major claims can be properly contextualised.

The several, successive and seriatim hearing of claims has not facilitated the efficient despatch of long outstanding grievances and is duplicating the research of common issues. Findings in one case may also affect others still to be heard who may hold competing views and for that and other reasons, the current process may unfairly advantage those cases first dealt with in the long claimant queue.

To alleviate these problems and to further assist the prioritising, grouping, marshalling and hearing of claims, a national review of claims is now proposed.

Pursuant to Second Schedule clause 5A of the Treaty of Waitangi Act 1975 therefore, the Tribunal is commissioning research to advance the inquiry into the claims as a whole, and to provide a national overview of the claims grouped by districts within a broad historical context. For convenience, research commissions in this area are grouped under the name of Rangahaua Whanui.

In the interim, claims in hearing, claims ready to proceed, or urgent claims, will continue to be heard as before.

Rangahaua Whanui research commissions will issue in standard form to provide an even methodology and approach. A Tribunal mentor unit will review the comprehensiveness of the commission terms, the design of the overall programme, monitor progress and prioritise additional tasks. It will comprise Tribunal members with historical, Maori cultural and

National Overview

legal skills. To avoid research duplication, to maintain liaison with interested groups and to ensure open process:

- (a) claimants and Crown will be advised of the research work proposed;
- (b) commissioned researchers will liaise with claimant groups, Crown agencies and others involved in Treaty research; and
- (c) Crown Law Office, Treaty of Waitangi Policy Unit, Crown Forestry Rental Trust and a representative of a national Maori body with iwi and hapu affiliations will be invited to join the mentor unit meetings.

It is hoped that claimants and other agencies will be able to undertake a part of the proposed work.

Basic data will be sought on comparative iwi resource losses, the impact of loss and alleged causes within an historical context and to identify in advance where possible, the wide ranging additional issues and further interest groups that invariably emerge at particular claim hearings.

As required by the Act, the resultant reports, which will represent no more than the opinions of its authors, will be accessible to parties; and the authors will be available for cross-examination if required. The reports are expected to be broad surveys however. More in-depth claimant studies will be needed before specific cases can proceed to hearing; but it is expected the reports will isolate issues and enable claimant, Crown and other parties to advise on the areas they seek to oppose, support or augment.

Claimants are requested to inform the Director of work proposed or in progress in their districts.

The Director is to append a copy hereof to the appropriate research commissions and to give such further notice of it as he considers necessary.

Dated at Wellington this 23rd day of September 1993

Chairperson
Waitangi Tribunal

APPENDIX II

DIRECTION COMMISSIONING RESEARCH

WAITANGI TRIBUNAL

CONCERNING the Treaty of Waitangi Act 1975

AND CONCERNING Rangahaua Whanui *National Overview*

DIRECTION COMMISSIONING RESEARCH

1. Pursuant to clause 5a(1) of the second schedule of the Treaty of Waitangi Act 1975, the Tribunal commissions Professor Alan Ward of Wellington to prepare the *National Overview* for the Rangahaua Whanui project.

2. The commission commences on 1 July 1996. The commission will end on 31 December 1996, at which time one copy of the report will be filed in unbound form and a copy of the report on disk.

3. The report may be received as evidence and the commissionee may be cross-examined on it.

4. The Registrar is to send copies of this direction to:

Dr Alan Ward
Solicitor General, Crown Law Office
Director, Office of Treaty Settlements
Secretary, Crown Forestry Rental Trust
National Maori Congress
New Zealand Maori Council

Dated at Wellington this 30th day of April 1996.

Chief Judge E T J Durie
Chairperson
Waitangi Tribunal

APPENDIX III

DIRECTIONS OF TRIBUNAL

WAITANGI TRIBUNAL

CONCERNING

the Treaty of Waitangi Act 1975

AND

Rangahaua Whanui *National Overview*

MEMORANDUM – DIRECTIONS OF TRIBUNAL

1. Pursuant to clause 5a(1) of the second schedule of the Treaty of Waitangi Act 1975, Professor Alan Ward of Wellington was commissioned on 30 April 1996 to prepare the *National Overview* for the Rangahaua Whanui project. Professor Ward's commission commenced on 1 July 1996 and ends on 31 December 1996.

2. I am given to understand that new evidence is emerging from the Rangahaua Whanui research programme about the nature of the historical grievances and Treaty breaches expressed by Maori. This may impact considerably on the Tribunal's work, and in light of his historical experience, Professor Ward is invited to suggest in his report some optional strategies about how the historical claims might best be dealt with.

Dated at Wellington this 4th day of November 1996.

Chief Judge E T J Durie
Chairperson
Waitangi Tribunal

APPENDIX IV

‘SURPLUS LANDS’ IN THE NEW ZEALAND COMPANY’S DISTRICTS

To provide additional information on New Zealand Company purchases, Mr Duncan Moore has written the following summary. It has been drawn from a more detailed report of the same title, which forms part of a three-part report, ‘The Land Claims Commission Process’, for the Rangahaua Whanui Series.

The New Zealand Company completed six initial transactions with Maori between September 1839 and February 1840 that were adjudicable under the Land Claims Ordinance 1840 and its successor Acts.¹ Rather than submit claims based on these transactions per se, the company arranged with Lord Russell for a colonising charter (issued in February 1841), which on the one hand ‘guaranteed’ the company an acre of land for every five shillings it spent colonising (conditional on the company’s purchases being found valid by the Land Claims Commission) and, on the other, restricted it to selecting lands in blocks of certain shapes and sizes and to on-selling lands at certain prices. These shapes, sizes, and prices subsequently gave rise to extensive negotiations and re-negotiations between the company and the Colonial Office. The company believed that this charter gave it a legally binding claim against the Crown for the value of the four acres awarded to it for each pound spent colonising. For six years, the company claimed this value from the Crown in land, but the Crown could not pay in this form because it did not have the land to grant.²

The company’s agents in New Zealand regarded their 1839 transactions at Queen Charlotte Sound and Porirua as extinguishing the broad ‘overlord’ interests of the Maori tribes that dominated the Cook Strait region from Taranaki to Wairarapa to the top of the South Island. They regarded their four transactions – one at Port Nicholson, one at Wanganui, and two at Taranaki – as extinguishing lower, ‘resident’ Maori interests in smaller parts of this general region of operation, which was planned for colonisation by the New Zealand Company.³

The company first surveyed its town acres in Port Nicholson, Porirua, and Wanganui in 1840 and 1841. Each survey aroused substantial opposition and physical resistance from Maori. Consistent with the above ‘overlord–resident’ purchase approach, at each settlement the company’s agents pursued a policy of making on-going payments to ‘residents’ upon taking physical occupancy of the purchase areas.⁴

1. D Moore, ‘The Land Claims Commission Process’, Rangahaua Whanui Series unpublished draft, pp 4–14

2. Ibid, pp 19–20

3. Ibid, pp 4–14. See also page 18 regarding conflicting Maori testimony on whether this was in fact Maori custom.

4. Ibid, pp 15–16

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Governor Hobson first visited the company's settlements in late 1841, finding that Maori at each place except Porirua appeared generally anxious for Pakeha to settle but were equally anxious not to be displaced by that settlement. Hobson had just received his instruction to fulfil within six months the 1841 charters 'guarantee' of four acres per pound. He did this, while also broadly endorsing the company's purchase approach, by waiving pre-emption. Hobson's pre-emption waiver authorised the company's agents only to try to complete their existing purchase transactions with the 'residents' in Port Nicholson, Wanganui, and New Plymouth – the three settlement areas where Maori appeared generally favourable. Hobson did not authorise the company to undertake any new purchases. He also issued directions that Maori had to be allowed to identify any particular lands that they wanted to exclude from the transactions.⁵

Hobson could grant unconditionally only from lands to which the Crown's own title was clear. It was accepted public law that the Crown obtained title clear of other interests pursuant to a written record.⁶ Hobson could not, therefore, grant the company land unless a land claims commission report had declared it free of Maori interests. His pre-emption waiver specifically aimed to secure favourable land claims reports for sufficient land to fulfil his instruction to grant the company four acres to the pound.

In early 1842, the company's agents began presenting their initial transactions to the Land Claims Court on the one hand, and on the other, they stepped-up negotiations for 'resident' interests to complete their selection of land for survey and sale at each of their settlements. These negotiations took them beyond Port Nicholson, Wanganui, and New Plymouth to Nelson and Manawatu, where they transacted for 'resident' Maori interests, ostensibly under authority of Hobson's pre-emption waiver.⁷ Hobson, however, complained that the transaction at Manawatu breached the 'purchase-completing' limits of his pre-emption waiver.

By August 1842, it was clear that the open-ended negotiations for 'resident' interests were not going well. The company's agent and the land claims commissioner assigned to the company's cases devised a plan for a binding arbitration that would give finality to the pre-emption waiver negotiations for the completion of the company's purchases.⁸ The Land Claims Court was to run two processes concurrently, in effect identifying the outstanding interests that the arbitration was to extinguish and then sanctioning the arbitration under the Land Claims Ordinances. Like the pre-emption waiver enabling it, the arbitration was restricted to the areas that the company sought for selection and settlement under its 1841 charter.⁹ The accompanying land claims inquiry was likewise restricted.¹⁰

From 1840 to 1846, Commissioner Spain and the officials involved in the company's land claims and first arbitrations, consistently deemed Maori at Port Nicholson, Wanganui, and New Plymouth, and then at Manawatu and Nelson, to have generally 'admitted the sale' of some territory. Put otherwise, they deemed the company to have effected a 'partial purchase', which meant that, in fairness to the purchaser, the vendor was committed to the deal. They understood that the vendor had surrendered the right to 'back out' of the deal altogether.

5. Moore, pp 20–23

6. Wai 145 rod, doc e3, pp 23–25

7. Moore, p 24

8. Ibid, pp 27–28

9. Ibid, pp 28–29

10. Ibid, pp 30–33

‘Surplus Lands’ in Company Districts

Hence, we find the judicial and arbitration officials from mid-1840 onwards consistently affirming that Maori at Port Nicholson, Wanganui, Nelson, and Taranaki had no general right to refuse to sell their land to the company. Maori had no choice as to whether to see their customary interests generally extinguished. They had a ‘right’ only to see their customary interests extinguished completely and fairly.¹¹

The official perception of a ‘partial purchase’ also had far-reaching implications in another direction. The basic features that indicated a partial purchase to the officials were:

- the company’s initial transactions, which had to involve at least some of the Maori with interests in some portion of the lands under arbitration or inquiry; and
- especially, undisputed physical possession.

The land claims commissioner took the latter – undisputed physical possession – as the essential feature distinguishing an incomplete (but valid) ‘partial purchase’ from a completely invalid claim. For example, Wakatu compared with Wairau and Taitapu compared with Porirua.¹²

From 1840 to early 1843 at Port Nicholson, Wanganui, and New Plymouth, Crown officials made specific pledges to convince Maori to stop obstructing both the company from carrying out surveys and its settlers from occupying their selected sections. That is, the Crown’s pledges stopped Maori from disputing the company’s physical possession.¹³ Or, put otherwise, the company’s peaceful possession was based upon the Crown’s pledges.

Hence:

- the company obtained title primarily by means of the Crown’s acknowledgement of its partial purchase; and
- the Crown acknowledged the company’s partial purchase mainly by virtue of its generally undisputed physical possession; and
- the company obtained generally undisputed physical possession mainly by means of the Crown’s pledges.

Therefore, the Crown granted the company title largely on the surety of its own pledges to Maori.

This leads us to the right question to ask of the Crown’s title to its ‘surpluses’ in the company’s districts: the Crown’s title to its ‘surpluses’ is, by nature, derived from the colonist purchasers’ extinguishment of the prior Maori interests. Therefore, we can see from the above that, wherever there was a ‘surplus’ in the company’s purchases, the Crown’s title to that surplus was largely grounded on its own ‘peaceful possession pledges’ to Maori.

The Crown’s 1840 to 1843 undertakings to Maori included some or all of the following:

- further ‘compensation’ payments;
- the fulfilment of the company’s promises of trust-style (‘tenth’) reserves;
- the exclusion of essential lands, including pa and ngakinga; and
- the reservation for Maori purposes of 15 to 20 percent of the proceeds of Crown land sales.¹⁴

It becomes crucial to weigh the Crown’s grants to the company, and its right to its ‘surpluses’ at Port Nicholson, Wanganui, and New Plymouth, against its fulfilment of those early pledges.

11. Ibid, pp 27–28, 42, 45

12. Ibid, pp 15–16, fn 34; see also BPP, vol 5, p 43

13. Moore, p 17, fn 37

14. Ibid, p 17, fn 38

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At Port Nicholson, Manawatu, Wanganui, Taranaki, and Nelson, the arbitrations were conducted, and the compensation was ultimately calculated, on the express understanding that the only lands under consideration were those to go to the company under its 1841 charter. Prior to Governor FitzRoy's arrival, there was no indication that the arbitrations would produce a surplus beyond that which was to go to the company.¹⁵

At Port Nicholson, the company selected and paid for just over 60,000 acres of land, and Maori signed deeds of release with an attached list identifying the 60,000 acres. Shortly afterward, though, the arbitration umpire (the land claims commissioner) instructed the surveyors to cut an exterior boundary following a natural route around these selected lands. This boundary was later found to enclose about 210,000 acres. No compensation was paid for the 'surplus' in this area (ie, the area over and above the company's 60,000 acres).¹⁶

Similarly, in Wanganui, the company only selected 40,000 acres, and the umpire and protector specifically assured Maori that their deeds of release affected only these 40,000 acres.¹⁷ Yet in 1846, when the boundaries of this theoretical 40,000-acre block were actually cut on the ground (and again when McLean renegotiated the location of the reserves in 1848 and paid over the £1000 additional compensation), they described an area later found to enclose 86,000 acres. In 1850, when the boundary was redrawn following natural features, the actual area conveyed increased again. Both times, neither the company's payment nor its award of 40,000 acres increased; the Crown's 'surplus' did.

Likewise, at Nelson, the arbitrated award (compensation payment plus reserves) expressly extinguished Maori interests only in the 150,000 acres claimed by the company as 1841 charter lands. Apparently on the 'strength' of his Wairau purchase of early 1847, however, Grey's 1848 Nelson grant engulfed this compensated and awarded land in an area of at least two million acres.

In 1844, at Port Nicholson and Wanganui, Governor FitzRoy began surveys of the pa and ngakinga (cultivations) to be excepted from the purchase). In 1846 and 1847, Governor Grey continued these surveys of the 1844 exceptions. In the 'surplus' areas, Grey bunched together discrete ngakinga to make large blocks, which he assigned to Maori by deeds (later dealt with in the land courts). In return for assigning these 'new' large blocks, Grey got Maori to agree to surrender other excepted ngakinga that stood in the path of Pakeha settlement and development.¹⁸ In short, Maori paid for their lands excepted from the Crown's surpluses by giving up some of their lands excepted from the company's awards.

Manawatu and Taranaki appear to have escaped the Crown's post-1844 expansions of the company's boundaries (although there was some exchanging of excepted lands at Taranaki). Surpluses probably were expected in 1844 – Spain sanctioned both the company's purchase of 'hundreds of thousands' of acres at Manawatu reaching to the hills and the entire 1840 Ngamotu deed up to the summit of Mount Taranaki. Probably, the Crown did not expand the boundaries to enclose these surpluses at Manawatu and Taranaki owing to the settlements' 1844 arrangements respectively lapsing and failing.¹⁹ It is, however, doubtful that McLean paid anything for the interests of resident Maori in his 1847 purchase of the Grey block, because he apparently believed that these had already been extinguished by the company's Ngamotu deed.²⁰

15. Moore, pp 23–26, 28–30

16. Ibid, pp 39–41

17. Spain, 'Wanganui Report', no 4, encl 8, BPP, vol 4, p 98

18. Ibid, pp 50–58, 78–79, 65–66, 96–99

19. Ibid, pp 52–53, 80, 46–48

20. Ibid, pp 66, 72–75

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In May 1843, in order to coax the company out of its suspension of operations, Lord Stanley instructed Governor FitzRoy to grant the company the lands it had selected for settlement under its 1841 charter, conditional upon there being no ‘prior titles’ to those lands. In February 1844, in lieu of issuing the conditional grants, Governor FitzRoy expanded the company’s waiver of pre-emption to enable entirely new purchases in Wairarapa and Otakou to be made.²¹

The waivers were initially for 150,000 acres each, with conditions that the negotiations would be overseen by Crown commissioners. At the insistence of one of these Crown commissioners, the Otakou purchase boundaries were expanded so as to create a 250,000-acre ‘unappropriated residue’ for the Crown. The Colonial Office approved this move in August 1845.²²

In this case, as in the previously mentioned expansions at Port Nicholson, Wanganui, and Nelson, the Crown apparently acted with Maori consent. Nevertheless, the Crown’s fiduciary role toward Maori raises the question of whether mere consent was an adequate limit to Crown self-restraint and an adequate measure of justice. Again, in this context, the various undertakings made in 1840 to 1843, including the promise of endowment reserves as well as the residential reserves, and the 15 to 20 percent allocation of Maori purposes from the profits of the Land Fund become relevant.

From May 1843 to June 1845, Lord Stanley repeatedly instructed Governors FitzRoy and Grey, first, to commence the registration that Lord Russell had instructed the Governor to carry out in 1841, thus distinguishing Maori lands from demesne lands, and, second, to issue the company a conditional grant of the lands guaranteed to them under Russell’s 1841 charter. In addition, in August 1845, Stanley loaned the company £100,000, instructed Grey to expand its pre-emption waiver to cover its entire field of operations (now everything south of a line from the Mokau River to the Ahuriri River), and arranged a Special Commissioner to supervise and aid their future purchases of Maori interests. The compulsory registration and the pre-emption waiver both aimed to generate enough unencumbered demesne to enable the company to fulfil the condition in the previously instructed conditional grants of the 1841 charter lands – that is, to extinguish all ‘prior titles’.²³

Governor Grey pursued these instructions up to mid-1847. He waived pre-emption and granted Otakou.²⁴ At Port Nicholson, Wanganui, and Nelson, he continued FitzRoy’s surveys of lands to be excepted for Maori from the ‘surplus’ areas – which he later reported as intended effectively to register the Maori interests in those districts’ demesne areas. Similarly, in March 1847, he attempted a ‘resumption’ of the Crown’s estate in New Plymouth with a registration or reservation of outstanding Maori interests in it.²⁵

Throughout these adjustments, resumptions, and registrations of interests, Grey presumed that those lands outside the company’s sections but within the ‘external boundaries’ sanctioned by Spain were ‘surplus’ for the Crown to keep, sell, or exchange with Maori as it pleased.

In contrast, Grey’s purchases of the Porirua and Wairau districts accepted that Spain had wholly disallowed the company’s purchases in those districts.²⁶ Apparently, Wakefield and Maori refused to buy these areas from, or sell them to, each other, but the purchases were

21. *Ibid.*, p 37

22. *Ibid.*, pp 48–49

23. *Ibid.*, pp 55–63

24. *Ibid.*, p 65

25. *Ibid.*, pp 64–65, 72–75

26. *Ibid.*, pp 49–50

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vital to Grey's wider military plans and the company's whole Nelson settlement. Grey went to the limit of his instructions and purchased the lands. He anticipated that, after the company had selected the lands for settlement under their 1841 charter, the Crown would be left with a huge remainder – for all intents and purposes a large 'surplus', able to be resold for many thousands of pounds.²⁷ Both transactions suffered in their integrity from being conducted while Grey held the vendors' chief, Te Rauparaha, captive.

The distinction between 'Crown' and 'company' purchases was obliterated in the 'combined operations' established by the Loan Act 1847. Knowledge of the Act reached New Zealand in about October 1847 and waived the Crown's demesne and pre-emption in favour of the company. The accompanying instructions stipulated that the company would choose which settlements to pursue and which lands to buy and that it would provide the funds to the local officials conducting the purchases. The Crown would lend the company the funds for the purchases and for further colonisation (secured by a mortgage against the lands purchased) and would do the face-to-face transacting with Maori. In the heyday of the Loan Act 1847 a few months later, Earl Grey said he saw Governor Grey as an agent of both the company and the Crown.²⁸

Hence, it was no mistake that in January 1848, Grey granted the company about 210,000 acres at Port Nicholson, when Spain had only awarded it 71,900. He was vesting the surplus demesne in the company under the Loan Act. Likewise, at Nelson, Grey granted the company almost two million acres, roughly 1.5 million acres of which was demesne land from the Crown's Wairau purchase. Similarly, rather than have the company select its portion of the Porirua purchase, Grey simply granted them the whole area, including the Crown's unappropriated residue.²⁹

Under the new Act's purchase procedures, in April 1848, Wakefield instructed the Crown to acquire land 'from Port Cooper to Otakou'. Native Secretary Kemp did so, his deed for 20 million acres in the South Island naming the company as the purchaser. Purchases attempted at Wairarapa under the Loan Act failed before the company folded in June 1850. They did not, therefore, pass any company surplus to the Crown.³⁰

Prior to the Loan Act 1847, the portion of the company's purchases that was not selected (or selectable) by the company under its 1841 charter was to have gone to the Crown. In the purchases that were completed as company purchases, this portion would have gone to the Crown as 'surplus'. In the purchases completed more as Crown purchases, though, we may not reasonably treat the residue as 'surplus'. Therefore, all the purchases in the company's districts, other than Porirua and Wairau, can fairly be said to have generated surpluses for the Crown.

Estimating the area of this surplus is perhaps less daunting than one would expect. Upon the dissolution of the company in July 1850, the Crown, under the Loan Act 1847, bought back the company's 1.3 million-acre right of selection – the company's portion of each of its purchases. The Crown merely resumed the remainder – the vast outlying areas that the company only held at the time as demesne waived to it under the 1847 Act.

At the time it surrendered its charter, the company had already exercised its right of selection over 828,000 acres out of its total right of selection of 1.3 million acres. These 828,000 acres were actual, locatable lands, and those lands that the Crown obtained were

27. Moore, pp 75–77

28. Earl Grey to Grey, 19 June 1847, BPP, vol 5, p 117

29. Ibid, pp 92–93

30. Ibid, pp 99–100

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acquired by paying the company five shillings per acre, as agreed under the Act. Of these 828,000 ‘realised’ acres, though, the company had already on-sold 199,000 acres to private purchasers. Because the company had already recovered its costs on these lands, the Crown did not need to ‘buy them back’. Or, alternatively, because these lands were owned by third parties, the Crown could not ‘buy them back’.

That left a company estate of 629,000 acres of selected lands (828,000 minus 199,000), plus 472,000 acres of unexercised ‘right of selection’ (1.3 million minus 828,000). All these lands and rights were valued under the 1847 Act at five shillings per acre or £275,000. This was the cash redemption of the company’s old 1841 charter claim against the Crown for four acres per pound spent on colonisation. Upon dissolution, the company handed over these lands and rights to the Crown, and the Crown started paying their value to the company.³¹

Excluding Porirua and the Wairau portion of the Nelson grant, a rough total of the company’s lands is given in the following table.³²

Land	Area (acres)
FitzRoy block	3500
Grey block	9770
Omata	12,000
Tataraimaka	4000
Nelson	1,500,000
Port Nicholson	210,000
Kemp purchase	20,000,000
Wanganui	110,000
Otago	400,000
Total	22,250,000

This total estate, minus the above 1.1 million acres of lands and rights that the Crown ‘bought’ from the company, leaves a ‘surplus’ in round figures of 21.2 million acres in the company’s purchase areas.

In 1856, the company commuted its £275,000 lien against the colony’s demesne lands for a single payment from the British Parliament of £200,000. This amount became simply a national debt to England, though it was still apportioned between the provincial governments (mainly according to the acreage they had ‘inherited’ from the company’s activities) and still paid primarily out of the proceeds of each province’s land sales. It would be difficult to guess the extent to which the need to repay this debt may have driven the Crown to continue to purchase far more Maori land than it needed for its actual use and occupation.³³

31. Earl Grey to Grey, 19 June 1847, BPP, vol 5, pp 100–101

32. Ibid, p 102

33. Ibid, pp 103–104

APPENDIX V

THE CROWN'S 1996 POLICY ON CLAIMS INVOLVING PUBLIC WORKS ACQUISITIONS

The Crown's broad definition of the kinds of legislation covered by its August 1996 policy on Treaty claims involving public works acquisitions is appropriate and reasonable. Moreover, the Crown's recognition that quite often Maori land gained by 'agreement' was in fact given under duress does the Crown credit. The document therefore goes some way towards acknowledging the Crown's responsibility in respect of public works acquisitions but, in the light of the discussion at section pti.11, falls short of what is required in the following respects:

- The definition of 'land' affected should be read to include *waters* – the rivers, streams and swamps which were extremely important for the Maori ecology and which were drastically affected by public works policies and drainage projects.
- It must be accepted that, from time to time, the Crown has obligations under article 1 of the Treaty to acquire land compulsorily in the public interest. On the other hand, as the Tribunal has pointed out, it has a duty to do so only when there is no other recourse, only after appropriate consultation with the persons affected has been conducted, and only after other possible approaches have been exhausted. This is as true for Pakeha land and waters as it is for Maori land and waters, but article 2 of the Treaty presents the Crown with the obligation of special regard for Maori rights. Yet, far from the authorities being more careful about consulting and compensating Maori than Pakeha, the reverse was commonly the case. There were (and are) no doubt circumstances in which sheer urgency makes full consultation and discussion of alternative approaches difficult: wartime exigencies, for example, or the excessive cost of delaying projects (although this should be genuinely serious, not a matter of common convenience, overriding normal consent). The Treaty obligation to give active protection to a people who had little experience with bureaucratic and legal processes compared with Pakeha, and who had all the added difficulties stemming from complexity of title and lack of access to credit, should have made the Crown especially careful of Maori rights. There were signs that more care was taken in the early days; Maori were militarily strong on the ground then and the Colonial Office kept an eye on the activities of settler politicians. But from 1865 on, the colonial Legislature's attitude towards Maori became somewhat vengeful, and Maori land and water were intruded upon with less care than Pakeha land apparently on the basis that somehow Maori 'owed' something to the colony's development, especially because they could not or would not pay local body rates in the same way as Pakeha did. From 1865 to 1981, especially, despite occasional concessions in the law to the special

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circumstances and disadvantages of Maori, it proved all too expedient for central and local government to take Maori land and pay compensation grudgingly, if at all.

- The Crown's policy in respect of offer-back is illogical, from a Treaty perspective. The Crown's statement assumes that only the legislation of 1981 imposes an obligation upon it to offer back to Maori land surplus to public work requirements – that only failure since that date to offer back land would constitute a Treaty breach. But in terms of the Treaty of Waitangi Act 1975, legislation, or the absence of legislation, should be reviewed in the light of Treaty principles, not vice versa. The Treaty of Waitangi Act Amendment Act 1985 extends the jurisdiction of the Waitangi Tribunal to review any act of omission or commission claimed to have prejudicial effect on Maori, including 'any ordinance or regulations, order, proclamation, notice or other statutory instrument made, issued, or given at any time or after the 6th day of February 1840' or 'any policy or practice (whether or not enforced) adopted by or on behalf of the Crown' (s 6(1)). Presumably the actions or inactions of the Crown must be interpreted by the Waitangi Tribunal in the light of the Treaty itself, including expectations of a reasonable balance between the Crown's rights and obligations of *kawanatanga* and its obligation to respect *tino rangatiratanga*, as indicated by the Court of Appeal in 1987. In this light, the failure to offer back land taken from Maori for public works but not used for the purpose intended (or for any genuine public purpose at all) might be considered as much a breach of the Treaty before 1981 as after.
- The question of offering the land back at current market value, including the price of improvements, is a contentious issue. On the one hand, the improvements and added value have generally been created by the capital and energies of the national community; on that basis, Maori taking over the property should pay at least something towards the value of the improvements. On the other hand, the national community has had the benefit of the land for some time – often a very long time – and often for no initial cost, or very little cost, in compensation. That would allow for at least a substantial discounting of current market value.
- By the same arguments as above, the Crown's refusal to recognise the acts or omissions of local authorities and statutory bodies is also illogical. A reasonable inference from section 6(1) of the Treaty of Waitangi Act would seem to be that the acts, orders etc of local bodies, acting in capacities bestowed upon them by statutes of parliament, are indirectly actions of the Crown-in-Parliament. At the very least, it is highly legalistic and ungenerous of the Crown to evade responsibility for the actions of local authorities that it created and whose tendency to take Maori land for public works in preference to Pakeha land (and without the full exercise of due process) it had long been aware of. Moreover, the Maori Trustee (that is, the Secretary for Maori Affairs) and Maori land boards have mixed records in terms of their association with local authorities in the taking of Maori land for public purposes.
- If this be accepted, it opens the way to a great many claims for Treaty breaches, but the Crown's policy puts a heavy onus of proof on claimants to prove each case a breach. As in the case of claims arising from the operation of the Native Land Acts, this is impracticable, except in respect of relatively recent or well documented actions. Confusion in the legislation, the great variety of definitions of 'Maori land' and shifting applications of the law, even year by year, makes specific identification of each breach very difficult. Even where cases of Treaty breaches can be proved, the research and legal costs are considerable. As with the impact of Native Land Acts, the

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case for a broad-brush approach up to a certain date is strong and likely to serve the best interests of all parties. Moreover, the Crown policy notes that a claimant group may have lost land through 'one or more public works acquisitions but also through earlier or later Crown actions' and accepts that in 'addressing a claimant group's concerns, the Crown should consider the overall impact on the claimant group of all Treaty breaches'. Conceivably a factor in the quantum of settlement could be allowed for land takings and disturbance to waters for each tribal rohe up to a certain date to settle the general grievance, while specific breaches within the living memory of claimants, and claims for the return of particularly valued pieces of land, are dealt with separately.

APPENDIX VI

ESTIMATED POPULATIONS

District	1840	1891	1936
Auckland	16,317	9542	22,426
Hauraki	2920	1971	2056
Bay of Plenty	8249	3515	7671
Urewera	1250	1171	2105
Gisborne–East Coast	9690	3526	8449
Waikato	10,326	2998	6242
Volcanic plateau	4718	2209	4576
King Country	2500	3141	5744
Whanganui	5111	1051	2312
Taranaki	4243	3114	3828
Hawke’s Bay–Wairarapa	6325	5332	8604
Wellington	5391	1965	4924
Northern South Island	1596	440	690
Southern South Island	1942	1579	2221
Chatham Islands	—	148	303
Total	80,578	41,702	82,151

Estimates of the Maori populations in the Rangahaua Whanui districts
at 1840, 1891, and 1936

Demography is highly relevant to the objectives of the *National Overview* report in helping to gauge the Crown’s responsibility in terms of ensuring that Maori retained sufficient land for their future needs. Therefore, an attempt has been made to provide demographic statistics for the Rangahaua Whanui districts at different points in time. The methodology used to collect these statistics, as well as the nature of the figures themselves, requires some discussion.

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There is little doubt that new epidemic and endemic diseases were the main causes of the overall decline in the Maori population during the nineteenth century, although there is much debate over when the decline reached its lowest point, what the population was at that point, and when it began to increase. By the 1880s, many local observers (not least Native Minister John Bryce in 1882) had concluded from local observations that the Maori population was stable or even increasing. There was some initial concern among statisticians that the population increase officially recorded in the 1896 census might not have marked the beginning of sustained growth. Or that it might even have been an improvement in the quality and thoroughness of the census-taking, and that in reality the population had only stabilised by this time. But it was certainly evident by the mid-1920s that a genuine and sustained increase in Maori population was occurring.

In addition to sickness and disease, other factors impacted on the population of different districts at different times. The search for employment or other opportunities created movements of the population within and between tribal districts of both a temporary and a permanent nature. Maori were often drawn away from their traditional lands to areas where work was available, such as to the gum fields to the north and south of Auckland, and to the Coromandel. Alternatively, Maori were forced out by conflict after British invasions of Waikato and Taranaki.

Aside from the factors influencing the real population of Maori in various localities, attempts to collect population statistics also encountered resistance from Maori, which distorted the census results and made them an unreliable representation of the actual population. In particular, Maori resistance to being included in any kind of census conducted by Pakeha meant that results obtained in Waikato, Taranaki, and the King Country, for example, were notoriously unreliable. Remote areas, such as Urewera, were not sufficiently accessible for reliable figures to be obtained.

For the purposes of this report, population estimates for the districts have been supplied for 1840, 1891, and 1936. Since there was no national census in 1840, the figures provided here were attained using Fenton's 1857 and 1858 census figures. These were redistributed according to Rangahaua Whanui district, adjusted to allow for underestimation, and projected back to 1840 on the basis of standard and uniform rates of decline from 1840 to 1857. The limitations of Fenton's census, with its bias towards accessible, mainly coastal, communities, are acknowledged and have been allowed for where alternative information is available. No allowance has been made for regional differences in the rates of decline or levels of underestimation. Where possible, however, attempts have been made to correct figures in terms of known internal migration, such as occurred in the 1840s when about 580 Maori from Waikanae moved to Waitara in Taranaki. With respect to the 1891 and 1936 figures, it is important to emphasise that, although information for the latter two dates is from census data, these figures are also estimates, because the counties used by the census takers do not align precisely with the Rangahaua Whanui district boundaries, and some distribution of the county statistics across boundaries was required.

APPENDIX VII

**ACREAGE PER HEAD OF MAORI LAND
IN EACH DISTRICT IN 1939**

The following table has been derived by dividing the Maori census figures for 1936, adjusted to Rangahaua Whanui districts, into the total acreage of Maori land remaining in 1939, according to the map prepared for the 1940 *Historical Atlas*. In the case of the South Island, the land area was taken from the 1890 map. Some 40,000 acres of South Island and Chatham Islands land were purchased after 1890, and some land was granted under the 'landless natives' provisions of the early twentieth century.

District	Acres per head
Auckland	9.7
Hauraki	3.5
Bay of Plenty	39.4
Urewera	55.2
Gisborne	53.6
Waikato	5.3
Volcanic plateau	110.0
King Country	56.6
Whanganui	115.6
Taranaki	5.2
Hawke's Bay–Wairarapa	40.4.0
Wellington	38.2
Northern South Island	153.6
Southern South Island	101.1
Chatham Islands	232.8*

* Maori and Moriori populations combined.

It must be appreciated that the figures are indicative only, various factors being likely to cause distortion:

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- (a) It is generally recognised that census figures under-counted Maori.
- (b) Some averaging of figures was necessary where census figures given by county crossed rather than coincided with Rangahaua Whanui district boundaries.
- (c) The censuses probably under-counted Maori who identified with South Island tribes more than Maori of North Island tribes, because out-migration from the South Island and the Chatham Islands was greater than from the northern districts and had been going on for much longer.
- (d) The large-scale maps from which the areas were calculated could not show parcels of land below about 10 acres in size. The area of Maori land would be higher in those areas where there were many small parcels. On the other hand, many of the small parcels were of little economic value.
- (e) The raw figures say nothing about the distribution of land between hapu and whanau, which varied greatly in each district.
- (f) The figures do not show anything about the quality of the land. Much of the remaining Maori land in the Gisborne and East Coast, volcanic plateau, and Whanganui districts, for example, was mountainous and bush-covered and unable to support close settlement. For climatic reasons too, much of the South Island and the Chatham Islands could not support close settlement.

Nevertheless, the figures do support the view that it was the large Maori populations of the Auckland and Hauraki districts, together with the confiscation-affected Taranaki and Waikato, who were the most land-short in 1939.

APPENDIX VIII

SALES UNDER MAORI LAND BOARDS

Totals of Land Alienated by Boards, 1911–30

The totals of land alienated by boards between 1911 and 1930 are:

Ikaroa:	242,919 acres
Aotea:	348,374 acres
Tairawhiti:	126,884 acres
Waiariki:	338,763 acres
Waikato–Maniapoto:	648,023 acres
Tai Tokerau:	376,911 acres

Totals of Land Alienated by Boards, 1910–30

The totals of land alienated by boards between 1911 and 1930 are:

North Island:	2,252,381 acres
Southern South Island:	55,112 acres
Total:	2,307,493 acres

Note: Sales were also made other than through the Maori land boards. See section pt.15 and volume ii, section 15.9.7.