# TE WHANGANUI A TARA ME ONA TAKIWA

# TE WHANGANUI A TARA ME ONA TAKIWA

## Report on the Wellington District

WAI 145

WAITANGI TRIBUNAL REPORT 2003

LEGISLATION DIRECT

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

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CONTENTS

Letter of transmittal . . . . . xiii

Executive summary . . . . . xvii

**Chapter 1: Introduction**

1.1 Te Whanganui a Tara and environs: the inquiry area . . . . . 1
1.2 A brief history of this inquiry . . . . . 1
1.3 The claims . . . . . 8
1.4 The report . . . . . 12

**Chapter 2: Maori Occupation of Te Whanganui a Tara and Environs to 1840**

2.1 Introduction . . . . . 13
2.2 Customary rights to land in Te Whanganui a Tara and environs . . . . . 15
2.3 History to 1840 . . . . . 17
2.4 Customary law . . . . . 32
2.5 The Whatonga-descent peoples of Te Whanganui a Tara and environs . . . . . 34
2.6 Taranaki and Kawhia tribes . . . . . 38
2.7 Tribunal finding . . . . . 44

**Chapter 3: The New Zealand Company Deed of Purchase**

3.1 Introduction . . . . . 45
3.2 The company plan . . . . . 45
3.3 The *Tory* expedition . . . . . 48
3.4 The decision to send Captain Hobson to New Zealand . . . . . 49
3.5 Wakefield's negotiations with Maori at Port Nicholson . . . . . 52
3.6 Other New Zealand Company and private transactions . . . . . 58
3.7 The Spain commission . . . . . 60
3.8 The validity of the Port Nicholson deed of purchase . . . . . 65

**Chapter 4: The Treaty and Treaty Principles**

4.1 Introduction . . . . . 71
4.2 The arrival of Hobson in New Zealand . . . . . 71
4.3 Allegations of Treaty breaches . . . . . 73
4.4 Applicable Treaty principles . . . . . 74

**Chapter 5: The Crown Intervenes**

5.1 Introduction . . . 81
5.2 The Crown assumes control . . . 81
5.3 Events in Wellington . . . 83
5.4 Investigation of direct land transactions with Maori . . . 91
5.5 Hobson's agreement with Wakefield . . . 94
5.6 Instructions to land claims commissioner Spain . . . 100

**Chapter 6: The Town Belt and Other Public Reserves**

6.1 Introduction . . . 103
6.2 History of the town belt and public reserves . . . 103
6.3 Claimant grievances regarding Hobson's proclamation of public reserves . . . 107
6.4 Matiu and Makoro . . . 109
6.5 Other claims regarding legislation, proclamations, and roads, 1840–42 . . . 110

**Chapter 7: The Crown Sanctions Arbitration**

7.1 Introduction . . . 113
7.2 Spain's inquiry . . . 113
7.3 Arbitration proposed . . . 114
7.4 Governor FitzRoy's instructions . . . 124
7.5 FitzRoy arrives in Wellington . . . 125
7.6 Was the sum of £1500 adequate for the land at issue? . . . 132
7.7 The transition from the Spain land claims inquiry to arbitration proceedings . . . 134
7.8 Did the Crown favour settlers over Maori? . . . 139

**Chapter 8: The 1844 Deeds of Release**

8.1 Introduction . . . 145
8.2 Deeds of release are signed . . . 146
8.3 Interpreting the deeds . . . 151
8.4 Additional deeds of release are signed . . . 167
8.5 Was the protectorate independent of the Crown? . . . 173
8.6 Did Maori freely and knowingly consent to the signing of the deeds of release? . . . 176
8.7 Surveying is carried out . . . 180
8.8 Spain's final report . . . 182
8.9 The position of Maori in Wellington in 1845 . . . 186

**Chapter 9: Ngati Toa, Ngati Rangatahi, Ngati Tama, and Events at Heretaunga**

9.1 Introduction . . . 187
9.2 Heretaunga to 1840 . . . 188
9.3 The Kapiti deed . . . 191
9.4 Attempts by the Crown to secure Ngati Toa agreement in 1844 . . . 194

**Chapter 9: Ngati Toa, Ngati Rangatahi, Ngati Tama**—*continued*

9.5 Developments in Heretaunga after November 1844 . . . . . 205
9.6 The arrival of Governor Grey . . . . . 210
9.7 Ngati Toa claims of Treaty breaches . . . . . 217
9.8 Ngati Rangatahi claims of Treaty breaches . . . . . 220
9.9 Ngati Tama claims of Treaty breaches . . . . . 223

**Chapter 10: The McCleverty Transactions**

10.1 Introduction . . . . . 227
10.2 The New Zealand Company rejects FitzRoy's Crown grant . . . . . 227
10.3 The appointment of McCleverty . . . . . 229
10.4 Grey provides additional land to Maori in Port Nicholson . . . . . 230
10.5 Grey's instructions to McCleverty . . . . . 233
10.6 McCleverty commences his inquiry . . . . . 235
10.7 Whose land was exchanged for Maori cultivations? . . . . . 243
10.8 Grey's 1848 Port Nicholson Crown grant . . . . . 249
10.9 The collapse of the New Zealand Company . . . . . 255

**Chapter 11: The McCleverty Reserves and Wellington Maori**

11.1 Introduction . . . . . 259
11.2 The land reserved by McCleverty . . . . . 259
11.3 Maori in Wellington after 1847 . . . . . 267
11.4 The effects of the McCleverty arrangements on Wellington Maori . . . . . 273

**Chapter 12: The Administration of Reserves, 1840–82**

12.1 Introduction . . . . . 279
12.2 Administration of the reserves to 1869 . . . . . 279
12.3 Heaphy's and Mackay's administration . . . . . 293
12.4 The status of the Wellington Tenths . . . . . 305
12.5 Findings on the Crown's administration of reserves, 1840–82 . . . . . 312

**Chapter 13: The Alienation of Reserves, 1840–82**

13.1 Introduction . . . . . 315
13.2 The Crown's appropriation of urban tenths reserves . . . . . 316
13.3 Te Aro and Pipitea Pa . . . . . 336
13.4 Further sales of urban reserves . . . . . 343
13.5 The sale of rural reserves . . . . . 345

**Chapter 14: The Status of the Public Trustee, Native Trustee, and Maori Trustee**

14.1 Introduction . . . . . 347
14.2 Crown's primary submission . . . . . 347
14.3 The Treaty of Waitangi Act 1975 . . . . . 348

**Chapter 14: The Status of the Public, Native, and Maori Trustees**—*continued*

14.4 Claimant counsel's primary submissions . . . 350
14.5 Tests for Crown agency . . . 351
14.6 Application of Crown agency tests for the Public Trustee and the Native or Maori Trustee . . . 359
14.7 The Public Trust Office Act 1872 . . . 360
14.8 The Native Reserves Act 1882 . . . 361
14.9 The Native Trustee Act 1920 . . . 364
14.10 The Native Trustee Act 1930 . . . 367
14.11 The Maori Trustee Act 1953 . . . 370
14.12 The Public Trustee and the Native or Maori Trustee in other legislation . . . 373
14.13 Conclusion on the status of the trustees . . . 377
14.14 Additional submissions . . . 378

**Chapter 15: Trustee Administration of the Wellington Tenths, 1882–1985**

15.1 Introduction . . . 379
15.2 The Native Reserves Act 1882 . . . 379
15.3 Public Trustee administration . . . 381
15.4 The administration of the Native and Maori Trustees . . . 385
15.5 Alleged end of independence of the Native or Maori Trustee . . . 388
15.6 Uneconomic shares . . . 393
15.7 Legislative provisions permitting freeholding of tenths . . . 396
15.8 Alienation of reserves by the Native or Maori Trustee . . . 401
15.9 Palmerston North reserves . . . 405
15.10 Treaty breach claims in relation to the Palmerston North reserves . . . 408
15.11 The compulsory taking of Palmerston North reserves . . . 411

**Chapter 16: Perpetual Leasing of Reserves**

16.1 Introduction . . . 417
16.2 The perpetual leasing regime . . . 417
16.3 Claimants' grievances concerning the perpetual leasing regime . . . 422
16.4 The Maori Reserved Land Amendment Act 1997 . . . 428
16.5 Claimant grievances concerning the Maori Reserved Land Amendment Act 1997 . . . 430
16.6 Treaty compliance of the 1997 Act . . . 434

**Chapter 17: The Taking of Maori Reserved Land for Public Purposes**

17.1 Introduction . . . 437
17.2 Discussion of public works takings in previous Tribunal reports . . . 437
17.3 Roads and railways . . . 440
17.4 Housing . . . 442
17.5 River protection – Waiwhetu Pa . . . 444
17.6 Other offer-back claims . . . 452
17.7 Miscellaneous takings . . . 453

**Chapter 18: Wellington Harbour and Foreshore**

18.1 Introduction . . . . . 455
18.2 Claims . . . . . 455
18.3 Maori use of the harbour . . . . . 457
18.4 Ownership of the seabed and foreshore, and Maori interests in the harbour . . . . . 459
18.5 History of Wellington Harbour . . . . . 460
18.6 Claimant grievances . . . . . 467

**Chapter 19: Findings and Recommendations**

19.1 Introduction . . . . . 479
19.2 Tribunal findings on events to 1840 . . . . . 479
19.3 Summary of Tribunal findings of Crown Treaty breaches . . . . . 480
19.4 Claimants entitled to remedies . . . . . 487

**Appendix i: Port Nicholson Deed of Purchase**

Port Nicholson block deed of purchase . . . . . 495

**Appendix ii: Record of Inquiry**

Record of hearings . . . . . 499
Record of proceedings . . . . . 500
Record of documents . . . . . 516

## LIST OF MAPS

Map 1: Boundaries of the Port Nicholson block . . . . . 2
Map 2: The Port Nicholson block in relation to Te Upoko o te Ika and Te Tauihu o te Waka . 14
Map 3: Areas within the Port Nicholson block . . . . . 15
Map 4: Felton Mathew's map of the city of Wellington, 1841 . . . . . *facing page* 86
Map 5: Initial selection of rural tenths. . . . . *facing page* 89
Map 6: The boundaries of the Port Nicholson purchase. . . . . 164
Map 7: Conflict over Heretaunga . . . . . 197
Map 8: The remainder lands. . . . . *facing page* 254
Map 9: Urban McCleverty reserves and tenths appropriated by the Crown . . . *facing page* 260
Map 10: Rural McCleverty reserves. . . . . *facing page* 262
Map 11: Remaining urban tenths in 1873 . . . . . 296
Map 12: Remaining rural tenths in 1873 . . . . . 297
Map 13: Palmerston North reserves. . . . . 404
Map 14: Waiwhetu Pa and surrounding area before and after reclamation. . . . . 446
Map 15: Reclamations in Wellington Harbour, 1852–1982 . . . . . 462

## LIST OF FIGURES

Fig 1: *Birdseye View of Port Nicholson, in New Zealand* . . . . . 53
Fig 2: *From the Pah Pipitea, Port Nicholson, Decr 1840.* . . . . . 55
Fig 3: *View of a Part of the Town of Wellington, New Zealand, 1841* . . . . . 85
Fig 4: *Pa, Te Aro, Wellington Looking towards the Hutt River*, circa 1842 . . . . . 90
Fig 5: *Makaenuku Pa, District of the Hutt 1845?*. . . . . 208
Fig 6: View of Te Aro, Wellington, 1857 . . . . . 337
Fig 7: Te Aro, Wellington, 1883 . . . . . 465
Fig 8: Stranded blackfish whales, first Te Aro reclamation, circa 1882–83 . . . . . 468

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WELLINGTON

16 May 2003

Te Minita Māori

Tēna koe e te rangatira e noho mai nā i runga i tēna taumata whakahirahira, e whakatutuki nei i ngā kaupapa me ngā moemoeā a te iwi Māori. Tēna hoki koe e whai ake ana i ngā tapuwae o te hunga rongonui i mua atu i a koe. Arā hoki ko Tā Te Rangihīroa, Tā Maui Pomare, Tā Timi Kara, te matua i a Tā Apirana Ngata me ngā mea o muri ake nei i a Matiu Rata, a Koro Wetere me ētahi atu.

He mihi he tangi anō hoki ki te hunga kua mene atu ki te pō otirā kua huri atu ki tua o te arai. Haere atu rā, haere atu rā, e moe i te moengaroa. Kati ka hoki mai ki a tātou o te ao tangata e takatū nei i roto i te ao hurihuri – tēna tātou katoa.

I te tīmatanga i tipu ake tēnei pūrongo i ngā tono a ngā uri o ngā hapū o Te Ātiawa, o Taranaki me Ngāti Ruanui. No muri tata mai i whakatakotoria anō hoki ētahi atu iwi o rātou ake tono i mua i te aroaro o te Taraipiunara. Ko ngā iwi nei ko Rangitāne, Muaupoko, Ngāti Toa, Ngāti Tama, Ngāti Rangatahi, me Ngāti Mutunga hoki.

This report concerns claims made by various Maori iwi in respect of the district surrounding Wellington Harbour (Te Whanganui a Tara) and extending to Heretaunga (the Hutt Valley) and the southwest coast. The district, frequently referred to in the 1840s as the Port Nicholson block, encompassed some 209,247 acres.

The Wellington Tenths Trust and Palmerston North Reserves Trust, predominantly representing certain hapu of Te Atiawa, Taranaki, and Ngati Ruanui, was the original claimant. However, over a period of years, further claims were brought on behalf of Rangitane, Muaupoko, Ngati Toa, Ngati Tama, Ngati Rangatahi, and Ngati Mutunga. These also became part of our inquiry.

In 1839, the New Zealand Company, by a deed of purchase which the Tribunal has found to be invalid, purported to purchase lands in the district under review from some of the Maori chiefs residing at or near the harbour. In reliance on the so-called deed, the company brought to Wellington several thousand settlers who proceeded to occupy, notwithstanding the objections of Maori owners, many of the desirable parts of the district. In

1840, following the arrival of Lieutenant-Governor Hobson and the signing of the Treaty of Waitangi, the Crown assumed responsibility for the government of the country.

In the executive summary which follows this letter, we note the salient features of our report. These include the failure by the Crown, in numerous instances, to ensure that the Treaty rights of the Maori owners were adequately protected. As a consequence, Maori were wrongly deprived of some 120,000 acres of land which they never consented to surrender and for which they were never paid. They also lost valuable sites in the heart of the capital city. In addition, Maori suffered losses arising from Crown acts or omissions relating to the town belt land, the administration of the Wellington tenths reserves, and the perpetual leasing statutory regime imposed on those reserves.

In chapter 19, we have recorded our findings of Treaty breaches by the Crown on a wide range of claims by various of the parties. Apart from a few recommendations made in chapter 19, we recommend that, given the relative complexity of the issues and the inter-relationships of Maori groups affected by Treaty breach findings, the parties should enter into negotiations with the Crown. We consider an important element in remedies granted by the Crown should be the return of land in Wellington city.

Before we were able to release this report, the Tribunal lost its long-standing member, Bishop Manu Bennett. Fortunately, the substantive writing of the report had been completed prior to his death. Bishop Bennett was closely involved in the writing process, to which he made an invaluable contribution. This was especially so in respect of those chapters which concern the customary rights of Maori as at 1840 or acquired shortly thereafter. But his contribution to the remainder of the report was also of material significance. His colleagues on this Tribunal greatly valued Bishop Bennett's wise and constructive contribution to the many hearings held by us and to this report. We deeply regret that he did not live to join us in signing it.

Heoi ano

# LIST OF ABBREVIATIONS

| | |
|---|---|
| AC | *Law Reports, Appeal Cases* (England) |
| ACJ | acting chief justice (when used after a surname) |
| AJHR | *Appendix to the Journal of the House of Representatives* |
| AJLC | *Appendix to the Journal of the Legislative Council* |
| app | appendix |
| ATL | Alexander Turnbull Library |
| BPP | *British Parliamentary Papers : Colonies New Zealand* (17 vols, Shannon: Irish University Press, 1968–69) |
| c | circa |
| CA | Court of Appeal |
| ch | chapter |
| CLR | *Commonwealth Law Reports* |
| DNZB | *The Dictionary of New Zealand Biography* (5 vols, Wellington: Department of Internal Affairs, 1990–2000) |
| doc | document |
| DSIR | Department of Scientific and Industrial Research |
| ed | edition, editor |
| fn | footnote |
| fol | folio |
| GPS | Government Property Services Limited |
| IA | Internal Affairs file |
| inc | incorporated |
| J | justice (when used after a surname) |
| KB | *Law Reports, King's Bench Division* (England) |
| *l* | pounds sterling |
| ltd | limited |
| NA | National Archives |
| NZ ConvC | *New Zealand Conveyancing Cases* |
| NZLR | *New Zealand Law Reports* |
| NZMC | New Zealand Maori Council |
| NZPD | *New Zealand Parliamentary Debates* |
| OR | *Ontario Reports* |
| P | president of the Court of Appeal (when used after a surname) |
| p, pp | page, pages |
| para | paragraph |
| pl | plate |
| PRNZ | *Procedure Reports of New Zealand* |
| ROI | record of inquiry |
| s, ss | section, sections |
| SCR | *Supreme Court Reports* (Canada) |
| vol | volume |

'Wai' is a prefix used with Waitangi Tribunal claim numbers

## ACKNOWLEDGEMENTS

The Tribunal gratefully acknowledges the assistance of a wide variety of conscientious staff who have assisted at various stages throughout our many hearings and more recently during our report writing: Phyllis Ferguson, Jane Lee, and Mata Moke (administrative and word-processing support); Lyn Fussell, Jeanette Henry, Moana Murray, Hemi Pou, Midge Te Kani, Turei Thompson, and Pam Wiki (claims administration); Rose Daamen, Penny Ehrhardt, Keith Pickens, and Ben White (claims facilitation and research); Campbell Duncan, Janine Hayward, Ewan Morris, and Kate Riddell (report writing); Dominic Hurley (typography and production); Noel Harris and Max Oulton (map production).

## EXECUTIVE SUMMARY

This is a report on 13 claims relating to the area covered by the New Zealand Company's 1839 Port Nicholson deed of purchase, as extended in 1844 to the south-west coast. The inquiry area consists of the takiwa (district, or environs) of Te Whanganui a Tara (Wellington Harbour or Port Nicholson), including Heretaunga (the Hutt Valley), and is now the site of Wellington city. The claims in this inquiry were heard by the Tribunal between 1991 and 1999.

The area which became the Port Nicholson block had been occupied for centuries by various Maori groups. Those in occupation immediately prior to the 1820s were Ngati Ira and related peoples who shared a common descent from the early explorer Whatonga. Rangitane and Muaupoko were also among these 'Whatonga-descent peoples' who had connections with Te Whanganui a Tara and its environs. From the 1820s, a series of migrations from the north progressively pushed out these earlier inhabitants. The migrants included Ngati Toa from Kawhia, Ngati Rangatahi from near Taumarunui, and several groups from Taranaki: Te Atiawa, Ngati Tama, Ngati Mutunga, Taranaki, and Ngati Ruanui. By the late 1830s, Ngati Ira and related groups had largely been driven out of the Port Nicholson block, and one of the migrant tribes (Ngati Mutunga) had also left the area, moving to the Chatham Islands. We consider that, at 1840, the groups holding customary rights within the Port Nicholson block were Te Atiawa, Taranaki, Ngati Ruanui, Ngati Tama, and Ngati Toa. These rights had been established through conquest, occupation, and use of resources.

In September 1839, Colonel William Wakefield arrived at Te Whanganui a Tara to purchase land from Maori on behalf of the New Zealand Company. The land acquired from Maori was to be sold by the company to British settlers. At Port Nicholson, Wakefield set about negotiating the purchase of some 160,000 acres of land, and on 27 September 1839 a deed of purchase was signed by 16 local chiefs. The deed, written in English, described the boundaries of the purchase, albeit inadequately, and provided for one-tenth of the land purchased to be reserved for the signatory chiefs and their families. The boundaries of the purchase were not delineated on a map.

The company's purported purchase of the Port Nicholson area was flawed in a number of respects. The explanation of the transaction to Maori and the delineation of the boundaries of the purchase were completely inadequate. No proper explanation was given to Maori of the 'tenths' reserve scheme, nor were they made aware that the deed of purchase made no provision for the retention by Maori of their pa, cultivations, and burial grounds. The signatories were therefore in no position to understand what they were supposedly selling. In fact, the very concept of 'a sale' was foreign to Te Whanganui a Tara Maori, and they could have

had no conception of the scale of settlement envisaged by the company. A further problem with the transaction was that the signatories did not represent all Maori having customary rights in the area covered by the deed. For these reasons, we have found that the deed was invalid and conferred no rights on the New Zealand Company or its settlers.

In April 1840, the Treaty of Waitangi was signed at Port Nicholson. The following month, Lieutenant-Governor William Hobson proclaimed British sovereignty over New Zealand. Hobson had already announced in January 1840 that pre-Treaty land purchases would be considered valid only if confirmed by the Crown. This meant that, until the New Zealand Company's purported purchase of Port Nicholson was investigated and confirmed by a Crown grant if found to be valid, the company and its settlers had no legal rights to the land which they claimed to have purchased. Nevertheless, the company began surveying sections at Port Nicholson, and company settlers began arriving in January 1840. Although a tenth of the sections in the new town of Wellington were reserved for Maori (as provided for in the deed of purchase), disputes between Maori and settlers quickly developed because settlers had been allowed to purchase sections which were the sites of Maori pa and cultivations.

In November 1840, the British Government and the New Zealand Company reached an agreement concerning the company's claims in New Zealand. The agreement provided that an assessment was to be made of the amount spent by the company in colonisation and that the company was to be granted four acres of land for every pound of expenditure. Under this agreement, the Crown also took over responsibility for fulfilling the company's promise to reserve for Maori a tenth of the land acquired by the company. The November 1840 agreement was, however, still subject to an investigation of the company's claims by a land claims commissioner. Land was to be granted to the company only if Maori title to that land had first been validly extinguished.

With the question of the company's title to land at Port Nicholson still unresolved, in 1841 the Crown itself took land for public reserves within the area of the company's purported purchase without properly acquiring it from Maori. Governor Hobson issued a proclamation stating that certain public reserves shown on the company's town plan, together with several promontories around the harbour, were reserved by the Crown for public purposes. The largest area acquired under this proclamation was the town belt – some 1500 acres surrounding the town. At around the same time, the Crown also assumed the ownership of the two small islands in the harbour known to Maori as Matiu and Makoro (Somes and Ward Islands). Maori did not consent to the acquisition of these islands or of the various public reserves taken by the Crown. Nor was there any consultation with, or payment made to, the Maori owners.

The land claims commissioner appointed to investigate the New Zealand Company's claims was William Spain, who began his inquiry into the Port Nicholson deed in May 1842. Spain's inquiry led him to form the opinion (expressed in a preliminary report of September 1843) that most of the land claimed by the company at Port Nicholson had not been validly

purchased from Maori. However, Spain never completed his investigation – following lengthy negotiations between the Crown and the company, it was replaced by a process of arbitration. In February 1844, Colonel Wakefield agreed on behalf of the company to pay £1500 'compensation' to Maori for some 67,000 acres within the Port Nicholson block. The land for which this money was to be paid was set out in a schedule, and consisted of sections which had already been surveyed by the company, together with sections being surveyed at the time or in places where the company proposed to begin surveying. There was a clear understanding between the company and the Crown that Maori were to retain their pa, cultivations, burial grounds, and native reserves.

We have found that the arbitration process was decided on and implemented by the Crown without consultation with Maori and without their informed consent. The Crown failed to devise a fair process for the arbitration or to determine whether this process was acceptable to Maori. The arbitration unfairly shifted the burden of proof to Maori instead of requiring the company to establish the validity of its claims. In setting a total compensation figure for the 67,000 acres of £1500, a figure which was based on the assessed value of the land in 1839 rather than in 1844, the Crown also deprived Maori of their right to sell their land only at a freely agreed price.

Shortly after Wakefield agreed to pay the £1500 compensation to Port Nicholson Maori, Spain and other Crown officials began seeking Maori assent to the release of their land. In February and March 1844, Maori from most of the pa within the Port Nicholson block signed deeds releasing their interests in the land set out in the schedule attached to each deed. However, the deeds specified that Maori were to retain their pa, cultivations, burial grounds, and native reserves. By this process, Port Nicholson Maori released their interests in some 67,000 acres of land, which was acquired by the New Zealand Company. Once Maori had signed the deeds of release, the external boundaries of the Port Nicholson block were surveyed. The block included the land which had been the subject of the 1839 deed of purchase, but the western boundary was extended to the west coast. Within this block were the 67,000 acres acquired by the company under the deeds of release, but it also included a very large area where there were no company sections surveyed or under survey. This unsurveyed land not included in the schedule to the deeds of release had never been sold by Maori.

In seeking Maori assent to the deeds of release, the Crown failed in several important respects to protect the interests of Maori. The Crown failed to ensure that Maori fully understood the nature and scope of the deeds of release. Crown officials also put undue pressure on Maori to sign the deeds by telling them that, if they did not accept the sum of money offered for signing the deeds, no higher offer would be made and the land would go to the Pakeha settlers without Maori consent. In addition, Maori rights to their pa, cultivations, burial grounds, and native reserves were not adequately protected. The surveying of Maori pa, cultivations, and burial grounds (which was essential if the reservation of this land for

Maori was to be effective) was never completed. A tenth of the land acquired by the company should also have been set aside for Maori as native reserves ('tenths'). While the full quota of tenths was reserved in the town of Wellington, the provision of tenths in the country districts fell short by some 3090 acres.

Before the company could gain secure title to the land acquired under the deeds of release, the Crown first had to deal with Maori claims to Heretaunga (the Hutt Valley), where many company sections included in the schedule to the deeds were located. Ngati Rangatahi, who had participated in the conquest of Heretaunga from its former inhabitants, occupied the valley seasonally from the 1830s. Their occupation was under the mana of the Ngati Toa chiefs Te Rauparaha and Te Rangihaeata, to whom Ngati Rangatahi paid tribute. Ngati Rangatahi were absent from the valley at the time of the signing of the Port Nicholson deed of purchase in 1839, but they returned to Heretaunga in 1841. They were joined in the valley by Ngati Tama, who moved there as a result of settler intrusion on their land at Kaiwharawhara. Both groups were occupying land claimed by the New Zealand Company and its settlers. Crown officials considered that Ngati Rangatahi and Ngati Tama had no rights in Heretaunga, but the Crown was prepared to acknowledge the rights of Ngati Toa.

In February and March 1844, negotiations took place with Te Rauparaha and Te Rangihaeata for the release of their interests at Port Nicholson in exchange for the payment of compensation. While the chiefs were prepared to release their interests around the harbour, they initially refused to surrender Heretaunga. Te Rauparaha did not agree to accept payment and release Heretaunga until November 1844, while Te Rangihaeata did not consent to the release until March 1845. Te Rangihaeata's eventual agreement was conditional on the reservation of land for those Maori occupying Heretaunga. Ngati Rangatahi and Ngati Tama were becoming increasingly independent of Ngati Toa, and throughout 1845 they refused to leave the valley, despite Te Rauparaha's attempts to persuade them to do so.

In February 1846, Governor George Grey arrived in Wellington and quickly showed his determination to resolve the dispute, by force if necessary. He insisted that Ngati Tama and Ngati Rangatahi abandon their land in Heretaunga. Ngati Tama left in exchange for a promise of compensation, but Ngati Rangatahi were forced out of the valley under threat of attack by Grey's troops. The expulsion of Ngati Rangatahi from Heretaunga was followed by armed conflict in the valley, with the war subsequently moving north to Porirua. Ngati Rangatahi were never compensated for the loss of their land, and they never returned as a group to Heretaunga.

Our consideration of Ngati Toa's, Ngati Tama's, and Ngati Rangatahi's rights in relation to events in Heretaunga has led us to make several findings. We consider that the Crown failed adequately to recognise Ngati Toa's interests in the Port Nicholson block or adequately to compensate them for their loss of interests there. More particularly, the Crown failed to ensure that Ngati Toa gained an interest in the Port Nicholson tenths reserves (something which had been promised them by Spain), although we have noted that this finding cannot

result in Ngati Toa now being included as beneficiaries in these reserves. With regard to Ngati Tama and Ngati Rangatahi, we have found that the Crown failed to recognise and protect their rights in Heretaunga. Ngati Tama were required to surrender their property in Heretaunga without a freely negotiated agreement and without adequate compensation. Ngati Rangatahi were forced out of Heretaunga, and their property in the valley was pillaged and burned. They received no compensation for their losses, nor was any land subsequently reserved for them in the valley.

In March 1845, Spain issued his final report on Port Nicholson. He awarded the company the land which was set out in the schedule attached to the deeds of release, but Maori pa, cultivations, burial grounds, and native reserves were excluded from the grant. Spain's award was the basis for a Crown grant to the company issued by Governor FitzRoy in July 1845. The area granted was 71,900 acres, minus 4010 acres of tenths reserves and an unknown area of pa, cultivations, and burial grounds. The company, however, rejected this grant, largely because it allowed Maori to retain their pa and cultivations on land purchased from the company by settlers. Rather than holding firm to the agreement earlier reached with Wakefield, which was that Maori pa, cultivations, burial grounds, and native reserves were to be excepted from any grant to the company, the Crown sought to accommodate the company.

Lieutenant-Colonel W A McCleverty was appointed to assist in settling the company's claims, and he proceeded to resolve the dispute by arranging 'exchanges', whereby Maori gave up their cultivations on sections purchased from the company by settlers in 'exchange' for other land which McCleverty reserved for them. 'Deeds of exchange' were signed by Maori at the main pa in the Port Nicholson block in 1847, but Maori were not given a free and unpressured choice as to whether they wished to relinquish their cultivations or as to the land which they would receive in exchange. Moreover, it was an exchange in name only. Almost all the land reserved for Maori by McCleverty was tenths reserve land (of which Port Nicholson Maori were already the beneficial owners); town belt land (which, as mentioned above, had never been purchased from Maori); or land outside the surveyed sections acquired by the company under the deeds of release (which Maori had never sold and which therefore still belonged to them). Port Nicholson Maori thus received no compensation for the surrender of their valuable cultivations. The land reserved for them by McCleverty amounted to an average of 21 acres per person, a land base which we have found to be completely inadequate for both their short- and long-term needs, and much of the land reserved for them was of poor quality.

The inadequacy of McCleverty's reserves should be seen in the light of the fact that, shortly after the reserves were set aside, Maori were deprived of their remaining land within the Port Nicholson block. In January 1848, Governor Grey issued a Crown grant to the New Zealand Company. Rather than covering only the area acquired under the deeds of release (some 67,000 acres), as FitzRoy's grant had done, Grey's Crown grant covered the whole of the Port Nicholson block, said to contain 209,247 acres. Maori retained only some 20,000

acres of McCleverty and tenths reserves. Since Maori had released only 67,000 acres under the deeds of release, the 1848 Crown grant resulted in the acquisition by the company of roughly 120,000 acres which had never been purchased from Maori. Although this land was outside the areas where Maori had their principal settlements, it belonged by right of conquest to Te Atiawa, Taranaki, Ngati Ruanui, Ngati Tama, and Ngati Toa. These Maori never relinquished their rights to this land, nor were they ever paid for it. When the New Zealand Company collapsed in 1850, this land became vested in the Crown.

The land reserved for Maori by McCleverty was generally treated as being under the ownership and management of those Maori to whom the land was assigned. Individualisation of tenure under the Native Lands Act 1865 and subsequent legislation led to the sale over the following decades of almost all of the McCleverty reserve land. The remaining urban and rural tenths reserves, by contrast, came under Crown administration. We have found that these reserves were to be held in trust by the Crown for Maori having customary interests in the Port Nicholson block at 1840, and that such Maori were the beneficial owners of the tenths reserves. The tenths were considerably diminished by the McCleverty arrangements, by which the Crown assigned the bulk of the tenths land to the Maori of particular pa rather than holding them in trust for all Port Nicholson Maori. By 1873, just over 36 acres of urban tenths (out of an original 110 acres) and 975 acres of rural tenths (compared to 3900 acres reserved for Maori under the deeds of release) continued to be held in trust for Maori.

Between 1840 and 1882, the tenths reserves were managed in a rather ad hoc manner by a series of reserves commissioners. After an initial period of uncertainty about the purpose of the reserves, the Crown settled on a policy of using the remaining reserves as an endowment for the benefit of their Maori beneficial owners. However, in the period to 1882, the Crown failed to make adequate provision for the effective administration of the tenths and failed to pass legislation fully defining their legal status. Wellington Maori were rarely consulted about, or involved in, the management of the tenths reserves and received little benefit from the reserves in this period. There were long delays in renting the reserves so as to produce an income for Maori; much of the income from the reserves went to pay the salaries of the reserves commissioners; and it was not until the 1870s that particular beneficiaries of the reserves began to be identified and to receive rental payments. The beneficial owners of the urban tenths were not determined by the Native Land Court until 1888.

The most significant alienation of tenths reserves to take place after the McCleverty arrangements was the appropriation by the Crown of 23 acres of urban tenths for hospital, educational, and religious endowments in 1851 and 1853. This valuable land, in the main commercial districts of Thorndon and Te Aro, was taken by the Crown without the consent of the Maori beneficial owners of those reserves. Wellington Maori received little benefit from these endowments. Although they made considerable use of the hospital in its early years – and received free treatment there – their use of the hospital declined dramatically thereafter. There is no evidence of significant benefit accruing to Wellington Maori from the

educational or religious endowments. They were not compensated for the appropriation of these tenths until 1877, and the compensation which was eventually paid was quite inadequate, being less than a quarter of the tenths' market value at the time that the compensation was assessed.

In addition to the appropriation of these 23 acres, another two acres of tenths reserves at Mount Cook were occupied by the military as a barracks in 1848, again without the consent of the beneficial owners, who received no rent from this land for 26 years. Finally, in 1874, the two acres were purchased by the Crown from the beneficial owners. The two largest pa in Wellington city, Te Aro and Pipitea, also passed out of Maori ownership. From the 1870s, Crown officials encouraged and facilitated the sale of land at these two pa, which had been reserved by McCleverty. Officials considered it desirable to remove Maori from the town, despite the evident importance of Maori retaining the ownership of land in the heart of the city in order to benefit from Wellington's growth and development.

The Wellington tenths were administered by the Public Trustee from 1882 until 1920, when they came under the administration of the Native Trustee (renamed the Maori Trustee in 1947). We consider that these trustees were not acting by or on behalf of the Crown in the performance of their statutory responsibilities as trustees for Maori reserve lands. Consequently, their acts or omissions in the performance of those responsibilities do not fall within the Tribunal's jurisdiction. The Tribunal does, however, have jurisdiction to consider legislation affecting reserves which was introduced during the period of trustee administration, and we have made findings in relation to the Native Reserves Act 1882, the Maori Reserved Land Act 1955, and the Maori Affairs Amendment Act 1967:

- The Native Reserves Act 1882 vested the Wellington tenths reserves in the Public Trustee without any consultation with the Maori beneficial owners of those reserves and made no provision for the active involvement of the beneficial owners in the administration of their lands.
- The Maori Reserved Land Act 1955 authorised the Maori Trustee compulsorily to acquire the 'uneconomic interests' (ie, interests worth £25 or less) of beneficial owners of Maori reserved land. These provisions were introduced without any consultation with the beneficial owners of the Wellington tenths, and there was no requirement that the trustee consult with and obtain the consent of such beneficial owners before acquiring their interests. These provisions were repealed in 1967.
- The Maori Affairs Amendment Act 1967 authorised the freeholding of Maori reserved land by the Maori Trustee. These provisions were introduced without any consultation with the beneficial owners of the Wellington tenths, and there was no requirement that the trustee consult with and obtain the consent of such beneficial owners before freeholding their land. Nor was there any requirement that other beneficial owners be given priority in acquiring the interest of any owner who wished to sell such an interest in Maori reserved land. These provisions remained in force until 1975.

As well as the Wellington tenths reserves, the Public Trustee and Native or Maori Trustee also administered certain reserves in Palmerston North, purchased in 1866 and 1867 to replace tenths reserves at Lowry Bay which had been sold a few years earlier. The Maori of Waiwhetu Pa and their descendants became the beneficial owners of these Palmerston North reserves. These lands originally comprised some 71 acres but had been reduced to almost 37 acres by 1975 through a combination of public works acquisitions and sales under 1964 and 1967 legislation allowing the freeholding of these reserves. In 1917 and 1941, Palmerston North reserve land was compulsorily taken under the Public Works Acts 1908 and 1928 for a recreation ground and a technical high school. This land, some 20 acres in total, was taken without consultation with the Maori beneficial owners and without obtaining their consent.

The most important change affecting Wellington tenths and Palmerston North reserves during the period of trustee administration was the introduction of perpetually renewable leases for 21-year terms. This change to the legislative provisions governing the leasing of the reserves was introduced by a series of Acts passed between 1895 and 1917. These Acts provided for rent to be reviewed at the end of each 21-tear term, at which time the lessee had an automatic right to renew the lease. Similar terms were imposed under the Maori Reserved Land Act 1955, which provided for a uniform leasing regime for all Maori reserves and set rents at a fixed percentage of the unimproved land value. These provisions were not changed until 1997, when an amendment to the 1955 Act provided for a move to market rents of Maori reserved land and gave the beneficial owners a right of first refusal to purchase a lease, should the lessee wish to sell.

The perpetual leasing regime was imposed without consultation with the beneficial owners of the Wellington tenths and Palmerston North reserves and without their consent. It effectively alienated Maori from their reserved land and restricted their ability to derive adequate benefit from the land. The imposition of a fixed-percentage rental formula over a 21-year term meant that the Maori beneficial owners received below-market rents, particularly in periods of high inflation. Rent could rise to reflect increased land values only once every 21 years, so rental income was eroded over the course of the lease term.

Substantial portions of Maori reserved land within the inquiry area were taken by the Crown for a variety of public works, including roads, railways, and public housing, but we have insufficient evidence about most of these takings and have therefore been unable to make findings on them. One significant public works taking was the acquisition of the Waiwhetu Pa reserve by the Hutt River Board in 1928. The reserve, of some 12 acres, was set aside by McCleverty in 1847 and was the only pa reserve that still remained intact in the 1920s, although Maori no longer lived there. The river board compulsorily acquired most of this reserve under the Public Works Act 1908, ostensibly for river protection purposes. It appears that the land was never in fact used for river protection, and that the real reason for its compulsory acquisition was to prevent the Maori owners from becoming the owners of the land

fronting on to their pa reserve which was to be reclaimed as part of the Hutt River estuary reclamation. Although the river board was not an agent of the Crown, the Crown was responsible for the legislative provisions under which the board took the Waiwhetu Pa land, and those provisions failed to protect Maori rights to retain their land until they wished to sell it at a freely agreed price.

The reclamation which took place in front of the Waiwhetu Pa reserve was one of many reclamations around Wellington Harbour from the 1850s onwards. The harbour and its foreshore were of great importance to Maori, being abundant sources of food and playing a major role in trade and transport. The Tribunal considers that those Maori having rights in Wellington Harbour and its foreshore in 1840 were Te Atiawa, Ngati Tama, Taranaki, and Ngati Ruanui. The interests of these Maori in the harbour foreshore were prejudiced by the reclamation of substantial parts of that foreshore. Reclamation was in many cases carried out by the Crown and was in all cases authorised by the Crown. It had the effect of destroying much of the foreshore, thereby depriving Maori of an important source of food, a place for landing waka, and a link between the land and the sea. Prior to the 1980s, the Crown failed to consult with Maori or to compensate them for the loss of access to the foreshore and the destruction of their customary fisheries, which were specifically guaranteed to them under the Treaty. While reclamation was of great benefit to the growth and prosperity of Wellington, the ability of Maori to benefit from such prosperity had been greatly reduced by the loss of many of their valuable urban reserves.

Maori interests in the harbour were also prejudiced by pollution, which rendered much of the kai moana in the harbour unfit for human consumption and thus deprived Maori of their fisheries. We have insufficient evidence to assess the Crown's responsibility for this pollution. However, we have found that the Crown failed to make legislative provision for the involvement of Maori in the managing of the harbour and its resources until very recently, and we deplore this lack of provision during the period in which the harbour became seriously polluted. Under the Resource Management Act 1991, Maori values and the principles of the Treaty of Waitangi must now be taken into account when making decisions about resource management and there is greater provision for Maori to have input into resource management issues concerning the harbour. We consider, however, that the Act does not go far enough, in that it merely requires decision-makers to take into account the principles of the Treaty and does not ensure that persons exercising powers under the Act do so in a way that gives effect to and is consistent with the Treaty.

As noted above, from 1920 the Wellington tenths and Palmerston North reserves were managed on behalf of their beneficial owners by the Native or Maori Trustee. The Palmerston North and Wellingon tenths reserves, in 1979 and 1985 respectively, were transferred to the administration of trusts established by the Maori Land Court to represent the interests of the beneficial owners of those reserves. The claim with which this inquiry began was brought on behalf of the Wellington Tenths Trust and Palmerston North Reserves Trust,

which represent predominantly people of Te Atiawa affiliation. However, the inquiry subsequently widened to include other claims concerning the Port Nicholson block. These claims were brought on behalf of Ngati Toa, Ngati Tama, Ngati Rangatahi, Rangitane, Muaupoko, and Ngati Mutunga.

The Crown Treaty breaches in the Port Nicholson block identified in this report affected Te Atiawa, Ngati Toa, Ngati Tama, Ngati Rangatahi, Taranaki, and Ngati Ruanui. It will be for the members of these groups who are descended from people holding customary interests in the Port Nicholson block in the 1840s to determine who should represent them in negotiations with the Crown for the settlement of their claims. The question of whether only current beneficiaries of the Wellington Tenths Trust should benefit from any settlement of grievances affecting beneficial owners of the Wellington tenths reserves also needs to be resolved.

No Treaty breach findings have been made in relation to Rangitane and Muaupoko, because we consider that they lost their rights to land within the Port Nicholson block prior to the arrival of the Crown. Nevertheless, we consider that the long history of occupation of Te Whanganui a Tara and the surrounding area by these and related peoples should be recognised in a meaningful and public way by the Crown, local bodies, and other iwi.

We have recommended that, once the question of representation has been settled, the Maori groups affected by Treaty breach findings should enter into negotiations with the Crown. The Tribunal considers that such claimants are entitled to substantial compensation, including the return of appropriate Crown lands in Wellington city and its environs.

CHAPTER 1

# INTRODUCTION

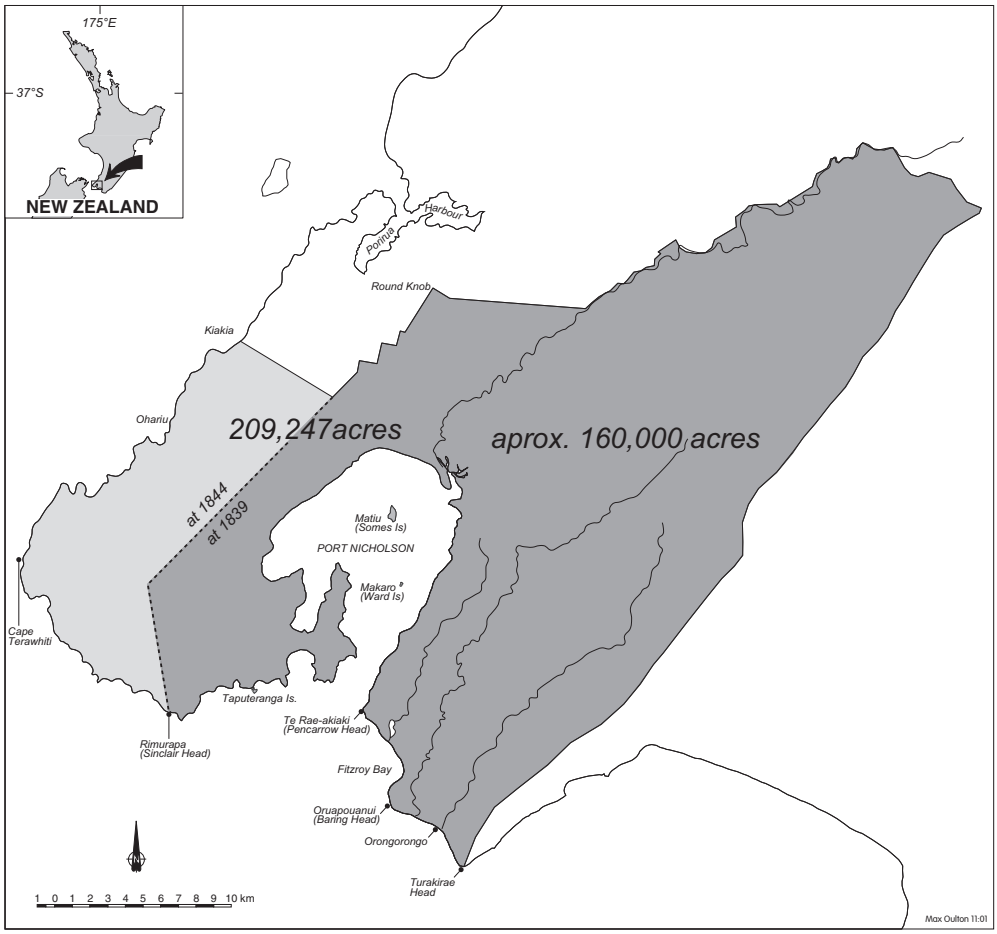
## 1.1 Te Whanganui a Tara and Environs: The Inquiry Area

This is a report on 13 claims relating to the area around Te Whanganui a Tara (Wellington Harbour or Port Nicholson), including Heretaunga (the Hutt Valley) and the south-west coast. More specifically, the inquiry area is defined by the boundaries of the New Zealand Company's 1839 deed of purchase for Port Nicholson, as extended in 1844 to the south-west coast. The boundaries of this area, which is sometimes referred to as the 'Port Nicholson block', are discussed at sections 3.5.5 and 8.7.1, and are illustrated in map 1. Situated within these boundaries are the whole of Wellington city and its suburbs, as well as Lower and Upper Hutt, and Wainuiomata. This area is the seat of government, a major population centre, one of New Zealand's most important ports, and the site of a great deal of business activity. It is also an area noted for its rugged terrain and scarcity of flat land. For all these reasons, certain land within this area has acquired very great financial value since the commencement of European settlement. In addition, it is an area with a complex history of Maori settlement prior to the arrival of Europeans, and as a result a number of Maori groups claim ancestral associations with the land.

The history of this inquiry has also been a complex and lengthy one, dating back more than a decade. It began with a single claim relating to reserve land, then expanded into a much wider inquiry covering all claims within the Port Nicholson block. We therefore begin by outlining the history of the inquiry, before summarising the various claims which are included within it.

## 1.2 A Brief History of this Inquiry

In December 1987, Makere Rangiatea Ralph Love and Ralph Heberley Ngatata Love submitted a statement of claim to the Waitangi Tribunal on behalf of the beneficiaries of the Taranaki Maori Trust Board, the Wellington Tenths Trust, and the Palmerston North Reserves Trust, together with Nga Iwi o Taranaki. This claim, registered as Wai 54, included grievances




**Map 1: Boundaries of the Port Nicholson block –**
**1839 deed of purchase area, and 1844 extension to the south-west coast**

relating to reserve land in Wellington and Palmerston North, as well as other claims relating primarily to Taranaki.[1] The claimants stated that they had been prejudicially affected by:

- the Crown's failure to ensure that one-tenth of the Port Nicholson block was reserved for specified Maori, as provided for in the 1839 deed of purchase for Port Nicholson;
- the exchange of reserve land in Port Nicholson for land of lesser value in Palmerston North;
- the taking of Wellington tenths reserve land for endowments; and
- the leasing in perpetuity of Wellington tenths and Palmerston North reserve land.

In March 1990, the claimants, concerned at the proposed sale of land in Wellington by Government departments and State-owned enterprises, asked the Tribunal for an urgent hearing of their claims on the ground that the proposed sales would prejudice and pre-empt those claims.[2]

1. Claim 1.2
2. Paper 2.5

Following a judicial conference in June 1990, the chairperson of the Tribunal directed that Wellington tenths issues should be separated from the Taranaki claims and registered as Wai 145, 'the Wellington Tenths claim'.[3] The original statement of claim for Wai 54 continued to be the statement of claim for Wai 145, however, until an amended statement was filed in 1995. At a judicial conference in October 1990, claimant counsel argued that an early inquiry into the Wellington tenths claim was necessary on the grounds that the Crown, as head lessee of certain tenths land, was proceeding with new subleases without seeking a prior settlement of the tenths trust's claims to the Waitangi Tribunal, and also that the Crown was likely to sell Crown land in the Wellington area claimed by the trust. The following month, the Tribunal's chairperson directed that the Tribunal should conduct an inquiry into the Wellington tenths claim 'as soon as that is practicable', and constituted the Tribunal of William Wilson (the presiding officer), Professor Gordon Orr, and Georgina Te Heuheu to hear the claim.[4] In March 1991, the Wellington tenths Tribunal was augmented by the appointment of the Right Reverend Manuhuia Bennett.[5]

The first hearing of the tenths Tribunal took place in March 1991. By Tribunal direction, this hearing was restricted to the issues of tenths reserve land leased to the Crown in perpetuity (including land in Pipitea Street, Wellington); tenths land taken by the Crown (including defence and railways land); and tenths land originally leased to the Crown or Crown agencies but later sold to third parties.[6] In April 1991, the Crown advised that the Government was to undertake a review of the Maori Reserved Land Act 1955, with the aim of seeking a fair settlement of issues regarding the leasing of Maori reserved land.[7] The review process proved to be a lengthy one: the initial review was completed in November 1991, but it was not until April 1993 that the Government released its proposals for a solution to Maori reserved land issues.[8] A reserved lands panel was then appointed to consult on the proposals and report back to the Government. The panel reported in January 1994, although its report was not made public until later that year, and the Government's decisions on the reform of Maori reserved land leases were published in January 1995.[9]

While the review process was under way, hearing of the Wellington tenths claim was suspended, but in the meantime the tenths trust and the Crown entered discussions in the hope of negotiating a settlement. These negotiations proved unsuccessful, however, and, in April 1993, counsel for the claimants sought a resumption of the Wai 145 hearings.[10] In July 1994, the Tribunal directed that the hearing of the matters originally granted urgency should resume, but be confined to certain properties in Russell Terrace and Pipitea Street nominated

3. Paper 2.6
4. Paper 2.8
5. Paper 2.21
6. Paper 2.19
7. Paper 2.25
8. Documents A42, A43
9. Documents B7, B7(a), (b), E1
10. Paper 2.39

by the claimants.[11] Mr Wilson having withdrawn from the Tribunal, Professor Orr took over as presiding officer in August 1994, and Professor Keith Sorrenson joined the Tribunal at the same time.[12] Hearings on the urgent matters were held in August, October–November, and December 1994, and closing submissions on these matters were presented at the December hearing. In November 1994, the Minister in Charge of Treaty of Waitangi Negotiations was authorised by the Cabinet to enter into discussions with the tenths trust and the chief executive of Government Property Services Limited (GPS) regarding properties at 9, 13, and 15 Pipitea Street, which had featured in the urgent hearings. As a result of those discussions, the Crown purchased the leasehold interests in the properties from GPS in March 1995 for the purpose of transferring the interests to the Wellington Tenths Trust in partial settlement of the Wai 145 claim.[13]

Despite the narrow focus of the urgent hearings, it became apparent quite early in the inquiry that much wider issues were involved in the Wellington Tenths Trust's claim, and this was confirmed when the Wai 145 claimants submitted a statement of issues in June 1994 and amended statements of claim in July and August 1995.[14] The new statements of claim were much more detailed than the original Wai 54 claim and were not confined to questions concerning the tenths reserves. Meanwhile, the Waitangi Tribunal had received claims relating to the Wellington area from a number of other groups, and these claimants became concerned that the Wai 145 inquiry was no longer restricted to tenths reserves issues. If wider issues arising from the purchase of the Port Nicholson block were to be canvassed as part of the Wellington tenths inquiry, then all groups claiming an interest in this area would want an opportunity to be heard.[15] The Tribunal agreed that they should be given this opportunity, and, at a conference with counsel for the Wai 145 claimants and the Crown in June 1995, Professor Orr indicated that other claims relating to the Port Nicholson block which were not represented by Wai 145 would need to be considered at the same time as Wai 145.[16] A conference with counsel and claimant representatives was held in July 1995, and in October 1995 the Tribunal directed that a number of specified claims should be 'aggregated for the purposes of inquiry, under the appellation Wai 145 The Wellington Tenths Claim'.[17] The Tribunal noted that:

> Whether or not an overlapping claim should be fully examined in the current inquiry, depends on whether the resolution of that claim is necessary to dispose of The Wellington

11. Paper 2.49
12. Paper 2.52
13. Paper 2.135
14. Paper 2.48; claims 1.2(a), (b)
15. See papers 2.36, 2.65
16. Paper 2.64
17. Papers 2.66, 2.69. This decision also resulted in the consolidation of the record of inquiry for claim Wai 145, and the renumbering of some of the documents in the record of proceedings.

> Tenths grievances, or whether the interests of the overlapping party in any property or with regard to future compensation, can be adequately acknowledged, safeguarded or reserved in the Tribunal's report on The Wellington Tenths, and dealt with later.[18]

With this direction, the Tribunal officially recognised that the issues involved in the Wellington tenths inquiry had broadened, and that as a result the 'overlapping' claimants would have equal standing with the Wellington Tenths Trust in this inquiry. The October 1995 Tribunal direction aggregated the following claims with Wai 145:

| Claim | Claimants |
|---|---|
| Wai 105 | Ihakara Porutu Puketapu and others |
| Wai 175 | Piri Te Tau and others for Rangitane o Wairarapa |
| Wai 183 | Eruera Te Whiti Nia |
| Wai 207 | Akuhata Wineera and others for Ngati Toa Rangatira |
| Wai 366 | Roger Herbert for Ngati Rangatahi |
| Wai 377 | David Churton for Ngati Tama Te Kaeaea Trust |
| Wai 415 | Tata Parata and others |
| Wai 442 | Mark Te One and others |
| Wai 474 | Michelle Marino for Ngati Tama and descendants of Te Kaeaea (Taringa Kuri) |
| Wai 543 | Ruth Harris for Rangitane ki Manawatu |

A number of other claims became part of the Wai 145 inquiry over the following three years. Wai 562 (Ihakara Porutu Puketapu for the Te Matehou and Puketapu hapu of Te Atiawa, Pipitea Pa land claim) was registered in January 1996.[19] In March 1996, a claim by the Wellington Tenths Trust concerning land at 1–3 Pipitea Street was registered as Wai 571 and granted an urgent hearing (see s1.3.9). Two Muaupoko claims, Wai 52 and Wai 623, became part of the Wellington tenths inquiry in January 1998, after the claimants filed amended statements of claim providing sufficient detail in relation to the lands subject to the Wai 145 inquiry.[20] Quite late in the inquiry, in September 1998, two more claims were registered and joined the list of claims to be heard as part of the Wellington inquiry: Wai 734 (Toarangatira Pomare for Ngati Mutunga) and Wai 735 (Te Puoho Katene and Te Taku Parai for Ngati Tama ki Te Whanganui-a-Tara).[21] Some claims have also been withdrawn or severed from the inquiry. The Wai 474 claimant joined her claim to Wai 377, and as a result Wai 474 was withdrawn in June 1997.[22] Wai 415 was withdrawn in September 1997, while Wai 105, Wai 183, and Wai 660 (a claim registered in March 1997 concerning Hutt section 19) were severed

18. Paper 2.69
19. Paper 2.70
20. Papers 2.164, 2.166
21. Papers 2.194, 2.196
22. Paper 2.127

from the Wai 145 inquiry by a Tribunal direction of September 1998.[23] A summary of the claims reported on by this Tribunal follows in section 1.3.

The first hearing of the wider Wai 145 inquiry did not take place until February 1996. During that first hearing, the Wai 145 claimants applied for an urgent hearing of an application to the Tribunal seeking a recommendation for the resumption of a section of land at 1–3 Pipitea Street, adjacent to Pipitea Marae. This land had been vested by the Crown in a State-owned enterprise and subsequently sold to a private company, which proposed to build townhouses on it.[24] The Tribunal granted both the request for an urgent hearing and a subsequent claimant application for the severance of this specific claim from the wider Wai 145 claim.[25] The claim for resumption was accordingly registered as Wai 571, but the severance was only temporary, as Wai 571 was aggregated with Wai 145 in May 1996.[26] The urgent hearing regarding the application for the resumption of the land took place in March 1996, but while the hearing was in progress the Crown purchased the freehold interest in this property and placed it in the Wellington regional land-bank for use in a possible future Treaty claims settlement.[27] The leasehold interest in 11 Pipitea Street was also purchased by the Crown in 1996 for inclusion in the Wellington regional land-bank.[28] In May 1997, the Crown and the tenths trust reached a settlement in relation to the properties at 9, 13, and 15 Pipitea Street, the Crown having purchased the leasehold interest in them in March 1995. Under the deed of agreement signed by the two parties, the Crown surrendered that leasehold interest to the tenths trust and made a payment of $70,000 to the trust as a settlement to be charged against any future final settlement of the Wai 145 claim.[29]

In July 1997, the Tribunal began hearing evidence from some of the claimants not represented by the Wellington Tenths Trust. Following Mrs Te Heuheu's withdrawal from the Tribunal in August 1996, it had continued with a quorum of three, but, in November 1997, John Clarke was appointed to the Tribunal so that it could continue sitting while Professor Sorrenson was overseas for the first half of 1998.[30] In June 1998, the Tribunal granted an application from the tenths trust for an urgent hearing in respect of the proposed GPS share float, and, owing to the absence of Professor Sorrenson and the illness of Bishop Bennett, the Tribunal was constituted for the purpose of that hearing to comprise Professor Gordon Orr, John Clarke, and Areta Koopu.[31] The trust's request for an urgent hearing was prompted by the Government's decision to sell nine GPS properties in Wellington city. The trust was

23. Papers 2.112, 2.144, 2.200
24. Papers 2.78, 2.79
25. Papers 2.80, 2.81, 2.84, 2.85, 2.86
26. Papers 2.86, 2.94
27. Document J1; paper 2.185, p 4
28. Document J1
29. Paper 2.134, 2.135
30. Paper 2.155
31. Papers 2.176, 2.179

concerned that, while these properties would still have memorials under section 27B of the State-Owned Enterprises Act on their titles (meaning that the Waitangi Tribunal could make binding recommendations for their return to Maori), it might become more difficult to access these properties as part of a settlement of the Wai 145 claim.[32] Moreover, the proposed sale of those properties came only a month after the Minister in Charge of Treaty of Waitangi Negotiations refused to rule out the repeal of the Tribunal's power to order the return of section 27B memorialised land.[33] The tenths trust therefore applied to the Tribunal for a recommendation that the proposed GPS share float be stayed until the Wai 145 claimants' land negotiation position had been adequately protected or, alternatively, that the terms of the float be varied to make direct provision for the potential settlement of the Wai 145 claims.[34]

The Tribunal heard the urgency application in June 1998, and the following month it released its decision on the proposed GPS share float. The Tribunal recommended that, before proceeding with the share float, the Crown should undertake to ensure that the provisions of the Treaty of Waitangi (State Enterprises) Act 1988, giving the Tribunal the power to make binding recommendations for the return to Maori of section 27B memorialised land, should remain in place and unaltered until any proposed changes to those provisions had been approved by the New Zealand Maori Council and sanctioned by the Court of Appeal. If the Crown declined to implement this recommendation, the Tribunal recommended that it should, following negotiation and agreement with the tenths trust and other claimants in the Wai 145 inquiry, land bank sufficient memorialised properties to adequately protect the claimants.[35] The Government rejected both recommendations in August 1998, arguing that it could not rule out legislation on any issue and that further land banking was unnecessary since there was no shortage of Crown-owned land in Wellington which could be returned to the claimants as part of any settlement. Treaty Negotiations Minister Douglas Graham did, however, issue an assurance that the Government was not considering changing the memorial system, that it would consider making such a change only if it felt that the entire settlements process was in jeopardy, and that any changes would be made in consultation with Maori.[36]

Hearings continued in the second half of 1998, then closing submissions from the claimants and the Crown were heard in March, April, and May 1999. Most of the claimant groups submitted replies to the Crown's closing submissions in May 1999, but the Wellington Tenths Trust's response was received in July 1999.

32. Paper 2.169
33. *New Zealand Herald*, 13 April 1998, in doc J4, supporting document 9
34. Paper 2.181
35. Paper 2.185
36. Paper 2.189

## 1.3 The Claims

We next introduce the claimants and the claims which are part of the Wellington inquiry and which are considered in this report. These summaries are based mainly on the claimants' most recent statements of claim and, for those claimants who made them, their closing submissions. This section provides a general overview of the claims and the key issues which they raise, but it does not attempt to cover all of the specific issues which are part of each claim.

### 1.3.1 Wai 52

Wai 52 is a claim by the late Tamihana Tukapua and others on behalf of Ngai Tara/Muaupoko. The claimants state that Muaupoko were originally known as Ngai Tara, and that in the early nineteenth century Ngai Tara occupied the area 'bounded by the Tararua Ranges in the east and the Tasman Sea in the west, from Sinclair Head in the south to the Rangitikei River in the north'.[37] They maintain that Ngai Tara/Muaupoko were in possession of the Wellington area when Ngati Toa and its Taranaki allies migrated to the area, and that the Taranaki tribes had not established customary rights to the land by the time of the Port Nicholson deed of purchase in 1839. Their main grievance, therefore, is that the Crown failed to recognise or protect the interests of Muaupoko within the Port Nicholson block. The claimants say that they have been prejudicially affected by the Crown's failure to consult or deal with Muaupoko, to protect their interests in land and resources, to set aside reserves for them, or to compensate them for the loss of their land and resources.

### 1.3.2 Wai 145

Wai 145 is a claim by the late Makere Rangiatea Ralph Love and Ralph Heberley Ngatata Love on behalf of the beneficial owners of the Wellington Tenths Trust and Palmerston North Reserves Trust. The Wellington Tenths Trust was established in 1985 and represents the interests of the beneficial owners and the beneficiaries (the families of the owners) of the Wellington tenths reserves. The beneficial owners are descendants of the Te Atiawa/Taranaki whanui people who were living in the Wellington Harbour area at the time of the New Zealand Company's Port Nicholson deed of purchase in 1839, as determined by the Native Land Court in 1888. The Wai 145 claim also represents beneficial owners of reserves in Palmerston North awarded to the Maori of Waiwhetu Pa in exchange for reserved land in the Wellington area.[38] The claimants state that they constitute the single tangata whenua iwi of greater

37. Claim 1.16(e)

38. The interests of the beneficial owners of these Palmerston North reserves are represented by the Palmerston North Reserves Trust, which was established in 1979.

Wellington, being predominantly Te Atiawa but now including 'peoples descended from all the iwi of Taranaki'.[39]

The Wai 145 claim covers two main topics: the acquisition of Maori land within the Port Nicholson block and the administration and alienation of the land reserved for Maori within this area. The claimants say that the 1839 New Zealand Company 'purchase' of Port Nicholson was invalid; that it was only in 1844 that Maori, under considerable pressure, signed deeds of release and received compensation for the land at Port Nicholson; that, even in 1844, Maori gave up only the land specified in the schedule to the deeds of release and did not relinquish ownership of the much larger area of unsurveyed land (sometimes referred to as 'surplus' or 'waste' land); and that the Crown assumed ownership of this unsurveyed land without making any payment to Maori. Thus, the claimants argue, Maori in Wellington lost their land through a process which was deeply flawed and which left them deprived of some 137,000 acres of land which they had never sold. The second part of the Wai 145 claim concerns the so-called 'tenths' reserves set aside for Maori in the Port Nicholson block. The claimants' main grievances in relation to the tenths are that some tenths reserve land was taken by the Government for endowing to various institutions, including Wellington Hospital and Wellington College, or for public works purposes; that the remaining tenths were poorly administered and that Maori were denied involvement in administering these reserves; and that the tenths reserves administered on behalf of Maori were made subject to leases in perpetuity with a fixed percentage rental system which has meant that the rent received by the beneficial owners has been well below market rates. An additional grievance put forward by the Wai 145 claimants concerns the alienation of the foreshore from Maori and the destructive effects of harbour reclamations.

### 1.3.3 Wai 175, Wai 543

Wai 175 and Wai 543 are claims by Jim Rimene and others on behalf of Rangitane. Although they are still registered as separate claims, they are now both covered by the same statement of claim, and the Rangitane claimants presented a single closing submission to the Tribunal. The claimants state that, prior to 1839, Rangitane exercised tino rangatiratanga over the whole of the Port Nicholson block. As do the Muaupoko claimants (Wai 52 and Wai 623), the Rangitane claimants say that, by dealing only with the Taranaki tribes during the Port Nicholson purchase process, the Crown failed to recognise or protect the pre-existing interests of Rangitane, who say that they were tangata whenua in the area.

39. Claim 1.2(d)

### 1.3.4 Wai 207

Wai 207 is a claim by Akuhata Wineera and others on behalf of Ngati Toa Rangatira. The claimants state that in 1840 Ngati Toa Rangatira had customary interests and rights within an area the boundary of which ran from Whangaehu in the north east to the Tararua Ranges, south to Turakirae Heads, across Cook Strait to Kaikoura, and then west to Arahura.[40] Their claim thus includes the area of the Port Nicholson purchase but also covers a much wider area. The aspects of the claim which relate to the Wellington inquiry area concern 'the failure of the Crown to sufficiently recognise and provide [for] Ngati Toa in respect of its interests in the Port Nicholson block, including Wellington proper, and the forcible extinguishment of its interests in the Hutt Valley'.[41] The claimants argue that by 1840 Ngati Toa had established customary interests in the Port Nicholson area by right of conquest, but that Ngati Toa were expelled from this area by Crown action and consequently prevented from exercising these customary interests.

### 1.3.5 Wai 366

Wai 366 is a claim by Roger Herbert and Wayne Herbert on behalf of Ngati Rangatahi, a hapu of Ngati Maniapoto with close kinship links to Ngati Toa. The claimants say that Ngati Rangatahi occupied land in the Hutt Valley which had been granted to them by the Ngati Toa chiefs Te Rauparaha and Te Rangihaeata, and that by the early 1840s they were acting independently of Ngati Toa. The claim states that Ngati Rangatahi had secured rights to the Hutt Valley land which they occupied both in terms of Maori custom and in terms of the guarantees contained in Governor FitzRoy's 1845 Crown grant to the New Zealand Company, but that they lost these rights as a result of their forced expulsion from the Hutt Valley by Crown forces in 1846. The claimants' grievances concern the Crown's alleged failure to recognise and protect Ngati Rangatahi's rights, the expulsion of Ngati Rangatahi from the Hutt Valley, and the failure to compensate Ngati Rangatahi for the loss of their lands and cultivations.

### 1.3.6 Wai 377

Wai 377 is a claim by David Churton and Michelle Marino on behalf of Ngati Tama Te Kaeaea Trust, a body claiming to represent descendants of the Ngati Tama chief Te Kaeaea (more commonly known as Taringa Kuri). The claimants in Wai 377, like the Wai 145 claimants, argue that both the original 1839 deed of purchase and subsequent attempts by the Crown to complete this purchase were deeply flawed. They also say that the Crown failed to recognise and protect Ngati Tama's distinct interests in land in Wellington, and that the

40. Claim 1.5(a)
41. Document N8

reserves set aside for Ngati Tama were inadequate and badly managed. An additional grievance is the expulsion of Ngati Tama from the Hutt Valley, where Taringa Kuri's people had resettled and where, according to the claimants, they had established rights.

### 1.3.7 Wai 442

Wai 442 is a claim by Mark Te One and others of Te Atiawa and Taranaki iwi, on behalf of the descendants of the owners of the original Waiwhetu Pa. The claim concerns the taking of Waiwhetu Pa land under the Public Works Act 1908 for river protection purposes, and the Crown's failure to offer this land back to the owners or their descendants once it was no longer required for this purpose.

### 1.3.8 Wai 562

Wai 562 is a claim by Ihakara Porutu Puketapu on behalf of the Te Matehou and Puketapu hapu of Te Atiawa. The claim concerns the alienation of Pipitea Pa and the Crown's failure to give Te Atiawa control of their reserves in Wellington. However, evidence presented by the claimant to the Tribunal makes it clear that he is also concerned to ensure that the benefits of any settlement of the Wellington tenths claim should not go only to the current beneficial owners of the tenths reserves, represented by the Wellington Tenths Trust. In the claimant's view, all descendants of those Te Atiawa who were in occupation of land in the Wellington area at the time of the Port Nicholson purchase should benefit from any settlement.[42]

### 1.3.9 Wai 571

Wai 571 is a claim by Ralph Heberley Ngatata Love on behalf of the Wellington Tenths Trust. It concerns land at 1–3 Pipitea Street, Wellington, which was the subject of an urgent hearing by the Wellington tenths Tribunal in 1996. The Wai 145 claimants asked for this specific claim to be severed from the wider Wai 145 claim, and as a result it was registered as a separate claim, but Wai 571 was subsequently aggregated with the other claims in the Wai 145 inquiry. For more information about this claim, see the history of the Wai 145 inquiry above.

### 1.3.10 Wai 623

Wai 623 is a claim by John Hanita Paki and others on behalf of Muaupoko. The territory in which they claim customary rights is essentially the same as for the other Muaupoko claim (Wai 52). The claimants say that Muaupoko were the original inhabitants of the Wellington

42. Document K5

area and that they remain tangata whenua there, and that the Crown therefore violated their rights by failing to recognise or deal with Muaupoko's interests in the Port Nicholson block.

### 1.3.11 Wai 734

Wai 734 is a claim by Toa Rangatira Pomare on behalf of Ngati Mutunga. The claimants state that Ngati Mutunga had customary interests and rights in the Wellington area, having taken possession of land in this area alongside the other Taranaki tribes, and that the Ngati Mutunga interest survived the departure of most Ngati Mutunga for the Chatham Islands in 1835. The Ngati Mutunga interest was neither recognised nor protected by the Crown, according to the claimants, who say that they have suffered prejudice as a result.

### 1.3.12 Wai 735

Wai 735 is a claim by Te Puoho Katene and Te Taku Parai on behalf of Ngati Tama ki te Whanganui-a-Tara. The issues raised by this claim are essentially the same as for the other Ngati Tama claim (Wai 377): the flawed nature of the Port Nicholson purchase process, the Crown's failure to recognise and protect Ngati Tama's distinct interests, the inadequacy of the reserves set aside for Ngati Tama, and the expulsion of Ngati Tama from the land they had occupied in the Hutt Valley.

## 1.4 The Report

We now report on the foregoing claims. In doing so, we take a roughly chronological approach, beginning with the history of Maori occupation of the area to 1840. We then examine the complex process by which the New Zealand Company acquired title to the Port Nicholson block, and this is followed by several chapters dealing with the history of the reserves set aside for Maori in this area. There is also a chapter on claims relating to the Wellington Harbour and foreshore. Along the way, we make findings in relation to the claims of breaches of the principles of the Treaty of Waitangi, and these findings, along with our recommendations, are summarised in the final chapter of this report.

CHAPTER 2

# MAORI OCCUPATION OF TE WHANGANUI A TARA AND ENVIRONS TO 1840

## 2.1 Introduction

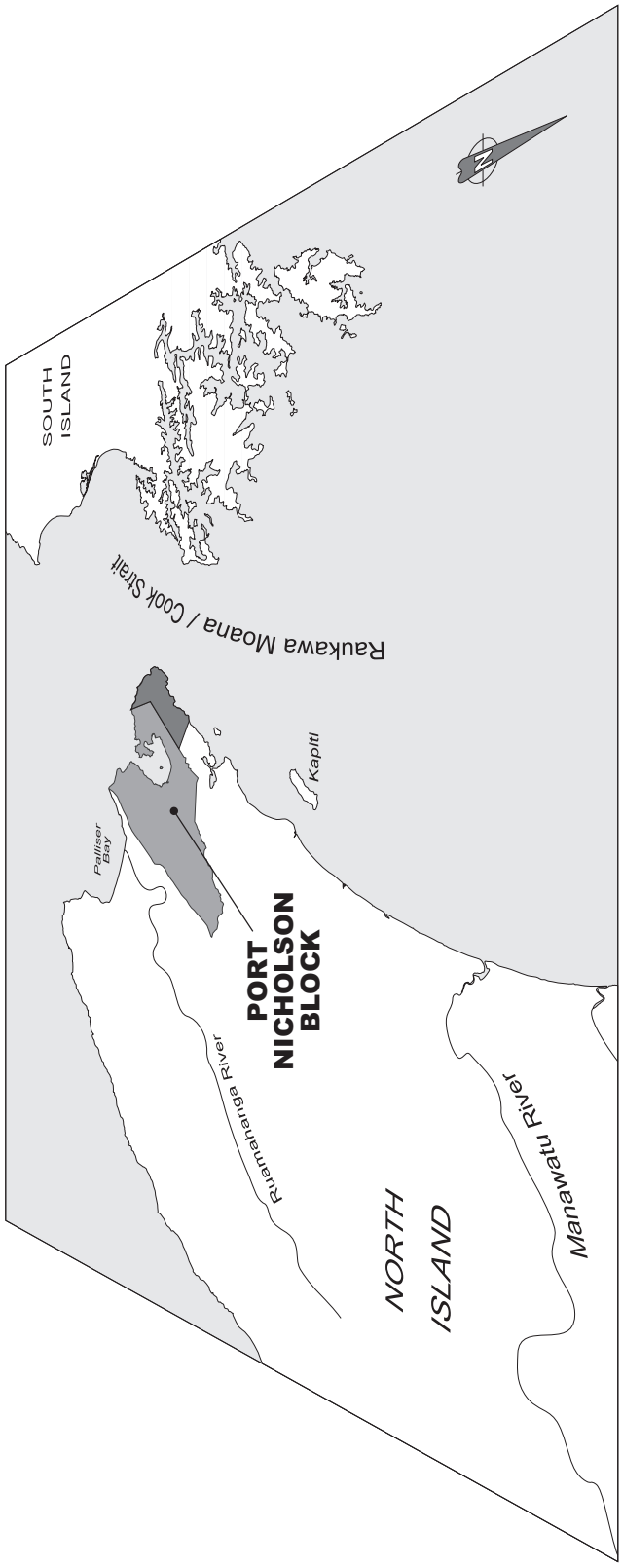
This chapter examines Maori occupation of, and customary rights to, the inquiry area up to 1840. It provides a detailed narrative of the movement of Maori groups into and out of the region and the interactions between these different groups. It also summarises the views on customary tenure matters presented to the Tribunal by the claimants in their statements of claim and closing submissions. Finally, we make findings in relation to the rights possessed by these groups within the inquiry area at 1840. First, however, it is important to situate the inquiry area within a wider Maori context. We do this by reference to Maori place names, which provide an important record of Maori geographical and historical knowledge.

This report is concerned with Te Whanganui a Tara ('the great harbour of Tara') – known to Pakeha as Port Nicholson or Wellington Harbour – and with the lands surrounding it. These lands include, to the north, Heretaunga (sometimes also called Te Awa Kairangi, and known in English as the Hutt Valley) and, to the south-west, the rugged hill country from Makara to Rimurapa (Sinclair Head). The inquiry area covers a large part of Te Upoko o te Ika, the head of Te Ika a Maui ('the fish of Maui', otherwise known as the North Island).[1] In Maori mythology, Maui, the great Polynesian ancestor, fished up the North Island from his waka, the South Island (Te Waka a Maui). The Remutaka (Rimutaka) mountain range and the ridge running from Heretaunga to the sea at Rimurapa are sometimes called Nga Kauwae o te Ika ('the jaws of the fish'). This report is concerned not with the whole of Te Upoko o te Ika but only with the Port Nicholson block. Map 2 shows the relationship between the wider takiwa (territory) of Te Upoko o te Ika and the Port Nicholson block. In this chapter, we deal with events which took place in this wider takiwa to the extent that they had an impact on our inquiry area; traditional rights did not stop at the arbitrarily imposed boundary of the Port Nicholson block but flowed throughout Te Upoko o te Ika and beyond.

The south-west coast of Te Upoko o te Ika looks across Raukawa Moana (Cook Strait) to Te Tauihu o te Waka ('the prow of the canoe', or the Marlborough Sounds). It was from the south-west coast of Te Upoko o te Ika, from Ohariu northwards to Porirua Harbour and

1. See Malcolm McKinnon (ed), *New Zealand Historical Atlas: Ko Papatuanuku e Takoto Nei* (Wellington: Department of Internal Affairs, 1997), pls 17, 25

2.1




Map 2: The Port Nicholson block in relation to Te Upoko o te Ika and Te Tauihu o te Waka




Map 3: Areas within the Port Nicholson block

Kapiti Island, that expeditions set out across Raukawa Moana to the sounds and to Te Tai Poutini (the West Coast of the South Island). Te Tai Poutini is the source of the prized pounamu, or greenstone. The Kapiti Coast was of great strategic importance in the Maori world because it connected the two islands.

In this report, the name 'Te Upoko o te Ika' will be used when referring to the general takiwa of the lower western North Island. The terms 'Te Whanganui a Tara' and 'Heretaunga' will be used to refer to the harbour area and the Hutt Valley respectively. The coast between Sinclair Head and Kiakia (north of Pipinui Point and west of modern-day Tawa) will be referred to as 'the south-west coast' (see map 3).

## 2.2 Customary Rights to Land in Te Whanganui a Tara and Environs

Maori customary rights to land and associated waterways and to the sea were complex, fluid, and multilayered. Physical occupation and cultivation created only one layer of rights, albeit

an important one. This was evidenced by ahi ka, or the lighting of fires of occupation; such fires were both symbolic and physical emblems of mana over the land. The ability to light fires, and so to prove strength of tenure, established rights to land. Where a group abandoned the land so that their fires died out and were not rekindled, such rights were disestablished. Occupation by establishing kainga and cultivations was evidence of association with the land, but the use of the land's resources was another important sign of association. Such uses could include birding, taking berries, collecting firewood, taking trees for waka, and gathering ingredients for rongoa (traditional medicines) in the forest or fishing and collecting food from waterways and the sea. The use of such resources was just as important as the occupation of the land, because kainga could not survive without these resources.

Other evidence of association with the land could be kin links, an ancient association through long historical occupation (ahi ka roa), having named a particular area, or spiritual associations owing, for example, to the birth or death of kin there. A group could retain such historical associations with an area even when its ahi ka had been extinguished there and it had lost all rights over the land.

Interwoven rights and associations, including ahi ka, were all held together by the ability to defend one's rights. Together, they formed a complex web, not easily understood by those familiar with a markedly different English system of land tenure. As later chapters will show, New Zealand Company representatives (and some Crown officials) tended to have regard only to those Maori who could demonstrate easily recognisable physical and material signs of occupation, such as pa, kainga, cultivations, and urupa. Pakeha found it easier to recognise these aspects of ahi ka occupation than to take account of related rights and associations which were less immediately apparent.

The customary law situation at Te Whanganui a Tara and its environs was unique, and particularly complex. By 1840, the raupatu (conquest) of the area contained within the Port Nicholson block was complete, but ahi ka rights were still developing. Into this situation of developing rights came the New Zealand Company and its settlers, who claimed not on the basis of take raupatu or ahi ka but instead through a purported purchase. Because of the unique nature of the situation in Wellington, therefore, the Tribunal's findings in relation to customary law and tenure there should not be seen as applicable to other parts of the country. We find ourselves in the position 160 years later of having to adopt a pragmatic interpretation of customary law – law that has changed considerably in the intervening century and a half. The arrival of the New Zealand Company in 1839 disrupted recently established ahi ka rights, which were still developing. Consequently, take raupatu (right by conquest) is more important in the Port Nicholson block than it may be in other areas, since those with take raupatu at Port Nicholson could still develop ahi ka. The Tribunal must therefore consider who, in 1840, had take raupatu and was developing ahi ka at Port Nicholson.

In this report, we use 'ahi ka' to refer to those areas which a group resided on or cultivated, or where it enjoyed the continuing use of the surrounding resources, provided such

occupation or use was not successfully challenged by other Maori groups. 'Take raupatu' will refer to a wider area in which a group had more general rights by virtue of having participated in the conquest of that area, provided the group had sufficient strength to sustain those rights. Where a group had take raupatu, it had the potential to develop ahi ka. Ahi ka is used here only in respect of those areas where a group had established non-contestable rights (albeit perhaps sometimes still developing), rights which were accepted by other Maori. A group could have contestable take raupatu in a shared area such as the Port Nicholson block, but it would have non-contestable ahi ka there only if it were in actual or seasonal occupation of an area, or made use of its resources, and if it were accepted as having such rights by other Maori groups. In the case of the Port Nicholson block, the potential to develop ahi ka depended on the initial possession of take raupatu, or on a group's relationship to those who had take raupatu.

## 2.3 History to 1840

This section outlines the history of Maori in that part of Te Upoko o te Ika which became the Port Nicholson district. It covers the period up to 1840, excluding the initial Maori dealings with the New Zealand Company and the Crown in 1839–40. (These dealings are discussed in later chapters.) This historical background is necessary in order to understand who occupied the Port Nicholson district, what form that occupation took, what rights resulted from this occupation, and where the various Maori groups were by the time of the Crown's intervention. We begin by identifying the groups who were in the area before the 1820s, and we then examine the interaction between these people and the Maori who migrated to the area from Taranaki and Kawhia in the two decades which preceded the arrival of the New Zealand Company settlers.

### 2.3.1 Discovery and naming of Te Whanganui a Tara

In Maori tradition, Kupe is known as the discoverer of Aotearoa, a name bestowed by his wife, Kuramarotini, and many place names around New Zealand's coasts record Kupe's circumnavigation of the country.[2] At Te Whanganui a Tara, these include Te Tangihanga o Kupe or Te Raranga a Kupe (Barrett Reef), and Te Aroaro o Kupe or Te Ure o Kupe (Steeple Rock, near Seatoun).[3] Kupe named Makaro (Ward Island) and Matiu (Somes Island) after his nieces or daughters.[4]

2. McKinnon, pl 17
3. G Leslie Adkin, *The Great Harbour of Tara: Traditional Maori Place-Names and Sites of Wellington Harbour and Environs* (Christchurch: Whitcombe and Tombs, 1959), pp 13–14, 81–82
4. Ibid, p 39

Te Whanganui a Tara also figures in the next sequence of Maori discovery and occupation, when the harbour received its name. Whatonga explored the great harbour and named it for his son, Tara.[5] Another name associated with Whatonga in the area around Te Whanganui a Tara is Heretaunga, which was originally the name of Whatonga's house at Nukutaurua (Mahia Peninsula) but also came to be used for the Hutt River and valley.[6] (The Hutt is also known as Te Awa Kairangi.) Tara lived for a time at Whetukairangi Pa on Motukairangi (Miramar Peninsula), which at one stage was an island. Rangitane claimant Richard Bradley suggested that these place names were connected. He stated that Whetukairangi was named as a result of Tara's wife 'looking up at the pa when the fires were burning and suggesting they looked like stars [whetu] in the night'. 'The continuation of this theme was Awakairangi for the modern Hutt River.'[7]

### 2.3.2 Ngati Ira and other Whatonga-descent peoples

Before the arrival of Maori from Taranaki and Kawhia, Te Upoko o te Ika was populated primarily by people of Kurahaupo waka descent, including Ngai Tara, Rangitane, Muaupoko, and Ngati Apa.[8] We will refer to the various related groups who settled in and around what became the Port Nicholson block before the 1820s as 'Whatonga-descent peoples', since all claimed descent from the early explorer Whatonga. It is generally accepted that until the 1830s Ngati Ira were the most recent inhabitants of Te Whanganui a Tara and environs. They had arrived in previous generations from the east coast of the North Island, and, on their way south, they had intermarried with the descendants of Tara and his brother Tautoki, including Ngai Tara and Rangitane.

Historian Angela Ballara explains that, by the time Ngati Ira settled in Te Whanganui a Tara, 'they were as much descendants of Whatonga's son Tara and grandson Rangitane as they were of Ira-turoto', and that they had also intermarried with Ngati Kahungunu. By 1800, Ballara says, they were still known as Ngati Ira in Wairarapa, at Te Whanganui a Tara, and on the Kapiti coast, but other sections (including those in the Hutt Valley) were known by the names of later ancestors, 'because their multiple tribal origins made the earlier names inappropriate'. By the start of the nineteenth century, Ngati Ira were settled along the east coast of Te Whanganui a Tara from Waiwhetu to Turakirae, while the western side of the harbour, from Thorndon to Ngauranga, was deserted. The inhabitants of the Hutt Valley were known as Rakaiwhakairi and Ngati Kahukuraawhitia. They were descendants of Iraturoto, Toi (Whatonga's grandfather), and Kahungunu, and had also intermarried with Ngai Tara

5. McKinnon, pl 25
6. Ibid
7. Document H44, para 12
8. McKinnon, pl 25

and Rangitane in Wairarapa.[9] These two hapu seem to have been distinct from Ngati Ira tuturu (proper), although they were related.

At the time of the arrival of the incoming tribes, Ngati Ira, Rakaiwhakairi, and Ngati Kahukuraawhitia occupied what became the Port Nicholson block and had tangata whenua rights there. Other members of these groups lived around Porirua and the Kapiti coast. The principal chiefs of Ngati Ira at this time were Whanake and his son Te Kekerengu, both of whom lived a few miles south of Porirua Harbour. Tamairangi, Whanake's wife and Te Kekerengu's mother, was a celebrated beauty and high-born lady of Ngati Ira, who also had connections to Ngai Tara, Rangitane, and Ngati Kuia of Queen Charlotte Sound.[10] This family was to lead Ngati Ira resistance to the invasions from the north which began in 1819.

### 2.3.3 The 1819 and 1821 taua from the north

In 1819, a Ngapuhi-led taua (war party) armed with muskets raided Te Upoko o te Ika. Ngati Toa warriors, including the chiefs Te Rauparaha and Te Rangihaeata, joined the taua at Kawhia. The invaders fought with Ngati Ira at Te Whanganui a Tara, and they acquired knowledge of an area which from that time on would be coveted by Te Rauparaha, though none of the taua remained to occupy the land.[11] This seems to have been the only pre-1840 fighting within the area that became the Port Nicholson block in which Ngati Toa were themselves involved. While accompanying this taua, Te Rauparaha noted the benefits of trade and safety offered by Kapiti Island.[12] He also arranged the marriage of his nephew Te Rangihaeata to Te Pikinga of Ngati Apa in order to ensure future connections and a welcome on Ngati Toa's expected return to Te Upoko o te Ika.[13] Ngati Apa occupied an area around the Rangitikei River and also lived in the north of the South Island.

The 1819 expedition was followed by another in 1821, led by Ngati Whatua. This taua was joined by Waikato, Ngati Maniapoto, and Ngati Maru, but not, apparently, by Te Rauparaha and Ngati Toa. Little is known of the taua's immediate impact in Te Upoko o te Ika, but, on its return north, it added to the instability in Taranaki. Once again, the invaders did not settle in Te Upoko o te Ika, and, though the tangata whenua were weakened by these events, they remained in occupation.[14]

9. Angela Ballara, 'Te Whanganui-a-Tara: Phases of Maori Occupation of Wellington Harbour, c 1800–1840', in *The Making of Wellington, 1800–1914*, D Hamer and R Nicholls (eds) (Wellington: Victoria University Press, 1990), p 13
10. Angela Ballara, 'Tamairangi', DNZB, vol 1, p 422
11. Patricia Burns, *Te Rauparaha: A New Perspective* (Christchurch: AH and AW Reed, 1980), pp 55–63; see also doc H8, pp 31–36
12. Burns, p 61
13. Ibid, p 63
14. Ballara, 'Te Whanganui-a-Tara', p 15; Burns, p 90

### 2.3.4 Migrations of settlement to Te Upoko o te Ika

Around 1821, not long after returning from his initial voyage south, Te Rauparaha led a heke to Kaweka in northern Taranaki. This move was called 'Te Heke Tahutahuahi' ('the fire-lighting expedition') and was in response to increasing Waikato pressure on the Kawhia tribes. Not all Ngati Toa migrated – in fact, one of Te Rauparaha's brothers remained at Kawhia – and the heke also included members of other tribes from the Kawhia area.[15]

This first step south was followed by a more permanent move further south. The second part of the expedition, which left Taranaki in 1822, has been called the 'Tataramoa' (bramble-bush) migration.[16] This was a deliberate migration, in contrast to the earlier raids, and Te Rauparaha's intention was to settle in the south.[17] There is some controversy over who was responsible for the migration – Te Rauparaha and his Ngati Toa people or Te Atiawa, Ngati Mutunga, and Ngati Tama, who sheltered Ngati Toa in Taranaki and then joined them in the heke. A whakatauki, or saying, refers to Te Atiawa as 'the horse on which Ngati Toa rode'. This could be interpreted in two ways: either that Ngati Toa controlled the horse or that the horse did the hard work and provided the strength for the migration.[18] It appears that some Te Atiawa and Ngati Tama who came south with Ngati Toa subsequently returned to Taranaki around 1823, then remigrated south in a later heke.[19] This pattern of migration back and forth between Taranaki and Te Upoko o te Ika was to continue for most of the nineteenth century.

Rather like the conglomerate names for the Whatonga-descent groups (most notably 'Ngati Kahungunu'), people from the Taranaki region were often lumped together under a common name (usually 'Ngati Awa') by outsiders. This has led to some confusion in the historical record. According to Professor Alan Ward, the name 'Ngati Awa' appears most often in the nineteenth-century literature and 'generally refers to the tribes of north and mid Taranaki' – 'It is often used inclusively of Ngati Mutunga and Ngati Tama.' 'Te Atiawa' became more commonly used in the documentary record from the 1860s: 'Its core reference seems to be the tribes on the north and south banks of the Waitara, southward to Nga Motu (New Plymouth) but exclusive of Ngati Mutunga and Ngati Tama.'[20] We will use the name 'Te Atiawa', but some sources quoted in this report use 'Ngati Awa'. Another possible source of confusion is the fact that, from the mid-1830s, there were people in Wellington who were from the specific tribe known as 'Taranaki'. This group is referred to below simply as 'Taranaki' (as opposed to the wider grouping of 'the Taranaki tribes', which includes Te Atiawa, Ngati Tama, Ngati Mutunga, Taranaki, and Ngati Ruanui).

15. Burns, pp 80–96
16. Ibid, pp 96–102
17. Ballara, 'Te Whanganui-a-Tara', p 16
18. Document A41, p 15
19. Burns, pp 113, 125
20. Document M1, pp v–vi

The heke made its way peacefully south to Rangitikei, escorted by Ngati Apa. Although Ngati Apa welcomed Ngati Toa because of the 1819 marriage alliance between Te Pikinga and Te Rangihaeata, they warned Ngati Toa to leave Ngati Apa's Muaupoko and Rangitane kin alone. Despite this warning, Te Rauparaha's brother killed a high-born Muaupoko or Rangitane woman, and this led to the terrible events at Lake Papaitonga in Horowhenua, where Muaupoko trapped and killed some of Te Rauparaha's own children. Te Rauparaha only just escaped himself, and, from this time on, Muaupoko and Ngati Toa were bitter enemies.[21]

Around 1823, Ngati Toa took Kapiti Island from Ngati Apa and Muaupoko, and Te Rauparaha moved his people to the island for protection from the Whatonga-descent peoples.[22] Conflict between the incoming tribes and the tangata whenua continued, and an attack on Ngati Toa at Waikanae, in which several children of the Ngati Toa high chief Te Peehi Kupe were killed, set off another devastating sequence as Te Peehi then went to England in February 1824 to acquire more muskets.[23]

### 2.3.5 The battle of Waiorua, 1824

In 1824, recognising the threat posed to them by the incoming tribes, the Whatonga-descent peoples from Whanganui to the South Island massed at Waikanae. Depending on who retells the story, anything from 600 to 2000 or more tangata whenua warriors assembled to attack the incoming tribes on Kapiti Island.[24] They attacked at Waiorua, on the northern end of Kapiti. The Whatonga-descent peoples were defeated in this battle, and as a result the incoming tribes gained the ascendancy over the Kapiti Coast.

There is some debate, however, as to who should be given credit for this victory.[25] Te Rauparaha was living at the southern end of Kapiti, and those encamped at Waiorua were mainly from the Taranaki tribes. Ballara says that Te Rauparaha was not at the battle until the very end, if at all, but that Waiorua is often regarded as his victory because 'he was the prime mover of the migration to and occupation of Kapiti and nearby coastlands; and his Taranaki allies were there under his mana'.[26] The victory undoubtedly enhanced the reputation of Te Rauparaha, who was regarded as the heke's main war leader.

Despite the fact that Waiorua broke the strength of the resistance of the Whatonga-descent groups, it did not finish this resistance, and some Ngati Ira, led by Whanake,

21. Burns, pp 98–101; Ballara, 'Te Whanganui-a-Tara', p 17
22. Burns, pp 108–114
23. Ballara, 'Te Whanganui-a-Tara', p 17; Burns, p 115
24. Rangitane claimant Ruth Harris stated that Donald McLean was told in the 1840s by a Ngati Apa chief that the attacking force numbered 600, whereas Ballara gives a figure of 2000: doc K10, p 9; Ballara, 'Te Whanganui-a-Tara', p 17.
25. Document A41, p 18
26. Ballara, 'Te Whanganui-a-Tara', p 17

continued to live undisturbed at Porirua, at least temporarily.[27] It appears that Muaupoko and Rangitane were no longer in occupation of land much south of Kapiti by this time, residing mainly in Horowhenua and Manawatu. According to Ballara, 'they were a defeated people', though Rangitane and Muaupoko claimants today do not accept that label.[28] Ngati Apa maintained some status after Waiorua through their marriage alliance with Ngati Toa. It is not clear if Rakaiwhakairi and Kahukuraawhitia were involved in Waiorua, but they and Ngati Ira continued to occupy Heretaunga and Te Whanganui a Tara for the time being.

### 2.3.6 Further migrations into Te Upoko o te Ika

Following the battle of Waiorua, another significant heke (called 'Nihoputa', or 'boar's tusk') left Taranaki for Te Upoko o te Ika.[29] This heke was made up of a large group of Ngati Mutunga, Ngati Tama, and Te Atiawa who were fleeing Waikato vengeance in Taranaki. Among those who arrived in this heke were the chiefs Pomare of Ngati Mutunga and Ngatata i te Rangi of the Ngati Te Whiti and Ngati Tawhirikura hapu of Te Atiawa. These two men were closely related.[30]

The Nihoputa migration was followed by another influx of people from Taranaki. Ngati Toa, who were generally pleased to have their strength augmented by the arrival of more allies, permitted Ngati Tama to settle at Ohariu and Ngati Mutunga and Te Atiawa at Waikanae. Some Ngati Tama then moved east to Tiakiwai (in Thorndon, around the Tinakori Road and Thorndon Quay intersection), and Ngati Mutunga followed into the harbour area, leaving Waikanae for Te Atiawa to occupy.[31] Ngatata i te Rangi accompanied Ngati Mutunga, thus establishing what Ballara has called Te Atiawa's 'first foothold' around the harbour.[32]

### 2.3.7 Coexistence at Te Whanganui a Tara breaks down into hostility

Ngati Ira remained around the eastern and southern shores of Te Whanganui a Tara. Ngati Tama and Ngati Mutunga at first coexisted with the Ngati Ira they found around the harbour (and with the Rakaiwhakairi and Ngati Kahukuraawhitia in Heretaunga). Ngati Tama also moved into Palliser Bay.[33] However, this coexistence came to an end, probably in the late 1820s, when Ngati Mutunga attacked Ngati Ira at Te Whanganui a Tara. The cause of this conflict is unclear, as is the sequence of events by which Ngati Ira were expelled from the area. As Ballara explains, Maori accounts depict the occupation of Te Whanganui a Tara by

27. Ballara, 'Te Whanganui-a-Tara', p 17
28. Ibid, p 18; doc K10, p 10; doc Q3, p 10; doc K4, p 2
29. Burns, pp 125–126
30. Ballara, 'Te Whanganui-a-Tara', p 18; Angela Ballara, 'Wiremu Piti Pomare', DNZB, vol 1, pp 348–349; Angela Ballara, 'Ngatata-i-te-rangi', DNZB, vol 1, pp 315–316
31. Ballara, 'Te Whanganui-a-Tara', p 18; doc A41, p 19
32. Ballara, 'Te Whanganui-a-Tara', p 23
33. Ibid, p 18

the incoming tribes as a 'gradual, untidy affair, a series of short sharp clashes and consequent occupation readjustments as Ngati Ira gradually conceded more territory'. However, it is clear that Ngati Ira were driven out of their eastern harbour settlements between Waiwhetu and Turakirae.[34]

It was at this point that the revered Ngati Ira chieftainess Tamairangi escaped with her younger children, moving initially to Tapu te Ranga, the island in Island Bay on Wellington's south coast. When that fell, she escaped in a canoe around the coast to Ohariu, where she was finally captured by Ngati Mutunga. Her life was spared, however, owing to the intervention of Te Rangihaeata, who placed Tamairangi and her children under his protection. Tamairangi and her son Te Kekerengu, along with about 100 followers, subsequently went to the South Island, where they were killed.[35] Ballara states that 'With the deaths of Tamairangi and Te Kekerengu the mana of the chiefly family of Ngati Ira was destroyed.'[36] Their descendants continued living in Wairarapa, however, and a grand-daughter of Tamairangi's married the Te Atiawa chief Wi Tako Ngatata (the son of Ngatata i te Rangi) in the early 1840s, which suggests that the incoming tribes still had some respect for the mana of Ngati Ira's chiefly family. The events leading to this marriage will be discussed below.

The importance of these events for this inquiry is that, by about the late 1820s, Ngati Ira, and most of the related Whatonga-descent peoples, were no longer in occupation of what became Port Nicholson. They had lost their ahi ka over land at Port Nicholson, while the conquerors from the north had gained take raupatu there. However, Rakaiwhakairi and Kahukuraawhitia persisted in the area a little longer.

### 2.3.8 The arrival of Ngati Raukawa

Meanwhile, the arrival of Ngati Raukawa into the area caused tension among the incoming tribes. Some time in the late 1820s, Ngati Raukawa, originally from Maungatautari in the Waikato, began to arrive on the Horowhenua and Kapiti coasts. They were welcomed by Te Rauparaha, whose mother was Ngati Raukawa. Ngati Raukawa settled in Horowhenua and made peace with Muaupoko and the other tangata whenua there.[37]

This had important implications, for while Te Rauparaha was closely related to Ngati Raukawa, Te Peehi Kupe was related instead to the northern Taranaki tribes, especially Te Atiawa. Te Peehi was also of higher birth than Te Rauparaha, and was the senior hereditary chief of Ngati Toa. Te Peehi had gone to England in 1824 to get guns after his children were killed by Whatonga-descent people, as noted above, and had become incensed on his return from England to find that Te Rauparaha had made peace with Ngati Apa, whom he blamed

34. Ibid, pp 19–20
35. Ibid, pp 19–21; Ballara, 'Tamairangi', p 422
36. Ballara, 'Tamairangi', p 422
37. Burns, pp 126–127; doc M1, pp 60–62; Ballara, 'Te Whanganui-a-Tara', p 20

for the death of his children. Te Peehi attacked Ngati Apa, angering both Te Rauparaha and Te Rangihaeata, who was married to Te Pikinga of Ngati Apa. As a result, Te Peehi and his hapu, Ngati Te Maunu, came into conflict with the Ngati Kimihia hapu of Te Rauparaha and Te Rangihaeata. This split was made worse by the arrival of Ngati Raukawa and the different kin allegiances this arrival exposed.[38]

### 2.3.9 Tama te Uaua and Paukena heke

In addition to Ngati Raukawa, groups from Taranaki continued migrating to Te Upoko o te Ika. More Te Atiawa people, fleeing Waikato attacks, migrated south late in 1832, in a group which may have exceeded 2000 people. These incoming Te Atiawa became known as the Ngamotu people after their last place of residence in Taranaki, and included Ngati Te Whiti, Ngati Tawhirikura, Te Matehou, and other hapu of Te Atiawa. They were accompanied by further Ngati Tama and Ngati Mutunga people. This migration, known as Tama te Uaua, was led by the cousins Te Wharepouri and Te Puni, their younger relative Wi Tako Ngatata, and their elder kinsman Rauakitua.[39] Some of the groups involved in Tama te Uaua may have already migrated south, returned to Taranaki, and then remigrated south in Tama te Uaua once more.

With Te Rauparaha's approval, the Ngamotu people joined their Te Atiawa kin at Waikanae, but some Te Atiawa moved on to Te Whanganui a Tara, having been invited to settle at Pito-one by Ngati Mutunga relatives. It will be recalled that Ngatata i te Rangi of Te Atiawa had already settled at Te Whanganui a Tara with Ngati Mutunga around 1825. Te Atiawa gained further rights around the harbour after some Ngamotu people, settled at Waikanae, fought at Heretaunga against Rakaiwhakairi and Ngati Kahukuraawhitia.[40] These were the only two hapu of the Whatonga-descent peoples who remained in the area around Te Whanganui a Tara, and it seems likely that they were expelled from Heretaunga at this time, retreating to Wairarapa. They may, however, have raided into Heretaunga as late as 1840 (as discussed below), and Rakaiwhakairi were not finally expelled from the Kapiti Coast (where they had also been living) until after the battle of Haowhenua in 1834.[41]

The Te Atiawa attack on the Whatonga-descent people in Heretaunga avenged the death of a Ngati Mutunga chief, and in gratitude Ngati Mutunga gifted Whiorau (Lowry Bay) and Waiwhetu to the Ngamotu people.[42] After about a year at Waikanae, a large number of Ngamotu went to take up this gift, and began to live around Whiorau and Waiwhetu. They had not been there long when some Te Atiawa were killed by Wairarapa people. Te Wharepouri and Te Puni went to Wairarapa to avenge these deaths, but found the Wairarapa

38. Ballara, 'Te Whanganui-a-Tara', p 20
39. Ibid, p 22
40. Ibid, pp 22–23
41. Ibid, p 25
42. Ibid, p 23

valley virtually deserted, the Wairarapa people having gone to the Mahia Peninsula under their chief Nukupewapewa. Te Wharepouri and Te Puni decided that Wairarapa would make a good home for their people, and they settled there for about three planting seasons, before the Wairarapa people returned from Mahia and forced them out. However, Ngamotu had left some of their people behind at Waiwhetu to maintain their ahi ka, so they were able to return there.[43] Thus, by around the spring of 1835, Ngamotu made what was to be their final migration, and moved back into Te Whanganui a Tara.

Tama te Uaua was followed by another major migration from Taranaki, Te Heke Paukena, which consisted of members of the Taranaki tribe and Ngati Ruanui, together with Te Atiawa under Te Rangitake (who was later to take the name Wi Kingi).[44] These new migrants quickly became embroiled in the politics of the increasingly fractious alliance of the incoming tribes.

### 2.3.10 The disintegration of the alliance

At the time of Tama te Uaua heke, Te Rauparaha's mana over the incoming tribes was still acknowledged.[45] However, the tribes who had conquered and were now physically occupying parts of Te Upoko o te Ika were starting to assert some independence and occupancy rights against Ngati Toa and Te Rauparaha. The incoming tribes had combined against those they found in possession of Te Upoko o te Ika, but once the external threat from the Whatonga-descent peoples had diminished, the incoming tribes dissolved back into hapu and other groupings, and began to compete amongst themselves. This was perhaps a more normal customary state than the loose alliance Te Rauparaha had maintained up to this point.

The arrival of Ngati Raukawa in the region increased the desire for independence from Te Rauparaha on the part of the Taranaki tribes. Ngati Raukawa were Te Rauparaha's kin, but they were traditional enemies of the northern Taranaki tribes. Their presence in the region therefore put immediate pressure on the northern Taranaki tribes, and eventually led to Ngati Mutunga's departure for the Chatham Islands.

The events leading to Ngati Mutunga's departure for the Chatham Islands give some sense of the breakdown in the alliance of the incoming tribes. Relations were deteriorating particularly rapidly on the Kapiti Coast, where competition for space and resources was most fierce and where, in Ballara's words, 'Rights were not clearly defined; mana over the land and people had been recently acquired through conquest and was open to challenge.'[46] This led to the Haowhenua battle of 1834. On one side of this battle were Ngati Raukawa; their

43. Ibid, p 24
44. Ibid, p 25
45. Ibid, p 22
46. Ibid, p 24

Whatonga-descent allies (Rangitane, Ngati Apa, and Muaupoko); Tuwharetoa, Ngati Maru, and Ngati Maniapoto from the north; and the Ngati Kimihia hapu of Ngati Toa under Te Rauparaha, who came to the aid of his Ngati Raukawa kin, albeit reluctantly. Their opponents were Te Atiawa, assisted by Ngati Mutunga, the recent migrants of Te Heke Paukena (including Taranaki and Ngati Ruanui), and, at the last minute, the Ngati Te Maunu hapu of Ngati Toa under Te Hiko, son of Te Peehi.[47] The battle of Haowhenua was inconclusive and was followed by withdrawals on both sides. Ngati Raukawa temporarily retired to Rangitikei, while Te Atiawa pulled out of Porirua. Ballara says that the last remnants of the Whatonga-descent peoples Hamua and Rakaiwhakairi also withdrew from the Kapiti Coast at this time.[48]

The Ngati Tama leader Te Kaeaea took this chance to try and gain some of the recently abandoned land. Twice Te Rauparaha and Te Rangihaeata had to drive Ngati Tama away: once from Paremata, and once from Mana Island. It was because of this obstinacy that Te Rangihaeata gave Te Kaeaea the name 'Taringa Kuri', or 'Dog's Ear, because, like a wilful dog, he refused to heed the expressed wishes of Te Rangihaeata'.[49] This is the name by which he most often appears in the later record.

The people of the Taranaki tribe and Ngati Ruanui who fought at Haowhenua moved on to settle at Te Aro, around what is now Courtenay Place. Ngatata i te Rangi allowed Taranaki and Ngati Ruanui to settle between Te Aro and Waitangi Streams (roughly between present-day Taranaki Street and Kent and Cambridge Terraces).[50]

### 2.3.11 Ngati Mutunga leave Te Whanganui a Tara

The next great migration that occurred was not into the area but out of it. Ngati Mutunga had been feeling insecure since the arrival of Ngati Raukawa. This insecurity was heightened by Haowhenua and by the fact that some of their Ngati Tama allies at Kaiwharawhara had already returned to Taranaki. Moreover, Ngati Mutunga's relationship with the Ngati Kimihia hapu of Ngati Toa was beginning to break down. Ngati Mutunga's chief Pomare was married to Tawhiti, Te Rauparaha's niece, but this marriage ended after Haowhenua. Tawhiti's brothers desecrated the grave of Pomare's brother, who had been slain in the battle, and as a result Pomare sent Tawhiti away.[51]

Ngati Mutunga at Te Whanganui a Tara gathered to discuss what they could do to escape the rising tensions. With reports of the abundance of the Chatham Islands and the pacifist nature of the Moriori there from Maori who had visited the islands on whaling ships, a plan was formulated to seize a ship they knew to be approaching the harbour, and to depart for

47. Ballara, 'Te Whanganui-a-Tara', p 24; doc M1, pp 70–71; doc A41, pp 23–24; doc M7, pp 173–175
48. Ballara, 'Te Whanganui a Tara', pp 24–25; doc M1, pp 70–72; doc M7, p 175
49. Ballara, 'Te Whanganui a Tara', p 25
50. Ibid
51. Ibid; Ballara, 'Wiremu Piti Pomare', pp 348–349

the Chatham Islands in it. On 26 October 1835, the *Rodney* sailed into the harbour, and was lured to Matiu (Somes Island), where the crew was captured by Ngati Mutunga and not released until the captain agreed to take Ngati Mutunga to the Chatham Islands. The ship was prepared with supplies, and on 14 November left for the Chatham Islands carrying 500 Ngati Mutunga, Ngati Tama, and some members of the Taranaki tribe.[52]

The remainder of Ngati Mutunga waited on Matiu with the second mate of the *Rodney* as hostage for the ship's return. It was at this time, in between the two voyages to the Chathams, that the Ngamotu Te Atiawa people returned from Wairarapa, having been forced out by the Wairarapa tangata whenua tribes. The Wairarapa people had captured Te Wharepouri's wife, sister, and niece after a battle called Tauwhiriata, and many Ngamotu people had been killed. The Ngamotu people were thus looking for a safer permanent base, and they had heard while in Wairarapa that Ngati Mutunga were planning to leave. Te Wharepouri had gathered those of his people left (who numbered around 300 or 400), and they returned to Te Whanganui a Tara, where they found the remaining Ngati Mutunga on Matiu preparing to depart for the Chatham Islands.[53]

Some time before 30 November, when the remainder of Ngati Mutunga and some more Ngati Tama left on the *Rodney*'s second voyage, a meeting took place on Matiu at which Ngati Mutunga transferred their rights to land around the harbour.[54] There are many different accounts of the agreements reached at this meeting, but most accept that some kind of formal handing over of Ngati Mutunga's rights did occur. One version, mentioned by Ballara, is that there was a formal panui (proclamation) gifting Ngati Mutunga's lands to certain Te Atiawa and Taranaki chiefs.[55] As Ward states:

> While it is clear that there were other avenues by which Te Atiawa (and others) succeeded to lands formerly occupied by Ngati Mutunga, there are very frequent references giving a significant place to the Matiu Island meeting and the agreements made there with Wharepouri and the groups returning from the Wairarapa. Unless Te Puni and many others were all lying there was a formal 'panui' at the meeting.[56]

Moreover, it seems that Ngati Toa were neither involved nor greatly interested in this new arrangement. Te Atiawa and Ngati Mutunga were now able to act independently of Ngati Toa, while Ward suggests that, at the time of Ngati Mutunga's departure, 'Te Rauparaha was relatively indifferent about Te Whanganui-a-Tara, then unimportant as a trading harbour'.[57] However, Te Wharepouri of Te Atiawa did pay a visit to Kapiti before settling at Pitone. The purpose of this visit is not known. Ballara asks: 'Was this a courtesy visit to Te

52. Ballara, 'Te Whanganui-a-Tara', p 26; doc M1, p 77
53. Ballara, 'Te Whanganui a Tara', pp 26–28
54. Document M1, pp 79–84; doc A41, pp 25–26; Ballara, 'Te Whanganui a Tara', p 28
55. Ballara, 'Te Whanganui-a-Tara', p 28
56. Document M1, pp 83–84
57. Ibid, p 84

Rauparaha acknowledging his mana over the new arrangements, or was Te Wharepouri assuring himself that his people would not suffer for the unresolved "take" between Ngati Toa and Ngati Mutunga?"[58]

It also seems clear from the record that Ngati Mutunga intended their departure from Wellington to be permanent, since they burnt their whare and the bones of their ancestors.[59] Ward usefully sums up Ngati Mutunga's departure, and the implication of this for any future Ngati Mutunga rights in the harbour:

> All in all, the weight of the evidence about Ngati Mutunga in Whanganui-a-Tara is that, despite being the principal conquerors of the area from Ngati Kahungunu, they considered their situation unrewarding and somewhat precarious, made a deliberate decision to move to what they believed to be a more lucrative and secure place, and did so, burning their buildings and the bones of their dead. This suggests a lack of any intention to return. Some Ngati Mutunga individuals did remain after 1835 and some returned, but there is no indication of a revival of a Ngati Mutunga group presence in Whanganui-a-Tara up to the end of the 1840s.[60]

The land arrangements in the harbour underwent another change soon after Ngati Mutunga's departure. Members of the Taranaki tribe from Te Aro attempted to take over Ngati Mutunga's abandoned cultivations at Ngauranga, but Te Atiawa drove them away and took possession of Ngauranga themselves. These actions were not resisted by Taranaki, who withdrew to the area around Te Aro.[61]

### 2.3.12 Continuing insecurity, 1836–39

By 1836, the situation in the harbour was still far from secure. Ngati Mutunga, who, with Ngati Tama, had taken Te Whanganui a Tara, Heretaunga, and the south-west coast from Ngati Ira, Rakaiwhakairi, and Ngati Kahukuraawhitia, were themselves gone. Although many Ngati Tama had also left for the Chathams, others remained at Kaiwharawhara and environs and at Ohariu. Taranaki and Ngati Ruanui were living between the Te Aro and Waitangi Streams. Various Te Atiawa hapu were in occupation from Waiwhetu to Kumutoto: Ngati Tawhirikura at Ngauranga, Pito-one and Waiwhetu; Ngati Te Whiti at Kumutoto; and Te Matehou at Pipitea. Te Matehou hapu also used Ngati Mutunga's abandoned seasonal occupation sites at Orongorongo.[62] It should be noted that pa may have been occupied by more than one group, which makes it difficult to divide pa neatly between groups.

58. Ballara, 'Te Whanganui a Tara', p 28
59. Document A41, p 25
60. Document M1, p 175
61. Ballara, 'Te Whanganui a Tara', pp 28–29; doc A41, pp 26–27
62. Document M1, pp 167, 179; doc A41, p 27

The continuing sense of insecurity in this period is apparent from the fact that, as Ballara points out, 'Matiu was the refuge of Port Nicholson during these troubled years as it had been for Ngati Ira at the beginning of the century'.[63] Te Atiawa remained unsettled for a time, and, in March 1836, Te Wharepouri tried unsuccessfully to hijack a trading vessel to take Te Atiawa to join Ngati Mutunga in the Chathams. Te Atiawa were also keeping their claims in Wairarapa warm with visits there.[64] However, from the time of Ngati Mutunga's departure onwards, Te Atiawa would remain at Te Whanganui a Tara.

It was this unsettled situation, with a number of groups possessing still inchoate rights, which those on board the New Zealand Company ship the *Tory* encountered in 1839. At that time, specific parts of the Port Nicholson block were settled through the ahi ka of Ngati Tama, Taranaki, Ngati Ruanui, Te Atiawa, and Ngati Toa (their ahi ka emanating out from the Porirua basin to Ohariu and Heretaunga). However, it is not at all clear who controlled the large areas of the block which had been conquered but over which the incoming tribes had not yet established ahi ka. Take raupatu over what was to become the Port Nicholson block had been established by all the collective of incoming tribes, and the previous inhabitants were gone (though Ngati Kahungunu from Wairarapa still contested the eastern boundary at this stage). Ahi ka and other rights were still developing, however, and the arrival of the *Tory* impeded this development. The New Zealand Company, being ignorant of the complex history of the area, proceeded immediately to transact with Te Atiawa for the harbour and surrounding area, as the next chapter explains. This transaction was followed by further changes in the relationships between Maori groups living in the vicinity of Port Nicholson.

By October 1839, the situation was again deteriorating on the Kapiti Coast, probably in part because of resentment towards Te Atiawa for transacting with the New Zealand Company.[65] When Ngati Raukawa attacked Te Atiawa in the battle of Te Kuititanga at Waikanae, the split within Ngati Toa between the Ngati Kimihia and Ngati Te Maunu hapu re-emerged. The attackers were decisively defeated, and, although Te Rauparaha arrived late at the battle in support of Ngati Raukawa, Te Atiawa saw Te Kuititanga as a victory over Te Rauparaha and as a final severing of their obligations to him.[66] The incoming tribes were now fragmented and openly competing amongst themselves.

### 2.3.13 Peace agreements with Ngati Kahungunu

There was also instability on the eastern flank of Te Whanganui a Tara. By 1840, peace was still not secure in the harbour district or Heretaunga, and raids from Wairarapa into Heretaunga continued until at least February 1840.[67] However, a peace agreement between Te

63. Ballara, 'Te Whanganui a Tara', p 28
64. Ibid, p 30
65. Ibid, p 31; doc M7, pp 191–192
66. Document M1, p 107
67. Ibid, p 101

Atiawa and Ngati Kahungunu of Wairarapa was negotiated in 1840. This agreement resulted from a journey Te Wharepouri undertook to Hawke's Bay (where most of the Wairarapa people had taken refuge). Te Wharepouri wished to negotiate for the release of his niece Te Kakapi, who, along with Te Wharepouri's wife, Te Urumairangi, had been captured by Nukupewapewa at the battle of Tauwhiriata in 1835. Nukupewapewa released Te Urumairangi, who told her husband that the Wairarapa chiefs were prepared to negotiate for Te Kakapi's return.[68]

On his arrival in Hawke's Bay, Te Wharepouri found that Nukupewapewa had recently drowned and that his successor, Tutepakihirangi, insisted that Te Atiawa abandon all claim to Wairarapa in return for Te Kakapi's release. A group of Ngati Kahungunu chiefs accompanied Te Wharepouri back to Wellington in July 1840, and it was probably during this visit that a peace agreement was reached between Ngati Kahungunu and Te Atiawa. This agreement meant that Ngati Kahungunu abandoned their claims west of the Rimutaka and Tararua Ranges, while Te Atiawa gave up any claim to the east of those ranges.[69] There is a suggestion that this boundary borrowed from the New Zealand Company's Port Nicholson deed boundary of 1839. Ballara notes that 'This Maori peace, arranged after the settlement of the harbour by Europeans, thus used the facts of land sale events as part of the final arrangement of Maori tribal boundaries'.[70] Although the peace agreement was not binding on Rangitane and others living west of the divide, it did mean that they would no longer have the support of the Wairarapa people for their claims.[71] The peace agreement, which was sealed by marriages between Te Atiawa and Ngati Kahungunu, was not broken after 1840, although the two sides remained very wary of each other for some years.[72]

Ngati Toa had also made peace with Ngati Kahungunu some time earlier, ruling out any Ngati Kahungunu claims on the west coast of Te Upoko o te Ika and any Ngati Toa claims to the east of the Tararua Range.[73] In addition, it appears that Ngati Tama made some kind of separate peace with Ngati Kahungunu in 1843, when some Ngati Tama returned from the Chatham Islands.[74] Thus, through peace agreements with Ngati Toa, Ngati Tama, and Te Atiawa, Ngati Kahungunu and the Whatonga-descent groups they represented (ie, those living east of the Tararua and Rimutaka Ranges) ruled themselves out of claims to the Port Nicholson block. Rangitane may or may not have been covered by the 1840 peace agreement, but they did not reassert their independent presence in the Port Nicholson block after 1840. It is possible that Rangitane raids into Heretaunga may have continued after 1840, but such raids would not equate to reviving lost ahi ka rights.

68. Ballara, 'Te Whanganui-a-Tara', p 32
69. Document M6, pp 474–476; Ballara, 'Te Whanganui-a-Tara', pp 32–33; doc M1, pp 121–124
70. Ballara, 'Te Whanganui a Tara', p 33
71. Document M6, pp 475–476
72. Ibid, p 476; doc M1, p 124
73. Burns, pp 121, 155; doc M1, p 100; doc H5, p 11
74. Document M1, p 124

Donald McLean, as the chief government land purchase officer, had some doubts that all claims of the Wairarapa people to the land west of the Tararua and Rimutaka Ranges had been totally extinguished in 1840. In 1853, in two cover-all deeds, he transacted with 'Ngatikahungunu' chiefs (including Hemi Te Miha, Te Kekerengu's son) for land which fell within the Port Nicholson block. The first deed recorded a payment of £100 for 'all our lands which have been sold by the Ngatiawa and Ngatitoa tribes' at Wellington, Porirua, and Heretaunga, while the second recorded that £2000 would be paid for a block which included land at Cape Turakirae and the Orongorongo Valley, within the Port Nicholson block boundary.[75] McLean also transacted with Ngati Toa, Ngati Awa, and Ngati Tama chiefs for all their claims to Wairarapa, thereby attempting to terminate any disputes about that land.[76] As Ward has suggested, these transactions were typical of McLean's 'regular practice of the mid to late 1850s of sweeping up the various claims and interests of successive groups over the areas of Crown purchase . . . [I]t is also likely that the claims were essentially "mana" claims, a demand by various chiefs that they and their former association with the land be recognised by the Crown in its purchase processes'.[77] Heather Bauchop suggests that these payments may have been intended as a 'lubricant' for the big Wairarapa purchases which followed rather than being primarily concerned with Port Nicholson.[78] The Tribunal concurs that it is most likely that these payments were cover-all payments, recognising general mana and attempting to sweep away all potential purchase problems, rather than constituting a recognition of rights.

### 2.3.14 Ngati Toa and Ngati Rangatahi

Ngati Toa had relatively secure ahi ka in the Porirua district by 1840. However, the arrival of the New Zealand Company at Port Nicholson further diminished Ngati Toa's influence at Te Whanganui a Tara. Previously, Ngati Toa had monopolised trade with the Pakeha, and controlled the access of incoming tribes to European goods.[79] Te Whanganui a Tara had been a trade backwater, but the New Zealand Company's decision to establish a settlement there threatened Ngati Toa's dominance of trade while at the same time giving Te Atiawa the enhanced security and independence that easy access to European weapons and the presence of Europeans provided. In Maori terms, this enhanced the mana of Te Atiawa at Te Whanganui a Tara. It also undermined Ngati Toa's mana as the dominant economic and military power in the region, and suddenly put their areas of residence outside the new sphere of importance.

75. *Turton's Deeds* (doc A27), pp 266–268
76. Ibid, p 306
77. Document M1, p 126
78. Document H5, p 21
79. Document M7, pp 171–173; doc H8, pp 93–94

Nevertheless, Ngati Toa continued to exercise mana within the Port Nicholson block, in part by means of their influence over Ngati Rangatahi in Heretaunga. Ngati Rangatahi, seemingly acting on the orders of Ngati Toa, had been using Heretaunga as a resource base prior to 1839, and had begun developing ahi ka rights there. They were probably further up the valley than Te Atiawa interests extended. Ngati Rangatahi came south with Ngati Toa in the Tataramoa heke, and probably moved into Heretaunga some time in the early 1830s. They were granted rights there by Te Rauparaha and Te Rangihaeata in return for helping to clear the area of the Whatonga-descent peoples. An 1842 report by the New Zealand Company's own protector of aborigines, Edmund Halswell, indicated clearly that he believed Ngati Rangatahi's rights to Heretaunga predated the arrival of the company. Ngati Rangatahi left Heretaunga temporarily around 1839, after a Ngati Toa chief placed a rahui on the area, but had returned by 1841.[80] These events are discussed further in chapter 9.

## 2.4 Customary Law

Before turning to a discussion of customary law in relation to the statements of claim, it is necessary to set out our understanding of that customary law. This section elaborates on issues discussed at section 2.2.

### 2.4.1 Mana and take raupatu

Mana is a difficult concept to define in the English language and will only be dealt with briefly here. People of mana may be born with it, owing to the superiority of their descent line from the gods and their ancestors; they may acquire it through knowledge and skills, deeds and actions; or, they may accrue mana by both birth and achievement. Mana comes from the gods and the ancestors through the land to the tangata whenua by whakapapa. Tangata whenua establish their relationship with the land through burying their tupuna and the placenta (also known as whenua) of their newborn in it, and through naming it, cultivating it, and using its resources.

The Waitangi Tribunal's *Whanganui River Report* provides a useful discussion of the nature of mana and of the relationships that cement it. That Tribunal cited the evidence of Professor James Ritchie that the mana of a rangatira was founded on whakapapa, and on personal relationships rather than structures. Ritichie called this mana tangata. The Whanganui River Tribunal commented that :

> The lands of the people, then, are defined not by boundaries but by relationships. The identifiable lands of a group of Maori people are the lands of their history, the places where

80. Document M1, pp 31–32, 99–100, 151, 176; doc H4, pp 4, 6, 14, 17

their tupuna are buried, all those lands that they could occupy or defend, or on which they could keep their fires alight.[81]

Thus, there are many layers of rights, at the base of which is the ability to defend one's territory and keep ahi ka alive. The ability to defend one's territory was fundamental to the possession of rights to land, for without this ability, all other rights were lost. Conversely, the ability to take another's rights or lands was also fundamental, for by this action, rights were won. Conquest gave mana and take raupatu to conquering chiefs and tribes. But rights to land derived from conquest had to be enforced and then sustained by laying down those other layers of rights, such as use-rights, kin links, and physical occupation of the land, in order to have ahi ka. It was well understood that conquest not followed by the establishment and defence of ahi ka conferred no lasting rights. If the conquerors did follow up their conquest with ahi ka, then rights derived from conquest would be replaced by rights derived from occupation, and, eventually, from long association. Once established, occupation gradually developed into a relationship with the land.

### 2.4.2 Tangata whenua

Tangata whenua means, literally, people of the land. To claim tangata whenua rights, a group must have ahi ka and ordinarily be the descendants of those who have had ahi ka over that land for a considerable period of time. There must be evidence of group occupation – papakainga, marae, mara, mahinga kai, and urupa. If occupancy is based on conquest, the conquerors must either have displaced the former tangata whenua entirely, and then, if challenged, defended their conquest successfully, or have intermarried with the former tangata whenua. Traditionally, groups coming into an area acquired tangata whenua status through intermarriage with those already possessing it. However, the available evidence does not suggest that there was a significant level of intermarriage in Port Nicholson between the Whatonga-descent peoples and the incoming tribes that replaced them. No descendants of the incoming groups claimed before this Tribunal to be tangata whenua on the basis of intermarriage with the tangata whenua they had replaced, though as we noted above, limited intermarriage did occur at a formal level to cement the peace agreements of 1840.

Those Maori whose ancestral origins lie in Taranaki and Kawhia, and who claim to be tangata whenua in Te Whanganui a Tara and environs today, are not the descendants of the original people of the land. If their claim to tangata whenua rights is valid, then they must have acquired these rights through means other than intermarriage and ancient association. In Te Whanganui a Tara, then, those with ahi ka gradually acquired tangata whenua rights by creating links to the land. Tangata whenua rights begin once secure tenure over specific places is held, growing stronger with the successful holding of those places over time, and

81. Waitangi Tribunal, *The Whanganui River Report* (Wellington: GP Publications, 1999), p 35

the recognition of that tenure by other groups. Tangata whenua rights are enhanced by the forging of a whakapapa link to the land, through the burial of one's kin and the burial of whenua in the whenua. Once this has occurred, then a conquest title to the land has become historical, or as the scholar Te Rangi Hiroa put it, 'ancestral inheritance' is created.[82]

The key is the ability of a group to establish and then hold its new turangawaewae. Thus, to have tangata whenua rights one must have an ongoing physical relationship with the land. Being able to claim descent from an ancestor held in common with a recognised tangata whenua group does not, without ongoing ahi ka, confer tangata whenua rights, though it may confer an enduring, non-proprietorial connection with the land. In fact, both the ancient and more recent history of this district shows that through conquest followed by occupation, new tangata whenua groups were created quite regularly.

Tangata whenua rights therefore require a current ahi ka relationship with the land. But the term 'tangata whenua' is also interpreted more broadly than this rather narrow link to 'rights'. A group could consider that its historical association and whakapapa enables its members to call themselves tangata whenua of an area, even when they no longer have ahi ka in that area. This may be the case, but for the term to be interpreted in terms of ownership rights, it must be related to ahi ka. A group may consider that they are tangata whenua of a whole territory, without claiming 'ownership' of that entire takiwa. Takiwa implies a territory traversed with all kinds of rights, of which ahi ka, and the ability to maintain it, is the most important one. The area which became Port Nicholson was part of a wider takiwa, which we have called Te Upoko o te Ika, but the extent of which remains undefined. This takiwa had different kinds of rights and associations invested in it, belonging to different groups. But only groups with ahi ka have tangata whenua rights to the areas they can occupy, use the resources of, and control.

In saying this, we recognise that tangata whenua also has a broader meaning, and that tangata whenua *connections* remain for all who can claim them through whakapapa and historical association, but tangata whenua *rights* are based on current ahi ka. Tangata whenua rights imply 'ownership'; tangata whenua connections do not imply ownership. Tangata whenua rights, and any sense of 'ownership' that went with them, were lost if ahi ka was lost by conquest or abandonment. However, tangata whenua historical connections can remain forever.

## 2.5 The Whatonga-Descent Peoples of Te Whanganui a Tara and Environs

The descendants of Whatonga and other ancestors occupied Te Upoko o te Ika for centuries. This was a large grouping, comprised of many different hapu and iwi. 'Whatonga-descent'

82. Te Rangi Hiroa (Sir Peter Buck), *The Coming of the Maori*, 3rd ed (Wellington: Maori Purposes Fund Board, 1949), pp 380–381

may not be a label they would have given themselves, but it enables distinction between the earlier occupants of Te Upoko o te Ika and those who arrived from the 1820s onwards. Of this Whatonga-descent group, the descendants of Tara were known as Ngai Tara. Ngai Tara, however, became subsumed within later tribal groupings. Muaupoko and Rangitane are the only Whatonga-descent groups that claim before this Tribunal.

### 2.5.1 Muaupoko

There were two Muaupoko groups claiming before this Tribunal. With regard to key customary tenure issues their claims were very similar, and will not be dealt with separately. Muaupoko state that they are direct descendants of Tara, and presented whakapapa showing their links to Tara.[83] Muaupoko assert that their name (which they relate to the head of Maui's fish) is evidence of their association with the region, and claim that they shared occupation of Te Whanganui a Tara with related tribal groups up to and even after 1840.[84] Muaupoko have claims to the wider territory of Te Upoko o te Ika, and their evidence relating to parts of the territory of Te Upoko o te Ika outside of what became the Port Nicholson block is yet to be heard by the Waitangi Tribunal.

Muaupoko seek to be recognised as the 'true owners' of Te Whanganui a Tara.[85] They claim that their hundreds of years of association with Te Upoko o te Ika could not be undone by what they see as an incomplete conquest by the allied incoming tribes. They acknowledge that, where land was lost through conquest and never reoccupied, 'mana over that land was lost forever'.[86] However, they believe that they were not conquered by the incoming tribes as they stayed in occupation in Te Upoko o te Ika, retreating from the coast to live in the bush.[87] They also claim that evidence of continued raids on Port Nicholson as late as 1839 shows that tangata whenua (including Muaupoko) had not left the area.[88]

### 2.5.2 Rangitane

Like Muaupoko, Rangitane claim descent from Tara, but their eponymous ancestor Rangitane (or Tanenuiarangi) was the son of Tara's brother Tautoki. Rangitane also claim descent from the explorer Kupe.[89] Through these lines of descent, Rangitane claim wahi tapu and other sites of special significance at Te Whanganui a Tara.[90] They claim that Rangitane's rights within the Port Nicholson block had been established over a long period of time, and

83. Document K11; see also doc Q3, p 5
84. Claim 1.16(e); doc K4; doc Q3
85. Document Q3, p 14
86. Ibid, p 7
87. Claim 1.16(e), pp 6–8; doc K4, p 2; doc Q3, p 10
88. Document Q3, p 12
89. Document N7, p 10
90. Claim 1.11(a), pp 4–5; doc H41(a); doc N7, pp 6–8, 26–28

could not be extinguished by the short period of occupancy of the incoming tribes.[91] Rather, they claim that these ancient rights were only temporarily disrupted by the arrival of the incoming tribes, and could have been revived 'but for the Port Nicholson acquisition'. They maintain that the Crown's view of customary law is 'unnecessarily narrow, restrictive and impractical'.[92]

Rangitane further claim that the Crown should have investigated, confirmed, and respected the rights of the previous inhabitants after 1840.[93] Specifically, counsel for Rangitane stated that land is the basis of all identity, and that with the loss of land comes the loss of rights 'under and over that land, the loss of tino rangatiratanga and the attendant loss of mana'.[94] Rangitane thus claim that the Crown failed to protect their tino rangatiratanga by not recognising their rights after 1840.[95]

Rangitane accept that the incoming tribes had begun to assert a clear primacy over the region during the period 1824 to 1834, and that these iwi have in the past 170 years established and maintained customary rights at Te Whanganui a Tara.[96] But Rangitane maintain none the less that they have retained unextinguished rights of association and historical connection with Te Whanganui a Tara and, in particular, customary rights over their sacred sites.[97] In addition, Rangitane claim that they have revived themselves as an iwi at Te Whanganui a Tara through acknowledgement by current local bodies and Crown representatives, and by claiming before this Tribunal.[98]

### 2.5.3 Crown submissions

In its submissions, the Crown did not involve itself in debates regarding the nature of Maori customary tenure. Crown counsel stated that the Crown takes no position on events prior to 1840 or on the displacement of the former inhabitants.[99] Crown counsel noted that 'the former occupants' did not have a 'material presence' by 1840, nor had they asserted a claim before the Spain commission in 1842–43. Furthermore, counsel for the Crown asserted that raiding into Heretaunga from Wairarapa up to 1840 does not establish a clear claim to continued possession of the land.[100] Crown counsel noted, however, that the Crown had been prepared to give some recognition to the claims of earlier inhabitants of Port Nicholson through the 1853 payments to 'Wairarapa Maori' to extinguish any remaining interests they

91. Document N7, pp 8–9, 32; doc Q4, p 10
92. Document Q4, pp 10–11
93. Document N7, pp 75–83
94. Ibid, pp 85–86
95. Claim 1.11(a), p 13; doc H40, pp 9–10; doc N7, p 86
96. Document H40, p 7; doc N7, pp 8, 32
97. Document N7, pp 8, 38
98. Ibid, pp 3–5, 9; doc Q4, p 4
99. Document P6, p 53
100. Ibid, p 54

might have had in the Heretaunga, Wellington and Porirua districts.[101] The implication seems to be that the Crown considers that this payment finally extinguished any rights which may have existed up to that point. In relation to contemporary Crown policy, Crown counsel asked the Tribunal to consider how the Crown could meet Rangitane's request for acknowledgement of their ancient association, especially when even Rangitane claimants have acknowledged that this is something for claimant groups to resolve themselves.[102] Regarding Muaupoko claims, Crown counsel merely restated that the Crown takes no position on the validity of 'assertions of long occupation before the invasions of the 1820s'.[103]

The Crown concluded its brief discussion of Rangitane historical claims with the following passage:

> It is not necessary to enter into the question of what customary rights conquest followed by occupation might confer . . . Clearly, the Crown was obliged to deal with Maori society as it found it. It could not have been reasonably contemplated that the Treaty would require the Crown to unravel the merits of ancient disputes and embark upon the exercise of displacing 'conquerors' and installing groups who had long since been driven from their lands.[104]

This would appear to be the Crown's position vis-à-vis all claims based on ancient occupation, and perhaps even on take raupatu – 'Maori society as it found it' seems to refer to those found in physical occupation on the ground.

These comments were virtually all the Crown had to say about events and rights prior to 1840. Otherwise, the Crown's closing submissions on what it terms the 'overlapping claims' focus mainly on events at Heretaunga from 1844 to 1846 (which we consider in chapter 9).

### 2.5.4 Tribunal consideration

Both Muaupoko and Rangitane claim an ancient association with Te Whanganui a Tara which could not be destroyed in the short period between the arrival of the incoming tribes and the intervention of the Crown. However, neither Rangitane nor Muaupoko, the only claimants from the 'Whatonga-descent' grouping of tribes, could provide any evidence that they were in occupation or used resources within the Port Nicholson block after 1840, or even for the period immediately before 1840. They undeniably have an ancient association with Te Upoko o te Ika, and, up to the 1820s, the related peoples of Ngati Ira were living in what became the Port Nicholson block, but none of Ngati Ira, Rangitane, or Muaupoko rekindled ahi ka at Port Nicholson after 1840. The Whatonga-descent peoples had lost their lands by the raupatu of the incoming tribes before the advent of the Crown, and it is not in the

101. Ibid, p 55
102. Ibid, p 56
103. Ibid
104. Ibid, p 55

power of the Crown to restore rights lost in such a way. However, we do consider it appropriate that the ancient history of Te Whanganui a Tara and environs, and its occupation over several centuries, should be publicly recognised, a matter which we take up in our final chapter.

## 2.6 Taranaki and Kawhia Tribes

The other major set of claimants before this Tribunal are from different descent groups altogether. These people migrated into Te Upoko o te Ika from Kawhia, and from Taranaki, in a loose alliance of kin groups. We have referred to them in this chapter as 'the incoming tribes'. Their names are Ngati Toa (also known as Ngati Toa Rangatira), Ngati Rangatahi, Te Atiawa, Ngati Tama, Ngati Mutunga, Taranaki, and Ngati Ruanui (Taranaki and Ngati Ruanui have not submitted a separate claim as part of this inquiry).

### 2.6.1 Ngati Mutunga

Counsel for Ngati Mutunga claimed that Ngati Mutunga established rights at Port Nicholson in 1825–35, conquering the former inhabitants and gaining 'firm control' of the harbour.[105] Counsel for Ngati Mutunga contended that as Maori custom and law are matters of rangatiratanga and were taonga to Maori, they are guaranteed to Maori by the Treaty of Waitangi. Therefore, it was submitted that the Crown had to consider the situation in 1840 at Port Nicholson from a Maori customary perspective.[106]

Counsel for Ngati Mutunga contended that Ngati Mutunga probably did not gift their rights to Te Atiawa by way of panui before their 1835 departure for the Chatham Islands, but that even if they had done so, this would have placed a reciprocal obligation on Te Atiawa to hold the land for them. Furthermore, it was stated that any such panui would have been a gifting of occupation rights and use of resources, not a gifting of overall conquest rights. It was submitted that it was contrary to Maori custom to transfer land in a way that totally extinguished all rights to land, and that the act of making a gift was a way of demonstrating who had the mana. Counsel stated that this was a gift made within the context of a broad kinship group, preserving Te Whanganui a Tara as a strategic point of entry and departure for Ngati Mutunga.[107] Therefore, Ngati Mutunga claim that they could have returned at any time to take up the land again, and that they retained significant interests in Te Whanganui a Tara. Moreover, they say that they continued to assert those interests after 1840, and that the Crown at least partially recognised their interests when it made a payment to their chief, Pomare, in 1844.[108]

105. Document N5, pp 20–22
106. Ibid, pp 15–16
107. Ibid, pp 22–23; doc Q8, paras 3.1–7.1
108. Document N5, pp 24–25; doc Q8, paras 7.1–7.2

Counsel for Ngati Mutunga argued that, if Ngati Mutunga's interests were extinguished, it was only by the Crown's blatant disregard for tikanga in relation to gifting, and not by Ngati Mutunga themselves.[109] Counsel contended that the failure to take up a right at a later point does not retrospectively negate the right's prior existence – that is, the fact that they did not return as a group does not mean they did not have a right to do so.[110]

Crown counsel made only brief submissions on Ngati Mutunga's claims. Crown counsel contended that payment to Ngati Mutunga's leading chief Pomare in 1844 (detailed at section 8.2.2) was apparently seen as providing 'suitable recognition' of Ngati Mutunga's interests in the Port Nicholson block, and that no further Ngati Mutunga claims were raised after this point.[111]

The Tribunal is satisfied that a panui did take place on Matiu, but irrespective of whether or not that panui took place, we believe Ngati Mutunga forfeited their rights. The lapse of Ngati Mutunga's rights in the Port Nicholson block came about because Ngati Mutunga forfeited their ahi ka and their take raupatu by burning not only their whare but also the bones of their dead, and in a final act of departure left Port Nicholson in 1835, never returning as a group. Both ahi ka and take raupatu must lapse if not maintained by group occupation. Ngati Mutunga would have had rights had they remained in occupation as a group at 1840, but they did not do so. Though a very few Ngati Mutunga individuals remained in Te Whanganui a Tara and environs, no group right was revived. With their 1835 departure, Ngati Mutunga therefore forfeited both the ahi ka and the raupatu rights that they had held prior to this time.

### 2.6.2 Ngati Toa

Through their counsel, Ngati Toa claimed to have led the collective of tribes that conquered the region. They claimed that, as a result of this conquest, Ngati Toa had established, and still held in 1840, non-exclusive rights and interests over the entire middle New Zealand region, including Te Whanganui a Tara, Heretaunga, and the south-west coast. Ngati Toa claimed that in 1840 they were the dominant economic and political influence in the Raukawa Moana (Cook Strait) region, and were non-exclusive tangata whenua of this area. It was claimed that this right was based on raupatu and on mana, which Ngati Toa say was derived both from military leadership and from their near-monopoly over trade.[112] Ngati Toa claim that the Crown failed to investigate, recognise or take into account these rights and interests and, indeed, took active steps to undermine and suppress Ngati Toa interests and rights.[113]

109. Document Q8, para 2.3
110. Ibid, para 7.3
111. Document P6, pp 52–53
112. Document N8, pp 29–32
113. Ibid, p 38

The crux of Ngati Toa's claim is that the Crown failed to recognise all rights which were not based on physical occupation. Counsel for Ngati Toa acknowledged that other groups had what Ngati Toa called 'primary occupation rights' over the areas they physically occupied and cultivated, but that occupation in a wider sense, such as use of resources, also gave rights, and that these more general rights were ignored by the Crown. It was claimed that in focusing on physical occupation, the Crown disregarded Maori customary law.[114] Counsel for Ngati Toa further claimed, in response to the Crown's closing submissions, that to insist that occupation had to be defined narrowly as physical occupation of every square metre of land is 'merely a reiteration of the "waste lands" argument which was rejected as a basis of acquiring native title'. Ngati Toa counsel noted that, in the *Ngai Tahu Report 1991*, the Tribunal rejected this narrow definition of occupied lands, and the implied notion that Maori owned only those lands on which they resided and cultivated.[115] Further, counsel for Ngati Toa submitted that 'The "waste lands" ideology was applied in practice' in relation to Ngati Toa, since, for the Crown, Maori interests came down to pa and cultivations alone.[116] Ngati Toa counsel further claimed that the Crown's insistence on physical occupation of land flowed on to a failure by the Crown to allocate reserves to Ngati Toa. The Crown also, in counsel's submission, prevented Ngati Toa from physically occupying Port Nicholson after 1840.[117]

Ngati Toa counsel argued that Ngati Toa had raupatu rights as conquerors of the whole Te Upoko o te Ika district, while also acknowledging that this conquest was not entirely a Ngati Toa affair, and that they did not physically occupy much of the conquered territory. Counsel stated that Te Rauparaha's mana, as the leader of the incoming tribes, was 'paramount' for most of the period between the conquest and 1840.[118] Ngati Toa submitted that the land that was not physically occupied, but was under take raupatu, belonged to the collective of Ngati Toa and Taranaki peoples. Ngati Toa kaumatua Ngarongo Iwikatea Nicholson stated that 'it is for that collective to reach consensus as to the extent each of them should be entitled and what the entitlement is to be. They must as a matter of custom (tikanga) recognise one another's contribution in having achieved the goal.'[119] Counsel for Ngati Toa also noted in replying to the Crown's closing submissions that, as the Tribunal had not heard evidence or submissions as to who should represent Maori in any Wellington settlement, the Tribunal 'should not make any recommendations with regard to the appropriate body to arrange a settlement', but should rather 'recognise which groups are entitled to settlement by virtue of customary interests and Crown prejudice to those interests.'[120] In summary, Ngati Toa

114. Document N8, pp 5, 30–31, 42, 49
115. Document Q10, p 11; Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 2, pp 251–264
116. Document Q10, p 22
117. Document N8, pp 5–7, 49
118. Ibid, pp 31–32
119. Document L14, p 25. The Tribunal acknowledges the valuable contribution of Iwikatea Nicholson to the subject of customary Maori rights.
120. Document Q10, pp 42–43

submitted that physical occupation alone is not a sufficient basis for determining customary rights, but that take raupatu, as well as other rights, must also be taken into account.

Ngati Toa's residence lay outside the Port Nicholson block. However, they lived at Porirua, in close proximity to Wellington; they used resources within Heretaunga and Ohariu; and they controlled hinterland and coastal access from the northwest. For these reasons, the Tribunal considers that at 1840 Ngati Toa had ahi ka in the Porirua basin, parts of Ohariu (other parts of which were used or occupied by Ngati Tama), and parts of Heretaunga. We note that their ahi ka rights were not confined to the area of day-to-day living in the kainga or place of habitation, but extended to other areas of association or influence. Ngati Toa had access by way of a track from Porirua to Heretaunga, which enabled Ngati Rangatahi during the 1830s to convey their tribute of food of various kinds (including eels, and also wood or canoes) to Ngati Toa at Porirua. It also enabled Ngati Rangatahi to give early warning to Ngati Toa should there be any further incursion by Ngati Kahungunu into Heretaunga. In addition, Ngati Toa's take raupatu put them in a position to further establish ahi ka over those lands within the Port Nicholson block where no other group had ahi ka.

### 2.6.3 Ngati Rangatahi

Counsel for Ngati Rangatahi made a similar claim to that of Ngati Toa regarding prejudice arising from the Crown definition of occupation on the basis of cultivations and physical occupation alone. Counsel noted that Tribunal member Bishop Manuhuia Bennett had made the point to Crown counsel that Heretaunga would have been seen by Maori as a ngahere (forest) which could be used for birding and other food-gathering activities – that is, a general pataka, or storehouse. Counsel for Ngati Rangatahi continued that 'In a customary sense this was as important to Maori as cultivations were to Europeans.'[121] Crown officials, however, 'did not consider seasonal use of forest as validating an "ownership" claim. Such lands were regarded as wastelands by early settlers', counsel submitted.[122] Ngati Rangatahi acknowledged that they were under the mana of Ngati Toa prior to 1839 and were originally occupying Heretaunga for Ngati Toa, but strongly asserted they were absolved from any obligations to Ngati Toa by the mid-1840s, and that normal Maori customs applied as to their rights to the land they used and occupied.[123] They claimed that the Crown failed to recognise or protect these rights and, indeed, took active steps to expel Ngati Rangatahi from Heretaunga in 1846.[124] Much of the detail regarding Ngati Rangatahi's claims is dealt with in chapter 9 on events in Heretaunga.

121. Document Q5, p 2
122. Ibid, p 4
123. Document H27, p 5; doc N6, pp 3–11; doc Q5, p 5
124. Document N6, pp 33–34

The Crown's closing submissions on what it terms the 'overlapping claims' focus mainly on events in Heretaunga from 1844 to 1846. It is clear from these submissions that physical occupation and cultivation was and is seen by the Crown as the key indicator of customary tenure rights.[125] Crown counsel implied that Ngati Rangatahi did not have rights in Heretaunga since there was no strong evidence that they had had pa, urupa, or cultivations there prior to the 1840s. Crown counsel stated that, after 1840, new customary rights could not be established unless they were based on pre-1840 rights, or were undisputed by other Maori.[126]

The Tribunal considers that Ngati Rangatahi developed ahi ka rights in Heretaunga after 1840, as will be explained in chapter 9.

### 2.6.4 Ngati Tama

There were two Ngati Tama claimant groups before this Tribunal, but the differences between them appear to have more to do with interpretation of whakapapa than with issues which can be addressed by this Tribunal. Both Ngati Tama claimant groups highlighted similar customary tenure issues, and described a similar picture of Ngati Tama's rights: primary interests, derived from physical occupation, at Ohariu and Kaiwharawhara, with other interests in between and surrounding these points.[127] The areas which they enjoyed use of but did not physically occupy were defined by counsel for one of the Ngati Tama groups as 'areas of lower-level influence and interest'.[128]

By 1840, Ngati Tama were established at Ohariu and other settlements on the south-west coast, and at Kaiwharawhara and nearby kainga on the western side of Te Whanganui a Tara. The Tribunal considers that Ngati Tama had ahi ka at Te Whanganui a Tara and the south-west coast at 1840, and also had take raupatu, having participated in the conquest of what became the Port Nicholson block.

### 2.6.5 Te Atiawa

Te Atiawa are the predominant iwi among the beneficiaries of the Wellington Tenths Trust, on whose behalf Makere Rangiatea Ralph Love and Ralph Heberley Ngatata Love submitted the claim which was to become the starting point for this inquiry.[129] In their statement of claim, the Wellington Tenths Trust claims to 'collectively constitute the tangata whenua

125. Document P6, pp 1–4

126. Ibid, pp 11–12. See also the cross-examination of Crown counsel by the Tribunal, which is noted by counsel for Ngati Rangatahi in document Q5 at page 6.

127. Document H39, pp 5–6; doc N4, pp 21–23

128. Document H39, p 6

129. Makere Rangiatea Ralph Love passed away in July 1994. Ngatata Love remarked that, with the passing of Sir Ralph Love, the tenths trust lost its 'rarest of resources', and that his knowledge of Te Atiawa's customary relationship to Wellington was irreplaceable: doc B5, p 3. See also Catherine Love, 'Makere Rangiatea Ralph Love', DNZB, vol 5, pp 292–293.

community of Poneke (greater Wellington) being predominantly Te Atiawa (Ngatiawa) and including the hapu of Te Matehou (Ngati Hamua), Ngati Te Whiti, Ngati Tawhirikura, and Ngati Puketapu'.[130] The statement of claim continues that the claimants 'have maintained the mana o te whenua and ahi ka roa, exclusively since 1835', and that they 'collectively constitute the single tangata whenua iwi of Wellington and which now includes, peoples descended from all the iwi of Taranaki (Taranaki whanui)'.[131]

The tenths trust claimants made only very brief submissions on pre-1840 customary tenure.[132] Their counsel quoted Ballara's view that Ngati Mutunga's 'unchallenged right to large areas of the harbour' was transferred to Te Atiawa and Taranaki in 1835.[133] In counsel's summary of Ballara, this left 'Te Atiawa and allies in rightful occupation' of Te Whanganui a Tara.[134]

The Tribunal considers that Te Atiawa's ahi ka rights are well-established. Te Atiawa created their own ahi ka rights once Ngati Mutunga had departed for the Chatham Islands in 1835 and such rights of Te Atiawa have been reinforced by their continued occupation ever since. Te Atiawa also participated in the general take raupatu as it existed at 1840 through participation in the conquest of Te Whanganui a Tara and environs. Te Atiawa were involved in the conquest of parts of the wider area of Te Upoko o te Ika, and also in parts of the Port Nicholson block.

### 2.6.6 Taranaki and Ngati Ruanui

There is no separate claim before this Tribunal from descendants of the Taranaki and Ngati Ruanui people who were resident at Te Whanganui a Tara. However, some Taranaki and Ngati Ruanui people are represented by the Wellington Tenths Trust claim because their ancestors were included in the beneficiary list for the tenths reserves compiled following the 1888 Native Land Court determination of ownership. Taranaki and Ngati Ruanui developed ahi ka in the area around Te Aro Pa, and also had take raupatu as participants in the conquest of the Port Nicholson block area.

### 2.6.7 Take raupatu in Te Whanganui a Tara and environs at 1840

The Tribunal concludes that those with take raupatu to all lands within the Port Nicholson block that were not covered by ahi ka rights at 1840 were the independent groups who were members of the collective which conquered Te Whanganui a Tara and environs: Ngati Toa, Ngati Tama, Te Atiawa, Taranaki, and Ngati Ruanui. This take raupatu gave them the

130. Claim 1.2(d), p 2; doc 01, p 29
131. Claim 1.2(d), p 2; doc 01, p 29
132. Document 01, pp 32–39
133. Ballara, 'Te Whanganui-a-Tara', p 30
134. Document 01, p 37

potential to further develop ahi ka within the Port Nicholson block. The extent of the lands covered by take raupatu is discussed in chapter 10. Ngati Rangatahi are not included in the take raupatu to Port Nicholson because, by their own admission, they acted on behalf of Ngati Toa and were not fully independent prior to the arrival of the Crown. Nor are Ngati Mutunga included, as they forfeited their take raupatu when they chose not to reoccupy Port Nicholson as a group after their departure in 1835, and could not re-establish it after the arrival of the Crown's peace in 1840.

## 2.7 Tribunal Finding

The Tribunal finds that, at 1840, Maori groups with ahi ka rights within the Port Nicholson block (as extended in 1844 to the south-west coast) were:

- Te Atiawa at Te Whanganui a Tara and parts of the south-west coast.
- Taranaki and Ngati Ruanui at Te Aro.
- Ngati Tama at Kaiwharawhara and environs, and parts of the south-west coast.
- Ngati Toa at Heretaunga and parts of the south-west coast.

These groups also had take raupatu over the remainder lands of the Port Nicholson block, as to which, see chapter 10.

CHAPTER 3

# THE NEW ZEALAND COMPANY DEED OF PURCHASE

## 3.1 Introduction

In this chapter, we relate the arrival of the New Zealand Company vessel *Tory* at Te Whanganui a Tara in 1839. The mission of those aboard was to purchase land in the district for an English settlement. Before describing their arrival in Port Nicholson and the subsequent events, we must first note the background to the company's formation in England and the circumstances surrounding the *Tory*'s departure for New Zealand.

We will also discuss the decision of the British Government in 1839 to appoint and dispatch Captain Hobson as consul and lieutenant-governor of New Zealand.

This will be followed by an account of the purported purchase by the New Zealand Company of some 160,000 acres in the vicinity of Port Nicholson and the subsequent inquiry into the validity of this 'purchase'.

## 3.2 The Company Plan

### 3.2.1 The formation of the New Zealand Company

The New Zealand Land Company, better known as the New Zealand Company, was formally constituted in London on 2 May 1839.[1] It was reconstituted from the New Zealand Association, which had been formed two years earlier, and it claimed the rights of an even earlier New Zealand Company, which had sent an exploratory expedition to New Zealand in 1825.[2] This expedition entered Te Whanganui a Tara in 1826, producing the first charts of the harbour and renaming it Port Nicholson, after the harbourmaster at Sydney.[3] Maori were not aware of this name until 1839. Though the board of the 1839 company was headed by Lord Durham and included several prominent London businessmen, its guiding if somewhat

1. The most recent history of the New Zealand Company is Patricia Burns's *Fatal Success: A History of the New Zealand Company* (Auckland: Heinemann Reed, 1989). See also John Miller, *Early Victorian New Zealand: A Study of Racial Tension and Social Attitudes, 1839–1852* (London: Oxford University Press, 1958), and Michael Turnbull, *The New Zealand Bubble: The Wakefield Theory in Practice* (Wellington: Price Milburn, 1959). The fullest discussion of British policy in relation to the New Zealand Company is in Peter Adams's *Fatal Necessity: British Intervention in New Zealand, 1830–1847* (Auckland: Auckland University Press, 1977).

2. On the original New Zealand Company and the New Zealand Association, see Burns, chs 1, 5, 7.

3. Burns, pp 19–20; doc 19, pp 37, 78–80

erratic genius was the colonial theorist Edward Gibbon Wakefield. The author of numerous works on colonisation and the chief progenitor of a recent settlement of South Australia, Wakefield was largely responsible for setting in train the New Zealand Company settlements of Wellington, Wanganui, and Nelson, and further settlements by off-shoots of the company at New Plymouth, Otago, and Canterbury.

### 3.2.2 Wakefield's theory of colonisation

The settlements in New Zealand were modelled on Wakefield's theory of systematic colonisation. He believed that the prime error in previous colonisation schemes was the failure to charge a sufficient price for Crown land. This had happened particularly in eastern Australia, where 'squatters' had dispersed over a huge area of the interior and laid claim to large tracts of pastoral country to which the Crown had already assumed title. It was impossible to control them, let alone provide the necessary services of government. To combat this problem, Wakefield recommended that Crown land be sold at a 'sufficient' price to provide revenue for surveys, public works, and other services and to fund the immigration of labourers, who would need to work for landowners for several years before they could themselves afford to buy land. The system was supposed to be self-supporting: 'the land itself could be made to pay for its settlement'.[4]

### 3.2.3 The Port Nicholson settlement scheme

The New Zealand Company printed a prospectus for New Zealand on 2 May 1839 and subsequently advertised 990 lots of Port Nicholson land for sale in London. Each lot was to consist of 101 acres – comprising 100 rural acres and one urban acre – at a cost of £1 per acre. All 990 lots were sold by July 1839, before the company's representatives had even arrived in New Zealand to purchase the land from Maori.[5]

The company's obligation was to make 990 lots of 101 acres available to its purchasers. The company's settlement plan for Wellington allowed for these lots, which totalled 99,990 acres of Port Nicholson land, as well as for 11,110 acres in reserves for Maori. (This 11,110 acres for Maori equalled one-tenth of the total 111,100 acres which the company sought at Port Nicholson.)

To give every purchaser an equal chance, a lottery was used to determine the order of selection. This was an ingenious scheme, since it offered all purchasers an equal chance of getting the prime waterfront sites, which were seen as far more valuable than the rural sections. But

4. Burns, p 14; see also Miller, pp 1–5
5. Burns, pp 99–107

the scheme was not all it seemed on the surface, since many of the purchasers were pure speculators who had no intention of migrating to the new colony, let alone employing labourers to help to develop rural land. Nor was that the only problem arising from Wakefield's systematic colonisation and sufficient price.

### 3.2.4 The New Zealand Company tenths

Wakefield had to make 'sufficient' provision for Maori in order to conciliate influential humanitarian opinion in Britain, as reflected in the 1837 report of the House of Commons committee on aborigines, which had roundly condemned the exploitation of indigenous peoples during the process of colonisation.[6] Thus, the company took Maori into account in its colonisation scheme. First of all, it promised to buy the land from Maori, though it considered that a trifling payment would be sufficient, since the main benefit to Maori would come from the reserves which it would create, which would give Maori a significant stake in the developing township. Maori – or at least Maori chiefs and their families – were to have reserved for them urban and rural lots in the proportion of one in 10. In the case of the Wellington settlement, Maori were to be given 110 urban one-acre lots and 110 100-acre rural lots, a total of 11,110 acres. The priority of choice of these 'tenths', as they came to be called, was also to be determined by the London lottery, with a company official drawing on behalf of Maori. The selection on the ground would be carried out by a company official in Wellington.[7]

Company plans were vague on the tenure of the tenths to be reserved for Maori, though it was assumed that initially the land would be held in trust for the Maori chiefs. No provision was made for Maori not of chiefly rank, but it was assumed that they, like the British labourers, would have to earn a living in the employ of their chiefs or colonists and that they could eventually buy land. The company assumed that Maori would surrender their existing habitations and cultivations and move onto their selected tenths. It was a very naïve scheme, but it accommodated humanitarian concerns and was dressed up in the grandiloquent language of the civilising mission. The Maori chiefs, pepper-potted among the British settlers, would profit from the rising value of their land and would acquire the civilised habits and customs of their neighbours. After all, Maori, many of whom had recently adopted Christianity and showed a remarkable affinity for commerce, were already demonstrating a capacity for civilisation – then equated with the lifestyle of upper-class Britons – that was deemed remarkable in a formerly 'savage' people.[8]

6. See Adams, pp 92–93, on the committee on aborigines.
7. Burns, pp 89, 114–115, 158
8. Document C1, pp 1–19. The tenths scheme is discussed in more detail in chapter 12 below.

## 3.3 The *Tory* Expedition

### 3.3.1 A hurried decision

To execute its plan, the New Zealand Company had to act quickly. When the company was formed in May 1839, it was already well known in London that the British Government intended to intervene in New Zealand and acquire sovereignty over some or all of the country. The Government was preparing to send Captain William Hobson, who had recommended such a policy, to give effect to it in New Zealand. Moreover, it was recognised British colonial policy, long exercised in North America, not to allow British subjects to obtain title to land except by a grant from the Crown (often expressed as a Crown right of pre-emption). It was known that this policy would be applied in New Zealand and that the Crown would acquire and sell Maori land at a 'sufficient price', thus creaming off the profit that Wakefield and his associates had hoped to gain for their company.[9] There was a further danger that, with the imposition of Crown pre-emption, all previous transactions with Maori for land would be subjected to an official inquiry. As noted below, the company was informed in June 1839 by Lord Normanby, the Secretary of State for the Colonies, that such an inquiry would take place. As a result, there was a great rush by British colonists and speculators already in New Zealand, or in Sydney or London, to stake out claims to Maori land. The New Zealand Company was a major player in that speculative contest.

### 3.3.2 The *Tory* departs

On 12 May 1839, less than 10 days after the New Zealand Company was constituted in London, Edward Gibbon Wakefield's brother, Colonel William Wakefield, was dispatched aboard the *Tory* on a land-buying expedition to New Zealand. There was a contest to secure New Zealand, only it was not between the British and the Americans or the French, as Edward Wakefield pretended, but between the company and Captain Hobson, who was sent by the British Government later that year on a treaty-making expedition.[10]

Apart from Colonel Wakefield, those on board the *Tory* included Edward Jerningham Wakefield, the 19-year-old son of Edward Wakefield; Ernst Dieffenbach, a German naturalist; Dr Dorset, the principal surgeon to the company; Charles Heaphy, the official artist, aged 18; and Ngati (or Ngaiti) of Ngati Toa, who had been living in Edward Wakefield's household for two years. There was no surveyor aboard.[11]

9. Burns, p 13
10. Turnbull, pp 28–32; Adams, pp 136–142
11. Miller, pp 21–23

### 3.3.3 Colonel Wakefield's instructions

When he left England, Colonel Wakefield was instructed by the company secretary, John Ward, on the general principles he was to apply in buying land from Maori. He was to explain 'with the most entire frankness' that the purchase was intended to establish a settlement of Englishmen, like those at Hokianga and the Bay of Islands, 'or rather on a much larger scale, like the English settlements in New South Wales and Van Dieman's Land'. He was not to complete a purchase until this was 'thoroughly understood by the native proprietors, and by the tribe at large'. He was to be 'especially careful' that all owners of the land approved the bargain and received a share of the purchase money. The boundaries of the land were to be 'most clearly set forth, not merely in words, but in a plan attached to the written contract'. The transactions were to be witnessed, preferably by a missionary, since the 'natives probably attach some peculiar importance to the attestation of a missionary'. Finally, Wakefield was to explain the company's tenths scheme and 'take care to mention in every *booka-booka*, or contract for land, that a proportion of the territory ceded, equal to one-tenth of the whole, will be reserved by the Company, and held in trust by them for the future benefit of the chief families of the tribe'. Wakefield was to explain that, after colonisation had progressed, these tenths would be far more valuable to Maori than the whole of their land had been beforehand. Moreover, these chiefly families would have 'every motive for embracing a civilized mode of life'. 'Instead of a barren possession with which they have parted, they will have property in land intermixed with the property of civilized and industrious settlers, and made really valuable by that circumstance.' The company regarded the tenths reserves as 'far more important to the natives than any thing which you will have to pay in the shape of purchase-money'. However, Wakefield was to attempt to buy land not for 'such mere trifles as a few blankets or hatchets' but by offering such a quantity of goods 'as may be of real service to all the owners of the land'.[12]

## 3.4 The Decision to Send Captain Hobson to New Zealand

### 3.4.1 February to August 1839

The final development of British policy towards New Zealand took place during the six months from mid-February to mid-August 1839.[13] During this period, Lord Normanby held office as Secretary of State for the Colonies. In March 1839, he rejected a proposal made on behalf of the New Zealand Colonization Association (which became the New Zealand Company) that the British Government promote or support a Bill in the House of Commons to establish a British province in New Zealand. Nor would Normanby support the granting of a charter for a colonisation company. The Government had come to the conclusion that it

12. Instructions to Colonel Wakefield, May 1839 (doc A29, pp 372–374)
13. For a full discussion of this and related topics, see Adams, pp 134–158.

could not 'consistently with the law of nations, exercise the rights of sovereignty in New Zealand without some previous arrangement with the inhabitants'.[14]

In March 1839, the Colonization Association was advised by the Colonial Office that the British Government would take the necessary steps to pre-empt all the land in New Zealand by obtaining the agreement of Maori not to dispose of any land except to the Crown. On learning this, Edward Wakefield urged the association to act immediately to obtain possession of the soil before the arrival of the Crown's representative. The departure date was fixed for 25 April, and, in the meantime, Wakefield was to arrange for the association to be turned into a public joint-stock company. In fact, the departure of the *Tory* was delayed until 12 May 1839, the New Zealand Company having been constituted a week or so earlier.[15]

As historian Peter Adams notes, 'The Colonial Office had been caught out . . . The Colonial Office pleaded ignorance of the intentions and objects of the colonizers and of the impending departure of an expedition to set up a government "independent of the authority of the British Crown".' It appears that the civil servants had not taken seriously prior intimations of the New Zealand Company's intentions. A company official subsequently denied any intention to set up a government in New Zealand.[16]

In June 1839, Lord Normanby advised Lord Durham of the New Zealand Company that Captain Hobson was being sent to New Zealand to negotiate a cession of sovereignty from the Maori inhabitants and to set up a government. An inquiry into land titles would follow, though bona fide and equitable purchases would not be interfered with.[17]

Consideration was given by the Colonial Office as to the appropriate mechanism for establishing a government in New Zealand. It was decided that, rather than seek parliamentary sanction, the boundaries of New South Wales would be extended by letters patent under the royal prerogative to include any territory gained in New Zealand. In sanctioning this, the lords of the Treasury insisted on the need to negotiate with Maori for sovereignty. Any annexation of New Zealand was to be strictly contingent upon territorial cession by Maori being obtained 'by amicable negotiation with, and free concurrence of, the native chiefs'.[18]

On 24 August 1839, Hobson departed for Sydney.[19] He arrived there on 24 December 1839 and was sworn in as lieutenant-governor of any territory which might be acquired in New Zealand. On 19 January 1840, he left for New Zealand, and on 29 January he arrived in the

14. Evidence of Henry Labouchere, Parliamentary Under-Secretary of State for the Colonies, to the 1840 House of Commons select committee on New Zealand (quoted in Adams, p 138)
15. Adams, pp 139–141
16. Ibid, p 141
17. Ibid, p 142
18. Treasury to Stephen, 22 June 1839, CO209/5:96-98 (quoted in Adams, p 151)
19. Adams, p 153

Bay of Islands. The next day, he publicly proclaimed that he had commenced his duties as lieutenant-governor.[20]

### 3.4.2 Normanby's instructions to Hobson

Lord Normanby's instructions of 14 August 1839 made it clear to Hobson that the Maori title to the soil and sovereignty of New Zealand was indisputable.[21] A principal object of Hobson's mission was to take effective measures for establishing a settled form of civil government. He was to treat with Maori for their recognition of the Queen's sovereignty over the whole or any parts of New Zealand they were willing to cede.

If possible, the Lieutenant-Governor was to induce Maori to contract with the Crown that no lands should be ceded by them except to the Crown of Great Britain. He was immediately on his arrival to announce by proclamation addressed to British subjects in New Zealand that the Queen would acknowledge as valid only those titles to land which were derived from or confirmed by a grant in her name.

The instructions recognised that British settlers had already made extensive acquisitions of land from Maori, and that it was likely that, before Hobson's arrival, a great deal more land would have been so acquired. This latter reference appears to be a recognition of the likely outcome of the Wakefield expedition to New Zealand. To deal with this situation, Normanby advised Hobson that the Governor of New South Wales would appoint a commission to investigate and ascertain what lands in New Zealand were held by British subjects under grants from Maori, whether such grants had been lawfully acquired and ought to be respected, and what price had been paid for them. The commissioners were to report to the Governor, who would decide to what extent, if at all, claimants should be entitled to confirmatory Crown grants.

Hobson was then to obtain 'by fair and equal contracts with the natives, the cession to the Crown of such waste lands as may be progressively required for the occupation of settlers'. All such purchases were to be effected by a protector appointed to safeguard the interests of Maori.

Hobson was instructed that all land dealings with Maori were to be conducted with sincerity, justice, and good faith. He was not to purchase from Maori any territory, 'the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence'. Land acquired by the Crown for future settlement was to be confined to such districts as Maori could alienate 'without distress or serious inconvenience to themselves'.

20. Ibid, p 158
21. Normanby to Hobson, 14 August 1839, BPP, vol 3, pp 85–90

Ensuring that these principles were followed was to be one of the first duties of the protector of aborigines to be appointed by Hobson.

## 3.5 Wakefield's Negotiations with Maori at Port Nicholson

### 3.5.1 The *Tory*'s entry into Wellington Harbour

In August 1839, the *Tory* reached Queen Charlotte Sound, and several weeks were spent by those aboard exploring the sounds. On 17 September, Colonel Wakefield learned that a missionary schooner had visited Port Nicholson and that the missionaries had advised the chiefs there not to dispose of any land.[22]

Wakefield decided to cut short his time in the sounds and to proceed to Port Nicholson. He took with him Dicky Barrett, a whaler then living at Te Awaiti in Queen Charlotte Sound, to assist in piloting the *Tory* into Wellington Harbour and to act as an interpreter. Barrett had spent 11 years in New Zealand and was married to a Maori, Rawinia (Wakaiwa) of Te Atiawa.[23] Protector of aborigines George Clarke junior later described Barrett, when acting as Wakefield's interpreter, as speaking 'whaler Maori, a jargon that bears much the same relation to the real language of the Maori as the pigeon English of the Chinese does to our mother tongue'.[24] Notwithstanding Barrett's marked incompetence as an interpreter, Wakefield preferred to use him in this role rather than Ngati of Ngati Toa. Ward, the New Zealand Company secretary, had advised Wakefield that Ngati had been fully briefed on the company plan and perfectly understood the tenths scheme.[25] In truth, how well Ngati understood the scheme is very questionable, since he appears to have had a 'poor' understanding of English.[26]

The *Tory* entered Te Whanganui a Tara on 20 September 1839 and came to anchor in the afternoon near Pito-one (now corrupted to Petone), the pa of Ngati Tawhirikura and Ngati Te Whiti, relatives of Barrett's wife. Prior to anchoring, two canoe-loads of Maori came on board, among them Te Puni and Te Wharepouri.

According to William Wakefield, the Maori 'hailed Mr Barrett as an old friend and companion in danger', and Te Puni 'betrayed the most lively satisfaction at being informed that we wished to buy the place, and bring white men to it'.[27] Barrett, however, put it differently: the chiefs, seeing Rawinia and their children on board, said that they would sell the land to

22. Journal of Colonel William Wakefield, 17 September 1839, extracts (doc A29, p 389)
23. Angela Caughey, *The Interpreter: The Biography of Richard 'Dicky' Barrett* (Auckland: David Bateman, 1998)
24. George Clarke junior, *Notes on Early Life in New Zealand* (Hobart: J Walch, 1903), p 49 (quoted in Burns, p 214). Strictly speaking, George Clarke junior was a sub-protector of aborigines under his father, George Clarke senior, who was the chief protector of aborigines.
25. Instructions to Colonel Wakefield, May 1839 (doc A29, p 373)
26. Burns, p 113
27. Wakefield's journal, 20 September 1839 (doc A29, p 390)

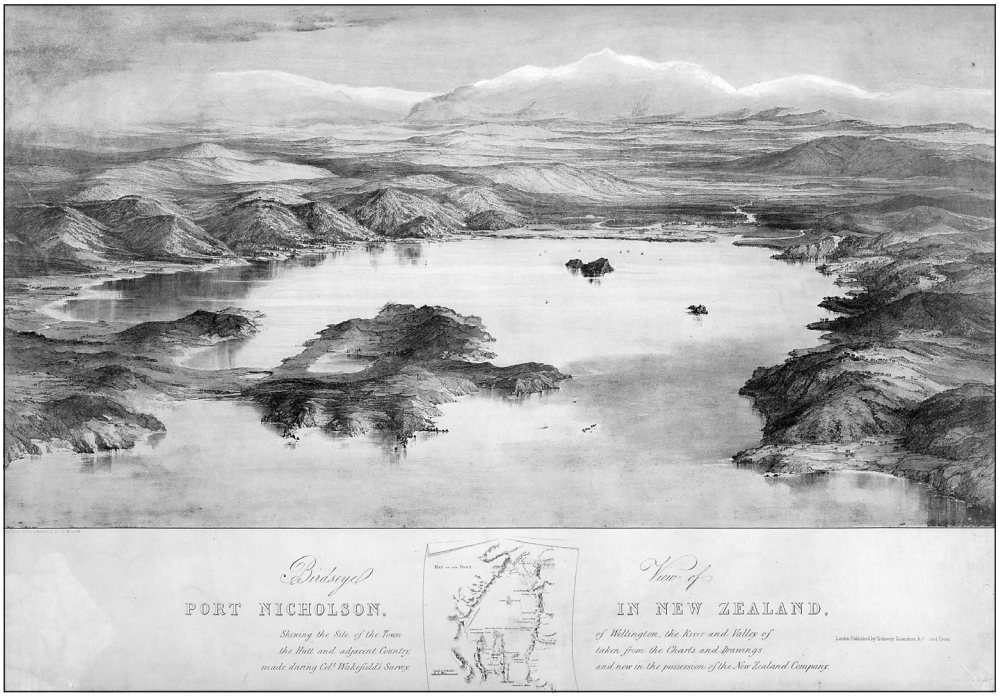



**Figure 1:** ***Birdseye View of Port Nicholson, in New Zealand, Shewing the Site of the Town of Wellington, the River and Valley of the Hutt and Adjacent Country, Taken from the Charts and Drawings Made during Col Wakefield's Survey, and Now in the Possession of the New Zealand Company.*** **This remarkable bird's-eye view of Port Nicholson was drawn by Charles Heaphy soon after he arrived on the *Tory* in 1839, and the lithographic copy was published in 1840. It was no doubt used to entice immigrants to the New Zealand Company settlement. Hand-coloured lithograph by Thomas Allom from a drawing by Charles Heaphy (1820–81). Reproduced courtesy Alexander Turnbull Library, Wellington, New Zealand (c-029-006-b).**

Barrett since he had brought their mokopuna to see them.[28] Wakefield also recorded that Te Wharepouri 'expressed his desire to see white people here, and his willingness to sell the land, which was solemnly made over to him by the natives of this place five years ago, when the greater portion of them emigrated to one of the Chatham Islands'.[29]

### 3.5.2 Discussions with Maori

The next day, Saturday 21 September, Wakefield went ashore and took a canoe six or seven miles up the Heretaunga River (renamed the Hutt River by the New Zealand Company), noting its various channels, the rich soil, the fine groves of trees on its banks, and the gardens being worked by some 60 people.[30]

The following Monday, Wakefield went to visit 'all the settlements in the harbour'. At Te Wharepouri's pa at Ngauranga, some 60 men debated the proposal to sell land. While

28. Evidence before Spain commission, 8 February 1843, OLC1/906 (doc H7(a), p 59)
29. Wakefield's journal, 20 September 1839 (doc A29, p 391)
30. Ibid, 21 September 1839 (pp 391–392)

admitting that one chief, Puakawa (from Waiwhetu), opposed the sale, Wakefield claimed that a vigorous though 'decorous' discussion ended by deciding in favour of the sale.[31] The next day, there was another debate at what Wakefield termed the 'principal village' (Pitone), and this discussion again ended, according to Wakefield, 'in a large majority deciding to sell me all their rights in this harbour and district'. Wakefield promised to let them on board the *Tory* the next day, when he would display the goods to be given in exchange for their land and harbour. He described this in glowing terms as 'a territory of forty or fifty miles in length, by twenty-five or thirty in breadth, containing a noble harbour, accessible at all times, . . . and land exceeding in fertility any I have seen in these islands, and equalling that of an English garden'.[32]

### 3.5.3 Wakefield displays goods on offer

On Wednesday 25 September, bales containing the various goods which Wakefield proposed to exchange for the land were displayed on the upper deck of the *Tory*. There were too many people on board for Wakefield to exhibit the actual number and kinds of goods he proposed to offer by way of exchange. Late in the day, at Wakefield's request, Te Wharepouri persuaded the numerous Maori to return to shore. The next day, when the various articles to be offered had been selected, Wakefield sent for Te Wharepouri and the other chiefs, who brought with them their sons. They approved the quantity and quality of the goods proposed to be exchanged but were uncertain as to how they were to be allocated to the satisfaction of 'the six tribes', by which Wakefield evidently meant the six settlements around the harbour. Wakefield accordingly proceeded to allocate the various lots on the *Tory*'s deck. Discussion followed, during which Puakawa expressed concern about the adequacy of the quantity of goods on offer and claimed that when the land had all been sold the Pakeha would drive the Maori into the mountains. The debate finished at sunset when Te Wharepouri promised that the affair would be settled the next day.[33]

### 3.5.4 The deed is signed

On Friday 27 September, the chiefs and their sons boarded the *Tory* and the proposed distribution of goods was settled under Te Wharepouri's supervision. William Wakefield's description of the signing in his journal is very brief. He noted that the deed, 'drawn on parchment, was then brought upon deck; and after a full explanation to all present, by Mr Barrett, of its contents, was signed by the chiefs and their sons'. Wakefield claimed that Ngati 'occasionally explained the nature of the deed, as relates to the reserve of land', though Wakefield

31. Wakefield's journal, 23 September 1839 (p 392)
32. Ibid, 24 September 1839 (p 393)
33. Ibid, 25, 26 September 1839 (pp 393–394)

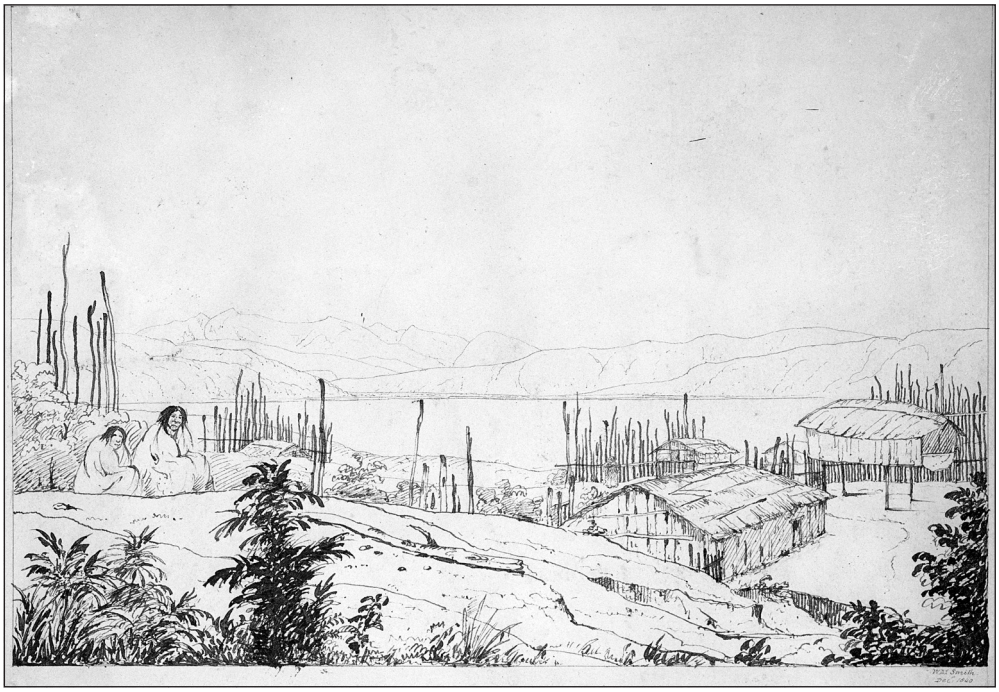


Figure 2: *From the Pah Pipitea, Port Nicholson, Decr 1840.* Pen and ink drawing by William Mein Smith (1799–1869). Reproduced courtesy Alexander Turnbull Library, Wellington, New Zealand (c-011-005).

admitted that Ngati lacked weight with these people. After the signing, the goods were placed on the *Tory*'s boats and landed at the various settlements, the chief of each taking it upon himself to distribute the goods among the families. Wakefield concluded in triumph: 'Thus has terminated, in the most satisfactory manner, this first and important purchase for the Company.'[34]

It is of course hardly surprising that Wakefield should write such a glowing account of what became known as the Port Nicholson purchase. The account of his nephew, Jerningham, who was present, is equally glowing, though more detailed than his uncle's account. Jerningham Wakefield wrote the deed of purchase. He recounted how the boundaries of the purchase (from Rimurapa to Turakirae, and from Tararua to the sea) were pointed out by Te Wharepouri from the deck of the *Tory*, in the hearing of other chiefs: 'He had followed with his finger the summit of the mountain ranges mentioned, and told me their names'. However, Jerningham Wakefield admitted that it was:

> extremely difficult – nay almost impossible – to buy a large and distinct tract of land, with fixed boundaries, from any native or body of natives of this part of New Zealand, perfectly unused as they were to any dealing in land according to our notions. These people had no distinct boundaries marked when they received the cession from the Ngatimutunga.

34. Ibid, 27 September 1839 (p 394)

He added that Ngati Toa 'laid a claim to this whole neighbourhood, also without exact boundaries'. Jerningham Wakefield claimed that Te Atiawa's right to land around the harbour depended on the gift made by Pomare of Ngati Mutunga on his departure for the Chathams, although they had also 'maintained by their own gallantry and strength their right to clear new patches where they pleased and to live unejected by their enemies'. They had no claim to the bush-clad land between the harbour and the distant ranges which had merely been included in the purchase to attract a larger payment and 'in order to receive a population beyond his imagination of numbers'. Colonel Wakefield had therefore been 'obliged to buy of the natives, not certain lands within certain boundaries, but the rights, claims, and interests of the contracting chieftains, whatsoever they might be, to any land whatever within certain boundaries'.[35] These uncertainties, however, did not prevent Colonel Wakefield and the New Zealand Company from claiming all the land within the boundaries described in the deed. We note that the Maori with whom Colonel Wakefield transacted did not have exclusive rights over the large area involved, and Jerningham Wakefield himself recognised that Ngati Toa also claimed rights over the area.

Jerningham Wakefield also described the distribution of goods in payment for Wellington, which took place on the *Tory* on the morning of 27 September. The goods were divided into six piles, with each having a case of muskets, for each of the six settlements around the harbour: Petone, Kaiwharawhara, Ngauranga, the adjoining pa of Pipitea and Kumutoto, Waiwhetu, and Te Aro. Te Aro received a smaller portion because the residents were described to Wakefield by Te Wharepouri as a 'tributary tribe', a description which Wakefield unhesitatingly accepted. The Waiwhetu chief Puakawa had led the vocal opposition to the purchase, but he capitulated when he saw the goods being distributed. After the distribution, the chiefs were called up to mark the deed, which they did with Jerningham Wakefield's assistance. Then the ship's boats were sent away with the piles of goods for the different pa.[36]

Two days later, 'in order to see how the people were satisfied', Colonel Wakefield visited the pa, including the 'slave settlement' at Te Aro, where Te Wharepouri explained why they had received a smaller portion of goods – 'the free settlements had required a larger proportion'. During this excursion, according to Jerningham Wakefield, the chiefs 'repeatedly impressed upon the people that their land was gone for ever, with the exception of what the white people would allow them for cultivation and residence'.[37] The following day, there was a large hui, at which some 300 people, dressed in their new finery and armed with their new muskets, performed several vigorous haka. There was a feast, and Wakefield's party:

35. Edward Jerningham Wakefield, *Adventure in New Zealand from 1839 to 1844: With Some Account of the Beginning of the British Colonization of the Islands*, Sir Robert Stout (ed), 2nd ed (Christchurch: Whitcombe and Tombs, 1908), pp 62–64

36. Ibid, pp 64–66

37. Ibid, pp 68–69

> drank the healths of the chiefs and people of Port Nicholson in bumpers of champagne, and, christening the flag-staff, took formal possession of the harbour and district for the New Zealand Land Company, amidst the hearty cheers of the mixed spectators. The whole scene passed with the greatest harmony, and we were sensibly struck by the remarkable good feeling evinced towards us by the natives.

This good feeling apparently persisted through the remaining three days that the expedition stayed at Port Nicholson.[38] This sanguine description certainly gave the impression that the New Zealand Company had completed a full and fully accepted purchase of the Port Nicholson district.

### 3.5.5 The terms of the Port Nicholson deed

Wakefield's Port Nicholson deed was marked by 16 Maori on 27 September 1839 (see app I).[39] The signatories' names were recorded as follows: Matangi, Epuni, Bouacawa, Rongatua, Kaihaia, Kariwa, Kawia, Tuarau, Etucko, Tingatoro, Tuati, Wakarudi, Emau, Atuewera, Ewareh, and Warepori.[40] Later, in giving evidence to the Spain commission in February 1843, Barrett provided a list of signatories and their pa. His list included 14 rather than 16 names, several with different spellings. Of the 14, seven belonged to Petone Pa, two to Waiwhetu Pa, and one each to Ngauranga, Kaiwharawhara, Pipitea, Tiakiwai, and Kumutoto Pa, but there was no signatory from Te Aro.[41] In the deed, the signatories were described as 'the sole and only proprietors, or owners' of Port Nicholson. They were said to have sold their 'lands, tenements, woods, bays, harbours, rivers, streams, and creeks' to Colonel William Wakefield for the New Zealand Company, 'for ever, in consideration of having received as a full, and just payment' various goods. These goods included 120 muskets and accompanying munitions, various utensils, and numerous items of clothing.

The boundary of the purchase was described, though in a scarcely intelligible way. It can be summarised as running north from Turakirae Head along the summit of the Rimutaka Range to the head of the Hutt Valley, then south-west across the base of the Tararua Range, then along the summit of the 'Rimarap' Range (to the west of Te Whanganui a Tara) until it reached the sea at Cook Strait outside the western headland of Te Whanganui a Tara at Rimurapa (Sinclair Head), and then back to Turakirae (see map 1). Because of the inadequacy of the boundary's description, it is impossible to make an accurate map of the lands

38. Ibid, pp 70–72
39. The deed is reproduced in document A29 at pages 439 to 441.
40. Epuni = Te Puni; Bouacawa = Puakawa; Kaihaia = Te Kaeaea (Taringa Kuri); Etucko = Wi Tako Ngatata; Warepori = Te Wharepouri
41. Document E5, pp 347–348

included in the deed, and it appears that the signatories were not shown a plan of the purchase, as required by the New Zealand Company's own instructions. For the same reason, it is impossible to calculate accurately the area covered by the deed. A subsequent alteration of the western boundary in 1844 took it out to the west coast at Pipinui Point, and the 1848 Crown grant to the company gave the total area within these extended boundaries as 209,247 acres (see chs 8, 10). At a very rough estimate, this extension added some 50,000 acres, making the area covered by the original purchase deed roughly 160,000 acres.[42]

The signatories bound themselves and their families, tribes, and successors to 'assist, defend, and protect' the company and its shareholders in 'maintaining the quiet and undisputed possession' of the purchased land. Finally, Wakefield and the company promised the signatories that 'a portion of the land ceded by them, equal to one-tenth part of the whole, will be reserved by the . . . Company . . . and held in trust . . . for the future benefit of the said chiefs, their families, and heirs for ever'. In effect, 10 per cent of the purchase was to be reserved for the 16 signatory chiefs and their families.

## 3.6 Other New Zealand Company and Private Transactions

Before examining the validity of the Port Nicholson deed of purchase, we briefly note other New Zealand Company deeds and certain other land transactions around Te Whanganui a Tara which preceded the signing of the Treaty of Waitangi and the imposition of the Crown right of pre-emption.

### 3.6.1 Other New Zealand Company deeds

The Port Nicholson purchase was overlaid by two further deeds negotiated by Wakefield. The first of these was negotiated at Kapiti Island with Te Rauparaha, the Ngati Toa chief who had long dominated both sides of Cook Strait and who claimed mana over the various Te Atiawa hapu and other iwi in the Wellington area. Though Wakefield denied that Te Rauparaha was entitled to a share of the goods paid to Te Wharepouri and others, he nevertheless regarded the Kapiti deed as a 'solemn ratification' of the Port Nicholson purchase.[43] The deed was marked on 25 October 1839 by Te Rauparaha and 10 other chiefs from Kapiti and the adjacent mainland coast.

42. The Tribunal attempted to remap the 1839 boundary in order to calculate the area covered by the 1839 deed, but, owing to the boundary's vague description, it was not possible to do this with any precision. Nor was it possible to establish accurately the size of the 1844 boundary beyond the acreage that was surveyed in 1844, which, according to the 1848 grant, amounted to 209,247 acres. An additional problem is that the 1855 earthquake raised so much land that comparisons with earlier figures are difficult to make.

43. Wakefield's journal, 24 October 1839 (doc A29, pp 423–424)

This deed (which is discussed further in chapter 9) purported to purchase a huge area of land on both sides of Cook Strait. In the South Island, this included all land north of a line from 43 degrees south (near the Hurunui River on the east coast to the Wanganui River on the west). In the North Island, it included all land south of a line from about 38 degrees south on the west coast (near Mokau) to about 41 degrees south on the east coast. Some 20 million acres, nearly a third of New Zealand, was included. The payment, in arms, utensils, and clothing, was specified, as in the Port Nicholson deed, but there was a subtle variation in the reserves promised: no tenths were specified, instead a 'portion' of the lands ceded, 'suitable and sufficient for the residence and proper maintenance of the said chiefs, their tribes and families', was to be reserved to them.[44] Though Te Rauparaha admitted that he signed the deed, he subsequently told the Spain commission that he had sold only Taitapu (Golden Bay). He also said that the deed was not translated, and that he had signed because he was told his 'name would be showed to the Queen of England and I should be known as the great chief of New Zealand'.[45]

The second deed was dated 8 November 1839 and was marked by various members of Te Atiawa then living in Queen Charlotte Sound and in other places on both sides of Cook Strait. Barrett and his wife were present at the signing. There were 30 Maori signatories, including the Waikanae Te Atiawa chief Wiremu Kingi Te Rangitake.[46] The wording of the deed was similar to that of the previous deed, covered the same area, and promised 'sufficient' reserves.[47]

After completing this transaction, Wakefield took the *Tory* up the coast to Taranaki, leaving Barrett and his family with his wife's relatives at Ngamotu to negotiate for land, while he went north to Kaipara.[48] Two deeds for the purchase of part of Taranaki were eventually signed on 15 February 1840. This was more than a fortnight after Hobson had issued his proclamation prohibiting private purchases of Maori land, and more than a week after the Treaty of Waitangi had been signed at Waitangi asserting the Crown's right of pre-emption.[49] The two Taranaki deeds were meant to reinforce the company's claim to part of the area already included in the deeds of 25 October and 8 November 1839, which in turn were meant to reinforce the Port Nicholson purchase. But all of them were flimsy transactions at best, and the claim for 20 million acres was not upheld when the company's claims were subsequently investigated by a special land claims commission. However, it was more than two years before that commission began its inquiry into the Port Nicholson purchase in May 1842, and, in the interval, the company had begun to colonise the area.

44. Document A29, pp 441–442
45. Quoted in doc H8, p 127; see also doc M7, p 210
46. Ann Parsonson, 'Te Rangitake, Wiremu Kingi', DNZB, vol 1, pp 499–502
47. Document A29, pp 442–444
48. Ibid, pp 433–434
49. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), p 23

### 3.6.2 Other pre-Treaty transactions

In addition to Colonel Wakefield's transactions on behalf of the New Zealand Company, there were several other transactions for land in the Te Whanganui a Tara area prior to Hobson's proclamation of 30 January 1840, which stated that the Crown would not recognise any alleged purchase of Maori land after that date. A number of traders or whalers (George Young, David Scott, Robert Tod, Thomas Barker, and Worser Heberley) had 'purchased' small blocks of land, usually trading sites.[50] It has been argued by Neville Gilmore (who quotes historians Dr Ann Parsonson and Professor Alan Ward) that Tod's 'purchase' in early 1840 was not a sale but a grant of rights of occupation and use. It was also, in Gilmore's view, a demonstration of Te Matehou hapu's territorial rights, as opposed to those of other Te Atiawa hapu, and those claimed by Wakefield.[51] The Wesleyan missionaries John Hobbs and John Bumby and the Church Missionary Society missionary Henry Williams also acquired small areas of land as sites for churches. In addition, Williams, with the assistance of Church Missionary Society convert Reihana Rewiti, placed a tapu over some 40 to 60 acres on the Haukawakawa flat behind Pipitea Pa in what Gilmore describes as an attempt to 'check the rapacity of Colonel William Wakefield and to ensure that Te Matehou retained some land'.[52] Williams later did a deal with Wakefield, exchanging his land claim for two of the company's town acres. All of the other individual claimants except Barker successfully pursued their claims before the land claims commissioner.[53]

## 3.7 The Spain Commission

### 3.7.1 An inquiry into the Port Nicholson deed

On 15 May 1842, a land claims commission headed by William Spain began to hear the New Zealand Company's claim to Wellington. Spain, an English lawyer, had been appointed in 1841 by Lord John Russell, the Secretary of State for the Colonies, to investigate the purported purchases of land by the company. The company was to receive a Crown grant for land at Port Nicholson only if Spain found that its purchase of the land from Maori was valid.[54] At this stage, our account of the inquiry is confined to the evidence relating to the validity of the Port Nicholson deed. Other aspects of Spain's inquiry are considered in subsequent chapters of this report.

50. Document E3, p 57
51. Document A11, pp 35–36
52. Ibid, p 32
53. Document E3, pp 57–59
54. Rosemarie Tonk, '"A Difficult and Complicated Question": The New Zealand Company's Wellington, Port Nicholson, Claim', in *The Making of Wellington, 1800–1914*, David Hamer and Roberta Nicholls (eds) (Wellington: Victoria University Press, 1990), pp 36–37

We noted above that, under Normanby's instructions to Hobson, a Maori protectorate office was to be established. George Clarke senior, a missionary from the Church Missionary Society, was appointed the chief protector of aborigines. His son, George Clarke junior, who had grown up at the Bay of Islands before entering the Government service as a probation clerk in 1841 and who spoke Maori fluently, was appointed sub-protector for the Wellington area. In this capacity, he was to assist Spain. This was an awesome responsibility for a young man of 18. Clarke junior had an uneasy relationship with Spain, who was totally dependent on him for advice on Maori language and custom, and he was held in low regard by company officials.[55]

At the hearing, Spain received little help from Colonel Wakefield, who had hoped to get away with a perfunctory inquiry. Wakefield produced only four witnesses – himself, his nephew Jerningham, his friend Dr Dorset, and the Petone chief who had signed the Port Nicholson deed, Te Puni.[56] The company was represented at times by its lawyer, Dr Evans. Te Puni's evidence was quite brief. In response to questions from Colonel Wakefield, he said that he had agreed to sell all his share of the land; that he had understood that under the deed 'reserves would be made for the Natives'; and that only he and Te Wharepouri had agreed to sell the land, but he later added that 'the others' had agreed. Asked whether the other signatories were 'satisfied with the whole transaction', Te Puni said, 'Some were satisfied with it, some were not'.[57]

Though Colonel Wakefield claimed that the company's title was 'triumphantly established' by Te Puni's evidence, Spain was far from satisfied and called on Wakefield to produce more Maori witnesses.[58] Wi Tako of Kumutoto Pa was then called to give evidence, in place of the principal Ngauranga chief, Te Wharepouri, who was unavailable. Wi Tako admitted signing the Port Nicholson deed because Barrett had told him and those present to write their names in the deed, 'that they may go to England, that the Queen may see them'.[59] Though he had accepted payment of goods, Wi Tako said that was not for his land at Kumutoto but merely for the *Tory's* anchorage, for his rights to land at Petone, and for a wedding present for Te Wharepouri's sister.[60] Realising how damaging Wi Tako's evidence was, Wakefield refused to call further Maori witnesses, but additional Maori witnesses were called by Spain, and, 'virtually without exception, [they] denied the Company's claims'.[61] Witnesses from Te Aro, Pipitea, and Kumutoto Pa repudiated the purchase.[62] The company's response was graphically described by Spain:

55. Document C1, pp 114–115
56. The hearing is described in documents C1 (pp 116–124) and E4 (pp 182–219). In the latter document, the author makes extensive use of the detailed record kept by George Clarke junior in English and Maori.
57. Quoted in doc E4, pp 188–189
58. Wakefield's journal of proceedings in the Commissioner's Court (doc A29, p 325)
59. Quoted in doc E4, p 193
60. Document C1, p 119
61. Ibid, p 120
62. Ibid, p 123

> After I proceeded to call native witnesses as to the Port Nicholson case, my proceedings were constantly embarrassed and delayed by the counsel of the Company failing to bring before me natives, living in the neighbourhood, who had been parties to the conveyance to the Company of the Port Nicholson district, and daily keeping me waiting for hours after the opening of the court. In fact, the whole conduct of the parties engaged in the Company's cases towards the proceedings of the court, went to show their utter disregard of all forms observed in courts of inquiry; and they evidently wanted to make it appear that the executive of the Commission was a mere useless form, to which they were obliged to submit, but that the result was immaterial to them, as they could call upon the Government, under the agreement, to give them a Crown grant, whether my report were favourable or not to the validity of the purchase.[63]

We note that Crown counsel drew our attention to evidence in later proceedings in 1871 in the case of *Regina v Fitzherbert* (discussed in chapter 13).[64] In those proceedings, Wi Tako, in the Supreme Court, claimed that the New Zealand Company's 1839 purchase was correct and complete and that Te Puni and Te Wharepouri were entitled to sell the land. This was in contradiction to his evidence before the Spain commission some 30 years earlier, to which we have just referred. Clearly, Spain accepted the evidence of Wi Tako, and the other witnesses who denied the claims, as being persuasive. Whether, 30 years later, Wi Tako's memory was defective or whether there was some other reason for his contradictory evidence in 1871 must now be a matter of speculation. Richard Barrett's evidence, to which we now refer, amply demonstrates that Maori could have had little, if any, understanding of what was contained in the deed.

### 3.7.2 Richard Barrett's evidence

There was a further blow to the New Zealand Company's case when Richard Barrett was called to give evidence to the Spain commission in February 1843. It soon became evident during Clarke's cross-examination that Barrett did not understand the English meaning of the deed. He was asked by Clarke to 'take the deed and explain it to the Court in the Maori language in the same way that you explained it to the natives'.[65] The minutes do not record Barrett's answer in Maori, but the court's translation of his explanation in Maori, as recorded by Spain in his final report, was as follows:

63. Spain to Colonial Secretary, 12 September 1843, BPP, vol 2, app 9, p 295. The agreement referred to is an agreement made in November 1840 between Lord John Russell, the Colonial Secretary, and the New Zealand Company. It is discussed in some detail at section 5.4.2 below.

64. Document P1, p 94

65. Quoted in doc E5, p 348

> Listen, natives, all the people of Port Nicholson. This is a paper respecting the purchasing of land of yours. This paper has the names of the places of Port Nicholson. Understand this is a good book. Listen, the whole of you natives, to write your names in this book; and the names of the places are Tararua, continuing on to the other side of Port Nicholson, to the name of Parangarahu. This is a book of the names of the channels and the woods, and the whole of them to write in this book, people and children, the land to Wideawake [Wakefield]. When people arrive from England it will show you your part, the whole of you.[66]

Barrett was further asked by Clarke whether he had explained the tenths reserve scheme to the signatories, to which he replied, 'No, I did not tell them they would get one tenth. I said they were to get a certain portion of land.' Neither did he recall explaining to them that they were selling their pa, burial grounds, and cultivations.[67]

It is evident that Barrett was quite incapable of conveying the meaning of the deed to the assembled Maori. They could not have understood that those signing the deed would be selling all their land, including their pa, cultivations, and urupa, save for one-tenth, which would be held by the company in trust for the benefit of the chiefs and their families.

Clarke later recalled that Barrett had admitted giving Maori the impression that 'one half [of the land] should be kept for their use'.[68] Clarke also recorded, in a letter to his father, Barrett's evidence that 'the Natives of Te Aro & Pipitea never agreed to the purchase and that he informed Col W [Wakefield] of it before the deed was signed!!'[69]

### 3.7.3 Spain's preliminary report

Although Spain's inquiry into the various New Zealand Company claims was far from complete by 1843, he had already formed his opinions on the adequacy of the company's original land purchases. He indicated in a preliminary report of 12 September 1843 that:

> I am of opinion, that the greater portion of the land claimed by the Company in the Port Nicholson district, and also in the district between Port Nicholson and Wanganui, including the latter place, has not been alienated by the natives to the New Zealand Company; and that the other portions of the same districts have been only partially alienated by the natives to that body. Some of the proprietors having signed the conveyances to the Company and received part of the payment, whilst others, with as good a claim as those who joined in the transaction, were not parties to the deed, did not assent to the sale, and received no part of the payment.

66. Spain's final report, 31 March 1845, BPP, vol 5, p 16
67. Quoted in doc E5, p 348
68. Clarke junior, pp 48–49 (quoted in doc C1, p 131)
69. Clarke junior to Clarke senior, 11 February 1843 (doc C1(g), pp 29–30)

> In other cases, that natives agreed to sell to the Company, took the payment and signed the conveyance, who, in some instances, had no right at all to convey the lands described in such deeds, and in others, who had only a right to a very small portion of such lands.
>
> It appears to me . . . that all the Company's purchases were made in a very loose and careless manner; that the object of the Company's agents, after going through a certain form of purchase, seems to have been to procure the insertion in their deeds of an immense extent of territory, the descriptions of which were framed from maps . . . and were not taken from the native vendors; and that such descriptions were generally written in the deeds before the bargain for the purchases was concluded. That these parcels contained millions of acres, and in some instances degrees of latitude and longitude. That the agents of the Company were satisfied with putting such descriptions in their deeds, without taking the trouble to inquire, either at the time of or subsequently to the purchase, whether the thousands of aboriginal inhabitants occupying the surface of these vast tracts of country had been consenting parties to the sale.
>
> I am further of opinion, that the natives did not consent to alienate their pahs, cultivations and burying-grounds. That the interpretation between the aborigines and the agents of the Company in the alleged purchases was exceedingly imperfect, and tended to convey in but a very slight degree any idea to the former of the extent of territory which the latter by those purchases pretended to have acquired, and that the explanation by the interpreters of the system of reserves was perfectly unintelligible to the natives.[70]

The longer Spain's inquiry into the company claims continued, the less convinced he became of their validity. He admitted that, had he proceeded to a final report at the time when he finished hearing evidence, 'it must have been most unfavourable generally to the Company's title, and left it, or rather its purchasers, in possession of a very inconsiderable portion of the district'.[71] Spain explained that, though Te Puni and his people at Petone had always admitted their sale of that land, the company's re-location of the township from Petone to Lambton Harbour (discussed in chapter 5) had put it on land 'belonging to the natives of Tiakarai, Pipetea, Kumatoto and Te-aro, who having always denied the sale, offered every opposition to the settlers, and have firmly retained possession of their pahs from that time to the present'. Some people of these pa had received Wakefield's goods and a few of them had signed the deed, but the principal chiefs had not done so. Spain believed that these people were willing to sell some of their land, although he added that it would be necessary to deal quickly with them since they were beginning to discover the real value that colonisation was bringing to that land and that they could profitably lease it. However, Spain was not willing to agree to their pa, cultivations, and burial grounds being taken from them without their

70. Spain to Colonial Secretary, 12 September 1843, BPP, vol 2, app 9, p 305
71. Ibid, p 295

consent, though he noted that some of these had already been sold by the company and roads and streets had already been cut through them.[72]

Although Spain chose to assume that Te Puni and his people had agreed to a sale, and inferentially that this was done with knowledge of the implications, he was aware that they had not consented to their pa, cultivations, and burial grounds being taken from them. He must therefore have been aware that Te Puni did not understand the implications of the deed of purchase. As Crown counsel noted, Te Puni, in his testimony before Spain, displayed little comprehension of the reserves scheme.[73]

## 3.8 The Validity of the Port Nicholson Deed of Purchase

### 3.8.1 The language of the deed

The Port Nicholson deed of purchase was drawn up by Jerningham Wakefield in English only. Wakefield had no more than a smattering of Maori and was forced to rely on Richard Barrett to interpret and explain the document to Maori. Barrett's own evidence makes it abundantly clear that he was unable to translate the deed into Maori and was incapable of explaining its significance to the assembled chiefs. And Ngati, despite his two years' residence in England, was of no use as an interpreter.

The deed reflected English property law notions which were foreign to Te Whanganui a Tara Maori. Although transactions with some individual Pakeha for land at Te Whanganui a Tara preceded the signing of the New Zealand Company's Port Nicholson deed, these were for very small areas of land and were based on personal relationships between Pakeha individuals and local rangatira. Maori could have had no comprehension of the effect of a deed of purchase of land, and no explanation was given to them of the significance of such a transaction. The most that might have been gleaned by a few – perhaps Te Puni and Te Wharepouri and their immediate associates – was that some Pakeha would come to live among them and that the goods were supplied as a token of appreciation. This was probably how they understood their earlier transactions with individual Pakeha.

Even if there had been someone present able effectively to translate the deed, it is unlikely that such a person could have adequately explained to Maori the real nature of the transaction in terms they would have comprehended, since they had no previous experience of the scale of such a 'purchase' and settlement. It is inconceivable that Maori would have agreed to vacate their kainga, their urupa, their cultivations, and their forests and fisheries and to attempt to live on the scattered one-acre and 100-acre lots, the location and nature of which were at the time unknown either to the company or to Maori.

72. Ibid, pp 295–296
73. Document P1, p 16

### 3.8.2 Possible Maori perceptions

The negotiations for the purchase of the area appear to have been confined almost wholly to Te Atiawa and, particularly, to Te Wharepouri's pa at Ngauranga and Te Puni's pa at Petone, where the chiefs agreed to sign a deed of purchase. Te Puni later admitted that he sold land which did not belong to him when he saw how many blankets and guns were being offered.[74] The Ngati Tama chief Taringa Kuri of Kaiwharawhara signed the deed and gained some goods. However, he later claimed in evidence to the Spain commission that the sale applied only to the land between Ngauranga and Petone and to 'the sea' (anchorage or other harbour rights), not to Kaiwharawhara and elsewhere.[75] Te Atiawa chiefs at Kumutoto and Pipitea played little part in the negotiations, though, according to Jerningham Wakefield, they accepted a pile of goods. The Taranaki and Ngati Ruanui people at Te Aro were not excluded altogether, but they received a smaller pile of goods than the other groups, and it appears that none of their chiefs marked the deed. Ngati Rangatahi, who intermittently occupied land in the Hutt Valley, may have been present at the haka and feast following the signing, but they did not sign the deed or receive any goods (see ch 9). Ngati Toa were not invited, perhaps because they lived outside the area covered by the deed and perhaps because Te Atiawa wished to assert their own claims above those of others. In any event, the New Zealand Company officials had been in the area for a very brief time and lacked any real understanding of the situation on the ground.

Te Puni and Te Wharepouri probably saw in Wakefield a useful new ally who would help to stabilise their position at Te Whanganui a Tara in relation to Ngati Kahungunu on their Wairarapa flank and Ngati Toa and Ngati Raukawa on the Kapiti coast. Having asserted his mana over Te Whanganui a Tara, Te Wharepouri went on to arrange a peacemaking between Te Atiawa and Ngati Kahungunu. Under this peacemaking, which was completed in July 1840, Te Atiawa's claims to Wairarapa and Ngati Kahungunu's claims to the land west of the Tararua and Rimutaka Ranges were abandoned (as discussed in chapter 2).

It is doubtful whether the Te Atiawa chiefs at Petone and Ngauranga Pa, who were the principal promoters of the transaction, had ahi ka rights to more than a small part of the land. These rights were confined to the land where they resided, cultivated crops, or used resources, including a somewhat indefinite hinterland that extended some distance up the Hutt Valley. Though they may well have been mystified by the terms of the deed, the chiefs could see that Wakefield, in comparison with other Pakeha traders who frequented the area, was rich in goods. He was also a potential guardian against threatening rival Maori groups. But it is unlikely that the chiefs who marked the deed believed that they were making available more than a few small sites, similar to those already given or sold to traders. As George Clarke senior explained it:

74. Shortland to Hobson, 9 October 1840 (doc A29, p 350)
75. Document H7, pp 23–25

> The primary object of a New Zealander [ie, a Maori] parting with his land is not only to obtain the paltry consideration which in many cases is given them for their land, but to secure to them the more permanent advantages of finding at all times a ready market for their produce with their white neighbours; but this important end is at once defeated upon the assumption of a total alienation, as claimed by the New Zealand Company.[76]

Some of the signatories stated before the Spain commission that they believed they were alienating even less: merely an anchorage in the harbour. Although they were keen to attract some more Pakeha traders, they experienced a rude shock when company settlers began to pour ashore at Petone a few months later. As Te Wharepouri put it:

> I know that we sold you the land, and that no more white people have come to take it than you told me. But I thought you were telling lies, and that you had not so many followers. I thought you would have nine or ten [Pakeha], or perhaps as many as there are at Te-awa-iti [Te Awaiti, Queen Charlotte Sound]. I thought that I could get one placed at each *pa*, as a white man to barter with the people and keep us well supplied with arms and clothing; and that I should be able to keep these white men under my hand and regulate their trade myself. But I see that each ship holds two hundred, and I believe, now, that you have more coming. They are all well armed; and they are strong of heart, for they have begun to build their houses without talking. They will be too strong for us; my heart is dark.[77]

Te Wharepouri had hoped to bind Wakefield into a continuing reciprocal relationship whereby both parties would continue to occupy the land to their mutual advantage. As Parsonson comments, the more land Wakefield tried to acquire for the company's settlers, the less plausible his schemes seemed to Maori, who had little experience with settlers, that experience being confined to the handful of Pakeha scattered at different pa or concentrated in small numbers at whaling stations, who, moreover, were living on Maori terms.[78]

### 3.8.3 Wakefield's non-compliance with his instructions

As we have seen at section 3.3.3, Wakefield was given quite detailed instructions as to the general principles he was to apply in buying land from Maori:

- he was to explain with complete frankness that the purchase was intended to establish a settlement for Englishmen on a much larger scale than those at Hokianga and the Bay of Islands; it was to be like the settlements in New South Wales or Van Diemen's Land (Tasmania);

76. 'Chief Protector's Report of a Visit to Port Nicholson', August 1841, enclosed with Hobson to Secretary of State for the Colonies, 13 November 1841, BPP, vol 3, p 522

77. Quoted in Wakefield, p 149. Parsonson notes that there were three whaling stations with 40 Europeans at Te Awaiti: doc M7, p 197.

78. Document M7, p 197

- he was not to complete a purchase until this was thoroughly understood by the Maori proprietors;
- he was to ensure that all owners of the land approved the bargain and received a share of the purchase money;
- the boundaries of the land were to be most clearly set forth in writing, with a plan attached; and
- he was to explain the nature and purpose of the company's tenths scheme.

In fact, Wakefield failed to ensure that any of these requirements were fulfilled. All were of critical importance if Maori at Te Whanganui a Tara were to have had a chance of understanding the implications of the proposed transaction.

The New Zealand Company had chosen to dispatch the *Tory* to New Zealand without a surveyor on board, and Wakefield was at Te Whanganui a Tara for a mere seven days before the deed, which had been hastily drawn up by his young nephew, was marked by the various chiefs. At that stage, no decision had been made as to the site of the town, and Maori were given no idea of its likely size or location or where they would be expected to live.

### 3.8.4 Submissions of counsel on the validity of the deed

Counsel for the Wellington Tenths Trust claimants submitted that there was no purchase:

> This point is beyond dispute – no researcher or historian, neither the Crown's, the Tribunal's, and not those employed by the claimants, admit there was anything like a valid sale for Te Whanganui-a-Tara. Maori who transacted with the New Zealand Company did so for various reasons (and these did not include the chiefs of the pa where the township heart would be located) but none of them believed they were alienating any great extent of land.[79]

The Crown, in its closing submissions, saw the 1839 deed as 'no more than a starting point – an event triggering a process that took years to conclude'.[80] Crown counsel conceded that the rights of the parties were not fixed in 1839 and that there was a real question about the extent to which the chiefs of the southern harbour settlements were parties to the 1839 deed.[81] Some (most notably those at Te Aro) had not participated at all, while others were quick to repudiate any involvement they may have had.[82] Later, the Crown referred to the 'mistaken assumption that the Company's claims [under the 1839 deed] were valid and binding'.[83]

79. Document O1, p 16
80. Document P1, p 4
81. Ibid, p 5
82. Ibid, p 16
83. Ibid, p 18

### 3.8.5 Tribunal finding on the validity of the deed

It is apparent that the New Zealand Company's 1839 Port Nicholson transaction failed to meet the elementary requirements of a deed of purchase. There was no real meeting of minds as between Maori and the company's representative. Richard Barrett's attempt to translate and explain the meaning of the deed was totally ineffective. It is evident that not only did he fail to understand the nature of the transaction, including the notion of 'tenths', but, even if he had, he was incapable of making a meaningful interpretation of the deed, let alone explaining it. While Te Puni may have admitted in evidence before Spain his sale of the land, it is evident that he had no real appreciation of the tenths reserves scheme, for example, or of the company's expectation that he would abandon his pa, cultivations, and wahi tapu. And if Te Puni had no such appreciation, then neither could any of the other chiefs.

Quite apart from this almost total lack of understanding by Maori of the English conveyancing forms is the even more fundamental difficulty that the Maori of Te Whanganui a Tara had no familiarity with, or comprehension of, the very notion of a sale of land. At best, a few Maori chiefs may have anticipated that a relatively small number of Pakeha might come to live among them on terms which would be negotiated by Maori and which would be mutually advantageous to the parties. Of the company's plans to oust them from their pa, burial grounds, cultivations, and other lands and forests, they could have had no suspicion. Moreover, the signatories were by no means representative of all Maori having rights at Te Whanganui a Tara and its environs.

The Tribunal finds that the 1839 deed of purchase was invalid and conferred no rights under either English or Maori law on the New Zealand Company or on those to whom the company subsequently purported to on-sell part of such land.

CHAPTER 4

# THE TREATY AND TREATY PRINCIPLES

## 4.1 Introduction

In this chapter, we record the arrival of Captain Hobson in New Zealand to take up his duties as the first Governor of New Zealand. Within 10 days of his arrival, he had overseen the drafting of the Treaty of Waitangi and its signing by numerous leading chiefs in the north. In due course, as we relate, an appreciable number of Maori in Wellington subscribed to the Treaty.

Our account of these highly significant events is followed by a discussion of the principles of the Treaty which are relevant to the various claims by Maori in relation to our inquiry area.

## 4.2 The Arrival of Hobson in New Zealand

As discussed in the previous chapter, the British Government, responding in large part to the colonising activities of the New Zealand Company, dispatched Captain William Hobson to New Zealand in 1839, with instructions to negotiate for the cession of sovereignty by Maori to the Crown. When Hobson arrived in New Zealand on 29 January 1840, he had with him three proclamations, all dated 14 January, issued by Governor Gipps of New South Wales. The first extended Gipps's jurisdiction as Governor over such territory in New Zealand as might be acquired in sovereignty by Queen Victoria. The second declared that he had administered the oaths of office to Hobson as Lieutenant-Governor over such territory in New Zealand as might be so acquired. The third announced that, pursuant to instructions of Lord Normanby dated 14 August 1839, the Queen would 'not acknowledge as valid any title to land which either has been or shall be hereafter acquired' in New Zealand 'which is not either derived from or confirmed by a [Crown] grant'. But care was to be taken to dispel any apprehension that owners of any land acquired on equitable conditions would be dispossessed; such acquisitions would be investigated by commissioners to be appointed by Governor Gipps.[1] The third proclamation acted as a public warning against further speculation in New Zealand land and was intended to prohibit Europeans from buying land directly from

1. BPP, vol 3, pp 38–39

Maori. Where such transactions had already taken place, they would be investigated by land commissioners.

The day after his arrival, Hobson made public the three proclamations.

### 4.2.1 The Treaty of Waitangi is signed

Hobson then went about seeking Maori consent to cede their sovereignty to the Crown by means of a treaty, the Treaty of Waitangi, drafted after his arrival in New Zealand. He lost no time in securing the signing of the Treaty by 45 chiefs at Waitangi on 6 February, some nine days after his arrival, then obtained more than 56 signatures at Hokianga on 12 February. This success persuaded him to seek the cession of the whole of New Zealand.[2]

On 1 March 1840, Hobson suffered a stroke and partial paralysis, and on hearing the news Gipps sent Major Thomas Bunbury to be the military commander in New Zealand, with powers to act for Hobson if necessary. Bunbury brought with him 90 troops. In a confidential note to Hobson, Gipps explained that he hoped to see the New Zealand Company settlers at Port Nicholson quickly brought under the Government, but that the annexation of the South Island was an even more urgent matter.[3]

Although Hobson recovered quite rapidly, he was not well enough to continue the negotiations with Maori himself. As a consequence, he issued facsimiles of the Treaty to various missionaries and military officers. By June 1840, these emissaries had covered substantial areas of the North Island. The missionary Henry Williams, who had been responsible for translating the Treaty into Maori, brought the Treaty to the Cook Strait region.[4]

### 4.2.2 The signing of the Treaty in Wellington

Williams reported to Hobson that, on his arrival in Port Nicholson, he 'experienced some opposition, from the influence of Europeans at that place', and it took 10 days before the local chiefs 'unanimously' signed the Treaty.[5] On 29 April 1840, the Treaty was signed at Port Nicholson by 34 Maori, including one woman, Kahe Te Rau o te Rangi of Ngati Toa. Among the signatories were at least six of the chiefs who had marked the Port Nicholson deed, including Te Puni, Te Wharepouri, and Taringa Kuri.[6] The Treaty was also signed at other nearby locations, including Queen Charlotte Sound, Waikanae, and Kapiti Island. Hobson attached particular importance to obtaining Te Rauparaha's signature, having been

2. Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830–1847* (Auckland: Auckland University Press, 1977), p 159
3. Ibid
4. Ibid, p 160; Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen and Unwin, 1987), ch 4
5. Henry Williams to Hobson, 11 June 1840, BPP, vol 3, p 227
6. The Port Nicholson signatories can be found in *Facsimiles of the Declaration of Independence and the Treaty of Waitangi* (Wellington: Government Printer, 1976). See also Miria Simpson, *Nga Tohu o te Tiriti: Making a Mark* (Wellington: National Library of New Zealand, 1990), pp 82–87.

told that he exercised 'absolute authority over all the southern parts of this island'. He therefore believed that Te Rauparaha's adherence would 'secure to Her Majesty the undisputed right of sovereignty over all the southern districts'.[7] In fact, Te Rauparaha signed the Treaty twice, once at Otaki and a second time (at the insistence of Major Bunbury) on board HMS *Herald* off Mana Island, where Te Rangihaeata also signed.[8]

## 4.3 Allegations of Treaty Breaches

The various claimants in this inquiry have made lengthy and detailed allegations of numerous Treaty breaches by the Crown. Almost all the allegations of Treaty breaches have been denied by the Crown in detailed closing submissions. We consider the main grounds advanced by the claimants and the Crown's responses in ensuing chapters, but before doing so it is desirable that we should record the Treaty principles which relate to the wide range of matters in issue in this inquiry. In doing so, we have had regard to the submissions of all the parties to the inquiry on the Treaty principles applicable to the matters in issue in the various claims. There is substantial agreement among the various claimants as to the relevant principles, but differing emphasis may be given to some of them, given the circumstances of particular claims.

### 4.3.1 Tribunal jurisdiction

If the Tribunal finds that any claim submitted to it under section 6 of the Treaty of Waitangi Act 1975 is well founded, it may recommend that the Crown take remedial action. But, before it can find a claim to be well founded, the Tribunal must be satisfied that:

- the claimant has established a claim falling within one or more of the matters referred to in section 6(1) of the Act;
- the claimant has been or is likely to be prejudicially affected by any such matters; and
- any such matters were or are inconsistent with the principles of the Treaty of Waitangi.

All three elements must be established before the Tribunal can find a claim to be well founded.

### 4.3.2 Previous Tribunal reports

There has been considerable discussion of Treaty principles by the Tribunal in earlier reports, not all of which are necessarily applicable to any one particular claim. Some of the expositions by the Tribunal on Treaty principles were noted in its 1997 *Muriwhenua Land*

7. Hobson to Bunbury, 25 April 1840, BPP, vol 3, p 140
8. Simpson, pp 77, 98

*Report*.[9] However, one leading principle has emerged as being applicable to many claims, including those now before us.

## 4.4 Applicable Treaty Principles

### 4.4.1 Cession of sovereignty in exchange for protection of rangatiratanga

The leading Treaty principle to which we have just referred is that Maori ceded sovereignty to the Crown in exchange for the protection by the Crown of Maori rangatiratanga. The Tribunal has stressed that this principle is 'fundamental to the compact or accord embodied in the Treaty and is of paramount importance'.[10] It is seen as overarching and far-reaching because of its direct derivation from the provisions of articles 1 and 2 of the Treaty. It embraces several concepts, sometimes characterised as principles, but better seen as inherent in or integral to the basic principle. In the context of this inquiry, we refer to the obligation of the Crown:

- actively to protect Maori Treaty rights;
- to ensure a fair process in determining such rights;
- to consult with Maori; and
- to afford redress for past breaches.

Implicit in this overriding principle is 'the notion of reciprocity – the exchange of the right to govern for the right of Maori to retain their full tribal authority and control [tino rangatiratanga] over their lands, forests, fisheries and other valuable possessions [taonga] for so long as they wished to retain them'. Cession of sovereignty to the Crown by Maori was qualified by their retention of tino rangatiratanga.[11]

Article 2 of the Treaty confirms and guarantees rangatiratanga, and this necessarily qualifies or limits the Crown's authority to govern. In exercising its powers, the Crown must guarantee Maori rangatiratanga in terms of article 2.[12] This Treaty constraint on the powers of the Crown was reinforced by the Tribunal in its *Taranaki Report*, in which it held that, in terms of the Treaty, 'from the day it was proclaimed, sovereignty was constrained in New Zealand by the need to respect Maori authority (or "tino rangatiratanga", to use the Treaty's term)'.[13]

9. Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), p 388, refers to the detailed discussion of the status of the Treaty, the Crown and Maori perspectives on the Treaty's provisions, the surrounding circumstances of the Treaty, and the related principles in Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 2, pp 215–247. See also the Tribunal's *Ngai Tahu Sea Fisheries Report 1992* (Wellington: Brooker and Friend Ltd, 1992), pp 267–274; *Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993), pp 99–102; *Te Whanganui-a-Orutu Report 1995* (Wellington: Brooker's Ltd, 1995), pp 201–203; *The Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995), pp 284–289.

10. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, pp 269–270

11. Ibid, p 269

12. Ibid

13. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), p 20

### 4.4.2 The Crown obligation actively to protect Maori Treaty rights

In addition to the guarantee of Maori rangatiratanga in article 2 of the Treaty, the preamble expresses the Queen's anxiety to protect the just rights and property of Maori. Article 3 extends the Queen's royal protection to, and bestows all the rights and privileges of British subjects on, the Maori people. In its various reports, the Tribunal has consistently stressed the duty imposed on the Crown under the Treaty actively to protect Maori interests. The Tribunal's views have been endorsed by the Court of Appeal; in particular, by the then president, Sir Robin Cooke, in the following passage:

> the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal's Te Atiawa, Manukau and Te Reo Maori reports which support that proposition and are undoubtedly well-founded.[14]

Under article 2, Maori yielded to the Crown the exclusive right of pre-emption over such lands as the owners were disposed to sell. In the *Ngai Tahu Report 1991*, the Tribunal found that, in exercising its right of pre-emption, the Crown was obliged to protect Maori interests in various ways. First, it should acquire only such land as Maori were prepared to sell. To be satisfied that the land was being sold with the owners' consent, it was necessary to ascertain who the owners were. The Tribunal noted that particular rights in land and resources could be specific to particular groups, families, or even individuals.[15] The Tribunal then emphasised that, notwithstanding all this:

> the tribe retained control over alienation of resources through senior rangatira. Crown agents seeking to purchase land from Ngai Tahu would be expected to negotiate with the tribe through these principal chiefs. They had the power of veto and without their consent the sale was not valid. However, the rangatira as trustees for their people and their resources could only approve a sale if the necessary consensus was in place. The traditional way of ensuring this then, and now, would be to debate the purchase on the marae in the presence of those who had rights in the land, both those living and those passed on. This would represent a meaningful exercise of rangatiratanga.[16]

The Tribunal noted that, while in the early years it might not have been possible to have the boundaries of a proposed purchase fixed by survey, it was implicit in the notion of consent that the Maori owners knew with reasonable certainty the area of land that they were being asked to sell. The Tribunal considered that the onus unquestionably lay on the Crown to ensure this – the duty of active protection required no less. The Tribunal stressed that:

14. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 664 (CA)
15. Waitangi Tribunal, *The Ngai Tahu Report 1991*, vol 2, pp 240–241
16. Ibid, p 241

> Equally important was the requirement that land which a tribe wished to retain, whether by express exclusion from a proposed sale or by way of reserves out of land agreed to be sold, should be sufficiently identified. And . . . it must also be adequate for both the present and reasonably foreseeable future needs of the tribe.[17]

As we have seen, the Crown appointed a commission to investigate the validity of the 1839 Port Nicholson deed of purchase. Later, when serious doubts arose as to the validity of that purchase, the Crown agreed to waive its right of pre-emption in favour of the New Zealand Company. In so doing, however, it remained under a duty to ensure that Maori were protected to the same extent as they should have been had the Crown been negotiating directly with them. In short, the Crown could not, consistently with its Treaty obligations, waive or avoid its responsibilities to ensure that Maori were amply protected.

The Crown appointed a protector of aborigines, and a heavy onus lay on the protector to ensure that the Crown's Treaty responsibilities were met. In the performance of his duties, the protector was required to respect the rangatiratanga and autonomy of Maori and their standing as a Treaty partner. This entitled Maori to be treated as equals and obliged the protector to inform them fully of any proposals relating to their land and its possible disposition. Above all, the protector was to ensure that Maori understood the implications of any such proposals and the consequences of their agreeing to them. Should the procedures adopted by the Crown or its agents be such as to place Maori at a disadvantage and render it difficult, if not impossible, for them to exercise their free, informed, and independent judgement, it would be the duty of the protector to ensure that Maori withdrew from the proceedings or negotiations. To enable him adequately to protect Maori, the protector had to be free to act independently of the Crown.

It is noteworthy that a principal reason for the British Government's dispatching of Captain Hobson to negotiate a treaty of cession with Maori was the presence in New Zealand of some 2000 British subjects and the likelihood of substantial numbers of New Zealand Company settlers joining them. The urgent need to protect Maori against the possible adverse consequences of this incursion was accepted by the British Government, and the Treaty was the outcome.

### 4.4.3 The Crown obligation to ensure a fair process in determining Maori Treaty rights

In its *Muriwhenua Land Report*, the Tribunal discussed four Treaty principles as being important in that inquiry; namely, 'protection, honourable conduct, fair process and recognition, though all may be seen as covered by the first'.[18] In effect, the Tribunal considered the last three were subsumed by the major Treaty principle of protection.

17. Waitangi Tribunal, *The Ngai Tahu Report 1991*, vol 2, p 241
18. Waitangi Tribunal, *Muriwhenua Land Report*, p 388

In amplifying the basis for the principle of fair process, the Tribunal noted that the Treaty had promised 'the necessary laws and institutions'; that Lord Normanby had insisted on the appointment of a protector of aborigines; and that Hobson had promised Maori, following their complaints prior to the signing of the Treaty, that pre-Treaty transactions would be inquired into and lands unjustly held would be returned. The principle of fair process, as defined by the Muriwhenua Tribunal, is 'that the Government should be accountable for its actions in relation to Maori, that State policy affecting Maori should be subject to independent audit, and that Maori complaints should be fully inquired into by an independent agency'.[19]

### 4.4.4 The duty to consult

The Ngai Tahu Tribunal noted that the question of whether the Crown had a duty under the Treaty to consult with Maori was considered by the Court of Appeal in *New Zealand Maori Council v Attorney-General*.[20] After citing a lengthy passage from the judgment of Sir Ivor Richardson in that case, the Tribunal stated:

> It follows from Sir Ivor Richardson's discussion that in some areas more than others consultation by the Crown will be highly desirable, if not essential, if legitimate Treaty interests of Maori are to be protected. Negotiation by the Crown for the purchase of Maori land clearly requires full consultation. On matters which might impinge on a tribe's rangatiratanga consultation will be necessary. Environmental matters, especially as they may affect Maori access to traditional food resources – mahinga kai – also require consultation with the Maori people concerned.[21]

### 4.4.5 The duty to afford redress for past breaches

In the *New Zealand Maori Council* case, Justice Somers recognised as a Treaty principle the Maori right of redress where the Crown is found to have breached the Treaty:

> The obligation of the parties to the Treaty to comply with its terms is implicit, just as is the obligation of parties to a contract to keep their promises. So is the right of redress for breach which may fairly be described as a principle, and was in my view intended by Parliament to be embraced by the terms it used in s 9 [of the State-Owned Enterprises Act 1986]. As in the law of partnership a breach by one party of his duty to the other gives rise to a right of redress so I think a breach of the terms of the Treaty by one of its parties gives rise to a right of redress by the other – a fair and reasonable recognition of, and recompense for,

19. Ibid, p 390
20. *New Zealand Maori Council v Attorney-General*
21. Waitangi Tribunal, *The Ngai Tahu Report 1991*, vol 2, p 245

the wrong that has occurred. That right is not justiciable in the Courts but the claim to it can be submitted to the Waitangi Tribunal.[22]

Sir Robin Cooke also accepted that the Crown should grant at least some form of redress if the Waitangi Tribunal found merit in a claim and recommended redress. He thought that withholding of redress by the Crown would be justified 'only in very special circumstances, if ever'.[23]

### 4.4.6 The principle of partnership

The principle that the Treaty signifies a partnership and requires the Crown and Maori partners to act towards each other reasonably and with the utmost good faith is a leading Treaty principle. It derives its authority from the Court of Appeal decision in the *New Zealand Maori Council* case.[24] Justice Casey saw the concept as underlying all the Crown's Treaty relationships.[25] Sir Ivor Richardson, who referred to the Treaty as a 'compact', commented:

> Where the focus is on the role of the Crown and the conduct of the Government that emphasis on the honour of the Crown is important. It captures the crucial point that the Treaty is a positive force in the life of the nation and so in the government of the country. What it does not perhaps adequately reflect is the core concept of the reciprocal obligations of the Treaty partners. In the domestic constitutional field which is where the Treaty resides under the Treaty of Waitangi Act and the State-Owned Enterprises Act, there is every reason for attributing to both partners that obligation to deal with each other and with their treaty obligations in good faith. That must follow both from the nature of the compact and its continuing application in the life of New Zealand and from its provisions. No less than under the settled principles of equity as under our partnership laws, the obligation of good faith is necessarily inherent in such a basic compact as the Treaty of Waitangi. In the same way too honesty of purpose calls for an honest effort to ascertain the facts and to reach an honest conclusion.[26]

The reciprocal nature of the obligation to act reasonably and in the utmost good faith was also emphasised by Sir Robin Cooke, who said that, for their part, Maori had 'undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation'.[27]

22. *New Zealand Maori Council v Attorney-General*, p 693
23. Ibid, pp 664–665
24. Ibid, p 642
25. Ibid, p 703
26. Ibid, p 682
27. Ibid, p 664

In subsequent chapters, we will, where appropriate, apply these principles in deciding whether and to what extent the Crown has acted in accordance with them in relation to the claims of the various parties.

CHAPTER 5

# THE CROWN INTERVENES

## 5.1 Introduction

This chapter deals with events in Wellington in the first few years after the signing of the Treaty and the issuing by Lieutenant-Governor Hobson of proclamations declaring British sovereignty over the whole of New Zealand. In this period, New Zealand became a separate colony, while at Port Nicholson surveying of the town and country sections began. The first immigrants arrived at Port Nicholson, and conflicts developed as Pakeha settlers sought to claim land which they had selected but on which Maori were still living. These early years also saw the selection of urban and rural tenths reserves for Maori, which reserves the New Zealand Company hoped Maori would occupy, rather than remain on sections claimed by settlers.

This chapter also deals with the November 1840 agreement between the Crown and the company, which, among other things, established a formula for calculating the amount of land to be Crown-granted to the company. The settlement of the company's Port Nicholson claim in accordance with the November 1840 agreement was then discussed by Hobson and Colonel Wakefield during Hobson's visit to Wellington in 1841. Hobson indicated privately to Wakefield that the Government would sanction any equitable arrangement made by the company to induce Maori to vacate settler-claimed sections. Both men clearly understood, however, that, before any land could be granted to the company, the validity of its purported purchase of Port Nicholson would have to be investigated by a land claims commissioner. William Spain was appointed as commissioner in January 1841, and this chapter concludes with a discussion of the instructions issued to him.

## 5.2 The Crown Assumes Control

### 5.2.1 Hobson proclaims British sovereignty

In chapter 4, we recounted how, immediately after his arrival in New Zealand, Hobson made public certain proclamations issued by Governor Gipps extending his jurisdiction to New Zealand, announcing the swearing-in of Hobson as Lieutenant-Governor of New Zealand,

and declaring that the Crown would recognise only those titles derived from or confirmed by a Crown grant.

We also recorded the early signing of the Treaty of Waitangi in the north and elsewhere in the North Island, including Wellington. Before Hobson's emissaries had completed their canvassing of North Island Maori for adherence to the Treaty, and before any news of Bunbury's success at gaining signatures in the South Island had reached him, Hobson officially proclaimed the whole of New Zealand to be British.

According to Adams, Hobson's haste in proclaiming British sovereignty over the whole of New Zealand was due to events at Port Nicholson. Colonel Wakefield had summoned a council of settlers on 2 March 1840 and persuaded the local chiefs to ratify its rules as a provisional constitution for the Wellington district. Hobson learnt of this at 8 pm on 21 May and, before the night was out, had issued a proclamation declaring that sovereignty over the North Island had been ceded by Maori to the Queen. On the same evening, Hobson issued a second proclamation vesting sovereignty over the South Island and Stewart Island in the Queen. Although not so stated in the proclamation, this was done by right of discovery. The publication of the two proclamations by the British Government in the *London Gazette* on 2 October 1840 'set the seal on British sovereignty over New Zealand'.[1]

On 23 May, Hobson issued a third proclamation in which he referred to certain persons residing at Port Nicholson as having formed themselves into an illegal association 'under the title of a Council' and as having, 'in contempt of Her Majesty's authority . . . assumed and attempted to usurp the powers vested in me [Hobson]'. In his capacity as Lieutenant-Governor, Hobson commanded all persons connected with this illegal association to desist from such conduct and called upon all persons resident at Port Nicholson or elsewhere who owed allegiance to the Queen to submit to the legally appointed authorities in New Zealand.[2]

### 5.2.2 New Zealand becomes a Crown colony

Statutory authority for making New Zealand a separate colony was provided for in the New South Wales Act passed by the British Parliament on 7 August 1840.[3] However, the separation of New Zealand from New South Wales was delayed pending news of Hobson's recovery from a stroke and the receipt of his proclamations of sovereignty.

On 9 December 1840, the Secretary of State for the Colonies, Lord Russell, enclosed in a lengthy dispatch to Hobson:

- a charter or letters patent providing for the future administration of New Zealand as a separate colony;

1. Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830–1847* (Auckland: Auckland University Press, 1977), pp 160–161. The two proclamations are in BPP, vol 3, pp 140–141.
2. BPP, vol 3, p 141
3. 3, 4 Victoria cap 62

- a commission from the Queen appointing Hobson the first governor of New Zealand; and
- royal instructions for the guidance of Hobson and his successors in the administration of the government of the new colony.[4]

Hobson received these instruments and publicly proclaimed the separation of New Zealand from New South Wales on 3 May 1841. New Zealand was now a Crown colony of the British Empire, with its own government.[5]

In his dispatch of 9 December 1840, Lord Russell urged that the aborigines of New Zealand should be the subject of Hobson's solicitude. He stressed that, of all the tribes within the extended colonial empire, 'there are none whose claims on the protection of the British Crown rest on grounds stronger than those of the New Zealanders'. He continued:

> They are not mere wanderers over an extended surface, in search of a precarious subsistence; nor tribes of hunters, or of herdsmen; but a people among whom the arts of government have made some progress; who have established by their own customs a division and appropriation of the soil; who are not without some measure of agricultural skill, and a certain subordination of ranks; with usages having the character and authority of law. In addition to this, they have been formerly recognized by Great Britain as an independent state; and even in assuming the dominion of the country, this principle was acknowledged, for it is on the deliberate act and cession of the chiefs, on behalf of the people at large, that our title rests.[6]

Although the Treaty of Waitangi is not specifically referred to, the 'cession' of the chiefs is clearly a reference to their signing of the Treaty.

## 5.3 Events in Wellington

### 5.3.1 The company surveyor arrives

In July 1839, Lieutenant William Mein Smith was appointed the New Zealand Company's surveyor-general and, together with his assistants, he sailed for New Zealand on the *Cuba*.[7] When the *Cuba* arrived at Port Nicholson on 4 January 1840, Smith found that Colonel Wakefield and his entire party had sailed north the previous October.[8]

As discussed in chapter 3, the New Zealand Company prospectus had promised a town at Port Nicholson consisting of 1100 acres, together with sections for general public use, quays,

4. Russell to Hobson, 9 December 1840, BPP, vol 3, pp 146–164
5. Hobson to Secretary of State for the Colonies, 26 May 1841, BPP, vol 3, pp 450–452; and see Adams, pp 161–162
6. Russell to Hobson, 9 December 1840, BPP, vol 3, p 149
7. Philippa Mein Smith, 'William Mein Smith', DNZB, vol 1, pp 399–400
8. John Miller, *Early Victorian New Zealand: A Study of Racial Tension and Social Attitudes, 1839–1852* (London: Oxford University Press, 1958), p 43

streets, squares, and other amenities. Country lands amounting to 110,000 acres were also to be selected.

Smith's first task was to survey the 1100 town sections. Wakefield had left instructions for this to be done in the south-west of the harbour, which included the area from Pipitea to Te Aro. However, Smith considered that this area contained insufficient flat land for the proposed town and that much of the best land was occupied by Maori in various pa and associated cultivations. In the absence of Wakefield, he decided to conduct his survey in the Hutt Valley. But about three miles up the Hutt River he found the valley to be blocked by a dense forest, while nearer the sea it was sandy and frequently swampy. When Wakefield finally returned to Port Nicholson on 17 January 1840, he found that the surveyors were marking out the town in the area near the sea in the vicinity of Pito-one.[9]

### 5.3.2 The arrival of immigrants

Meanwhile, in England the New Zealand Company had engaged six ships to take emigrants to New Zealand. The first ship departed on 15 September 1839, before Wakefield had even arrived in Port Nicholson, let alone acquired any land for settlement.[10]

When the first shipload of company settlers arrived at Port Nicholson on 21 January 1840, they found that there was no accommodation. As more ships arrived in ensuing weeks, the chiefs at Petone became increasingly concerned at the large number of immigrants; they had not expected anything like as many as the 1500 colonists who had arrived at Port Nicholson by June.[11]

As the weeks passed, the captains of the immigrant ships grew anxious to discharge their passengers and cargo. There was increasing pressure on Wakefield to move from Petone to 'Thorndon' on Lambton Harbour, the site of Pipitea and adjacent pa. When the Hutt River once more overflowed its banks and flooded settlers' huts, Wakefield decided on 6 April to move the settlement to the area he had originally chosen.[12]

As Smith had envisaged, there were great difficulties in transposing the company plan for 1100 urban one-acre lots, along with the same number of 100-acre farm lots, to the landscape, with its rugged hillsides running down to the harbour.

There was insufficient flat land for all of the sections, many of which ran well up into the surrounding hills. The surveyors treated the land as if it were vacant and ran their straight lines for the town acres across four occupied Maori pa at Te Aro, Kumutoto, Pipitea, and Tiakiwai. These pa covered some 15 acres, and there were also burial grounds and extensive

9. Miller, pp 43–45; Patricia Burns, *Fatal Success: A History of the New Zealand Company* (Auckland: Heinemann Reed, 1989), pp 131–132

10. Burns, pp 106, 110, 126

11. Ibid, pp 132–133; Rosemarie V Tonk, 'The First New Zealand Land Commissions, 1840–1845', MA thesis, University of Canterbury, 1986, p 149

12. Burns, pp 133–136



Figure 3: *View of a Part of the Town of Wellington, New Zealand, Looking towards the South East, Comprising about One-third of the Water-frontage in September 1841 by C Heaphy, Draftsman to the New Zealand Company.* This picture of the infant township of Wellington by New Zealand Company draughtsman Charles Heaphy emphasises the areas of flat land around Lambton Harbour and gives little sense of the hilliness of the surrounding landscape. Maori waka can be seen beside the harbour, but there is no sign of Maori pa. Watercolour by Charles Heaphy (1820–81). Reproduced courtesy Alexander Turnbull Library, Wellington, New Zealand (c-025-009).

cultivations in the area.[13] Moreover, these occupied lands belonged to Maori who had not been directly involved in the negotiation with Wakefield. Only one chief from each of Pipitea, Kumutoto, and Tiakiwai Pa had signed the Port Nicholson deed, and they had received less than the chiefs of the other pa in payment.[14] Alarmed and appalled at the surveyors' disregard of their property and wahi tapu, they retaliated by removing the survey pegs.[15] This was the beginning of a long struggle whereby the company sought to impose its chessboard plan on the landscape and its Maori occupants, irrespective of their rights and feelings. As the company's naturalist, Ernst Dieffenbach put it, 'The moving spirit of English colonization is that of absolute individuality. It is unwilling in its contact with foreign nations to acknowledge any other system but its own, and labours to enforce on all who are under its control its own peculiar principles.'[16]

13. Document c1, p 53

14. As discussed in section 3.5.4, Pipitea and Kumutoto had to share one payment, while Te Aro received a smaller portion than other pa. Tiakiwai did not receive a separate payment at all.

15. Burns, pp 151–152

16. Ernst Dieffenbach, *Travels in New Zealand: With Contributions to the Geography, Geology, Botany and Natural History of that Country*, 2 vols (London: J Murray, 1843), vol 2, p 172 (quoted in Miller, p 48)

### 5.3.3 The selection of the Wellington urban tenths

Smith completed his survey of the urban lots in July 1840, and produced a plan of the town of Wellington. Between 28 July and 14 August, the Wellington colonists made their choice of the urban sections, according to the order of priority established by the London ballot of July 1839.[17] At the same time, Smith selected the 110 Maori urban tenths reserves, which were shown on the town plan completed by Smith after the selection process was concluded.[18] (Another town plan produced in 1841 by Government Surveyor-General Felton Mathew is reproduced as map 4 and shows the urban tenths in green.) Some of the sections selected by Smith as reserves were already Maori pa and cultivations, including part of Pipitea (though some of this was excluded as the Tod old land claim), Kumutoto Pa, and other cultivations adjacent to Tiakiwai and in the Aro Valley. But foreshore pa at Tiakiwai and Te Aro, and part of Pipitea Pa, were not included, presumably because they had already been selected by purchasers of company lots who had drawn priority of selection.

Many other Maori tenths reserves were selected on the fringes of the proposed town and were of little use for commercial or agricultural development. Nevertheless, if we remember that Smith's selection of the Maori tenths reserves was constrained by the order of choice established by the London lottery, we can conclude that he did reasonably well in the circumstances. After all, Smith did select some prime foreshore sites, including four at Lambton and Thorndon Quays, which have increased enormously in value as the city of Wellington has developed. But in terms of the agricultural value of cultivated or formerly cultivated lands – from which Maori could have been expected to benefit by selling food to the new settlers – they did badly. According to R D Hanson, who was a land purchase agent for the company, Maori in the town had lost most of their cultivation land.[19]

Whether the Maori owners managed to retain their reserves and whether they got the full value of them are major concerns of this inquiry and will be discussed as we proceed with this report.

### 5.3.4 Land dispute at Te Aro

Because much pa and cultivation land had not been reserved for Maori, there were disputes when the purchasers or their agents tried to occupy this land. The New Zealand Colonial Secretary, Willoughby Shortland, visited Port Nicholson in June 1840 accompanied by a

17. Document E3, p 63

18. He selected lots 1 to 16, 18 to 20, 22 to 28, 37, 39 to 46, 49, 89 to 90, 109, 111, 113, 270 to 272, 278 to 279, 487, 514, 539, 542 to 543, 545, 574, 580, 584, 591 to 594, 601 to 608, 633 to 637, 659 to 660, 864, 893, 972 to 989, 995 to 1005, 1081 to 1082, and 1098 to 1100: see R L Jellicoe, 'Report on the Native Reserves in Wellington and Nelson Under the Control of the Native Trustee', 26 March 1929, AJHR, 1929, G-1, pp 11–12 (doc A24, pp 279–280). The plan is reproduced in Peter B Maling, *Historic Charts and Maps of New Zealand, 1642–1875* (Auckland: Reed Books, 1999), p 181.

19. Hanson to secretary, Aborigines Protection Society, 24 May 1842, published in *New Zealand Gazette and Wellington Spectator*, 4 October 1843 (quoted in doc C1, pp 54–55)

detachment of 30 troops under Lieutenant Best. The expedition was sent by Hobson to quash the company settlers' attempts to set up their own government.[20]

Shortland stayed on with his soldiers and some policemen. At first, Shortland reported that 'both the European and native population are in a very satisfactory state'.[21] However, in August conflict arose when settlers began trying to take possession of the sections they had just selected. Shortland reported that:

> on Wednesday last a serious breach of the peace took place, in consequence of a dispute between the natives of the Taranaki [Te Aro Pa] and the New Zealand Company, about some land situated in the town. To prevent a recurrence of the same, I have entered into an agreement with the natives to assign over their interests to the Crown . . . I beg to state that the natives behaved exceedingly well; when I arrived at the pah it was full of armed Europeans, but the natives were quiet and unarmed.[22]

Shortland persuaded certain Maori at Te Aro to sign an agreement assigning to him on behalf of the Queen all their 'rights, title and interest in certain [unspecified] lands situate in a bay in the harbour of Port Nicholson, New Zealand, on which a town has been laid out by the New Zealand Land Company'. In return, Shortland promised that the dispute as to the alleged purchase of their lands by the company would be submitted to Governor Hobson and that, 'if such lands shall not have been fairly and equitably purchased', a 'fair and reasonable compensation' would be paid to them. The agreement was explained to the Maori of Te Aro Pa by Richard Barrett, who acted as an interpreter.[23]

We question how well, if at all, Te Aro Maori would have understood this 'agreement'. We also note that Shortland failed to promise that, if it were shown that the lands had not been purchased (as was the case), the continued ownership of this land by Te Aro Maori would be recognised. Shortland merely undertook that Maori would be compensated, and did not promise to return the land.

### 5.3.5 Alleged Treaty breaches

The Wellington Tenths Trust claimants, in their fourth amended statement of claim, allege that:

- the Crown did not protect Maori when settlers moved on to Maori land in Lambton Harbour and elsewhere in 1840;

20. Burns, p 155
21. Shortland to Hobson, 20 June 1840 (doc A28, p 206)
22. Shortland to Hobson, 29 August 1840 (doc A29, p 348)
23. 'Agreement with the Natives of Pah Taranake', 29 August 1840, enclosure to Spain's final report, 31 March 1845, BPP, vol 5, pp 28–29

- the Crown failed to have any Government administrative presence at Te Whanganui a Tara for 19 months (between 1840 and mid-1841), and so failed to protect the mana and rangatiratanga of the tangata whenua resident there; and
- from April to July 1840, there were repeated encroachments by surveyors on Maori land, including pa, cultivations, and wahi tapu. During this period, it is alleged that the Crown failed to take any, or any adequate, steps to protect the tangata whenua.[24]

The Crown's response to the first of these claims is that it was beyond the Crown's capacity to have an immediate presence in Port Nicholson at the time. As to the second claim, Crown counsel said that the allegation is made without regard to the resources available to the Crown in this period.[25]

The Crown drew our attention to the presence of the Colonial Secretary, Shortland, from June through to August 1840, when the Te Aro Pa incident took place. Crown counsel referred us to *The Journal of Ensign Best* and noted Best's warm relations with his Maori neighbours, especially Wairarapa and Moturoa.[26] Best concluded that the company settlers had been foiled in their purpose by the Maori having given their land into the care of Shortland, 'who will allow the Company to occupy the sections they have chosen under certain restrictions and to this the Natives have consented'.[27]

As Crown counsel noted, Shortland later issued two public notices. The first cautioned against unauthorised armed assemblies and the other announced that:

> having entered into an agreement with the natives, by which they have assigned over and yielded up to me, in the name and on the behalf of Her Majesty Queen Victoria, all their rights, titles and interest in the lands aforesaid, [I] do hereby give notice, that all persons wishing to occupy any part of the said lands, until the question as to title shall be determined, or until the pleasure of His Excellency the Lieutenant-Governor shall be known, will be placed in possession by application made to me, through Colonel Wakefield . . . and all persons who shall attempt to take possession without such permission, will be proceeded against according to law.[28]

As we have seen, in his agreement with Te Aro Maori, Shortland offered compensation, not the return of the land. The Tribunal has difficulty in finding that the Crown, in the circumstances complained of by the Wellington Tenths Trust claimants, may realistically be found to have acted in breach of the Treaty. Hobson was based more than 400 miles to the north, and he was for a time seriously ill in 1840. However, he did dispatch his deputy – Shortland – with troops to Wellington in June 1840 when Maori were experiencing

24. Claim 1.2(d), paras 10.7, 10.9, 10.10
25. Document Q1, pp 13–14
26. Document P1, p 25
27. Abel D W Best, *The Journal of Ensign Best, 1837–1843*, Nancy M Taylor (ed) (Wellington: Government Printer, 1966), p 239
28. Notice by Shortland, 29 August 1840, BPP, vol 3, p 206

difficulties with the settlers. Peace of a kind was restored by Shortland's response to the settlers' hostile acts in August. While the Crown may be open to the criticism that it tended to favour the settlers, Maori were subsequently guaranteed their pa, cultivations, and urupa, in addition to their tenths reserves (see ch 8).

### 5.3.6 The selection of rural tenths

The selection of the rural tenths by Smith began when the first surveyed sections at the Hutt became available in October 1840.[29] Smith chose the bulk of the rural tenths in the Port Nicholson block, but the selection was later continued by commissioners of native reserves Edmund Halswell and Henry St Hill.[30] A 500-acre block (equivalent to five tenths) was also 'reserved by the desire of Mr Shortland for the especial use of the Natives of Kai Warra'.[31] By February 1844, it appears that 39 rural tenths had been selected, but some additional rural tenths were evidently added after this time.[32] Assistant surveyor T H Fitzgerald recorded 43 tenths in 1845 (including the 500-acre Kaiwharawhara block), while native reserves agent St Hill listed 37 tenths within the Port Nicholson block (as extended in 1844).[33] St Hill's list did not include the Kaiwharawhara block, which adds another five tenths, giving a total of 42. It seems, then, that by 1845–47 there were 42 or 43 rural tenths within the Port Nicholson block, and in 1848 4200 acres of rural tenths were excepted from the Crown grant to the New Zealand Company (see ch 10).[34] Map 5 shows the rural tenths as they appeared on a company map of the country districts of Port Nicholson in January 1843.[35]

The basis on which the rural tenths were selected is not clear. Writing about his selection of reserves for Maori, primarily in Horowhenua, reserves commissioner Halswell reported that he had 'carefully attended, whenever possible, to their own wishes . . .; my attention has been particularly drawn to their own clearings and pahs, and I have secured for them as

29. Document C1, p 53

30. Henry St Hill, 'Account of Native Reserve Lands in the New Zealand Company's First and Principal Settlement', 31 December 1847, NM8/1850/1151, NA Wellington (doc A40, pp 301–304). St Hill replaced a few of the selections made by Smith with different sections.

31. Fitzgerald to superintendent, Wellington, 24 December 1845, IA1/1847/1557 (doc C1(b), pp 347–348)

32. George Clarke junior, 'Schedule . . . Showing the Probable Extent of Land for which it is Proposed to Compensate the Native Claimants', 7 February 1844, BPP, vol 2, apps, p 419. This schedule is reproduced, and its purpose explained, at section 7.5.3 below.

33. Fitzgerald to superintendent, Wellington, 24 December 1845, IA1/1847/1557 (doc C1(b), pp 347–358); Henry St Hill, 'Account of Native Reserve Lands in the New Zealand Company's First and Principal Settlement', 31 December 1847, NM8/1850/1151, NA Wellington (doc A40, pp 301–304). St Hill listed the following rural reserves within the Port Nicholson block: Lower Hutt 1, 2, 3, 16, 20, 42, 57, 58; Ohiro 15, 19, 21, 26; Ohariu 12, 13, 77, 88, 91, 97, 98; Harbour 5, 6; Town 6, 7; Kinapora 7, 8, 9; Makara 22, 24, 37, 39; Horokiwi Road 11; Wainuiomata 39; Upper Hutt 98, 102, 132; Lowry Bay 1, 4. Fitzgerald also listed Harbour 23 and the 500-acre Kaiwharawhara block.

34. These excepted reserves are listed in the schedule enclosed with Wakefield to secretary, New Zealand Company, 28 February 1848, CO208 (doc C1(c), p 312). This list is the same as St Hill's, except that it also includes the 500-acre Kaiwharawhara block.

35. The original company map is reproduced in Maling, p 185.

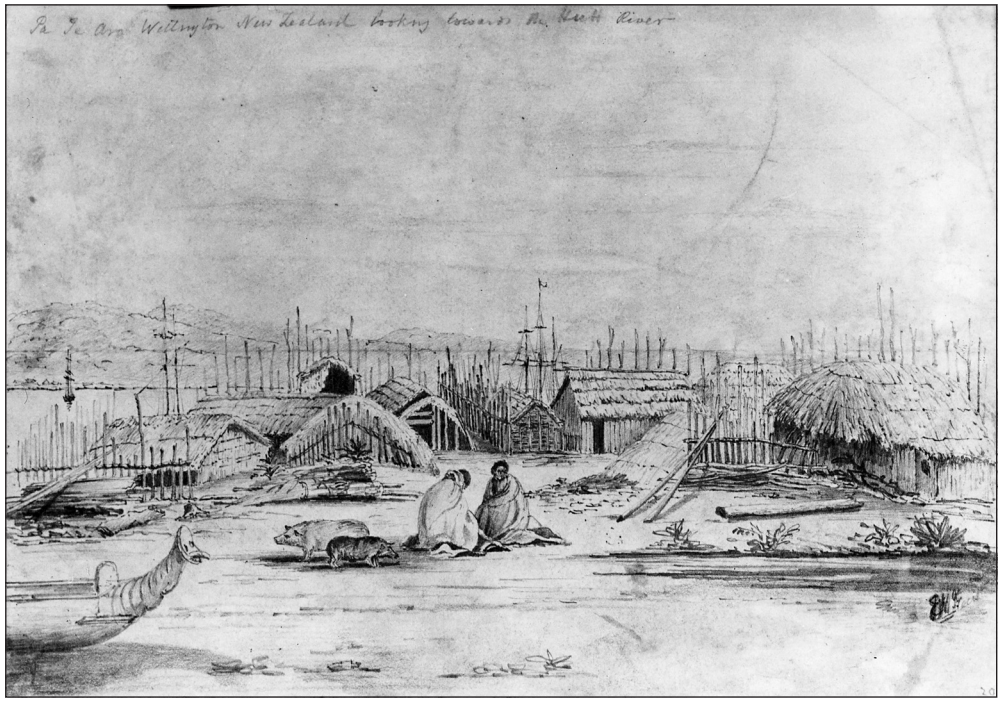


Figure 4: *Pa, Te Aro, Wellington Looking towards the Hutt River,* circa 1842. Pencil drawing by Edmund Norman (1820–75). Reproduced courtesy Alexander Turnbull Library, Wellington, New Zealand (A-049-001)..

much water frontage as possible'.[36] If the same principles were followed at Port Nicholson, it was with only partial success, and the selection was clearly constrained by the ballot system which meant that the tenths reserves could not be chosen all at once, before the settlers made their selections.[37] Some of the reserves selected contained existing pa and cultivations; for example, the very first selection of reserves in the Hutt included Petone Pa.[38] Other groups were not so fortunate, however, and found that their pa or cultivation land had been selected by settlers. In 1842, Taringa Kuri and his Ngati Tama people moved to the Hutt Valley because of incursions on their cultivation land at Kaiwharawhara by settlers and their cattle.[39]

In general, it cannot be said that the reserves selected for Maori were well suited to Maori use or occupation. Hanson, the company land purchase agent, wrote in 1842 that Maori in the area around the harbour used some 500 to 600 acres for cultivation (although not all of this was being cultivated at any one time). He estimated that not more than a third, or more probably a sixth, of this area had been reserved for them. Moreover, most of the land which

36. Halswell to Wakefield, 4 June 1842 (doc A29, p 492)

37. In 1846, after receiving a copy of Fitzgerald's critical report on the suitability of the reserves for cultivation, William Mein Smith defended his selection of reserves by arguing that he had made the best selections he could, given the circumstances of the time and the constraints of the ballot system: Smith to Wakefield, 1 April 1846, CO208 (doc C1(c), pp 159–165).

38. Document C1, p 53

39. Document H7, pp 42–47. Ngati Tama's move to the Hutt is discussed further in chapter 9 below.

had been reserved possessed, in his opinion, 'but little utility for the present purposes of the natives' (although the reserves near Petone were an exception). Further, he noted that the pa at Kaiwharawhara, Ngauranga, and Waiwhetu had not been reserved.[40] At around the same time, land claims commissioner Spain endorsed the opinion of his surveyor, Campbell, that:

> with few exceptions, the native reserves have been selected in spots so distant from the pahs, and where the ground is so hilly as to render them almost useless to the natives for the purposes of cultivation; and that little regard has been paid to the interests of the natives in these choices.[41]

Several years later, the Government's assistant surveyor, TH Fitzgerald, carried out a detailed assessment of the suitability of the reserves for cultivation, and estimated that only 1530 acres out of the total of 4300 acres (roughly one-third) were cultivatable.[42] Even the New Zealand Company's surveyor, Alfred Wills, who challenged Fitzgerald's assessment of many sections, estimated that only 1980 acres (less than half the total area) of rural tenths land was suitable for Maori cultivation.[43]

## 5.4 Investigation of Direct Land Transactions with Maori

### 5.4.1 Land claims legislation

As foreshadowed in Normanby's instructions to Hobson of 14 August 1839, the Governor of New South Wales was required to make appropriate provision for the investigation of private land transactions with Maori before Hobson's arrival in New Zealand. Accordingly, in August 1840 the New South Wales Legislature enacted the New Zealand Land Claims Act. However, the Act was later disallowed by the British Government, as it had decided to sever New Zealand from the jurisdiction of New South Wales.[44]

When New Zealand became a Crown colony with its own legislature, Hobson lost no time in securing the passage of the Land Claims Ordinance 1841 on 9 June 1841. This ordinance largely followed the 1840 New South Wales legislation:

- it authorised the appointment of one or more commissioners to examine and report on claims to land based on purported purchases from Maori;
- it stipulated that an inquiry should investigate the manner in which such claims to land had been acquired, and the extent and locality of such claims;

40. Hanson to secretary, Aborigines Protection Society, 24 May 1842, published in *New Zealand Gazette and Wellington Spectator*, 4 October 1843 (quoted in docs C1, pp 54–55, and E3, p 149)
41. Spain to Hobson, 22 June 1842 (quoted in Spain's interim report, 12 September 1843, BPP, vol 2, apps, p 294)
42. Fitzgerald to superintendent, Wellington, 24 December 1845, IA1/1847/1557 (doc C1(b), p 356)
43. Wills to Wakefield, 4 April 1846, CO208 (doc C1(c), p 193)
44. Tonk, pp 29, 47

- in examining such claims, the commissioners were to be guided by 'the real justice and good conscience of the case, without regard to legal forms';
- if satisfied that a claimant was entitled to a grant of land, the commissioners were to report accordingly to the Governor; and
- the area of the grant recommended was to be fixed in relation to the price paid, as set out in a schedule to the ordinance. However, no grant was to exceed 2560 acres, unless specially authorised by the Governor.[45]

### 5.4.2 The November 1840 agreement between the Crown and the New Zealand Company

On 10 March 1841, Lord Russell sent Hobson particulars of a November 1840 agreement between the British Government and the New Zealand Company.[46] A principal objective of this agreement was to make a retrospective adjustment of the company's claims in New Zealand. The agreement referred to expenditure incurred by the company in respect of its colonisation ventures, which included such things as purchasing land from Maori, transporting immigrants to New Zealand, and carrying out surveys and public works.

An assessment of the amount spent by the company was to be made by an accountant, James Pennington. When he had calculated the amount involved, the company would receive a Crown grant of four acres of land for every pound sterling of expenditure, and the New Zealand Government was to complete the survey of the external lines of every block of land assigned to the company. However, no more than 160,000 acres was to be selected by the company 'at or in the neighbourhood of' Port Nicholson and New Plymouth.

The lands to be assigned to the company were those to which the company had 'laid claim in virtue of contracts made by them with the natives or others' prior to Hobson's arrival. The agreement was founded on the assumed validity of the purchases the New Zealand Company claimed to have made.[47]

The lands so granted to the company were to be held subject to all New Zealand laws relating to lands, especially those relating to public roads, wharves, quays, and other such works. All public works and buildings included in Pennington's award were to vest in the Crown for public use should the Governor require them for such purpose.

As a quid pro quo, the company disclaimed all title or pretence of title to any lands purchased or acquired in New Zealand other than the lands granted to them under the agreement, and any other lands subsequently purchased or acquired from the Crown. In effect,

45. Ibid, p 48. The 1841 ordinance is in BPP, vol 3, pp 275–281. An amendment to the ordinance, mistakenly made by Hobson in 1842, was disallowed by Lord Stanley, the new Secretary of State for the Colonies, in December 1842. As a result, the 1841 ordinance was revived: see doc E4, pp 168–169; Stanley to Hobson, 19 December 1842 (doc A29, pp 631–634); Shortland to Stanley, 6 November 1843, BPP, vol 2, apps, p 360. The 1842 ordinance can be found in BPP, vol 4, pp 124–126.

46. BPP, vol 3, pp 207–209

47. See our subsequent discussion at section 7.3.2. Paragraphs 8.5, 10.2, 10.3, and 10.4 of the Wellington Tenths Trust's fourth amended statement of claim (claim 1.2(d)) must be read down accordingly.

the company abandoned all other claims under the various land deeds it had entered into with Maori.

Clause 13 of the agreement, which related to the provision of the tenths reserves referred to in the Port Nicholson deed of purchase, provided:

> It being also understood that the company have entered into engagements for the reservation of certain lands for the benefit of the natives, it is agreed that, in respect of all the lands so to be granted to the company as aforesaid, reservations of such lands shall be made for the benefit of the natives by Her Majesty's Government, in fulfilment of and according to the tenor of such stipulations; the Government reserving to themselves, in respect of all other lands, to make such arrangements as to them shall seem just and expedient for the benefit of the natives.

By this clause, the Crown took over responsibility for the tenths, a point discussed further in chapter 12.

The agreement also confirmed that the Crown would grant a charter of incorporation to the New Zealand Company.

The acceptance of Lord Russell's proposals was confirmed by the company on 19 November 1840.[48] Early in December, the company in London was advised by Russell of certain general principles which the Crown proposed to be guided by in governing New Zealand. The company was also informed that the necessary measures had been taken to make New Zealand a separate colony, independent of New South Wales.

With regard to all lands in the colony acquired otherwise than by Crown grants, it was proposed that the titles of the claimants should be subjected to investigation by a commission. Such inquiries would be directed to ascertaining which lands in New Zealand had been 'granted by the chiefs of those islands according to the customs of the country, and in return for some adequate consideration'.

Russell further advised that it was 'proposed to apply to all other British subjects, the rule to which the New Zealand Company will be subject in respect of the lands claimed by them within the colony'. That is, all Pakeha claiming land in New Zealand would be granted four acres of land for every pound sterling 'invested by them in the manner mentioned in the arrangements with the New Zealand Company'. This arrangement would, however, apply only to those who had acquired lands before 5 January 1840, the date of Gipps's proclamation on the subject, and was subject to the investigation of title by the Land Claims Commissioner.[49]

In a dispatch of 22 April 1841,Russell advised Hobson that the November 1840 agreement had been varied. Instead of limiting the land to be granted to the company to those areas to which it laid claim by virtue of contracts with Maori, the Governor was given discretion to

48. Somes to Russell, 19 November 1840, BPP, vol 3, pp 209–210
49. Vernon Smith to Somes, 2 December 1840, BPP, vol 3, pp 210–211

grant the company land anywhere in New Zealand (other than the intended capital of New Zealand and its vicinity).[50]

Then, on 20 May 1841, following the Colonial Office's receipt of Pennington's preliminary award recommending that 531,929 acres be granted to the company, Russell instructed Hobson to 'make the necessary assignments of land to the agents of the Company, in pursuance of the terms of the Agreement'.[51] Pennington's award was thus very much larger than the 160,000 acres allowed for Port Nicholson and New Plymouth under the November 1840 agreement, and Russell agreed to allow the company to take the excess elsewhere in New Zealand. Russell now believed the final award would probably amount to over one million acres, a result he had not foreseen when the original agreement was made.[52]

## 5.5 Hobson's Agreement with Wakefield

### 5.5.1 Hobson visits Wellington

In August 1841, Hobson visited Wellington with several of his officials and met local Maori and company representatives. George Clarke senior, the chief protector, accompanied Hobson. Clarke visited the different groups at their pa around Port Nicholson and described Maori concern at what they regarded as company encroachments on their lands, 'which they declared had never been alienated'. He estimated that there were about 1000 Maori living in the vicinity of Port Nicholson and 'found them everywhere clamorous and indignant about their lands, they having been given to understand that their pas and cultivations were sold'. Maori resistance to this notion was so great that those carrying out the survey for the company went armed. It was at this stage that Hobson and his party arrived and assured the local Maori that they would retain their pa and cultivations. Maori then agreed to let the survey proceed.[53]

Hobson also met Colonel Wakefield, who proposed terms for a settlement of the company's Port Nicholson claim based on the November 1840 agreement. Wakefield set out those terms in a letter written following his meeting with Hobson. Wakefield asserted that it was presumed in the agreement that the company had acquired from the natives a valid title to a very large territory. On the basis of this presumption, Wakefield claimed that the agreement authorised the selection of 110,000 acres in the Port Nicholson district, although the agreement had in fact authorised 160,000 acres for both the Port Nicholson and the New Plymouth districts, with no specific area for Port Nicholson. Wakefield noted that a

50. Russell to Hobson, 22 April 1841, BPP, vol 3, p 260

51. Russell to Hobson, 20 May 1841 (doc A28, p 175). Pennington later recommended a supplementary award of 180,664 acres: Hope to Somes, 11 January 1843 (doc A28, p 298). See also Burns, pp 171–172.

52. Vernon Smith to Somes, 1 September 1841, BPP, vol 3, p 374

53. 'The Chief Protector's Report of a Visit to New Zealand', enclosed with Hobson to Russell, 13 November 1841, BPP, vol 3, pp 521–523

commission was to be named by the British Government to decide on the validity of the company's presumed purchases from Maori.

Wakefield called on Hobson to guarantee those who had purchased land from the company an indefeasible title to all lands surveyed 'for the purpose of satisfying their claims'. However, if anyone, either Maori or Pakeha, was later found to have title to parts of those lands which had not been extinguished by the company's purchase, the company would pay them compensation. In addition, the company would not interfere with occupied pa, sacred places, or any unsold land prior to the commissioner's decision.[54]

Hobson responded by promising, in a letter to Wakefield, that the Crown would forgo its right of pre-emption to the lands comprised within the limits laid down in an accompanying schedule, and that the company would receive a grant of all such lands as had been validly purchased 'by any one' from Maori.[55] In a private accompanying note, he added that the Government would sanction any equitable arrangement the company made with Maori who lived on the lands referred to in the schedule 'to yield up possession of their habitations', provided no force or compulsion was used. Hobson had made the note private, lest any 'profligate or disaffected persons' used this agreement to 'prompt the natives to make exorbitant demands'.[56] We note here that the Wellington Tenths Trust claimants allege that Hobson acted in breach of his Treaty duty to protect Maori in agreeing to forgo the Crown's right of pre-emption and in entering into the private agreement to which we have just referred. We consider this claim and the Crown's response in section 5.5.2.

The schedule of land referred to by Hobson was prepared by Felton Mathew, the Crown's Surveyor-General, on 1 September 1841. With reference to the company's plan of the district, it listed sections in the vicinity of Port Nicholson as follows:

- 1100 acres in the town of Wellington;
- 5000 acres in the town district, including Karori and Ohiro;
- 6900 acres in the harbour district;
- 6400 acres in the Hutt district;
- 1200 acres at Watt's (Miramar) Penninsula; and
- 10,600 acres in the Porirua district (outside the Port Nicholson block).

This made 31,200 acres of land claimed by the company which were already laid out on the plan. Added to this, the schedule provided:

> Seventy-eight thousand eight hundred (78,800) acres, more or less, to be surveyed and allotted by the said Company, in the neighborhood of Port Nicholson, the boundaries of which neighbourhood are thus declared; viz.
>
> The River 'Manawatu,' from its mouth upwards to the parallel of the Wahins and Tararua ranges; from thence by the summit of the Tararua range, extending in a general direction

54. Wakefield to Hobson, 24 August 1841 (doc A29, pp 306–307)
55. Hobson to Wakefield, 5 September 1841, BPP, vol 3, p 524
56. Ibid, p 525

about south to the river Hutt; from thence by a line bearing south, by compass, to the summit of the 'Turakirai' range, which forms the eastern boundary of the valley of the river Hutt, to the sea at Baring Head.[57]

We note that the figure of 78,800 acres was the balance between that already laid out on the plan (31,200 acres) and the total area sought by the company 'in the neighbourhood of Port Nicholson' (110,000 acres).[58] However, it is difficult to characterise the extensive area from which the 78,800 acres was to be surveyed as being in the 'neighbourhood' of Port Nicholson – it extended some 100 miles north of the embryonic settlement at Port Nicholson to the Manawatu River.

It is not known whether, in September 1841 when Hobson agreed to waive the Crown's right of pre-emption over the lands in the schedule, he had received Russell's dispatch of 22 April 1841 advising that the land the subject of the 1840 agreement (160,000 acres at Port Nicholson and New Plymouth) could be extended to include such other lands as might be agreed to by Hobson. The fact that he was willing to include lands so obviously not within the Port Nicholson block suggests that he had. It must be remembered, however, that his agreement with Wakefield applied only to lands 'validly purchased' from Maori within the extended area.

When reporting on 13 November 1841 to Stanley about his arrangement with Wakefield, Hobson noted that on his arrival in Wellington in August uncertainty existed as to the validity of the New Zealand Company's claims to the land sold by it to the settlers at Wellington. In order to relieve the embarrassment of a 'numerous and respectable body of British subjects', he entered into the agreement (details of which he enclosed) with Wakefield. He noted that the boundaries 'defining the neighbourhood of Port Nicholson' were made to enable the company's agent to make his selections according to the terms of the November 1840 agreement. Hobson makes no reference to the powers conferred on him in April 1841 to extend the scope of that agreement.[59]

Though there was now apparent agreement between Hobson and Wakefield, this disguised an important difference that developed between the Crown and the New Zealand Company. Wakefield wanted Maori to 'exchange' lands which they occupied but which had been selected by settlers for the tenths reserves allocated to them. However, Hobson (and later Shortland, Spain, FitzRoy, and even Stanley) insisted that Maori be allowed to retain both their occupied land and their tenths reserves.[60] As we shall detail in chapter 10, Governor Grey and Colonel William McCleverty came round to the company view. Grey and McCleverty removed Maori from land which had been selected by settlers, and 'exchanged'

57. BPP, vol 3, pp 524–525. The schedule also included 50,000 acres at New Plymouth and 50,000 acres at Wanganui.
58. Document E3, p 100
59. Hobson to Stanley, 13 November 1841, BPP, vol 3, pp 523–524
60. Document E3, p 141

this cultivation land for tenths reserves and other land of which Maori were already the owners.

### 5.5.2 Alleged Treaty breaches

The Wellington Tenths Trust claimants have made two claims concerning Hobson's arrangements with Wakefield as related in the previous section:

- that Hobson agreed to waive the Crown's right of pre-emption in favour of the New Zealand Company at the expense of Maori of Te Whanganui a Tara; and
- that Hobson on behalf of the Crown made private agreements with the New Zealand Company which would allow the company to use whatever measures were necessary, save force, to induce Maori to move from tribal lands.[61]

Before examining these claims, we provide some context by quoting from a report by George Clarke senior, the chief protector of aborigines, who arrived in Wellington with Hobson and his party on 19 August 1841. Clarke's report on his visit to Port Nicholson was in due course sent by Hobson to the Secretary of State for the Colonies. The following extract from this report throws useful light on the situation in Port Nicholson at the time and on Hobson's reaction to the concerns of Maori:

> I visited the natives at their pas in and about Port Nicholson, and found them everywhere clamorous and indignant about their lands, they having been given to understand that their pas and cultivations were sold, and nothing could more clearly point out the odious light in which they viewed this assumption than the resistance which, for several months, they offered to what they considered the infringement of the whites upon them, who could or would not dare to proceed in their survey without being armed. Happily for the settlers of Port Nicholson, the government officers arrived at this crisis, and having pledged the government to assist in an amicable adjustment of their affairs, the Company have been permitted to proceed in their survey without molestation, and the natives to retain their pas and cultivations until a further adjustment could take place.
>
> His Excellency had various meetings with the natives in the presence of the principal agent of the Company, and other gentlemen of Wellington, and invariably, and on all occasions, they declared they had never sold their pas and cultivations, and that unless they were compelled by the Governor to vacate them, they never would. His Excellency proposed compensating them; this was alike unavailing, they declaring they would not leave the places where they had buried their fathers, nor leave the land which had long nourished them and their children; and although the Governor possessed a large share of their confidence, yet so strong were their feelings, and so cautious were they, that they would not give their consent to the erection of a custom-house within their pas. In the various

61. Claim 1.2(d), paras 10.1, 10.5

intercourses I had with the natives, endeavouring to elicit the extent of their alienation, they always asserted that they had no intention, nor ever expected that it would be required of them to part with either their pas or cultivations; they thought they would be conferring a benefit, as well as reaping a benefit, by allowing Europeans to cultivate beside them.

And here I would for a moment digress, in order to show the improbability of their ever having parted from the places which they so tenaciously hold. I believe it never was the custom of the natives to alienate a tract of country upon which they were living, unless they intended migrating or altogether abandoning it. The primary object of a New Zealander parting with his land is not only to obtain the paltry consideration which in many cases is given them for their land, but to secure to them the more permanent advantages of finding at all times a ready market for their produce with their white neighbours; but this important end is at once defeated upon the assumption of a total alienation, as claimed by the New Zealand Company; and the natives are at once disgusted with what they consider the grasping disposition of Europeans.

The unvarying statements of the natives on this subject having led his Excellency to assure them that they would not be obliged to leave their pas and cultivations, which they had not alienated, was received by them with great satisfaction.[62]

As noted in the previous section, Hobson wrote two letters dated 5 September 1841 to Wakefield in response to proposals in the latter's letter of 24 August. The first was an open letter, substituted for a draft proclamation which Hobson was persuaded by Wakefield not to issue, and advised that Hobson intended to forgo the Crown's right of pre-emption to the lands in the schedule. It also promised that the New Zealand Company would receive a grant of all such lands 'as may by any one have been validly purchased from the natives'.[63] On its face, it is difficult to infer that the waiver of the Crown's pre-emptive right would be at the expense of Maori at Te Whanganui a Tara, given the requirement that a valid purchase from Maori had to be established. In his letter to the Secretary of State for the Colonies enclosing Clarke's report, Hobson stated, in respect of the occupation of lands at Port Nicholson by the New Zealand Company, that:

From the conflicting and various statements and contradictions which are advanced on this subject, I find it impossible to arrive at any definite conclusion. Nor ought any decision be come to, until the case is fairly weighed and considered by the commissioner who is appointed to investigate these claims.

Hobson concluded his letter by advising that he had informed Wakefield that native pa and cultivations must be respected and that, 'for the rest, it might be necessary to make further payments to remove all difficulties'.[64]

62. Chief protector's report, undated, BPP, vol 3, p 522
63. Hobson to Wakefield, 5 September 1841, BPP, vol 3, p 524
64. Hobson to Secretary of State, 13 November 1841, BPP, vol 3, pp 520–521

In his private letter to Wakefield, also written on 5 September, Hobson advised that the Government would sanction 'any equitable arrangement' Wakefield might make 'to induce those natives' living on lands included in the schedule to 'yield up possession of their habitations'. However, he qualified this by saying that 'no force or compulsory measures for their removal' would be permitted.[65]

Counsel for the Wai 145 claimants submitted that Hobson's private letter conflicted with his concluding comments in his letter to the Secretary of State for the Colonies that he had told Wakefield that the native pa and cultivations must be respected.[66] He claimed that Hobson's private letter gave the company 'significant largesse' when dealing with Maori.[67] Counsel invoked a comment by historian Peter Adams, who noted that in September Hobson had told Wakefield that he would sanction 'any equitable arrangement' which might persuade Maori to give up their villages, despite his assurances to Maori that their unsold pa and cultivations would be protected. In Adams's opinion, this was 'hardly straight dealing, let alone in accord with a policy of not purchasing land "essential, or highly conducive" to the Maoris' "comfort, safety or subsistence"'.[68]

Crown counsel replied that, in the circumstances, Hobson acted responsibly and had made sure that Maori would not be moved from pa and other lands they did not wish to sell, while also indicating that he would not stand in the way of any equitable settlement between the parties.[69]

We are disposed to agree with the reply of counsel for the Wai 145 claimants that Hobson's private letter to Wakefield gave the company sanction to 'induce' Maori to move from the lands sought by the company, thus exposing them to the possibility of serious and real pressure to leave.[70] But, in the event, it appears that any efforts Wakefield may have made or wished to make to 'induce' Maori to give up their lands were frustrated for a time. In a November 1841 letter to the company secretary, Wakefield wrote:

> I have already informed you that, notwithstanding Governor Hobson's private assurance to me that no objection would be made to my inducing the natives to quit their pahs and cultivated grounds for the reserved lands, Mr Clarke, the missionary protector, had written in the Governor's name to the natives, telling them that they were to remain on the land hitherto occupied by them. This step has of course frustrated my efforts to remove them to the places destined by the Company for them, and is likely to produce great mischief and litigation. In many places since the selection of sections by the purchasers from the Company, the natives have enclosed land with the purpose of retaining it according to Mr Clarke's recommendation; consequently the owners are debarred from entering on possession.

65. Hobson to Wakefield, 5 September 1841, BPP, vol 3, p 525
66. Document O1, pp 86–87
67. Document Q11, p 10
68. Adams, p 191. Adams is quoting here from Normanby's 1839 instructions to Hobson.
69. Document P1, pp 30–31
70. Document Q11, p 11

Wakefield concluded his letter by expressing the hope that the company might, 'in the event of the continuance in office of a governor so hostile as the present one to the Company's interests, take steps with the Home Government to counteract the designs of the missionary protector'.[71]

We infer from this correspondence that, while Hobson's private letter may have encouraged Wakefield to exert undue pressure on Maori to vacate their habitations, the protector effectively frustrated for a time Wakefield's efforts to do so. As we will later note, however, serious encroachment by settlers on Maori land took place subsequently. Having carefully weighed all the circumstances we have related, the Tribunal is not satisfied that either of the two alleged Treaty breaches under discussion has been established. To find a Treaty breach, there must be proven 'prejudice' under section 6 of the Treaty of Waitangi Act 1975. Such prejudice has not been proven at this point.

### 5.6 Instructions to Land Claims Commissioner Spain

William Spain was appointed land claims commissioner in New Zealand on 20 January 1841.[72] In early March of that year, while still in England, Spain was instructed to confer with William Martin and William Swainson, who had recently been appointed New Zealand's chief justice and attorney-general respectively.[73] Martin wrote to the Colonial Office seeking instructions to guide Spain's work as land claims commissioner, and the office replied on 24 March, in a letter which was sent to the New Zealand Government the following day. This letter, written on behalf of Lord Russell, observed that, 'as Mr Spain is about to execute a Judicial Commission & to act as Arbiter between the Crown & HM Subjects on various questions of property', the only instructions which it would be proper to give were that he should carry out the New Zealand law from which he got his authority. However, the letter continued: 'Lord John Russell wishes me to remark that Mr Spain will be called upon to execute the law rather with a view to prevent future injustice than with the expectation of being able to redress satisfactorily past wrongs.'[74]

The Wellington Tenths Trust claimants allege in their statement of claim that Spain 'was instructed that the object of his Commission was not the resolution of past injustices committed against tangata whenua but was instead the prevention of any future wrongdoings'.[75]

71. Wakefield to secretary, New Zealand Company, 5 November 1841 (doc A29, pp 309–310). The letter from Clarke to which Wakefield refers was a letter from George Clarke junior to the Pipitea chief Wairarapa, dated 10 September 1841, reassuring him that he would not be driven out of his pa against his will. Two different English translations are given in document E3 at page 103 (the Maori original has not been found).

72. Tonks, p 125

73. Document E4, p 167

74. Vernon Smith to Martin, 24 March 1841, CO406/1, fols 192–193 (quoted in G A Phillipson, *The Northern South Island*, Waitangi Tribunal Rangahaua Whanui series (working paper: first release), June 1995, p 71)

75. Claim 1.2(d), para 11.1

Claimant counsel relies on a version of the letter of 24 March 1841 which appears to be an earlier draft and which states that 'the redress of past injustice to the Natives is less the object of this Commission than the prevention of future wrongs'.[76] The statement of claim substitutes 'not' for 'less', which significantly changes the meaning. Quite apart from this consideration, we are unaware of any evidence that Russell's 'remark' or, indeed, any part of the letter to Martin was ever communicated to Spain. Claimant counsel relies on the evidence of claimant historian Duncan Moore, who states that on 24 March Martin was instructed by the Colonial Office to tell Spain that 'the redress of past injustice to the natives is less the object of this commission than the prevention of future wrongs'.[77] However, there is no instruction in the letter of 24 March that Martin should communicate its contents to Spain. It is possible that either Martin or Hobson did convey Russell's views to Spain, but, even if this were so, the only specific instruction contained in the 24 March letter was that Spain should carry out the New Zealand law. The evidence does not establish that Spain was in any way influenced by Russell's remark about preventing future injustice rather than redressing past wrongs.

Spain left England in April 1841, arriving in Auckland in December.[78] In March 1842, following the passage of the Land Claims Amendment Ordinance 1842 (later disallowed) on 25 February, Spain received Hobson's instructions for his inquiry into the claims of the New Zealand Company.[79] These instructions contain no reference to Lord Russell's 'remarks' to Martin in the letter of 24 March 1841. Hobson's instructions expressly required Spain to hear and report on the New Zealand Company's claims under the provisions of the Land Claims Amendment Ordinance 1842. He was:

- to be guided 'by the real justice and good conscience of the case without regard for legal solemnities';
- to ensure that a protector of aborigines was present at all hearings, his duty being to represent the rights of Maori and protect their interests and to act for them in the conduct of their cases; and
- not to recommend the grant to any claimant of more land than four acres for every pound sterling expended in the manner referred to in the ordinance, 'nor any more than the contents of the purchase made' from Maori, irrespective of the amount paid for the land, 'with the exception of the New Zealand Company, who hold Blocks of Land under their Charter from the Crown'.

These instructions envisaged reports on the claims referred to him being made by Spain to the Governor. The instructions refer to Spain making 'awards', but one critical provision placed restrictions on the amount of land he could 'recommend' to be granted. Spain's

76. Document 02, p 117. This version of the letter is quoted in document E4 at page 167 and in Phillipson at page 70. Phillipson identifies it as an earlier draft.

77. Document E4, p 167

78. Tonks, pp 127–128

79. Shortland to Spain, 26 March 1842, IA4/253 (quoted in doc E4, pp 172–173)

instructions from Hobson were made pursuant to the Land Claims Amendment Ordinance 1842, but this ordinance was disallowed by Lord Stanley in December 1842 and, as a consequence, the 1841 ordinance was revived.[80] The 1841 and 1842 ordinances both made it clear that no report or recommendation of a land commissioner was to take effect unless and until it was confirmed by the Governor. Hobson had no power under the ordinance to confer any greater power on Spain. Accordingly, Hobson had no legal power to authorise Spain to make an 'award' or 'determination' as to the amount of land to be Crown granted.

In his covering letter with the instructions, Hobson told Spain to bear in mind that 'the Town of Wellington and the shores of Port Nicholson have been guaranteed to the Company with the exception of the native pahs cultivations and burying grounds'.[81] This was presumably a reference to Hobson's September 1841 letter to Wakefield and the accompanying schedule (see s 5.5.1). However, while Hobson had made clear to Wakefield that the company would be granted only 'such lands *as may by any one have been validly purchased from the natives*' (emphasis added), Hobson failed to add this caveat in his letter to Spain which, as Crown counsel admitted, 'contained some loose expressions'.[82] Nevertheless, Spain clearly understood that proof of a valid purchase by the company was an essential precondition to any such 'guarantee'. In a confidential dispatch to Hobson in June 1842, Spain wrote:

> I cannot construe the word 'guaranteed' as meaning that the Company's title to the lands thus described is to be admitted, until it be first proved to me that the native one has been extinguished. If, however, I should have mistaken your Excellency's meaning, I trust you will be pleased to cause specific directions to be given me upon the subject.[83]

No such further directions were given by Hobson.

Having received his instructions from Hobson, Spain travelled from Auckland to Wellington in April 1842 and began his inquiry into the company's claim at Port Nicholson the following month. These proceedings, and Spain's preliminary report on the company's claims, were discussed in chapter 3. In chapter 7, we relate how Spain's inquiry was replaced by arbitration.

80. See fn 45 above
81. Shortland to Spain, 26 March 1842, IA4/253 (quoted in doc E4, p 177)
82. Document P1, p 35
83. Spain to Hobson, 22 June 1842 (quoted in Spain's interim report, 12 September 1843, BPP, vol 2, apps, p 293)

CHAPTER 6

# THE TOWN BELT AND OTHER PUBLIC RESERVES

## 6.1 Introduction

Before continuing with our discussion of Spain's inquiry, we examine another important event that occurred under Hobson's governorship: the taking by the Crown of land for the town belt and other public reserves. The establishment of a green belt of land around the town of Wellington which was to be kept free of buildings and used for public recreation was part of the original New Zealand Company plan for the town. In 1841, Governor Hobson proclaimed the town belt a Crown reserve, and this was its status until 1861, when the town belt was granted to the provincial superintendent of Wellington. The superintendent then granted the town belt to the city of Wellington in 1873, and it has remained in Wellington City Council ownership ever since. From the earliest years of the Port Nicholson settlement, the colonists felt strongly about the town belt and tried to ensure that it retained its status as a reserve for public recreation. Few have considered how this land was acquired from Maori in the first place. In fact, Maori never sold the town belt, nor did they receive compensation for the loss of much of this land.

A number of other public reserves were also claimed for the Crown by Governor Hobson's 1841 proclamation, and at least some of these reserves subsequently remained in Crown ownership. The Crown likewise assumed ownership of Matiu and Makoro (Somes and Ward Islands) in the early 1840s. This chapter discusses all these early takings of Maori land for public reserves and considers whether, in assuming ownership of this land, the Crown breached the Treaty. Later takings of Maori reserve land for public purposes are discussed in chapter 17.

## 6.2 History of the Town Belt and Public Reserves

In August 1839, New Zealand Company secretary John Ward instructed the company's surveyor, William Mein Smith, that 'the whole outside of the Town, inland, should be separated from the country sections by a broad belt of land which you will declare that the company intends to be public property on condition that no buildings be ever erected on it'.[1] Smith duly

1. Ward to Smith, August 1839, NZC102/1-2, NA Wellington (quoted in doc K3, p 6)

laid out a town belt surrounding the 1100 town acres in his August 1840 plan of the town of Wellington. His plan showed a clear exterior boundary to the belt, and this exterior boundary also marked the start of the country district. Duncan Moore has calculated the area of this original town belt, before any land was taken from it for other purposes, as 1562 acres 36 perches.[2] Smith's plan also marked out a number of other areas within the town which were to be used for public purposes.[3]

On 10 September 1841, Governor Hobson proclaimed the boundaries of the town of Wellington (which were also the interior boundaries of the town belt). On the same day, the Governor directed that a notice be placed in the *New Zealand Gazette* requiring all persons occupying public or native reserves to vacate those sites, and declaring that 'all persons are warned not to clear, fence, cultivate, or build in or upon any portion of the belt of reserved land surrounding the town'.[4]

### 6.2.1 Governor Hobson proclaims public reserves

Under sections 6 and 7 of the Land Claims Ordinance 1841, the land claims commissioners were not to recommend the granting to private claimants of 'any headland, promontory, bay, or island, that may hereafter be required for any purpose of defence, or for the site of any town or village reserve, or for any other purpose of public utility'.[5] It seems that this ordinance provided the basis for the Crown's early acquisition of public reserves in Wellington.[6]

The Government's Surveyor-General, Felton Mathew, accompanied Governor Hobson on his August 1841 visit to Wellington, and Mathew's main task during this visit was to identify land in the town to be reserved by the Crown for public purposes.[7] He also made some general observations on the layout of the town, which he considered 'a magnificent site completely destroyed . . . [by] the absurdity of laying out a plan on a sheet of paper, and restricting the size of the allotments to an acre'. He considered that the one-acre sections were too large for their intended purpose, and that it would have been better to have had sections 'varying in extent from an eighth of an acre upwards'. Although he found the public reserves made by the New Zealand Company insufficient and inadequate, Mathew made 'arrangement for their appropriation' by the Crown and marked them on the map of the city of Wellington which he prepared. Commenting on these public reserves, he noted that the sites proposed for a marketplace and a custom house were occupied by Pipitea and Te Aro Pa, which the Maori inhabitants had no wish to alienate.[8] Mathew's map, which was largely the

2. Document K3, pp 10, 13
3. Document I3(c)
4. Document K3, p 14; *New Zealand Gazette* notice in Turton, *Epitome* (doc A26), s D, p 1
5. BPP, vol 3, p 278
6. Cathy Marr, *Public Works Takings of Maori Land, 1840–1981*, Waitangi Tribunal Rangahaua Whanui series, May 1997, p 32
7. Document E3, p 110
8. Surveyor-General's report, 20 October 1841, BPP, vol 3, pp 534–535

same as Smith's map of 1840, was forwarded by Hobson to London and was subsequently published, along with Mathew's report, in the *British Parliamentary Papers*.[9] It is reproduced in the present report as map 4.

Then, in a proclamation published in the *New Zealand Gazette* on 20 October 1841, Governor Hobson claimed the reserves marked out by Mathew for the Crown. This proclamation stated that the public reserves shown on the company's town plan, including the town belt, together with a number of promontories around the harbour (Points Jerningham, Halswell, and Waddell, and Pencarrow and Baring Heads), were 'reserved by the Crown for public purposes'.[10] In forwarding Mathew's report to the Colonial Secretary, Hobson criticised the company's lack of attention to the selection of reserves for public purposes, remarking that, apart from the barracks, none of the places selected for public reserves in the town 'are in situations I would have selected if I had had a more extended choice'.[11]

### 6.2.2 The town belt in the 1840s

It appears that, despite Hobson's prohibition on clearing and cultivating the town belt, Maori continued to do both largely unhindered. There were a number of areas of Maori cultivation within the town belt – Te Aro's at Polhill Gully and Omaroro, Pipitea's at Orangikaupapa/Tinakori, and Kumutoto's in part of what is now the Wellington Botanical Gardens[12] – and Maori cleared trees in the belt by burning them, and collected firewood there. Such activities attracted the ire of the pro-company *Gazette and Spectator*, which complained that, unless they were prevented from doing so, Maori would convert 'the chief beauty of our town into a mass of cheerless, stunted, naked barrenness'. The newspaper continued that, by clearing the town belt by fire and replacing forest with cultivations, Maori were creating a fire hazard and detracting from the value of property in Wellington, which depended heavily on the attractiveness of the town belt.[13] Notwithstanding such concerns, Maori seem to have been allowed to continue clearing, cultivating, and collecting firewood in the town belt in the 1840s.

In 1847, Colonel McCleverty, who had been given the task of persuading Maori to 'exchange' their cultivation land claimed by settlers for other land (see ch 10), reported that Pipitea, Kumutoto, and Te Aro Maori were cultivating 62 acres in the town belt. He recommended that additional land in the town belt should be assigned to Maori as part of his 'exchanges', 'in the belief that the Town Belt is to be considered as waste land and belonging to the Crown'. McCleverty seemingly concluded that the town belt was waste land simply on the basis that it had not been included in Governor FitzRoy's 1845 Crown grant to the New

9. Document K3, pp 13–14
10. Proclamation, 16 October 1841, *New Zealand Gazette*, 20 October 1841 (reprinted in Turton, *Epitome* (doc A26), s A3, p 166)
11. Hobson to Secretary of State for the Colonies, 13 December 1841, BPP, vol 3, p 534
12. Document K3, pp 8, 36, 39, 40
13. *Gazette and Spectator*, 19 January 1842 (quoted in doc K3, pp 17–18)

Zealand Company. The company rejected this grant, and McCleverty recognised that one of its objections was to the continued presence of Maori cultivations on town belt land. Nevertheless, he thought it advisable to provide Maori with more town belt land owing to the great difficulty of obtaining land in good situations.[14] In his letter to Earl Grey enclosing McCleverty's preliminary report, Governor Grey noted that necessity compelled him to approve McCleverty's recommendation that town belt land should be assigned to Maori, regardless of Pakeha opposition to any such proposal.[15] McCleverty assigned some 219 acres of town belt land to Te Aro, Pipitea, and Kumutoto Maori.[16] The company was not happy about the fact that some town belt land had been assigned to Maori and tried unsuccessfully to have this land restored to the town belt.[17]

### 6.2.3 Town belt vested in Wellington City Council

In June 1861, the Governor, under the authority of the Public Reserves Act 1854, granted the town belt to the superintendent of Wellington province 'for purposes of Public Utility to the Town of Wellington and its inhabitants'. This grant comprised 1234 acres 2 roods 18 perches, the area of the town belt having been reduced mainly by the award of town belt land to Maori, but also by some other takings for various purposes.[18] The superintendent tried almost immediately to have the town belt vested in a local body, but first such a body had to be created. Legislation establishing a Wellington town board passed through the Provincial Council in tandem with the Wellington City Reserves Act in mid-1862. The town board commissioners then set about surveying the town belt and dividing it into allotments, many of which were leased.[19] Title to the town belt remained with the superintendent of Wellington, however, until 17 March 1873, when the land was granted upon trust to the city of Wellington, 'to be forever hereafter used and appreciated as a public recreation ground for the inhabitants of the City of Wellington'. The area granted was 1061 acres 1 rood 2 perches, a further reduction of 173 acres from the 1861 grant. This reduction was apparently due mainly to the granting of town belt land to Wellington Hospital, and for the Governor-General's present residence.[20] The remaining town belt land has been held and managed by the Wellington City Council ever since.

14. McCleverty, 'Report on Port Nicholson Cultivations', enclosed with dispatch from Governor Grey to Earl Grey, 21 April 1847, BPP, vol 6, [892], p 41
15. Governor Grey to Earl Grey, 21 April 1847, BPP, vol 6, [892], p 37
16. McCleverty to Eyre, 20 November 1847, in Turton, *Epitome* (doc A26), s D, p 13. See chapters 10 and 11 below.
17. Document K3, pp 26–27
18. Crown grant 1961b, *Crown Grants*, vol 2, fol 150, Land Information New Zealand, Wellington district (quoted in doc K3, p 29)
19. Document K3, pp 31–32
20. Ibid, p 33

### 6.2.4 Other public reserves

It is not clear exactly how much of the town land marked as public reserves on Felton Mathew's 1841 map and claimed for the Crown by Hobson in 1841 actually became public reserve land in practice. However, almost 50 acres of public reserves in the town of Wellington, listed in a schedule of land excepted from the 1848 Crown grant to the New Zealand Company, were said to have been 'originally Reserved by the Company'. The same was true of some 280 acres of public reserves outside the town (not including the town belt), which were likewise excepted from the Crown grant. These reserves consisted of Points Jerningham, Halswell, and Waddell; Palmer Head; Somes and Ward Islands (see below); and a 100-acre 'Government Domain'.[21] (The Government domain, set aside as a country residence for the Governor, was converted by Grey and McCleverty into a reserve for Kaiwharawhara Maori in 1846–47 and thus ceased to be a public reserve (see s10.4.2).)

A return of public reserves published in 1870 showed that there were still a number of reserves within the town listed as having been reserved by the New Zealand Company. This return also listed Points Jerningham, Halswell, Waddell, and Dorset, and Palmer Head, as military reserves originally reserved by the New Zealand Company.[22] Points Waddell and Dorset were listed together, and, since Point Dorset is just south of Point Waddell, it was presumably deemed to have been taken by the Crown along with the latter in the October 1841 proclamation. It is not clear when Palmer Head was reserved, while Pencarrow and Baring Heads, which were claimed by the Crown in 1841, became part of the Parangarau block assigned by McCleverty to Petone Maori, and were not listed in the 1870 return.

## 6.3 Claimant Grievances Regarding Hobson's Proclamation of Public Reserves

The Wai 145 claimants have made the following claims regarding Hobson's proclamation of public reserves (including the town belt):

- Hobson's proclamation was made 'despite knowing that Maori denied the sale of most of the lands so claimed, denied any desire to sell them in the future, and were living on and using many of the lands so claimed for the Crown'.[23]
- Hobson's proclamations of September and October 1841 included Te Aro, Kumutoto, and Pipitea kainga (thereby making Maori living in those places technically 'squatters on Crown land') and also included the promontories around the harbour.[24]

We start by discussing the first claim as it relates to the town belt.

21. Schedule enclosed with Wakefield to secretary, New Zealand Company, 28 February 1848, CO208 (doc C1(c), pp 312–313, 316–317)
22. 'Return of Reserves Made in the Several Provinces of New Zealand', 1870, AJHR, 1870, C-2, pp 24–25
23. Claim 1.2(d), para 9.1; doc O1, pp 41–42, 96–97
24. Claim 1.2(d), paras 9.5, 9.9; doc O1, pp 96–97

### 6.3.1 The Crown's acquisition of the town belt

The town belt was originally set aside out of land included in the Port Nicholson deed of purchase, a deed which the Tribunal has found to be invalid. Thus, the land had not been validly purchased when the town belt was made a Crown reserve by Governor Hobson in 1841. The town belt was not included in the lands in the schedule to the 1844 deeds of release, nor was it included in FitzRoy's or Grey's Crown grants to the New Zealand Company (see chs 8, 10). Although McCleverty considered the town belt to be waste land belonging to the Crown, the Tribunal rejects this assertion (see s10.7.5). Following the McCleverty awards, Maori retained only 219 acres, or about 14 per cent, of the original 1562 acres of the town belt. The remainder was lost to them, even though this land had never been purchased either by the company or by the Crown, and Maori received no compensation for the taking of this land. Nor is there any evidence that Maori were consulted or that they consented to the taking of this valuable land, part of which they were cultivating.

### 6.3.2 Tribunal finding of Treaty breach

The Tribunal finds that the Crown, in taking most of the town belt land from Maori without their consent or any consultation, and without making any payment, acted in breach of article 2 of the Treaty and failed to respect the rangatiratanga of Maori in and over their land. As a consequence, Te Atiawa, Ngati Tama, Taranaki, and Ngati Ruanui were prejudiced thereby.

### 6.3.3 The Crown's acquisition of other public reserves

In relation to the claim that Hobson's proclamation claimed Te Aro, Kumutoto, and Pipitea kainga as public reserves, the Tribunal finds that the proclamation had no effect on those kainga. Although it is true that parts of Te Aro and Pipitea Pa were marked out on maps of the town as the location of a custom house and a marketplace, the land was never in fact used for those purposes, and Maori ownership of the pa was subsequently guaranteed in both the 1844 and the 1847 arrangements (see chs 8, 10). As for Kumutoto Pa, it was on a tenths reserve, so it was never proposed that it would become a public reserve, and it too was guaranteed to Maori in 1844 and 1847.

In relation to the more general claim about the Crown's acquisition of public reserves by the October 1841 proclamation, counsel for the tenths trust maintained that, at the time of Hobson's proclamation, 'the Crown had no legal authority to take land from Maori without their consent'. Counsel submitted that the Crown was obliged either to purchase land directly from Maori or compulsorily to reserve land already purchased from Maori by Pakeha settlers.[25] In reply, Crown counsel suggested that:

25. Document 01, p 97

> Hobson's proclamation of public reserves probably flowed from clause 6 of the [November] 1840 agreement. This provided that no tracts of land selected under the agreement 'shall be such as, regard being had to the general interests of the colonists at large, ought to be reserved and appropriated for any purposes of public utility, convenience, or recreation.' From the Crown's perspective, this agreement was conditional on there being a valid extinguishment of Maori claims. If Hobson believed he was acting in accordance with clause 6, he would have done so in the knowledge that any claim the Crown might make would depend upon the Company proving or making good its claim.[26]

The Tribunal has found that the company was not in fact able to prove or make good its claim, and that its purported purchase of the Port Nicholson block was invalid. The land which the Crown took as public reserves had not been validly purchased by the company, nor was it purchased by the Crown or included in the lands given up by Maori in the 1844 deeds of release. The Crown simply assumed ownership of this land in 1841, and continued to assume that it owned at least some of these public reserves thereafter. The public reserves proclaimed in 1841 were taken without the consent of Maori, and Maori received no payment for this land. It is unclear how much of this public reserve land (apart from the town belt) remained in Crown ownership after 1841, but it is clear that, at the very least, the Crown's ownership of Points Jerningham, Halswell, and Waddell (apparently including Point Dorset as well) dates from this time. These public reserves were within the surveyed areas around the harbour, where Te Atiawa, Taranaki, Ngati Ruanui, and Ngati Tama had ahi ka.

### 6.3.4 Tribunal finding of Treaty breach

The Tribunal finds that the Crown, in taking various reserves in and about Wellington from Maori in 1841 without their consent or any consultation, and without making any payment, acted in breach of article 2 of the Treaty and failed to respect the rangatiratanga of Maori in and over their land. As a consequence, Te Atiawa, Ngati Tama, Taranaki, and Ngati Ruanui were prejudiced thereby.

## 6.4 Matiu and Makoro

### 6.4.1 Ownership of Matiu and Makoro

Another area of land which the Crown simply assumed ownership of, and which is the subject of a claim,[27] is Matiu (Somes Island). As will be apparent from chapter 2, many Maori

26. Document P1, p 33
27. Claim 1.2(d), para 9.8; doc O1, pp 98–99; doc Q1, pp 9–10

groups have had associations with Matiu over the centuries, from the time when it was named by Kupe. The island has played an important role in the history of Te Whanganui a Tara as a place of refuge and residence. It was from Matiu that Ngati Mutunga departed for the Chatham Islands, and it was there that the meeting at which Ngati Mutunga transferred their rights to land around the harbour took place. On the evidence before us, we cannot say that any one group living around the harbour in 1840 owned Matiu, and we therefore consider that it belonged equally to Te Atiawa, Ngati Tama, Taranaki, and Ngati Ruanui.

Matiu and the smaller Makoro (Ward Island) were specifically mentioned in the Port Nicholson deed as having been purchased by the New Zealand Company, and Matiu was originally intended to be used for military purposes.[28] In 1841, Wakefield gave Matiu on lease to William Swainson, and Hobson later gave Swainson permission to occupy it for an indefinite period at a nominal rental.[29] The island was subsequently listed as one of the public reserves excepted from the 1848 Crown grant to the company. It apparently remained in Crown ownership thereafter, and was later used for many decades as a quarantine station. Makoro also became a public reserve, presumably at the same time.

The Crown's claim to these islands was probably based on sections 6 and 7 of the Land Claims Ordinance 1841, which provided for the exclusion of islands from the land which could be awarded to private claimants. Once again, however, the Crown assumed ownership before any inquiry had been made into the validity of the New Zealand Company's alleged purchase of Port Nicholson. There is no evidence that Maori were ever consulted about, or compensated for, the Crown's assumption of ownership of Matiu and Makoro. The claimants made no claim in respect of Makoro, and accordingly we confine our finding to Matiu.

### 6.4.2 Tribunal finding of Treaty breach

The Tribunal finds that the Crown, in assuming ownership of Matiu in 1841 or thereabouts without the consent of or any consultation with Maori, and without making any payment, acted in breach of article 2 of the Treaty and failed to respect the rangatiratanga of Maori in and over their land. As a consequence, Te Atiawa, Ngati Tama, Taranaki, and Ngati Ruanui were prejudiced thereby.

## 6.5 Other Claims Regarding Legislation, Proclamations, and Roads, 1840–42

In part B of their fourth amended statement of claim, the Wai 145 claimants allege that in various respects the Crown passed legislation, made proclamations, gazetted lands, and laid out

28. Port Nicholson deed (doc A10(a)(1)); Ian Wards, *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand, 1832–1852* (Wellington: Department of Internal Affairs, 1968), p 50

29. Document E3, p 117

public roads in breach of the Treaty.[30] We have not found it necessary to discuss these claims because, having regard to the Crown responses, we are not satisfied that they justify findings of Treaty breaches.[31]

30. See claim 1.2(d), paras 9.2, 9.3, 9.4, 9.6, 9.7, 9.10, and the submissions made by Wai 145 claimant counsel and Crown counsel in respect of these allegations.

31. Document Q1, pp 7–10

CHAPTER 7

# THE CROWN SANCTIONS ARBITRATION

## 7.1 Introduction

In chapter 5, we discussed Governor Hobson's indication to Colonel Wakefield in September 1841 that the Government would sanction 'any equitable arrangement' to induce Maori to give up land claimed by settlers. However, Hobson clearly envisaged that Maori could 'yield up possession of their habitations' only voluntarily and that the company could not be granted any land until there had been a proper investigation of its claim to have purchased the Port Nicholson block. This investigation, by land claims commissioner Spain, began in May 1842, but it was never completed. In this chapter, we examine how what started as an inquiry into the validity of the Port Nicholson deed turned into an arbitration between the New Zealand Company and those who purported to represent Port Nicholson Maori.

The move to arbitration was the subject of lengthy negotiations between the Crown and the company, beginning in August 1842, which we detail in this chapter. Finally, in February 1844, Wakefield agreed that the New Zealand Company would pay £1500 'compensation' to Maori for some 67,000 acres within the Port Nicholson block. The land for which Maori were to be 'compensated' was set out in a schedule enclosed with a letter from protector George Clarke junior, and this schedule will play an important part in our discussion of the deeds of release in chapter 8. The chapter concludes by considering whether £1500 was an adequate payment for the land at issue; whether Maori freely consented to the move to arbitration; and whether, in sanctioning the move to arbitration, the Crown favoured settlers over Maori.

## 7.2 Spain's Inquiry

In section 3.7, we discussed Spain's hearings, which began on 15 May 1842, in terms of the evidence presented about the validity of the Port Nicholson deed. Just before Spain commenced his first hearing, Wakefield presented him with documentation to support the company's claim based on Pennington's award. Included was a letter from Vernon Smith of the Colonial Office stating that Pennington had awarded the company 531,929 acres, including

111,100 acres at Port Nicholson.[1] This neatly coincided with the original company plan for 111,100 acres, consisting of 110,000 acres of rural lots and 1100 acres of urban lots, all of which had been sold in the original land orders, apart from 11,110 acres ostensibly set aside for Maori urban and rural tenths.

There were several counterclaims from other Europeans who claimed to have purchased small areas within the block prior to the Crown's prohibition of private purchases from Maori. To Wakefield's dismay, Spain took his responsibilities seriously. Indeed, he decided that any grant to the company of the land it claimed according to the November 1840 agreement and the Pennington award, 'without obliging it to prove the extinction of the native title, would have been a direct contravention of and in utter opposition to the spirit of the treaty of Waitangi, and in violation of all assurances of Her Majesty's Government to the aborigines, of affording them justice and protection'.[2] We agree, but note that neither Spain nor the Government stuck by these principles.

At the hearings, Spain received little help from Colonel Wakefield, who hoped to get away with a perfunctory inquiry. On 30 May 1842, by which time he could see that Spain was intent on conducting a thorough inquiry, Wakefield wrote to the company secretary in London. He saw Spain's investigation as being incompatible with the November 1840 agreement and the Pennington award, which he considered entitled the company to select land in the Port Nicholson and New Plymouth neighbourhoods. Wakefield considered that any inquiry into the company's titles should be little more than a matter of form. He sought instructions.[3] We note that correspondence between New Zealand and London then took several months each way, often delaying responses to Wellington by six to nine months.

### 7.3 Arbitration Proposed

With the company's claim collapsing by the day, and notwithstanding his view that Spain's inquiries were misconceived, Wakefield felt obliged to make a firm proposal to Spain. On 22 August 1842, he expressed a willingness to make further payments to those Maori with grievances, a number of which he instanced, and he agreed to accept the decision of Spain and protector Halswell as to the amount of compensation payable to all Maori in cases of disputed possession of or title to land.[4] Spain forwarded a copy of this letter to the Governor around 14 September, unaware that Hobson had died some days earlier.[5] It was not until January 1843 that Spain was advised that Colonial Secretary Shortland (who temporarily took over government following Hobson's death) had approved the appointment of George

1. Wakefield to Spain, 14 May 1842 (doc A29, p 323)
2. Spain's first report, 12 September 1843, BPP, vol 2, apps, p 294
3. Wakefield to secretary, New Zealand Company, 30 May 1842, BPP, vol 2, apps, pp 558–559
4. Wakefield to Spain, 22 August 1842, BPP, vol 2, apps, pp 56–57
5. Spain to Wakefield, 14 September 1842, BPP, vol 2, apps, p 58

Clarke junior and an agent of the New Zealand Company to be referees. They were to recommend the amount of compensation that the company was to pay Maori in the case of disputed land. In the event of a difference, Spain was to act as arbitrator (or 'umpire').[6] In the meantime, through 1842 Maori had been growing increasingly resistant to company colonists encroaching on disputed land around the harbour.[7]

Shortland gave detailed instructions to Clarke in January 1843 as to how he was to perform his duties as a referee. He was told that Spain would advise him of the cases in which the commissioner considered further payments were due to Maori. On receiving this information, he was to communicate with the other referee (to be appointed by Wakefield) for the purpose of deciding the appropriate payment. If the two referees could not agree, the matter was to be referred to Spain, as umpire, and his decision would be final. Clarke was further directed:

> In the execution of the important trust committed to your charge, it will be necessary to use a sound discretion in ascertaining what are the real interests of the natives. Such lands must be retained for their present use as will ensure their satisfaction, and will prevent their interference with the property of the settlers resident within the Company's claims; but that object effected, it is not considered expedient to prevent the alienation of the remainder, as the provision made for their future welfare, both by the reservation of the tenth of all lands by the New Zealand Company, and of one-fifteenth of all lands sold by the Government, will be an ample provision for their future wants.
>
> While maintaining with every possible firmness what you may consider to be the rights of the natives, your intercourse with agents of the New Zealand Company should be marked with the greatest courtesy and forbearance.[8]

It appears that the Crown's objective was to ensure the preservation only of land needed by Maori 'for their present use', so that they would be satisfied and not interfere with the property of the resident settlers. It was considered that there was no need for the protector to prevent the alienation of the remainder. The decision as to what Maori land should be retained by Maori and what could be alienated was to be made by Clarke, subject to Spain's directions. Spain would settle any difference between Clarke and the company's representative as to the appropriate payment. The Maori owners were apparently to have minimal input, especially since they could neither choose their own representative nor instruct that representative on a negotiating position. It is difficult to reconcile this with article 2 of the Treaty.

6. Freeman (for Colonial Secretary) to Spain, 16 January 1843; Freeman (for Colonial Secretary) to Wakefield, 16 January 1843, BPP, vol 2, apps, pp 59–60

7. Document E4, pp 284–289

8. Freeman (for Colonial Secretary) to Clarke, 27 January 1843, BPP, vol 2, apps, pp 60–61. As for the 15 per cent fund, see footnote 58.

Moreover, the arbitration process was irreconcilable with the Land Claims Ordinance 1841 under which Spain was authorised to hold an inquiry with full opportunity for the parties, Maori and the company, to be heard. The inquiry was abandoned, and Spain's role was converted from that of a judicial officer into an umpire directing and, when required, deciding the outcome of negotiations between the company and the protector. Maori had no independent voice and were entirely in the hands of the protector, Clarke junior, who, in turn, was subject to pressure by Spain to reach an agreement with Wakefield.

### 7.3.1 Negotiations proceed

On 14 February 1843, Spain advised Wakefield that, having recently heard Richard Barrett's evidence, he thought it appropriate that Wakefield should take advantage of Shortland's proposals for compensating Maori in cases of disputed possession or title to land. He referred in particular to the cases of Te Aro, Kumutoto, and Pipitea. If Wakefield wished to pursue the matter, Spain advised that he would immediately instruct protector Clarke to cooperate with Wakefield.[9] It is not surprising that Spain, after hearing Barrett's evidence, decided that it would be to Wakefield's advantage to resort to arbitration. Barrett's testimony had made it clear that his purported explanation of the 1839 Port Nicholson deed of purchase was worthless. It would have been apparent to Spain that the Port Nicholson Maori had not received any intelligible explanation, let alone translation, of the deed. It is significant that in his letter to Wakefield he referred to proposals for compensating Maori in cases not only of disputed possession but also of disputed title to land.

Spain, in his letter, gave Wakefield a choice between two mutually exclusive alternatives. He could follow the arbitration route or he could choose to proceed with his case. Spain stated that he was equally ready to hear any further evidence Wakefield might have to offer prior to 'allowing the Protector to go into his case on behalf of the natives'.[10] It is clear that at this stage the case for Maori had not yet begun. We agree with the conclusion drawn by historian Duncan Moore:

> Given that Wakefield chose the arbitration option, and that there was, in fact, no further inquiry into the Company's Port Nicholson claim, we can be sure that the Land Claims Court never heard a 'case on behalf of the natives'.[11]

Not surprisingly, Wakefield responded at once, saying that he was prepared to go into the question of further payment to Te Aro Maori.[12] Spain accordingly requested that Clarke

9. Spain to Wakefield, 14 February 1843, BPP, vol 2, apps, pp 307–308
10. Ibid, p 308
11. Document E5, p 378
12. Wakefield to Spain, 14 February 1843, BPP, vol 2, apps, p 308

actively cooperate with Wakefield, and offered his assistance.[13] Clarke replied the same day, advising Spain that he had called a meeting of Te Aro Maori for the following morning, 'when the question of compensation will be discussed publicly'. He invited Spain to attend and render his valuable assistance.[14] However, it appears that Spain did not attend. On 17 February, Clarke wrote to Spain advising that he had told the Te Aro Maori resident at their pa of the Government's wishes respecting the compensation due to them for 'the lands they claim in Port Nicholson'. After several meetings, they declined to enter into any arrangement with the New Zealand Company respecting the lands claimed by the company, 'which they declare they have never alienated to that body'.[15]

Spain, in replying to Clarke, expressed surprise at the contents of his letter because leading Maori of the district had visited him and expressed their anxiety to have the matter settled. Spain told Clarke he should immediately inform Wakefield of the terms he thought ought to be granted to the Te Aro Maori and endeavour to obtain their agreement. If he and Wakefield could not agree, Spain told Clarke to 'submit your points in difference to my decision'.[16] Clarke advised Wakefield of the attitude of the Te Aro Maori. However, he indicated that he thought the Kumutoto and Pipitea Maori might be amenable to the payment of compensation, provided suitable reserves were made for them. He suggested that, if Wakefield were willing to negotiate with them, the sight of a payment might induce Te Aro Maori to accept fair compensation for their lands.[17] Wakefield agreed to a further payment to those at Pipitea and Kumutoto.[18]

Clarke acted promptly, and six days later he advised Wakefield that he considered the Maori at Pipitea, Kumutoto, and Te Aro were fairly entitled to a payment of £1050. In addition, Maori were to be allowed to retain their pa and cultivated grounds until they felt disposed to alienate them. However, Clarke felt it his duty, in cases where pa and cultivations interfered with the public convenience, to induce Maori to alienate such lands for a fair payment, provided another suitable spot could be found for them.[19] Wakefield was outraged by these proposals, which he rejected. Among other matters, he considered the figure £1050 unacceptable, referring to the 'enormous value' conferred by the company's colonisation on the reserves made for Maori. He also expressed fear over the fire and public health dangers of the pa being located so close to the town centre. He urged 'the imperative necessity of making our arrangements not merely reasonable, but final, conclusive, and as general as possible in their application'. He also asked Clarke to include in one proposal all claims for the Port Nicholson district, if there were any beyond those he had advanced, and on such terms as to

13. Spain to Clarke, 15 February 1843, BPP, vol 2, apps, p 309
14. Clarke to Spain, 15 February 1843, BPP, vol 2, apps, p 310
15. Clarke to Spain, 17 February 1843, BPP, vol 2, apps, p 310
16. Spain to Clarke, 20 February 1843, BPP, vol 2, apps, pp 310–311
17. Clarke to Wakefield, 20 February 1843, BPP, vol 4, p 468
18. Wakefield to Clarke, 21 February 1843, BPP, vol 4, p 468
19. Clarke to Wakefield, 27 February 1843, BPP, vol 2, apps, p 322

leave no question as to the surrender of the pa and cultivations required for the settlement as soon as Maori could be reasonably expected to leave them.[20]

Clarke replied immediately to Wakefield's letter.[21] Among other matters, he pointed out that:

- the permission to compensate Maori was granted by the Government at Wakefield's request, and it was for Wakefield to decide whether to take up the compensation option or to continue with the evidence and await Spain's decision;
- Barrett had recently stated in his evidence that the Maori of Pipitea and Te Aro were unwilling to sell their lands;
- the majority of the tenths reserves said by Wakefield to be of 'enormous value' were badly chosen, without sufficient regard having been paid to the wishes and interests of the Maori themselves;
- the inferiority of the land selected for Maori was a principal reason for their objecting to occupy the reserves;
- Maori had repeatedly stated (as was confirmed by Barrett's testimony) that the only explanation they had ever received of the reserves system was that one portion (or side) of land was for the Europeans, the other for themselves; and
- he had repeatedly been instructed by the Government that it would maintain Maori in the possession of their pa and cultivations for so long as they wished to retain them, and he was not aware of any permission granted by the Government to the company allowing it to allot to settlers portions of pa occupied by Maori.

Wakefield, in reply, denied that permission to compensate Maori had been granted at his request, stating he would have been willing to abide by Spain's report. He also denied that the reserve sites had been badly chosen by the company's surveyor, Smith.[22] At some point prior to 15 March 1843, Clarke advised Wakefield that he would need time to visit Maori and promised to 'estimate the value of the native claim' in the wider Port Nicholson district.[23]

No further discussions took place between Clarke and Wakefield for some 12 weeks. Then, on 23 May, Clarke wrote to Wakefield in reference to the latter's proposal that he should include all claims of Maori resident within the limits described in the New Zealand Company's Port Nicholson deed when calculating the amount of compensation to which he considered they were entitled. He informed Wakefield of his conclusion that such Maori were entitled to compensation equal in value to £1500.[24] It was not clear at this point what this £1500 was to cover. How Clarke reconciled the figure of £1500 for all Maori claims in the district with his earlier figure of £1050 for only the Maori at Pipitea, Kumutoto, and Te Aro he did not

20. Wakefield to Clarke, 1 March 1843, BPP, vol 2, apps, pp 322–323. Wakefield advised Spain of this request by letter dated 24 May 1843: BPP, vol 2, apps, p 320.
21. Clarke to Wakefield, 2 March 1843, BPP, vol 2, apps, pp 323–325
22. Wakefield to Clarke, 6 March 1843, BPP, vol 2, apps, p 325
23. Clarke junior to Clarke senior, 15 March 1843, qms/CLA/1822-71, vol 7, ATL (doc C1(g), p 42)
24. Clarke to Wakefield, 23 May 1843, BPP, vol 2, apps, pp 325–326

explain. Wakefield commented in a letter of 1 April 1843 that, based on Clarke's assessment of compensation for Pipitea, Kumutoto, and Te Aro, he thought at least £100,000 would be required for the whole award.[25]

Wakefield responded to Clarke's letter by advising that he had recently been informed that the New Zealand Company in London was in active correspondence with the Imperial Government on the matter that he and Clarke were considering. He therefore sought a short postponement of the correspondence.[26] We note that the preceding month Wakefield had written to the company secretary expressing his great satisfaction at the remonstrance made by the company's directors to the Secretary of State for the Colonies, Lord Stanley, against Spain's proceedings in respect of the company's titles. He noted that the New Zealand Government had taken no steps to fulfil its part of the November 1840 agreement, which, in Wakefield's view, required it to make a grant to the company of the land awarded under the agreement. He advised that he awaited with considerable anxiety the outcome of the directors' remonstrance and in the meantime had suspended negotiations with Clarke.[27]

### 7.3.2 Stanley authorises conditional grants

The correspondence between the New Zealand Company and the Imperial Government to which Wakefield referred had been going on for some time. In response to Wakefield's May 1842 complaints about Spain's inquiry, in October 1842 the New Zealand Company directors asked Lord Stanley to direct that a Crown grant be made pursuant to the November 1840 agreement and Pennington's award and without reference to Spain's proceedings.[28] Stanley rejected the company's contention that the title Maori had to their lands was extinguished by the November 1840 agreement. He emphasised that it was:

> impossible to maintain that the rights of the natives of New Zealand to the soil which had been recognized as indisputable by Her Majesty's Government in 1839, could be thereby affected; or that the Crown either intended thereby to deprive them, or did in fact deprive them of 'the full, exclusive and undisturbed possession of their lands and estates', which had been 'confirmed and guaranteed' to them by the treaty of Waitangi.[29]

This response, however, failed to satisfy the company directors, and they persisted for some months with frequent and lengthy letters to Stanley in an endeavour to have him change his mind.[30]

25. Extract from private letter from Colonel Wakefield, 1 April 1843 (doc A29, p 335)
26. Wakefield to Clarke, 24 May 1843, BPP, vol 2, apps, p 326
27. Wakefield to secretary, New Zealand Company, 15 April 1843 (doc A29, pp 335–336)
28. Somes to Stanley, 24 October 1842, BPP, vol 2, apps, pp 8–9
29. Hope (for Stanley) to Somes, 7 November 1842, BPP, vol 2, apps, p 14
30. This correspondence is in BPP, vol 2, apps, pp 15–46.

Stanley's position was clearly stated in a Colonial Office letter to Joseph Somes of the New Zealand Company on 10 January 1843.[31] He pointed out that:

- The November 1840 agreement was founded on the assumed correctness of two allegations made by the company: that it had 'acquired by purchase from the natives a proprietary right to about 20,000,000 acres of land' and that it had expended large sums in the colonisation of parts of such land.
- It was in reliance on the accuracy of these statements that the Government had entered into an agreement with the company.
- 'Lord Stanley cannot now permit it to be maintained, either that the natives had no proprietary right in the face of the Company's declaration that they had purchased those very rights, or that it is the duty of the Crown, either to extinguish those rights, or set them aside in favour of the Company.'
- 'The fact of the validity or invalidity of the purchase was known to the Company, and to them alone; the assumed validity was the basis of the promised grant.'
- If the facts were incorrectly stated at the time or could not be proved, it was for the company to bear the 'loss resulting from their own mis-statements'.
- Pennington's award had nothing to do with the title to the land but was simply a declaration that 'at the rate of 5s per acre, the previous expenditure by the Company was equivalent to a given number of acres', which the company was authorised to select only if the native title were found to have been validly purchased.
- The grant by the Crown of any land 'must be taken to be conditional upon the fact asserted by the Company'; that, by its previous arrangements, the Crown had the land in fact to grant. The investigation of that question was committed by law, with which Stanley could not interfere, to a local and legally constituted tribunal and not to Pennington.

Thus far, Stanley had stood his ground and his contentions appear to us entirely convincing. However, he then went on to note that he was 'fully alive to the great inconvenience resulting to a large body of Her Majesty's subjects, from the uncertainty now hanging over titles derived from the Company in the Wellington districts'. He wished to remedy this inconvenience by some means consistent with justice and good faith towards others. Stanley proceeded to hold out an olive branch to the company, conscious no doubt of the influence which some of the directors held in parliamentary circles in London.

Stanley noted that what the company complained of was being required to establish titles which no one disputed and to demonstrate the purchase of extensive 'waste' lands, 'of which no person could be proved to be entitled to act as vendor'. Stanley was prepared to put any lands which ultimately proved to be 'waste' at the company's disposal, but he could not exclude 'inquiry on the spot' into native title or prior title of others. Subject to such inquiry

31. Hope (for Stanley) to Somes, 10 January 1843, BPP, vol 2, apps, pp 20–22

but 'being anxious to go so far as his duty will permit', he would not object to a grant being made to the company of a prima facie title in the lands claimed.

Should the company agree with his view, he would instruct the Governor to make to the company:

> a conditional grant, subject to prior titles to be established as by law provided, not only of such portion of the Wellington settlement as is in the actual occupation of the settlers under them, but also of all parts not in the occupation or possession of others; the extent of such grant, of course, not to exceed that to which they are entitled, under Mr Pennington's award.

It would appear that, in devising the plan for a conditional grant of land occupied by the settlers and of 'waste' or unoccupied land, Stanley contemplated that the company would receive title to a substantial area of land. He must have been conscious of the fact that, by permitting the Governor to make a conditional grant of such lands in favour of the company, he was transferring to Maori in the Port Nicholson block the burden of proving their title to the land. In short, the burden of proof of ownership was being reversed.

Finally, Stanley dealt with a proposal by the company that settlers who had been unable to obtain particular lands should be compensated out of the tenths reserves. Stanley noted that these reserves were proportionate parts of the lands sold by Maori which had been conveyed to the Government for the benefit of Maori, and were in addition to their unsold lands. The statement that the reserves had been conveyed to the Government was apparently a reference to clause 13 of the November 1840 agreement. Stanley turned down the company's proposal as involving injustice to Maori and a breach of trust on the part of the Government.

Two weeks later, the company directors in London responded to Stanley's proposal for a conditional grant, which they rejected out of hand, since acceptance would be tantamount to abandoning their right to the land. They proceeded at great length to reargue their claim that the Crown was obliged to 'fulfil the agreement of November 1840' entitling the company to a Crown grant in terms of the Pennington award.[32]

In responding to this letter, Stanley reiterated his previous offer of a conditional grant, subject to prior titles, emphasising that this was as far as he could go. He refused, as Secretary of State for the Colonies, to:

> join with the Company in setting aside the treaty of Waitangi, after obtaining the advantages guaranteed by it, even though it might be made 'with naked savages,' or though it might 'be treated by lawyers as a praiseworthy device for amusing and pacifying savages for the moment.'[33]

32. Somes to Stanley, 24 January 1843, BPP, vol 2, apps, pp 22–33
33. The disparaging references to the Treaty are from Somes to Stanley, 24 January 1843, BPP, vol 2, apps, p 30.

In conclusion, he affirmed that, as a servant of the Crown, he would not admit that any person or government acting for the Crown could contract a legal or moral obligation to 'despoil others of their lawful and equitable rights'.[34]

Further correspondence from February to May 1843 between the company and Stanley failed to change Stanley's position. On 8 May, Somes again wrote to Stanley. Among other matters, the company now agreed to accept a conditional grant of the lands selected by their agents. They proposed that, in the event of prior claims being made, the company should either exclude such claims from the selected lands, in which case they would receive a corresponding number of acres in lieu, or include those portions, subject to the prior title but with the Crown giving over to the company its exclusive pre-emptive right to purchase that land.

In addition, the company asked that the New Zealand Government be instructed to establish some general rule for defining native titles and settling claims to land, and to do their best to aid the company's agents in effecting the necessary arrangements with Maori, either to purchase their unimproved land or to compensate them for the original value of land which had been occupied by company settlers without sufficient title and on which they had made improvements.[35]

On 12 May 1843, Stanley's assent to those proposals was communicated to the company.[36] Shortly thereafter, Stanley sent a copy of the company's letter of 8 May and his response of 12 May to Shortland for the latter's information and guidance but told him it was not necessary for him to implement the arrangements for settling the company's title to land because these matters were reserved for the newly appointed Governor, who would shortly be leaving for New Zealand.[37]

### 7.3.3 Negotiations break down

Early in August 1843, Spain, who was soon to leave Wellington, proposed to Wakefield that he should resume the arbitration process at the point at which it had been left off in May.[38] Wakefield agreed to this and advised Clarke that he was willing to resume negotiations on the basis set out in Clarke's letter to him of 23 May, from which he inferred that Clarke had waived his objection to 'the cession of the pahs and cultivated grounds'.[39] Clarke showed this letter to Spain. Wakefield followed it with a separate letter to Spain in which he said that nothing short of 'a final and conclusive settlement' of the claims of all Maori living within the limits of the New Zealand Company's Port Nicholson deed would satisfy the settlers.[40] Since

34. Hope (for Stanley) to Somes, 1 February 1843, BPP, vol 2, apps, p 36
35. Somes to Stanley, 8 May 1843, BPP, vol 2, apps, pp 90–91
36. Hope to Somes, 12 May 1843, BPP, vol 2, apps, p 92
37. Stanley to Shortland, 19 May 1843, BPP, vol 2, apps, pp 92–93
38. Spain to Wakefield, 5 August 1843, BPP, vol 2, apps, pp 326–327
39. Wakefield to Clarke, 24 August 1843, BPP, vol 2, apps, p 329
40. Wakefield to Spain, 25 August 1843, BPP, vol 2, apps, p 329

Spain had already made it clear to Wakefield that he could not accept the imposition of any condition 'inconsistent with the original terms of the arbitration',[41] his immediate reaction to the letter was to terminate the arbitration, saying that the terms proposed by Wakefield were 'such as to interdict the resumption of the negotiation'.[42]

### 7.3.4 Spain's preliminary report

Having broken off negotiations, Spain proceeded to Auckland, where, in September, he wrote a preliminary report to the Acting Governor.[43] In this report, Spain reviewed events since taking up his appointment in early 1842. He considered that the November 1840 agreement did not entitle the company to expect a grant from the Crown irrespective of whether or not native title had been extinguished by a valid purchase. As he put it, 'the Crown could not grant what the Crown did not possess'.[44] He emphasised that he could not agree to pa, cultivations, and burial grounds being taken from Maori without their free consent, 'because it appeared clear, from the evidence, that they had never alienated them'.[45] Spain made it clear that the chief reason for his breaking off the arbitration process was that Wakefield was proposing that the negotiations should proceed on the basis that the pa, cultivations, and burial grounds would be ceded by Maori.[46]

However, Spain still believed that Port Nicholson was a case that 'might easily be settled by carrying out the compensation system'. He continued:

> supposing I were called upon to make a final report of purchase or no purchase, or to separate the sold from the unsold portions of land, in both cases innumerable difficulties would present themselves; and, if the report showed that the purchase, as a whole, was not good, I fear that the natives, with their notions of the increased value of their land by the establishment upon it of the town of Wellington, would never consent to alienate their lands at a fair and reasonable price. The consequence of this would be the total ruin of the settlement, which would fall with equal severity upon the European and the native population; as the land of the latter would, in that case, decrease as rapidly as it had previously risen in value, while its restoration, thus reduced in value, would form but a poor equivalent to them for the advantages they were daily deriving from the European community around them, and of which, under these circumstances, they would be deprived. Had I to separate the parts

41. Spain to Wakefield, 24 August 1843, BPP, vol 2, apps, p 329
42. Spain to Wakefield, 25 August 1843, BPP, vol 2, apps, p 330
43. Report of Commissioner Spain, 12 September 1843, BPP, vol 2, apps, pp 291–307. Certain aspects of this report, chiefly concerning Spain's findings in relation to the 1839 Port Nicholson deed of purchase, are noted at section 3.7.3 above.
44. Spain's report, BPP, vol 2, apps, p 295
45. Ibid, p 296
46. Ibid, p 303

> sold from the parts not sold, there would be the greatest difficulty in ascertaining correctly the boundaries and the quantities of the lands belonging to each division or family, or individual native claimant.[47]

Spain also emphasised the need for a survey to be made of the excepted pa, cultivations, and burial grounds, with the survey plans to be attached to the Crown grants, in order to prevent future disputes.[48]

## 7.4 Governor FitzRoy's Instructions

Captain Robert FitzRoy, the new Governor, while still in London wrote to Lord Stanley on 15 June 1843. He sought confirmation of his understanding of Stanley's arrangements with the New Zealand Company respecting its title to land in New Zealand. His understanding was that:

- out of a certain extent of land said to have been purchased by the company, the Government would confirm the company's title to one acre for every five shillings spent by it in colonisation, provided it proved the validity of its purchase; and
- the Government would assist the company in making good its claims, so far as could be done with propriety.[49]

In his reply, on the first point, Stanley referred FitzRoy to his correspondence of 8 and 12 May 1843 with the company, copies of which he had sent to Shortland in New Zealand on 19 May. He added:

> Her Majesty's Government have conceded to the Company, as regards the district included in the original agreement, that with a view to facilitate the adjustment of their titles, the local government of New Zealand should be directed to make to the Company's agents a conditional grant of the lands selected by them on the terms definitely stated in that correspondence, the principle of that concession being to allow to the Company a *prima facie* title to such lands, under the condition that the validity of their purchases shall not be successfully impugned by other parties. Subject to this qualification, I concur in the view taken by you on this point.[50]

On the second point, Stanley authorised FitzRoy to assist the company in making good its claims, so far as might be consistent with the interests of other parties and of the community at large, on which point he referred FitzRoy to the correspondence sent to Shortland. These, then, were the instructions FitzRoy took with him to New Zealand.

47. Spain's report, BPP, vol 2, apps, p 306
48. Ibid, p 307
49. FitzRoy to Stanley, 15 June 1843, BPP, vol 2, apps, p 93
50. Stanley to FitzRoy, 26 June 1843, BPP, vol 2, apps, pp 93–94

We have earlier noted that, in sanctioning the Governor to make conditional grants of lands selected by the company, which gave it a prima facie title to such lands, the Crown had reversed the onus of proving title to Maori land. It was now for Maori to prove that they had not sold the land, rather than for the company to prove its purchase and right to title.

Article 2 of the Treaty confirms and guarantees to Maori the full, exclusive, and undisturbed possession of their lands and other properties for so long as it is their wish and desire to retain them. The onus must surely rest on any 'purchaser' to establish that Maori, in any given instance, have willingly and knowingly agreed to part with their ownership of such land. As we have seen, the company signally failed to prove a valid sale of the land included in the Port Nicholson deed.

The arrangement for the conditional grants of land was made in England. Maori were totally ignorant of the negotiations which led to Stanley's instructions to FitzRoy. There is no evidence that they were ever advised of the arrangement or consulted in any way. In the event, however, as we later note, no 'conditional grant' as proposed by Stanley was in fact made by FitzRoy.

## 7.5 FitzRoy Arrives in Wellington

Governor FitzRoy arrived in Wellington on 26 January 1844, and on that day Wi Tako Ngatata presented him with a petition from 21 Maori of Kumutoto. In it, they asked that the Governor pay them for the land. If he agreed, 'let one part of the land be for you, the other for us'. They said that they had not been paid by Wakefield, nor did they want Wakefield to pay them: 'we say, let the Governor pay us'.[51] In a dispatch sent some months later, FitzRoy reported that he had found a tense atmosphere in Wellington, with the Pakeha settlers expressing great hostility towards Maori as a result of 'the land question'. Maori were equally agitated, most of them believing that 'one-half of the land was for the settlers, and one-half for themselves'.[52]

### 7.5.1 FitzRoy's agreement with Wakefield

On 29 January at police magistrate Major Matthew Richmond's house, FitzRoy met with Wakefield, Spain, and others, including the protector, Clarke junior, and Thomas Forsaith (whom FitzRoy had brought down with him from Auckland as an additional protector and interpreter). Full minutes of the meeting were kept by Forsaith.[53] They make no reference to the representations of the Kumutoto people, nor were any Maori present at the meeting,

51. BPP, vol 4, p 180
52. FitzRoy to Stanley, 15 April 1844, BPP, vol 4, p 172
53. 'Minutes of the Conference held at Major Richmond's, on Monday, 29 January 1844', BPP, vol 5, pp 26–28

notwithstanding their expressed wish to deal directly with the Crown and not with Wakefield. After considerable discussion, FitzRoy asked Wakefield whether he was 'prepared to make a fair compensation to the natives who may be entitled to receive it, without including their pahs, their burying places, and their grounds actually in cultivation'. We note that at no point did FitzRoy or any other Crown official suggest that the full complement of use rights discussed in section 2.2 should be guaranteed to Maori; only their rights to the obvious physical sites of pa, cultivations, and burial grounds were to be protected.

After some further discussion, FitzRoy repeated his question, remarking that:

> If we agree upon this general principle of compensating the natives for lands for which they are entitled to receive it, without reference to their pahs and cultivations, the details of the arrangement can be adjusted to mutual satisfaction afterwards.

Wakefield then said in answer to the question, 'I am prepared'.

It is not clear what FitzRoy had in mind in stating that the details of the arrangement could be adjusted to mutual satisfaction. He may have envisaged that the exception of pa and cultivations was a provisional matter that could be modified later. Duncan Moore points out that this would have been in line with previous promises made by Hobson and Shortland that such land could be negotiated for but not acquired compulsorily.[54]

Discussion next ensued as to the meanings of 'pa' and 'cultivation grounds'. FitzRoy considered the limits of a pa to be 'the ground that is fenced around their native houses, including the ground in cultivation or occupation around the adjoining houses without [outside] the fence'. 'Cultivation grounds' FitzRoy understood to be 'those tracts of country which are now used by the natives for vegetable productions, or which have been so used by the aboriginal natives of New Zealand since the establishment of the colony'. These definitions of 'pa' and 'cultivation grounds' were adopted by Spain in his final report in 1845.[55]

After receiving an assurance that Wakefield would provide the necessary funds for compensating Maori, FitzRoy turned to Spain. He asked him, 'as Her Majesty's Commissioner, to resume your duties, or rather to continue your exertions as umpire, in effecting the speedy settlement of this question'. We note that FitzRoy here draws a distinction between Spain exercising his duties as a land claims commissioner and the duties of an umpire in arbitration proceedings. FitzRoy next obtained an assurance from Wakefield that he had no objection to the earlier arrangement for the conduct of the arbitration, with Clarke acting on behalf of Maori, Wakefield or his appointee acting for the New Zealand Company, and Spain acting as umpire, 'whose award will be finally referred to me'. FitzRoy reserved to himself the power of final ratification. Wakefield made no objection to this arrangement. Discussion then took place on the extent of the lands for which Maori were to be compensated; it was defined as

54. Document E5, pp 464–465
55. Ibid, pp 467–468

'all that had been surveyed, or given out for selection in the Port Nicholson district, independent of the pahs, cultivations and reserves'.

These arrangements were of critical importance to Maori, but they were not included in the meeting. Presumably, protector Clarke was there to represent their interests, though he had not been chosen by Maori as their representative. There is, however, no mention in the detailed account of the discussions in the minutes that Clarke was consulted or that he made any contribution on behalf of Maori to the matters under discussion, apart from confirming one statement made by Spain and explaining that a 'pah' would include any Maori settlement. He was there to receive instructions from the Governor, who, in addressing Clarke in particular, said:

> I trust you will consider it a sacred duty to be as moderate as justice will allow. We know that the natives are apt to be exorbitant, and you must not fail to impress upon their minds the comparatively valueless nature of their lands when the settlement was formed.

### 7.5.2 Clarke's assessment of compensation

Clarke described how he calculated the compensation to be paid to Port Nicholson Maori in a letter to his father, the chief protector, in June 1844:

> On the arrival of his Excellency the Governor at Wellington, last January, I was directed by him to resume negotiations with Colonel Wakefield, which had been for some time suspended, and we finally concurred in awarding the sum of 1500*l* to the natives, as compensation for their unsatisfied claims in the surveyed district of Port Nicholson and the vicinity. Having previously obtained the general consent of the natives to accept of a fair award, I based my estimate of it upon what I deemed to have been the marketable value of the land at the time when Colonel Wakefield commenced to treat about the sale of it, modified by the consideration some of them had already received, for dividing the sum I have named. I carefully considered the situation, quality and extent of the land claimed by each tribe, as well as the comparative strength of the claims they respectively advanced.[56]

How, on that basis, Clarke reached the figure of £1500 is not known. In fact, as we earlier related, this sum was fixed by him in May 1843 (see s 7.3.1). As Moore points out, when Clarke first proposed this sum all the associated purchase policies remained in place. Clarke's instructions required him to take account of the policies that Maori were to receive 'one fifteenth' (properly, 15 percent) of the proceeds of Crown land sales (this being intended to pay for services such as hospitals and schools), plus one-tenth of the company's award of land. Maori pa and cultivation lands were also to be excepted from sale (enabling Maori to

56. Clarke junior to Clarke senior, 26 June 1844, BPP, vol 4, pp 464–465

continue to participate in the local produce markets).[57] We note that Maori saw little if any benefit from the 15 per cent fund, while the reserves set aside for them in the Port Nicholson block amounted to significantly less than one-tenth of the land finally awarded to the New Zealand Company by Spain (see s 8.8.1).[58]

It seems clear that Clarke, in fixing £1500 as compensation, was strongly influenced by FitzRoy's stricture that he impress on the Maori owners that their land was 'comparatively valueless' when the settlement was established. But much of this land was of great value to the settlers, especially those sections with harbour frontage. And, moreover, the land was of considerable value to Maori regardless of its settlement value. It provided them with a good living, with ready access to birds, berries, fish, and other customary foods (the importance of which was not recognised by the Crown and the company), and it sustained substantial cultivations. Already, by 1839, some traders had settled among the Maori, presumably because they, too, thought the area valuable.

In insisting that compensation should be based on the value that the land had when the settlement was formed, FitzRoy presumably meant when Wakefield entered into the 1839 deed of purchase. At section 7.6, we consider the question of whether or not it was reasonable to assess compensation on this basis. It is important to emphasise that in 1844 Wakefield was seeking to purchase only some of the land within the surveyed or selected area over which Port Nicholson Maori had customary rights. Both Governor FitzRoy and the New Zealand Company recognised that Maori would continue to own their pa, cultivations, and burial grounds.

### 7.5.3 The arbitration is resumed

The youthful protector Clarke lost no time in resuming negotiations with Wakefield. We note that the Crown had not heeded Spain's proposal in his preliminary report of September 1843 that in any future negotiations Clarke should be assisted by an experienced person with an understanding of the Maori character and language. Spain considered that Clarke's duty of acting for Maori was far too difficult and onerous to be carried out by Clarke on his own.[59]

Clarke wrote to Wakefield after the conclusion of the 29 January meeting at Richmond's house. He asked Wakefield for a certified plan and statement showing the exact quantity of land, either surveyed or given out for selection, together with the extent of the native reserves, within the limits described in the company's Port Nicholson deed. Clarke needed

57. Document E5, p 479

58. Up to 1846, the 15 per cent fund failed even to meet the running costs of the office of the protector of aborigines, and it was discontinued after 1846. The history of the fund is covered briefly in Alan Ward, *National Overview*, 3 vols (Wellington: GP Publications, 1997), vol 2, pp 28, 460–461. For a more detailed history, see Robert Hayes, 'Brief of Evidence of Robert Hayes on the Mangawhai Block', June 2001 (Wai 674 R01, doc P5), ch 2. See also doc P1, pp 23–24.

59. Spain's preliminary report, 12 September 1843, BPP, vol 2, apps, p 307

this information in order to estimate the amount of compensation to be awarded to unsatisfied Maori claimants, in accordance with the arrangements which Wakefield had just agreed with FitzRoy for 'the final adjustment of the land question'.[60]

Two days later, Wakefield responded by sending Clarke a report and schedule of land from the company's principal surveyor, Samuel Brees. Brees's report included a sketch showing 'the land surveyed, and under survey' within the limits of the Port Nicholson deed. On its face, this wording differed from the statement made at the meeting with FitzRoy, which had referred to all the land that had been surveyed or given out for selection (see s 7.5.1). According to Brees's schedule, the land surveyed – which included the town of Wellington but excluded public reserves, the town belt, roads, and native reserves – totalled 45,440 acres. Another 2700 acres were still under survey at the time. In addition, 110 town sections of one acre each and 34 rural sections of 100 acres each – amounting in all to 3510 acres – had been set aside as tenths reserves for Maori. The total area of land surveyed and under survey amounted to 51,650 acres. Nothing was said about land occupied by Maori which was not tenths land or about Maori land neither surveyed nor under survey. A table showed the number of 100-acre sections in each of 18 districts, which included seven sections in Porirua and one in 'Tukapu' (Takapu), both districts being outside the Port Nicholson block. No lands were identified nor were any acreages estimated for compensation outside of the 51,650 acres surveyed or under survey for the company.[61]

Following discussions with Wakefield, Clarke replied to him on 7 February acknowledging receipt of the Brees report and plan.[62] Owing to uncertainty about the precise location of the eastern and western boundaries of the Port Nicholson block and to 'a desire not to embarrass the negotiation by including within those limits any land to which the natives of Porerua may lay claim', Clarke proposed:

> That under the present negotiation, the New Zealand Company shall compensate the natives who lay claim to the districts specified in the enclosed Schedule, excepting native reserves, pahs, cultivations and burial-grounds.

Clarke gave £1500 as the amount necessary to compensate the Maori claimants.

The schedule enclosed by Clarke is reproduced on the following page.[63] The heading to the schedule described it as 'showing the probable extent of land for which it is proposed to compensate the Native claimants'. In other words, the schedule set out the land for which Maori were to be paid.[64] There is no suggestion that the £1500 proposed by Clarke was to be payment for all the land within the boundaries of the Port Nicholson deed.

60. Clarke to Wakefield, 29 January 1844, BPP, vol 2, apps, p 417
61. Brees to Wakefield, 31 January 1844, BPP, vol 2, apps, pp 417–418
62. Clarke to Wakefield, 7 February 1844, BPP, vol 2, apps, p 419
63. Schedule attached to Clarke to Wakefield, 7 February 1844, BPP, vol 2, apps, p 419
64. The headnote to the schedule refers to the 'probable' extent of land, whereas a handwritten copy of the same schedule in Internal Affairs files omits 'probable' from the headnote: Internal Affairs inwards correspondence files concerning Wellington tenths, IA1 (doc C1(a), p 257).

Schedule referred to in the accompanying Letter, showing the probable extent of Land for which it is proposed to compensate the Native Claimants.

| Names of Districts. | No of Sections Surveyed on Plan. | No of Sections chosen on Plan. | No of Sections left unchosen. | No of Sections reserved. | No of Native Reserves. | No of Native Reserves reserved. |
|---|---|---|---|---|---|---|
| Watt's Peninsula | 18 | 18 | — | — | — | — |
| Evan's Bay | 6 | 6 | — | — | — | — |
| Town District | 9 | 9 | — | — | 2 | — |
| Ohiro District | 18 | 18 | — | — | 4 | — |
| Karore | 25 | 25 | — | — | — | — |
| Kaiwarawara | 9 | 9 | — | — | — | — |
| Upper Kaiwarawara | 7 | 7 | — | — | — | — |
| Te Rawite | 5 | 5 | — | 3 | — | — |
| Oterongo | — | — | — | 6 | — | — |
| Ohan [Ohaua] | — | — | — | 9 | — | — |
| Makara | 40 | 40 | — | — | 4 | — |
| Ohariu | 71 | 67 | 4 | 15 | 5 | 2 |
| Kinapora | 26 | 26 | — | — | 3 | — |
| Harbour | 67 | 28 | 39 | — | 3 | — |
| Horokiwi Road | 34 | 20 | 14 | — | 1 | — |
| Lower Hutt | 80 | 80 | — | 3 | 8 | — |
| Upper Hutt | 100 | 63 | 37 | 6 | — | — |
| Lowry Bay | 9 | 6 | 3 | 3 | 2 | — |
| Pakuratahi, &c | — | — | — | 50 | — | — |
| Wainuitmate, &c, west of Turakirae | — | — | — | 50 | — | — |
| Block at Kaiwarawara | — | — | — | — | 5 | — |
| Total No of Sections | 524 | 427 | 97 | 145 | 37 | 2 |
| Total in Acres | 52,400 | 42,700 | 9,700 | 14,500 | 3,700 | 200 |
| Town in Acres | 990 | 990 | — | — | 110 | — |
| **Total in Acres** | 53,390 | 43,690 | 9,700 | 14,500 | 3,810 | 200 |

(signed) *George Clarke*, jun.
Protector of Aborigines.

The schedule lists the names of 'districts' in the first column. The second column gives particulars of the number of sections 'surveyed on plan'. All the 'districts' referred to in this column appear to be in the nature of survey districts,[65] although the districts of Oterongo, Ohaua, Pakuratahi, and Wainuiomata were yet to be surveyed. The fifth column of Clarke's schedule also listed sections which had not yet been surveyed in the four districts just mentioned, as well as other sections which were to be surveyed at Terawhiti ('Te Rawite'), Ohariu, Lower Hutt, Upper Hutt, and Lowry Bay.

65. See the plan showing the boundaries of the 'Port Nicholson Purchase' dated 7 October 1844 (doc 13(d)).

It is evident that Clarke had incorporated in his schedule substantially more land than had Brees. While Clarke omitted the land at Porirua and Takapu that was in Brees's schedule, he had added the districts of Oterongo, Ohaua ('Ohan'), Makara, Pakuratahi, and Wainuiomata, as well as adding sections in most of the other districts. On 12 February, Wakefield reported that, in response to a request from the New Zealand Company in London, he had ordered the surveying of land at Pakuratahi, to the east of the Hutt River, and of 5000 acres in the Wainuiomata Valley. He noted that he had 'secured quiet possession of these lands, by including them in the schedule of those for which the natives of this district are to receive further payment'.[66] It appears, then, that these and other areas were included in Clarke's schedule as a result of discussions with Wakefield. They were lands given out for selection and under survey by the company in addition to those already surveyed.

The total extent of land in Clarke's schedule of land surveyed and under survey (in columns 2, 5, 6, and 7) amounted to 71,900 acres. Of this area, 4010 acres consisted of native reserves, leaving 67,890 acres for the company. However, as Clarke made clear, and as had been stipulated by FitzRoy and agreed by Wakefield, Maori pa, cultivations, and burial grounds were also to be excepted from the land to be granted to the company. These exceptions had not been surveyed and are not referred to in Clarke's schedule. It is not apparent, therefore, precisely what area of land Clarke took into account in assessing £1500 as the amount necessary to compensate Maori. In the absence of a survey of pa, cultivations, and burial grounds, he could not have had an accurate knowledge of the extent of land for which Maori were to be compensated. It must have been less than the 67,890 acres but considerably more than Brees's figure of 51,650 acres. We have deducted 890 acres for pa, cultivations, and burial grounds and have assessed the land acquired by the company under the 1844 deeds of release (see ch 8) at 67,000 acres.[67]

Wakefield acknowledged receipt of Clarke's letter 'enclosing a Schedule of land, for which it is proposed to compensate the native claimants, exclusively of the native reserves, pahs, cultivations and burial grounds contained therein'. We note that this wording indicates a clear understanding on Wakefield's part that only the land specifically identified in the schedule (minus reserves, pa, cultivations, and burial grounds) was to be covered by the compensation payments. Wakefield went on to note that he was unaware whether or not Spain had reported that any portion of the lands included in the schedule had been alienated by Maori. As a consequence, he was not in a position to estimate what further payment might

66. Wakefield to secretary, New Zealand Company, 12 February 1844, BPP, vol 2, apps, pp 416–417

67. The figure of 890–900 acres for pa, cultivations, and burial grounds is a rough estimate based on Colonel McCleverty's assessment in 1847 that there were 576 acres of Maori cultivations on sections claimed by settlers; evidence that McCleverty may have underestimated the area under cultivation or that this area may already have fallen by 1847; and an allowance for pa and urupa (bearing in mind that FitzRoy's definition of 'pa' included land occupied or cultivated outside the fence, while his definition of 'cultivation' included any land which Maori had cultivated since the establishment of the colony): McCleverty, 'Report on Port Nicholson Cultivations', enclosed with Governor Grey to Earl Grey, 21 April 1847, in Turton, *Epitome* (doc A26), s D, p 11; doc 18, pp 50–51.

reasonably be due to them. However, to avoid delay he stated that he was prepared at once to provide the £1500 required.[68]

Wakefield appears to have contemplated that, if Spain did report that some of the land described in the schedule had in fact already been validly purchased by the company, then the payment of £1500 should be reduced. There is nothing in Wakefield's letter to suggest that he considered that the £1500 was intended to constitute payment for all the lands within the limits of the Port Nicholson deed of purchase. On the contrary, it is clear that he was relating the proposed payment of £1500 to the lands already surveyed and under survey referred to in Clarke's schedule. It was these categories of land which were detailed in Brees's schedule, which Wakefield had supplied to Clarke. And it is these same categories (along with native reserves, also noted by Brees) which are detailed in Clarke's schedule.

Later in February, Wakefield reported to the New Zealand Company his payment of the £1500 to Clarke.[69] He enclosed copies of his correspondence with Clarke on what he termed the 'termination of the negotiation, respecting further payment to the natives by the Company for land in this district'. By 'district', he probably meant the Port Nicholson district. He did not say that the payment was for all the land within the limits of the Port Nicholson deed of purchase. On the contrary, he stated that the £1500 amounted to 'about sixpence per acre', which makes the total area some 60,000 acres.[70]

If the 4010 acres of native reserves (tenths) noted in the last two columns of the schedule are set aside, 67,890 acres are left. However, Maori pa, cultivations, and burial grounds had not been separately surveyed, and most were included in that acreage, although some were on tenths reserves. Wakefield had agreed with FitzRoy that these sites would be excluded from the area for which compensation was to be paid. He may have overestimated the acreage of the pa, cultivations, and burial grounds excepted from the transaction as amounting to some 8000 acres, hence his assessment that 60,000 acres would be available for the company. We have estimated that if pa, cultivations, and burial grounds are assessed at, say, 890 acres, and if this area is deducted from the 67,890 acres referred to above, the acreage being acquired by the company as set out in the foregoing schedule is some 67,000 acres.

## 7.6 Was the Sum of £1500 Adequate for the Land at Issue?

### 7.6.1 Claimant and Crown submissions

The Wai 145 claimants allege in their amended statement of claim that the compensation of £1500 paid to Maori was inadequate for the amount of land at issue; that is, some 67,000

68. Wakefield to Clarke, 8 February 1844, BPP, vol 2, apps, pp 419–420
69. Wakefield to secretary, New Zealand Company, 19 February 1844, BPP, vol 2, apps, p 417
70. £1500 x 240p/£1 x 1 acre/6p = 60,000 acres

acres within the Port Nicholson block.[71] We calculate this to be very roughly fivepence per acre. Counsel for the Wai 145 claimants and counsel for the Crown each made detailed submissions on this question, and we have given careful consideration to those submissions.[72]

Mr Green for the claimants acknowledged that goods which he estimated as having a maximum value of £900 were distributed by the company to some Maori in 1839. He invoked the average price of 2.2 shillings per acre said to have been paid to Maori vendors by purchasers in Muriwhenua who pursued their claims through the land claims inquiry. Counsel stressed that, at the time that the £1500 was first proposed by Clarke in 1843, associated policies of Maori receiving 15 to 20 per cent of the proceeds of Crown land sales and being allocated a full tenth of land purchased by the company were in place. Maori received little if any benefit from the Crown land sale fund, and the provision of tenths reserves was honoured in part only. Mr Green also cited, by way of example, estimates made in 1843 by a trader, David Scott, that in 1840 his three acres at Kumutoto were worth £500, regardless of the company's settlement.

Crown counsel in reply quoted FitzRoy's insistence that Maori should be paid no more than the fair value of the land 'when it was bought, for this is no new purchase, but the completion of a purchase made four years ago'.[73] Unfortunately, the Governor mistakenly assumed that the 1839 Port Nicholson deed effected a valid, if partial, purchase. The Governor stressed that the New Zealand Company had expended funds in sending ships, immigrants, and property to New Zealand and had made roads and other improvements in Wellington. That all this added value to the land is readily apparent.

Crown counsel also referred to a statement by Te Aro chief Mohi Ngaponga at the meetings in February 1844 before the first deeds of release were signed (see s 8.2) that Maori were not satisfied with the payment when compared with the amount the company had received from the Europeans. Ngaponga said Maori considered that the company should pay them the same sum it had received from the settlers.

Crown counsel characterised this debate between FitzRoy and Ngaponga as demonstrating that the issue was whether Maori were entitled to the price the company received from its purchasers – something akin to market value – or whether it was fair to measure value as at 1839, 'before annexation and before the Company's massive expenditure'.[74]

### 7.6.2 Tribunal consideration

Giving the matter the best consideration we can and given the vagaries and uncertainties in the period 1839 to 1844, the Tribunal considers that the answer should be somewhere

71. Claim 1.2(d), para 11.20. The actual amount paid to Maori for this land between 1844 and 1846 was £1510 (see s 8.4.7 below).
72. See doc O2, pp 185–193; doc Q11, pp 74–75; doc P3, pp 20–28.
73. FitzRoy quoted in doc P3, p 22
74. Document P3, p 23

between the two competing views. As we have earlier noted, the land was immensely valuable to Maori; they had established their homes and their livelihood in the Port Nicholson block or, in the case of Ngati Toa, adjacent to it. Maori living in the block had customary rights to well-established cultivations and ready access to forest and bird resources and the sea and its fisheries. Moreover, they had room for considerable expansion to land then sought by the company. Neither the company, through its own default, nor the settlers had title to any land in the Port Nicholson block. It was all subject to the customary rights of Maori, who were being pressured and induced to part with much of their best land in the block to accommodate the settlers. The Tribunal considers that Maori were entitled to be fairly compensated for making it possible for the several thousand immigrants to be accommodated in the Port Nicholson block, at very considerable inconvenience to Maori and at the cost of losing much productive land. The Tribunal concludes that the Crown erred in insisting that, in fixing a price for the land, no regard could be had to the situation as at 1844 and the sacrifice required of Maori to part with much valuable land for the benefit of the company and its settlers.

### 7.6.3 Tribunal finding of Treaty breach

The Tribunal finds that, in insisting that the price to be paid by the New Zealand Company to Maori for 67,000 acres in the Port Nicholson block should be based on the assessed value of the land at the time of the invalid 1839 deed of purchase of the block, the Crown failed to protect the article 2 Treaty rights of Maori to sell the land at a price freely agreed upon by them. As a consequence, those Maori who released their customary interests in the 67,000 acres in exchange for such payments (namely, Te Atiawa, Taranaki, Ngati Ruanui, Ngati Tama, and Ngati Toa) were prejudiced thereby.

## 7.7 The Transition from the Spain Land Claims Inquiry to Arbitration Proceedings

In the preceding sections, we recounted the shift by Spain from conducting a public inquiry under the Land Claims Ordinance 1841 into the validity of the New Zealand Company's 1839 Port Nicholson deed of purchase to a role as an arbitrator or umpire in proceedings of a quite different nature. A number of the claims of the Wellington Tenths Trust and Ngati Tama claimants relate to Spain's decision, which was sanctioned by the Crown, to make this important transition. Inevitably, there is some overlap and repetition in the claims, and we propose to confine our discussion to what we perceive to be the principal issues raised by the claimants under this head.

The Wellington Tenths Trust claimants allege that the Crown failed to affirm Maori title to Maori lands once it knew that the sale of land at Te Whanganui a Tara was invalid.[75] However, this proposition was modified somewhat in closing submissions, when the Crown was said to have accepted the company's alleged purchase as 'partly valid'.[76]

This Tribunal, with the benefit of a much fuller appreciation of the nature and fundamental defects of the company's 1839 'purchase' than Spain could have had, given his incomplete investigation, is in no doubt about the invalidity of the 1839 'purchase'. Spain, as he recorded in his interim 1843 report, considered that Te Puni and his associates at Petone had always admitted a sale, although those at Lambton Harbour had not done so. However, Spain also wrote that he could not agree to Maori 'pahs, cultivations and burying-grounds being taken from them without their own free consent, because it appeared clear, from the evidence, that they had never alienated them'.[77]

We believe that Spain was unduly influenced by the admission of the chiefs at Petone that they had 'sold' their land. He failed to see that this was inconsistent with his belief that they and all other Maori at Te Whanganui a Tara had not sold their pa, cultivations, and burial grounds. Yet, it was over much of these that the company surveyors had laid out the town and country sections subsequently selected by the settlers. It could not have been at all clear to Spain just what Te Puni and his colleagues had purported to sell. Nor would it have been at all clear to them, as Barrett's evidence so convincingly demonstrated.

### 7.7.1 Were Maori consulted about the move to arbitration?

The response of Crown counsel is that the Crown 'proceeded on the basis that Maori were agreeable to the correction of the flaws in the Company purchase by means of further payments and the setting aside of suitable reserves'.[78] The Crown denies that 'compensation' was a solution imposed on Maori without consultation or agreement.[79] Crown counsel invoked an incident when the Colonial Secretary, Shortland, visited Port Nicholson in 1840 accompanied by a detachment of troops. This visit coincided with the selection by the settlers of the town acres and is discussed in some detail at sections 5.3.4 and 5.3.5. Crown counsel suggested that the resulting 'agreement' with Te Aro Maori 'envisaged compensation as the appropriate solution in cases where the Company claim was justly disputed'.[80] However, the Tribunal believes the arrangement entered into was devised principally to defuse a possibly explosive situation between Maori and the settlers. It cannot reasonably be invoked as indicating that Maori, properly informed and in peaceful conditions, considered that

75. Claim 1.2(d), para 8.2
76. Document o1, p 112
77. Spain's report, 12 September 1843, BPP, vol 2, apps, pp 295–296
78. Document q1, p 3
79. Document p1, pp 42–55
80. Ibid, p 42

compensation might be a fair way of dealing with land disputes between Maori and the company or its settlers.

As an indication of Maori willingness to compromise with the company, Crown counsel referred to a meeting with chiefs of the Port Nicholson district at which Wakefield, Spain, and the protector Clarke were present.[81] This is described by Acting Governor Shortland in an April 1843 letter to Lord Stanley.[82] The purpose of the meeting, which appears to have been held in February 1843, was to explain to 'the chiefs of the district' the nature of the arrangement reached with Wakefield. Shortland informed them that Wakefield 'had promised to give them satisfaction in cases where their Protector considered that their demands upon the Company were just'. He continued:

> I assured them that their interests would be most anxiously protected by the Government, and advised them to place the fullest reliance on the decisions of Mr Clarke and Mr Spain. The chiefs declared themselves perfectly satisfied with what was proposed to be done, and expressed perfect confidence in the Government. They said that their only wish was to be allowed to live peaceably with the Pakeha, and to cultivate the lands to which they were habituated; but that the boundaries of the land of the white man and of the Maori must be clearly defined.
>
> When I left Port Nicholson, Mr Commissioner Spain had concluded the sitting of his court at Wellington, by the evidence of Richard Barrett, the principal actor in the purchases of Colonel Wakefield, and had notified to the Company's agent some points which required to be completed in conformity with the arrangement noticed above.

It is necessary to consider this meeting, and the suggested satisfaction of Maori, in the light of the situation on the ground, as related by Clarke junior in a letter of 15 March 1843 to his father, the chief protector. In early March, in the course of his negotiations with Wakefield, Clarke visited various Maori cultivations. He recorded that:

> I found that the white settlers did just as they liked pulled down the fences and drove the cattle on the potatoes, this is the systematic robbery by which the company's settlers deprived the natives of the plantations and all this while they have borne it patiently and not even once attempted to avenge their wrongs – this is the way in which H . . . l got possession of his farm. Since the settlers have heard that in any arrangement with the company I make it a sina qua non that the natives shall retain possession of their cultivated lands – there has been an evident attempt on the part of some of them to drive the natives off and it requires my very utmost energies to keep the Europeans in check and the natives from adopting violent measures in self defence.[83]

81. Document P1, pp 43–44
82. Shortland to Stanley, 17 April 1843, BPP, vol 2, apps, pp 53–54
83. Clarke junior to Clarke senior, 15 March 1843, qms/CLA/1822-71, vol 7, ATL (doc C1(g), p 43)

In these circumstances, it is not surprising that the assembled chiefs addressed by Acting Governor Shortland should have welcomed his assurances that their interests would be protected by the Government. It is obvious that they needed protection from the hostile activities of the settlers and would have regarded Shortland's undertaking as reassuring. We accept Mr Green's submissions that 'Maori saw before them a highly uncertain situation which promised only to become more uncertain and less secure as the settlement increased. They were in no position to reject the overtures of the Crown.'[84]

### 7.7.2 Pressure from Spain

We note that Shortland, in the passage from his letter to Lord Stanley quoted in the pevious section, referred to Spain having concluded the sitting of his court at Wellington with the evidence of Richard Barrett. We have earlier noted that, given the nature of Barrett's evidence, Spain had on 14 February 1843 considered it would be to Wakefield's advantage to act on Shortland's proposals for making further payments to Maori (see s 7.3.1). In fact, Spain gave Wakefield the option of adopting this procedure or proceeding with his case. The latter option would also have involved allowing protector Clarke to go into the case on behalf of Maori. While Wakefield would have been well aware of the devastating effect of Barrett's evidence on his attempt to establish a valid purchase in 1839, it by no means follows that Maori would have had the same appreciation, for they had at best a very imperfect notion of what constituted a sale, a concept which was foreign to them. Thus, while most Port Nicholson Maori denied the company's claims that they had parted with their land, they were probably unaware of the weakness of the company's case before the land claims commissioner.

In his letter of 15 February 1843 to Clarke, Spain requested that he enter into 'active cooperation with Colonel Wakefield'. It is apparent that Spain put pressure on Clarke to reach a speedy settlement with Wakefield.[85] Clarke complained at some length to his father of Spain's overbearing attitude towards him: 'if I differ with him in opinion he up[b]raids me with my youth, my pertinacious obstinacy or my want of deference . . . I cannot do a single thing with the natives about their land but the Commissioner must interfere'.[86]

A further example of such interference by Spain, and also of his overbearing and dictatorial attitude to Clarke and to Maori, is to be found in a passage in a private and confidential letter from Spain to Shortland in May 1843:

> The natives who have been, through their Protector, parties to the negociation, are naturally most indignant at Colonel Wakefield's refusal to pay them the compensation to which I may decide they are entitled, but I have assured them that the Government will insist

84. Document Q11, p 13
85. See, for example, Spain to Clarke, 23 February 1843, BPP, vol 2, apps, p 312
86. Clarke junior to Clarke senior, 15 March 1843, qms/CLA/1822-71, vol 7, ATL (doc C1(g), pp 44–45)

> upon their being satisfied; and I am happy to say that I have been fortunate enough to pacify them for the present. In first entering upon the affairs at this place, I had the greatest difficulties to contend against, in the exorbitant demands of the natives, but I met them with firmness, and ultimately succeeded in reducing them to reason; even when I found Mr Clarke disposed to advise them to ask extravagant prices, I immediately interfered, and in the exercise of the discretion with which you were pleased to trust me, told them, through my interpreter, that I would not listen to them. The most annoying part of the business is, that after encountering all sorts of opposition and difficulties, and just as I had got all the natives to listen to reason, and ready to settle the question, Colonel Wakefield should draw back and refuse to fulfil his engagement . . . I can with ease settle the Port Nicholson district for a sum of 1,500*l*, reserving, of course, the pahs and cultivations, which, in my opinion, the natives have never alienated.[87]

We note that £1500 is the same sum proposed by Clarke in May 1843 (see s 7.3.1). It was also the sum Clarke proposed, following his discussions with Wakefield in February 1844, for the land in the schedule attached to the various deeds of release (see ss 7.5.2–7.5.3).

### 7.7.3 Did Maori freely consent to arbitration?

Crown counsel submitted that it is apparent from comments made by Clarke in 1844 that he subsequently obtained authority from Maori to represent the various pa affected by the New Zealand Company's claim.[88] Crown counsel cited a remark made in passing by Clarke in a letter to his father reporting on the resumption of negotiations with Wakefield following the arrival of Governor FitzRoy in Wellington in January 1844. In this letter, Clarke junior remarked that, having 'previously obtained the general consent of the natives to accept of a fair award', he had based his estimate of the compensation on the marketable value of the land at the time Wakefield 'commenced to treat about the sale of it' (presumably in 1839).[89] That the Port Nicholson Maori entered into these discussions with Clarke may well have been the result of the unenviable situation they were in following the unauthorised occupation of their lands by the settlers. We believe that their situation was such that they lacked any real alternative to becoming involved in the discussions which Spain had directed Clarke to prosecute without delay.[90] Neither did they know what sum Clarke would decide on as a 'fair award' for them. The Tribunal finds that neither Maori nor Clarke, acting as the Crown-appointed protector of aborigines, took part in the decision to switch to arbitration. Nor

87. Spain to Shortland, 31 May 1843, BPP, vol 2, apps, pp 87–88
88. Document P1, p 47
89. Clarke junior to Clarke senior, 29 June 1844, BPP, vol 4, p 465
90. See, for example, Spain's letters to Clarke of 15 and 20 February 1843, BPP, vol 2, apps, pp 309–311

were Port Nicholson Maori consulted as to who should be appointed as arbitrator or arbitrators. They were simply told.

### 7.7.4 Tribunal finding of Treaty breach

The Tribunal finds that the Crown acted in breach of Treaty principles in that:

- it failed adequately to consult with Maori having customary interests in the Port Nicholson block before deciding to switch from proceeding with the Spain inquiry to a form of arbitration;
- it proceeded to implement the arbitration process without the informed consent of such Maori; and
- it failed to ensure that a fair process, acceptable to Maori, would be followed by the arbitrator, in that he reserved the right to impose conditions and settle compensation without the willing consent of Maori, which was required by article 2 of the Treaty,

and that as a consequence such Maori were prejudicially affected by the arbitration proceedings.

## 7.8 Did the Crown Favour Settlers over Maori?

### 7.8.1 Claimant and Crown submissions

The Wellington Tenths Trust claimants contend that the Crown favoured settlers over Maori when attempting to resolve the dispute over land at Port Nicholson.[91] In support of this claim, the Tribunal was referred to a statement by the chief protector, George Clarke senior, in a letter to Acting Governor Shortland expressing his opinion on certain statements made by Wakefield to his company directors.[92] Clarke senior advised Shortland that:

> The natives have been frequently assured that Her Majesty's Government would administer justice impartially both to natives and Europeans, and this assurance alone, with their confident reliance upon it, has kept them from driving the Company's settlers from lands which have been [allocated], but which the natives constantly affirm were never sold. To relieve the Company in some measure from their embarrassments, the natives have been informed that they cannot now resume the lands which have been built upon by the settlers, even though they were not purchased, but that in the event of such fact being established in the Commissioners' Court, they would be awarded compensation.

91. Claim 1.2(d), para 11.5
92. Document 02, pp 153–154

Responding to a request from the company that Maori be prevented from taking the law into their own hands, Clarke observed that 'the way in which the natives have been annoyed by being dispossessed of their cultivations is beyond endurance'.[93] Spain likewise thought that, if a prohibition against aggression were enforced against both Maori and Pakeha:

> our courts of law would be pretty fully occupied in hearing cases where the natives would be complainants against Europeans for having taken possession of their land, which they had never either agreed to sell or received payment for.[94]

Crown counsel responded to the claim that the Crown favoured settlers over Maori when attempting to resolve the dispute over land at Port Nicholson by suggesting that Spain endeavoured to follow a 'middling course', which he believed would be in the best interests of both Maori and settlers.[95] Counsel noted that Spain explained to Shortland on 16 September 1842 that compensation would represent 'a middling course, calculated . . . to be beneficial alike to the Europeans and aborigines, and to prove conducive to the prosperity of the Company's settlements'.[96]

### 7.8.2 Spain's interim report

Crown counsel also quoted extensively from Spain's 1843 report.[97] We now consider the main matters which fall for consideration from Spain's review of the situation at Port Nicholson in 1843:

- Spain concluded that, if he had proceeded to make his final report after the conclusion of his hearing of the evidence, 'it must have been most unfavourable generally to the Company's title, and left it, or rather its purchasers, in possession of a very inconsiderable portion of the district'.[98]
- Only Te Puni and his people at Petone said they adhered to the sale. We note, however, that it is by no means clear that Te Puni and his people understood that this would oblige them to give up possession of their pa, cultivations, and burial grounds and other use rights, or that they had any real comprehension of the tenths scheme or indeed of the wider implications of a 'sale' of land. In short, they had no informed comprehension that the Port Nicholson deed was intended by the company to constitute a sale of their land under English law.
- Spain saw advantage in acceding to Wakefield's proposition to compensate Maori in cases of disputed possession or title to land because this would enable an equitable

93. Clarke senior to Shortland, 26 October 1843, BPP, vol 2, apps, pp 283–284
94. Spain to Shortland, 19 November 1843, BPP, vol 2, apps, p 283
95. Document P1, pp 36–42
96. Spain to Colonial Secretary, 16 September 1842, BPP, vol 2, apps, p 59
97. Document P1, pp 37–40
98. Spain's report, 12 September 1843, BPP, vol 2, apps, p 295

settlement of the disputes, having regard to the need to carry out the November 1840 Russell agreement between the Crown and the company while also complying with the Treaty of Waitangi.[99] We are unable to agree that requiring Maori, without their willing and informed consent, to accept compensation for land which they had not sold was either equitable or in any way in compliance with article 2 of the Treaty of Waitangi.

As we have seen, notwithstanding the company's view to the contrary, the November 1840 agreement was based on the assumption that the company had acquired a valid title to the land. By this time, Spain was well aware that this assumption was without foundation, save perhaps (in his opinion) for Te Puni's interest in some unspecified land in the vicinity of Petone. We believe that Spain was mistaken in assuming even this, given Barrett's failure to inform Te Puni and other signatories to the 1839 deed of purchase of its meaning and significance.

- Spain was of the opinion that those Maori who denied the sale (ie, almost all of them) 'seemed to be more anxious to obtain payment for their land than to dispossess the settlers then in the occupation of it, and that they pressed for a final settlement of the question'.[100] But Spain was only too well aware, as was Clarke, that the company's settlers were steadily dispossessing Maori of their lands, which they had not sold, and that Maori had even been prevented from occupying their lands which had been built on by settlers. They had been told they would not receive such lands back but would be awarded compensation. In the circumstances, many Maori would have concluded that there was no prospect of the trespassing settlers being removed from their land, and they were left with no alternative but to accept this 'compensation'. But they had no effective voice in determining the level of compensation to be offered to them or in setting the terms of the arbitration proceedings.

  We believe that, given the choice, Port Nicholson Maori would have opted for the return of their unsold land while still agreeing to make some land available for settlers. But Spain's 'solution' did not allow for this. Port Nicholson Maori were faced with a fait accompli. The only exception was to be in respect of their 'pahs, cultivations and burying-grounds', which Spain found they 'did not consent to alienate'.[101] Their other rights to use resources (see s 2.2) were given no consideration.
- Spain considered that the plan of compensating Maori who had not received payment in 1839 for their lands (ie, who had not sold their lands) was 'the only method likely to effect an amicable and speedy settlement of the question with advantage and justice to both races, and to enable the Government and the company to carry into effect the agreement of November 1840'.[102] The 'advantage and justice' to Maori are not readily

99. Ibid
100. Ibid, pp 295–296
101. Ibid, p 305
102. Ibid, p 306

apparent. Because of the settlers' widespread unlawful occupation of land belonging to Port Nicholson Maori, which occupation included the erection of buildings, Maori were seriously prejudiced in the free and untrammelled exercise of their undoubted right to occupy their lands. There is no evidence that the Crown took any effective steps to remove trespassing settlers from Maori land.

- We believe that the passages which follow the reference near the end of Spain's 1843 report to compensation effecting 'an amicable and speedy settlement' reveal the fundamental reasons for Spain's recommendation that 'the local Government should carry into effect the arbitration commenced by the company's agent, and pay the natives the amount of compensation that I may declare them entitled to receive'.[103]

Spain considered the implications of his being required to complete his inquiry under the Land Claims Ordinance 1841 in a passage which we have earlier quoted at section 7.3.4. It is apparent from the passage referred to that Spain was very anxious to avoid being required to carry on with his incomplete inquiry into the validity of the 1839 Port Nicholson deed of purchase because of the 'innumerable difficulties' he foresaw in doing so. He raised the spectre of Maori refusing to sell their lands at a fair and reasonable price. Spain was well aware of the provisions of article 2 of the Treaty; he cited it earlier in his report.[104] It was the right of Maori to retain the full, exclusive, and undisturbed possession of their lands, forests, and other possessions for as long as they wished to do so. Spain was essentially speculating that, if Maori were made a fair and reasonable offer for their land, they would not agree to a sale. Moreover, the proposal to 'compensate' Maori through the arbitration procedure would be in conformity with article 2 of the Treaty only if Maori gave their free and willing agreement to any such proposal and to the price offered by the company. Yet, Spain recommended, in the passage already cited, that Maori would simply be paid 'the amount of compensation that I [Spain] may declare them entitled to receive'.[105]

It is difficult to escape the conclusion that Spain saw the arbitration as a convenient means of avoiding the 'innumerable difficulties' he foresaw should his formal inquiry proceed. Moreover, should Maori seek 'compensation' (a euphemism for the 'purchase price') which Spain considered excessive, he as arbitrator would make a binding decision as to the amount of 'compensation' which they were to receive, whether they agreed to it or not. Spain made no attempt to reconcile such an outcome with article 2 of the Treaty. Nor, in our view, could he possibly have done so.

We also consider that Spain's prediction that the settlement at Wellington faced 'total ruin' if arbitration proceedings were not implemented was highly speculative. Settlement may have been impeded for a time (as it already had been, owing to Wakefield's

103. Spain's report, 12 September 1843, BPP, vol 2, apps, p 306
104. Ibid, p 292
105. Ibid, p 306

procrastination), or it may have proceeded on a reduced scale. But, sooner rather than later, given the obvious great advantages of the Port Nicholson site (not least its splendid harbour), a flourishing settlement would have been established.

- Spain followed the passage under discussion by observing that:

> the entering into new contracts with the natives for the purchase of those lands would, for the reasons I have before stated, be attended with great difficulty; but the equitable completion of the old contracts would be more easily effected.[106]

We consider that Spain was being disingenuous in proposing 'the equitable completion of the old contracts', which assumes that there existed valid old contracts which were capable of being completed. No such contracts existed, and Spain himself was only too conscious of the grave difficulty he would have experienced if he had been required to decide whether the 1839 deed constituted a valid purchase of the Port Nicholson land. We have found that no such valid contract existed.

The Tribunal is not convinced that the 'middling course' – that is, the abandonment of Spain's formal inquiry and the substitution of arbitration – was fair to Maori. Nor are we satisfied that Maori freely and willingly agreed to the arbitration process. The circumstances were such that they were left with no alternative. The arbitration clearly favoured the settlers over Maori, who, as a result of the settlers' wrongful occupation of their land, were now placed in the invidious position of being obliged to establish their right to compensation. In short, the onus was now placed on Maori to establish that they had not sold their land, whereas the onus properly lay with the New Zealand Company to prove that it had validly purchased the land from Maori. This, the company was in no position to prove. Moreover, Maori who had not sold their land were not to be given the option of retaining that land but were to be required to accept compensation.

### 7.8.3 Tribunal finding of Treaty breaches

The Tribunal finds that the Crown imposed on Maori having customary interests in the Port Nicholson block an arbitration regime which was intended to complete the extinguishment of any claims to title by Maori without a determinative inquiry into, and finding on, whether or not a valid sale had occurred and which lands, if any, Maori had knowingly and willingly wished to alienate; and, further, that the Crown imposed on Maori the burden of establishing a valid claim to their lands and thereby shifted the burden of proof to Maori. In so doing, the Crown acted in breach of article 2 of the Treaty by failing to protect the rangatiratanga of Maori in and over their lands and by failing to ensure that Maori freely agreed to such a regime. As a consequence, Maori were prejudicially affected thereby.

106. Ibid

7.8.3

The Tribunal further finds that the Crown favoured the interests of the settlers over those of Maori by requiring Maori not to resume any of their lands built upon by settlers and by failing to prevent settlers from pulling down fences erected by Maori and from driving their cattle on Maori cultivations. In so failing to protect Maori rangatiratanga in and over their lands, the Crown acted in breach of article 2 of the Treaty, and those Maori having customary interests in the Port Nicholson block (other than Ngati Toa) were prejudicially affected thereby.[107]

107. Ngati Toa did not reside or have cultivations within the Port Nicholson block.

CHAPTER 8

# THE 1844 DEEDS OF RELEASE

## 8.1 Introduction

By early February 1844, Crown and company officials had agreed to a process whereby Maori would be 'compensated' for their interests in certain lands within the Port Nicholson block, as set out in a schedule prepared by protector Clarke junior. However, Maori had played no direct part in the negotiations which led to this agreement. In order for the 'compensation' proposal to be carried out, it was necessary to obtain the agreement of Maori to release certain of their lands in exchange for payment. This was accomplished by way of a series of 'deeds of release', most of which were signed within just over a month between late February and the end of March 1844. Some Maori signed much later, however: Ohariu and Makara Maori did not sign a deed of release until August 1846, and the release of Ngati Toa's interests in Heretaunga was also delayed for some time (see ch 9).

This chapter deals with the process by which Maori agreement to the deeds of release was obtained and with various matters related to the implementation of those deeds: the surveying of the company sections, the exterior boundary of the Port Nicholson block, and the land to be reserved for Maori; Spain's final report on Port Nicholson and his award to the New Zealand Company; and the Crown grant of the land awarded by Spain, which was issued to the company by Governor FitzRoy. We also consider in this chapter the lengthy submissions of Crown counsel and counsel for the Wellington Tenths Trust on the extent of the land released by Maori in the deeds; that is, whether the deeds released almost the whole of the Port Nicholson block or only the land set out in the schedule attached to the deeds. Having made a finding on this important issue, we go on to discuss and make findings on whether, in the process of obtaining Maori agreement to the deeds of release, the protector of aborigines remained independent of the Crown and free to protect the interests of Maori; whether Maori freely and knowingly consented to the deeds of release; whether the Crown adequately protected Maori rights to their pa, burial grounds, and cultivations; and whether the Crown provided Maori with the full number of rural tenths reserves to which they were entitled.

## 8.2 Deeds of Release are Signed

### 8.2.1 Special sitting at Te Aro

On 8 February 1844, Colonel Wakefield had agreed to pay £1500 to Maori for land within the Port Nicholson block which was set out in a schedule sent to him by Clarke junior. Spain then moved quickly to seek the assent of Maori to the release of their land. He began by holding a special sitting of the Court of Land Claims at Te Aro Pa on 23 February 1844. It was an unusual sitting in that it was attended not only by Te Aro Maori but also by Governor FitzRoy and his officials and by Wakefield for the New Zealand Company. Clarke had determined that Maori at Te Aro were to be paid £300 as their share of the £1500 provided by the company as compensation. The discussion at the Te Aro meeting was recorded, apparently in full, by Thomas Forsaith, who also acted as interpreter.[1] We will quote extracts from this record to illustrate both the way in which FitzRoy and his officials pressured Te Aro Maori to accept the offer and the way in which Maori responded.

Spain began, as if he were presiding in court, to hand down a judgment rather than act as the referee in arbitration proceedings. He reminded his Maori listeners that when he had gone to Auckland some months previously he had promised that he would return as soon as possible and 'settle the Land question':

> I am now come back, to redeem my word, accompanied by the Governor, who has been sent by the Queen to be Ruler and Governor of New Zealand. He has examined and considered my proceedings about the Land, and will tell you the decision. The words of the Governor are Sacred, and his decision which you will now hear is final.

This did not leave any room for negotiation, though FitzRoy, who spoke next, began by saying that the Government would act 'most faithfully, punctually and fairly towards you' and, indeed, had no wish to 'obtain from you anything which you are not willing to part with'. His countrymen wanted to buy only 'what you are inclined to sell' by 'bargains perfectly satisfactory to yourselves'. However, the proposed arrangement, 'made in perfect good faith, and after a thorough investigation . . . must be a final one'. FitzRoy reminded Te Aro Maori that Clarke and Spain had thoroughly investigated the case of Te Aro and recommended the amount of compensation which ought to be paid to them. FitzRoy asked them whether they had any questions before the money was paid, since, once payment was made, 'the case of Te Aro will be at an end'.

FitzRoy added that there should be no more doubts about 'the Land near Te Aro which you will thus alienate'. The payment about to be made, he said, was in compensation for land purchased some time ago by Wakefield for the New Zealand Company. It is apparent that

1. Minutes sent by Forsaith to Clarke senior, 26 February 1844, enclosed in protector, Auckland, to Colonial Secretary, 23 March 1844, IA1/44/40. Transcriptions of Forsaith's minutes of the meetings held on 23, 24, and 26 February 1844 are in document E5 at pages 484 to 499, and in document A11 at pages 105 to 116. BPP, vol 4, pp 188–189 reproduces part of the minutes of the first day of meeting (23 February) only.

FitzRoy either was unaware or had overlooked the fact that, as Spain had clearly recognised, the Te Aro people had never sold any of their land to Wakefield, who had in fact refused to recognise that the Te Aro people were anything more than slaves.

Forsaith's minute then records that Clarke read the following deed, which was 'a copy from the original, and the approved form according to which all future documents of the kind will be prepared':

> Kua homai ki a matou i te rua tekau ma ono o nga ra o Pepuere i te tau kotahi mano e waru rau e wa tekau ma wa e nga kai whakariterite o te whakaminenga o Niu Tirani i Ranana, he mea utu mai e Wiremu Wekepiri (William Wakefield) e te kai mahi o taua whakaminenga, e toru rau Pauna moni, he tino utunga, he tino whakaritenga, he whakamahuetanga rawatanga i to matou papa katoa, i o matou wahi katoa i roto i o matou wenua katoa, kua tuhituhia ki roto i te Pukapuka kua whakapiria ki tenei nei, ara ko nga wahi katoa i Poneke, i nga wahi patata ki Poneke i Niu Tirani, ko nga Pa ia, ko nga ngakinga, ko nga wahi tapu, ko nga wahi rongoa anake e toe ki a matou a ka whakaae matou kia tuhia e matou o matou ingoa, ki tetahi pukapuka tuku wenua a muri nei me e kiia mai kia tuhia ki nga kai whakariterite o taua whakaminenga i o matou wahi katoa i roto i aua wenua, heoti ano nga wahi e waiho mo matou, ko nga wahi anake kua korerotia ra i mua. Ko nga ingoa o nga kai titiro i enei tuhinga ingoa.[2]
>
> Schedule referred to in the foregoing.
>
> Names of Districts. Watts' Peninsular
> Evans Bay
> Town District
> Ohiro District
> Karore
> Kaiwarawara
> Upper Kaiwarawara
> Te ra witi
> Oterongo
> Ohaua
> Makara
> Ohariu
> Kinapora
> Harbour

2. Extract from Forsaith's minutes, CO209/29 (doc C1(i)). This extract is very hard to read, so has been transcribed with the assistance of the printed version of the deed in Turton's *Deeds* (doc A10(a), p 2:1). It is apparent from the date (26 February) in this and in the English translation of the deed in Forsaith's minutes that what is recorded in the minutes is the deed as signed on 26 February rather than, strictly speaking, the deed as read out on 23 February. However, there is no reason to believe that anything other than the date had changed between 23 and 26 February.

Horokiwi Road
Lower Hutt
Upper Hutt
Lowry Bay
Pakuratahi
Wainuiomata
Block reserved for Natives Kaiwara

Forsaith next records an English translation of the deed of release, which Clarke had read in the Maori language:

> We have received on the twenty sixth of the days of February in the year One thousand eight hundred and forty four from the Directors of the Company of New Zealand at London the payment being made by William Wakefield the Agent of the said Company three hundred pounds money, a full payment a full satisfaction, an absolute surrender of all our title to all our claims, in all our lands, which are written in the Document affixed to this Viz, all the places at Port Nicholson and in the neighbourhood of Port Nicholson in New Zealand, and on the other hand the pahs, the cultivations, the sacred places and the places reserved will remain alone for us, and we consent ourselves to write our names in a Land conveying document hereafter if asked to write them, to the Directors of the said Company of all our claims within the said Lands. The only places left for us are those above mentioned.

It does not appear that this English translation was read out. When Clarke finished reading the Maori version of the deed, he added, 'You must distinctly understand that this is a final settlement, of all your claims, for all your Lands, and that it includes your interest in all the places which I have enumerated.' Then, in response to a request, Clarke read the deed again. Still, it seems, the deed was not understood, since an unnamed 'Native' asked, 'Are we to have no cultivations in Port Nicholson?', to which Clarke replied, 'I have already told you that your cultivations are excepted.' Since there was evidently some confusion, Clarke, on Spain's prompting, asked Te Aro Maori, 'are you satisfied and do you understand that this payment is for all your Lands?' Forsaith then notes that:

> Upon this there was a general excitement, many of the Natives present calling out in their usual violent manner joined by several women at the lower end of the room – 'Is this the payment for our Land? No – No – we will not have it; can we live upon cultivations and sacred places alone? No – we will not agree to it.'

Speeches in this vein continued for some time and were reported by Forsaith. Though there was outspoken opposition to the notion of a final sale, some speakers argued that the payment was insufficient, and they asked for horses, tobacco, and guns.

In the midst of the continuing debate, the Reverend Samuel Ironside, a Wesleyan missionary, intervened to assure Te Aro Maori that FitzRoy's words were good and that their cultivations, pa, and burial grounds would be safe. He criticised them for talking about money:

> What is money? What is money compared with Christianity and peace? What shall it profit a man if he gain the whole world and lose his own soul? Suppose you had so much money that you tread it under feet, and scatter it about, what would it profit you if you lost your Christianity, and what will be the result if you continue to refuse this payment?
>
> I shall not approve of your conduct. The Governor will go and leave you to settle your differences in the best manner you can, and what will be the result? Why your destruction! Therefore Friends, I say it is much better to accede to the sums that are proposed to you, that your peace and prosperity may be promoted.

Clarke rose and spoke in support of Ironside, saying: 'Listen to me ye people that are seeking your own destruction. He is right. Listen to me ye self-deceiving people!' Then Clarke proceeded to tell them how for three years he had been:

> striving, and seeking justice for you, and here it is, and what if I should say, that your payment is [to] be only one shilling a piece, that is quite sufficient, because you know that my decision is right . . . If you refuse this I shall [offer?] you nothing further.

He proceeded to denigrate them, saying 'you are of small consequence'. Forsaith then rose and, although admitting he was a stranger, delivered a combination of scriptural and commercial advice. One of the Maori present replied directly to Forsaith:

> Some things you have said may be true, but some are also wrong. You talk about our being Christian Natives, yes, tis true, but will our Christianity alone support our lives, or fill our bellies? We must have our land, or an adequate payment for it. Land is the source from which we derive our nourishment and support – and if you take that Christianity will not supply its place. Therefore I say if you take the land let your payments be equal to it in value.

Forsaith added that several other speeches followed 'to much the same purport'. Then the Ngati Mutunga chief Pomare, who had vacated Te Whanganui a Tara on his migration to the Chatham Islands in 1835 but was back temporarily, advised Te Aro Maori to accept FitzRoy's offer and emphasised that he must have part of the payment. At this point, FitzRoy adjourned the meeting till the following morning.

### 8.2.2 Pomare's intervention

Pomare's claims seem to have focused on recognition of his earlier conquest of the harbour rather than an assertion of rights at 1844. Professor Alan Ward comments that 'the officials

may have discerned an ally in Pomare. He received no less than one-third of the compensation allocated for Te Aro and Clarke involved him in his negotiations with Te Rauparaha.'[3] Pomare's share of Te Aro's release money was paid to him by Te Aro Maori and not by the Government. Ward points out that 'Pomare attended the Spain commission, gave evidence about Scott's and Young's claims, but said nothing, not one word, in support of continued Ngati Mutunga rights in Whanganui-a-Tara'.[4] He concludes that the evidence does not suggest that Pomare was:

> pursuing on-going interests in the land, but rather that he wanted his rank and his mana as conqueror of the land recognised . . . [He] seemed to have acquiesced in the sale of Port Nicholson. Pomare took his quite substantial proportion of the payment at Te Aro and went back to the Chatham Islands.[5]

In his closing submissions, Crown counsel states:

> Pomare expected to receive a significant payment in recognition, it would seem, of Ngati Mutunga's conquest of the harbour . . . There would appear to have been ample opportunity for Pomare, or other Ngati Mutunga representatives, to formulate wider claims to the area. The fact that such claims were not raised in the 1840s suggests that the payment to Pomare was [seen] as a suitable recognition of Ngati Mutunga's association with Port Nicholson. It also confirms the view that Professor Ward has taken of the nature of Ngati Mutunga's interests.[6]

The Tribunal agrees with Professor Ward and Crown counsel that the payment by Te Aro Maori of a share of their 'release' money to Pomare was a recognition not of Ngati Mutunga rights in the Port Nicholson block at 1844 but of Ngati Mutunga's original conquest of the area in the later 1820s and early 1830s (see ch 2). Ngati Mutunga had ample opportunity to press any claims of their own before Spain and did not do so; we believe that this is because Pomare accepted that Ngati Mutunga had given up their rights at Te Whanganui a Tara in 1835.

### 8.2.3 Maori agree to sign the deeds

The wrangling at Te Aro continued for two more days, with Te Aro Maori continually asking for the price to be higher and FitzRoy and his officials refusing to raise it. On the second day of the meeting, 24 February 1844, Mohi Ngaponga told the Governor that Te Aro Maori had taken no part in the 1839 'purchase' by the New Zealand Company, and he therefore considered that 'we have a right to fix the price'. In reply, FitzRoy repeated his earlier erroneous

3. Document M1, p 140
4. Ibid, p 173
5. Ibid, pp 173–174
6. Document P6, p 52

view that 'this is no new purchase, but the completion of a purchase made 4 years ago'. He said that, out of their population of 200, the men among them would each receive £3, declaring:

> This is a fair and just nay a handsome sum; to give you more would be injustice to the other Natives of other pa's and a very bad precedent. This sum has been awarded by the Commissioner and Mr Clarke after much enquiry. The Government will see this payment made, but will not consent to any increase in the amount.

In this way, the Governor made it clear that the sum 'awarded' was not negotiable.

No meeting was held on Sunday, but on Monday 26 February Forsaith records that the Te Aro Maori maintained the same determined opposition as previously. The Governor then made known his intention of departing immediately. Forsaith informed Ngaponga that a report would be made to the Queen which would lower his character in her estimation.

Forsaith notes that these arguments, together with 'constant assurances' given the Maori 'that their own welfare was entirely dependent upon the satisfactory settlement of this question' persuaded several of the leading men to agree to take the sum offered. This, it appears, had an almost immediate flow-on effect. Thus, Forsaith states:

> The Natives of 'Kumutoto,' 'Pipitea,' and 'Tiakiwai,' soon followed so good an example, and at 2 O'clock Mr Spain the Commissioner, accompanied by Mr Clarke and myself met them on Te Aro flat, and having read over and duly witnessed the signature of proper deeds paid the Natives for the surrender of all their claims to Land within the boundaries surveyed by the Company in the vicinity of Port Nicholson (excepting their pa's, cultivations, 'wahi tapus,' and the native reserves), according to the following scale:
>
> | | |
> |---|---|
> | Te Aro | £300 |
> | Kumutoto | £200 |
> | Pipitea | £200 |
> | Tiakiwai | £30 |
>
> These payments were given and received in the most public and satisfactory manner and with great good will.

We later recount the signing of other deeds of release by Maori in the Port Nicholson deed of purchase area. However, it is first necessary to determine what lands were encompassed by these transactions.

## 8.3 Interpreting the Deeds

Crown counsel made extensive and detailed submissions on the area covered by the deeds of release, arguing that they released not only the lands detailed in the schedule to the deeds

but the whole of the Port Nicholson deed of purchase area (as extended in 1844), with the exception of pa, urupa, cultivations, and tenths reserves.[7] In reply, Wai 145 claimant counsel submitted, also at some length, that the scope of the deeds of release was limited to the land set out in the schedule to the deeds.[8] Because of the detailed nature of these submissions and the importance of this question, we now give careful attention to the competing arguments about how the deeds of release should be interpreted. We note that the schedule to the deeds of release, which is crucial to the discussion that follows, is identical in all but a few minor respects to the schedule sent by Clarke to Wakefield, which is reproduced at section 7.5.3.

### 8.3.1 Crown counsel's submissions

The argument put forward by Crown counsel can be summarised as follows. The 1844 deeds of release were a product of two quite separate 'discourses'. One, between the Crown and the New Zealand Company, concerned the amount of land to be granted to the company in terms of the November 1840 agreement. The other, between the Crown and Maori, concerned the extent of land to be released by Maori; that is, the extent of land over which native title was to be extinguished. These two distinct discourses were brought together in the deeds of release and the accompanying schedule.

Crown counsel maintained that the first column of this schedule, which listed the districts, related to the Crown–Maori discourse. The deeds released all the interests of Maori in all the districts listed (with the exception of pa, cultivations, urupa, and native reserves). These 'districts' did not refer specifically to the sections surveyed or under survey, as set out in the schedule, but were more general descriptions of areas within the Port Nicholson block. Added together, they made up the whole of the block; or, as Crown counsel put it, each deed 'fills out a block by naming places within it, rather than describing a linear boundary around the outside'. Crown counsel admitted that this made the deeds 'a little unusual'.[9] In summary, then, Crown counsel contended that, by agreeing to the deeds of release, Maori released all their interests in the whole of the Port Nicholson block (other than pa, cultivations, urupa, and reserves).

According to Crown counsel, the remaining columns of the schedule (columns 2 to 7) were part of the Crown–company discourse. This part of the schedule set out the extent of land to which the company would become entitled immediately all the deeds of release had been signed. It also set out the native reserves, which were to be excepted from the company's entitlement. The difference between the area ceded by Maori (ie, almost the whole of the Port Nicholson block) and the area to be acquired by the company (ie, the sections set out in columns 2 to 5 of the schedule) went to the Crown. While it was probably intended

7. Document P2
8. Document Q11, pp 51–71
9. Document P2, p 15

that much or all of this remaining land would also, in due course, be granted to the company, in the first instance the company was to receive only some 67,000 acres, as set out in the schedule.

Having summarised Crown counsel's line of argument, we will examine in more detail the basis for his submissions on this matter.

### 8.3.2 The schedule attached to the deeds

Certified true copies of the Te Aro deed of release of 26 February 1844 (and other Port Nicholson deeds of release) are contained in H H Turton's 1882 collection of Maori land deeds.[10] The Te Aro deed acknowledges the payment of £300 by Wakefield, as the agent of the New Zealand Company, in:

> full satisfaction, an absolute surrender of all our title to all our claims in all our Lands, which are written in the document affixed to this vizt, all the places at Port Nicholson and in the neighbourhood of Port Nicholson in New Zealand; and on the other hand the Pas, the cultivations, the sacred places, and the places reserved will remain alone for us . . . The only places left for us are those above mentioned.[11]

The 'document affixed' referred to in the deed is described as a 'schedule', and the full banner heading to this document in Turton's *Deeds* is 'Schedule referred to, showing the Probable Extent of Land for which it is proposed to compensate the Native Owners'. This heading differs in only two respects from that of the schedule sent by Clarke to Wakefield with his letter of 7 February 1844 and reproduced at section 7.5.3. The schedule is there described as the schedule 'referred to in the accompanying letter', whereas in the document affixed to the deed, as noted above, the words 'in the accompanying letter' have been omitted. The words 'Native Claimants' in the schedule sent by Clarke to Wakefield have also been changed to 'Native Owners' in the schedule affixed to the Te Aro deed. It is clear, however, that in all material particulars these two copies of the schedule are identical.[12]

We believe that, at the Te Aro meeting which we discussed at section 8.2, Clarke read (and Forsaith recorded) the first column of the schedule – namely, the districts. We have no doubt that Clarke read out only the first column, headed 'Name of Districts', and omitted the rest. To have read out the whole of the schedule of seven columns, with the numerous sections listed, together with the totals of sections, and acres and town acres, plus the totals of the six columns, would have been hopelessly confusing. But it does not follow from this intrinsic difficulty that the first column was, as Crown counsel submitted, the 'key' part of the

10. Reproduced in doc A10(a), pp 2:1–2:7
11. Document A10(a), p 2:2
12. Apart from some differences in the spelling of place names, the only discrepancy between the two copies of the schedule is in the 'No of Sections chosen on Plan' for Karori – the version printed in Turton's *Deeds* as the schedule attached to the Te Aro deed gives a figure of 23 rather than 25.

schedule.[13] The districts were listed simply to assist in identifying the location of the land comprising the 71,900 acres in the schedule.

We have other difficulties about the procedure followed by Clarke and presumably sanctioned by Governor FitzRoy and Commissioner Spain. Of the list of 'districts' read out by Clarke, seven are wholly in English. Two relating to Kaiwharawhara are partly in English and partly in Maori, as is 'Horokiwi Road', which could easily be confused with the Horokiwi or Horokiri Valley to the north of the Port Nicholson block. Crown counsel suggested that the list of 'districts' may have been read out in Maori, but this is not how the schedule is recorded as having been read out by Clarke in Forsaith's minutes of the proceedings.[14] Immediately after Forsaith's recording of the deed in Maori are the words in English 'Schedule referred to in the foregoing', followed by the first column only, headed 'Names of Districts'.

This raises the question of whether Clarke read out a Maori translation of the English heading, including the words 'Names of Districts', and explained what 'district' referred to, and that some of the places mentioned (Oterongo, Ohaua, Pakuratahi, and Wainuiomata) were not 'survey' districts. Did Clarke translate and explain where Watts Peninsula, Evans Bay, Town District, Harbour, Lower and Upper Hutt, and Lowry Bay were located and their extent? Did he explain that the Harbour survey district included sections on both sides of the harbour? If so, Forsaith failed to record these important details. If not, Maori may well have had little understanding of what they were alienating.

It is significant that Forsaith makes no mention in his full minutes of any plan of the surveyed land, the land under survey, and the large unsurveyed area having been shown to and explained to Maori. Nor does Forsaith record any explanation being given to Te Aro Maori of the location and extent of the land in the schedule for which they were being paid, or of the number and location of their reserves. The Crown and company officials present at the meeting knew that the probable extent of the land 'for which it is proposed to compensate the Native Owners' by the payment of £1500 was set out in the schedule and was less than the total acreage of 71,900 acres (which included 4010 acres of native reserves, as well as Maori pa, cultivations, and urupa).

### 8.3.3 The purpose of the schedule

Crown counsel asserted that Clarke read (and Forsaith recorded) only 'the key part of the schedule in the transaction with Maori – namely, the districts'. It is apparent from the deed that Clarke referred to 'places' ('nga wahi') at Port Nicholson and its neighbourhood, presumably as being the equivalent of 'districts'. Counsel further submitted that what he termed the 'refined' schedule (with its additional columns) brought together the Crown–company and Crown–Maori discourses. He contended that the principal object of the deed and

13. Document P2, p 25
14. Ibid, p 15

schedule was the release by Maori of all their land within the districts listed in the first column of the schedule. This release was part of the Crown–Maori discourse. However, he claimed that the schedule also had a second purpose, which was part of the Crown–company discourse. This was to set out (in columns 2 to 7) the land which the company was to receive 'in the first instance, and the exceptions from its allocation'.[15]

This submission overlooks the genesis and purpose of the schedule. It originated from the agreement reached between FitzRoy and Wakefield at their meeting on 29 January 1844 (see s7.5.1). The last matter to be settled at that meeting was the extent of the lands to be estimated for compensation. As noted, the lands were defined to be 'all that had been surveyed, or given out for selection in the Port Nicholson district, independent of the pahs, cultivations and reserves'. Later on that same day, Clarke asked Wakefield for a certified plan and statement showing the exact quantity of land as defined at the meeting, together with the extent of the native reserves. As we have earlier noted, Clarke needed this information in order to estimate the amount of compensation necessary to carry out the arrangements Wakefield had agreed with FitzRoy.

Wakefield responded by sending him the company surveyor's report on the land 'surveyed and under survey', which amounted to 51,650 acres. Adjustments were made by Clarke, who included an additional 14,700 acres for sections to be allocated from land being surveyed. After excluding the native reserves, the total area for which Maori were to receive £1500 compensation amounted to 67,890 acres. However, that acreage included the pa, cultivations, and burial grounds, which remained the property of Maori, so the actual area being purchased by Wakefield was more likely some 67,000 acres, 7000 acres more than the quantity assessed by Wakefield when reporting to the company directors.

If the contents of this schedule were not intended to be part of the negotiations with Maori, why was the schedule annexed to each of the identically worded deeds of release signed by Port Nicholson Maori? It is clear from the schedule, and from the agreement reached between Wakefield and Clarke and approved by Spain, that the £1500 was payment for the lands particularised in the schedule. The naming of survey districts and other places was to identify the sites of the various sections which were being purchased from Maori.

### 8.3.4 The Te Aro deed analysed by the Crown

Crown counsel referred to passages in the speeches preceding the Te Aro signing (as recorded by Forsaith) and to the terms of the deed itself. He cited from the deed: 'We have received . . . a full payment, a full satisfaction, an absolute surrender of all our title to *all our claims, in all our lands, which are written in the Document affixed to this Viz, all the places at Port Nicholson and the neighbourhood of Port Nicholson in New Zealand* (emphasis added by Crown counsel).

15. Ibid, pp 25–26

Mr Sinclair for the Crown characterised this language as 'emphatic and all-embracing'. There is, he said, 'no hint of any distinction between surveyed and unsurveyed land'. Nor, in his opinion, were there any words which suggest that the extent of the transfer was limited to a specific number of acres or sections.[16] But to focus so forcefully and exclusively on the quoted words without at the same time referring to the contents of the attached schedule, which is an essential part of that deed, is seriously to misread the deed. The 'claims' being surrendered expressly relate to all their lands which were 'written in the document affixed' to the deed, that is, to the schedule 'showing the probable extent of land for which it is proposed to compensate the Native owners'.

It is highly improbable that Te Aro and other Maori who signed the various deeds of release were shown and had fully explained to them in Maori a copy of the schedule. However, had such a full explanation been given, they would have understood that they were surrendering and being paid for, in total, some 67,890 acres, less the (unspecified) area of their pa, cultivations, and burial grounds. In addition, they might have understood that 4010 acres were being reserved for them as 'tenths'.

The acreage of their lands being surrendered and their location in various 'survey' districts and other localities are described in the schedule, which relates specifically and exclusively to their surveyed lands and lands under survey. It is only these lands which they are surrendering and for which they are being 'compensated'. The schedule is of central importance and defines the scope and ambit of the transaction. Any language in the body of the deed, which on its face may appear to extend further than the clear and unambiguous words of the schedule, must be qualified accordingly. It is inconceivable that Maori, being properly informed of the contents and purpose of the schedule, could or would have understood that, despite its plain and specific content, they were releasing a far greater area than that set out in the schedule; an area, moreover, for which they were not being paid.

Contrary to Crown counsel's submission, the deed, through its vitally important schedule, identified the surveyed sections on the survey plan and the sections reserved but not yet on the plan (ie, sections under survey). It also detailed the native reserves (tenths). It is clear from the language of the banner heading that the purchase price relates only to a specific number of acres and sections.

Crown counsel further contends that the definition of lands retained by Maori likewise contains no hint that a large area of unsurveyed land was excluded from the transfer of 'all the places at Port Nicholson'.[17] He cites a further passage in the deed: 'on the other hand the pahs, the cultivations, the sacred places and the places reserved will remain alone for us . . . *The only places left for us are those above mentioned*' (emphasis added by Crown counsel). This submission is tenable only if the passage is read in isolation and without reference to

16. Document P2, p 13
17. Ibid, p 14

the 'lands . . . written in the Document affixed' (the schedule). If proper regard is had to the contents of the deed and its schedule and they are read as a whole, it is apparent that the lands being surrendered by Maori are 71,900 acres, less the 4010 acres expressly reserved, which leaves 67,890 acres. But this acreage, as the passage cited makes clear, does not include the pa, cultivations, and sacred places which are contained within the 67,890 acres but had not been surveyed out. The words 'the only places left for us are those above mentioned', which Crown counsel emphasised, relate to the stipulated reserves for Maori of 4010 acres and the unsurveyed and unquantified pa, cultivations, and sacred places contained within the 67,890 acres but reserved for Maori. In short, read in context, the phrase 'the only places left for us are those above mentioned' refers to the places left to Maori out of the 71,900 acres tabulated in the schedule to the deed of release.

### 8.3.5 Land 'given out for selection'

Crown counsel contended that what had been agreed upon at the meeting between FitzRoy and Wakefield on 29 January 1844 was compensation not for surveyed lands alone but for the lands given out for selection, plus the districts from which they had been chosen.[18] He appeared to found this submission on the definition of the lands to be estimated for compensation, as recorded in the minutes of the 29 January meeting, as being 'all that had been surveyed *or* given out for selection in the Port Nicholson district, independent of the pahs, cultivations and reserves' (emphasis added by counsel). He then claimed it to be clear that districts 'given out for selection' were the areas within which the company would select its Pennington lands.

One difficulty with this argument is that the passage in question does not mention 'districts'; it is concerned with 'land' surveyed or given out for selection in the Port Nicholson district; that is, the land within the boundaries of the Port Nicholson deed of purchase. At the time, a considerable area had been surveyed, and Wakefield had selected additional land (for example, 10,000 acres at Pakuratahi and Wainuiomata) over and above the land included in company surveyor Brees's schedule. There is no evidence that the company had selected the entire area of land within the Port Nicholson block, much of which was considered unsuitable for settlement. As we have earlier noted, agreement was reached between Wakefield and Clarke early in February as to the land to be purchased for £1500, and this was specified in the schedule agreed upon and later appended to each deed of release when it was signed.

Mr Green, in his response for the claimants, submitted that Clarke made a precise request that Wakefield supply him with a plan and statement showing 'the exact quantity of land either surveyed or given out for selection, and the extent of the native reserves within the

18. Ibid, pp 9–10

limits described in the New Zealand Company's Port Nicholson deed of conveyance'. As Clarke and Wakefield were in a constant discourse and appeared to understand each other well, Mr Green submitted that when Clarke asked for the above plans, including those showing 'land either surveyed or given out for selection', Wakefield would have understood what was required. In response, Mr Green noted, Wakefield supplied a plan showing the 'land surveyed, and under survey', and this points unambiguously to the fact that the phrase 'surveyed, or given out for selection' was restricted to mean those lands 'surveyed, and under survey'.[19] We believe Mr Green's submission to be sound, reinforced as it is by Wakefield having selected additional land to be surveyed, and such land 'under survey' being included by Clarke in the schedule he supplied to Wakefield. This schedule was, with Wakefield's knowledge, then included as the schedule to the various deeds of release.

Among the areas 'given out for selection' but not yet surveyed were Oterongo and Ohaua on the west coast. Crown counsel refers to a visit by Spain, Forsaith, and Clarke to these settlements to obtain their consent to the deeds of release (see s8.4.5). Counsel suggested that there would have been little point in seeking the release of their lands by these communities if securing the company's title to surveyed areas alone was the sole object. In particular, he queried the point of asking Maori to surrender 'all their places at Port Nicholson'. At most, he said, 'Spain would have been treating against the possibility that the Company *might* have surveyed in these locations – though it seems never to have done so before a Crown grant was issued' (emphasis added by Crown counsel).[20] As Mr Green observed in his response, this was precisely the point, and one which the Crown acknowledged in a footnote indicating that, under the schedule agreed with Clarke, the company had reserved the right to select a small number of sections in these areas.[21] These are indicated in the agreed schedule to the deeds of release, where, under the column headed 'No of sections reserved' are noted six sections of 100 acres each at Oterongo and nine sections of 100 acres each at Ohaua. Also noted are three reserved 100-acre sections at Terawhiti. These all fall into the category of sections selected by the company but yet to be surveyed. It is plain that they were part of the land intended to be included in the deeds of release. The Ohaua and Oterongo deeds of release were probably also intended to cover any interests which these communities had elsewhere in the Port Nicholson block.

### 8.3.6 Relevance of earlier negotiations

Crown counsel submitted that it is plain from correspondence throughout 1843 that Clarke, Wakefield, and Spain contemplated a negotiation which would include all lands within the

19. Document Q11, p 59
20. Document P2, p 18
21. Document Q11, p 62, para 162

Port Nicholson block.[22] We would agree that Wakefield, in his dealings with Clarke and Spain, was endeavouring, with increasing emphasis, to obtain a comprehensive settlement. We have related the negotiations which took place in 1843 in sections 7.3.1 to 7.3.4. Throughout most, if not all, of this period, Wakefield was hoping and, we suspect, expecting that the protracted 'remonstrance' of the company directors with Lord Stanley would secure the company's entitlement to such land in the Port Nicholson deed of purchase block as the company sought to have allocated under the November 1840 agreement without any further proof of a valid purchase of such land or any further payment being required. Hence, Wakefield's action in delaying the negotiations for some months in 1843. When he attempted to resume the negotiations in August, his terms were unacceptable, and Spain broke off all further discussions and repaired to Auckland, where he wrote his first report on 12 September 1843. Little, if anything, of substance occurred from that point until Governor FitzRoy arrived in Wellington in January 1844.

Crown counsel referred us to Clarke's letter to Wakefield of 23 May 1843, in which he estimated £1500 as being the value of the compensation for 'all claims of the natives resident within the limits' set out in the Port Nicholson deed, and to Wakefield's reply, in which he noted Clarke's suggestion that he should pay £1500 or equivalent 'for the whole of the claims of unsatisfied natives resident in Port Nicholson'.[23] Because Wakefield chose to suspend negotiations at this point, nothing came of this proposal. Wakefield's subsequent agreement with Clarke was to compensate Maori for the land in the schedule supplied by Clarke and later attached to the Te Aro and other deeds of release. Had Wakefield reached agreement with Clarke as to the 'compensation' for the whole of the approximately 209,000 acres comprised in the Port Nicholson deed of purchase, that would surely have been made clear in the correspondence. Whatever may have been contemplated by one or more of the parties in 1843 was superseded by the agreement which Wakefield entered into (albeit reluctantly) with FitzRoy on 29 January 1844.

At the 29 January meeting, FitzRoy, while anxious to bring some certainty to the settlers at Port Nicholson, was explicit in the terms to which he required Wakefield's agreement. These made no reference to past and failed negotiations. FitzRoy was quite clear about the land for which Port Nicholson Maori were to be compensated – that being all the land that had been surveyed or given out for selection in the Port Nicholson district, independent of the pa, cultivations, and reserves. The history of the protracted on-again off-again negotiations between the Crown and the company (in which Maori played virtually no part) is relevant in explaining the transition from inquiry to arbitration that culminated in the deeds of release, but these negotiations are in no way determinative of the scope and effect of the 1844 deeds of release.

22. Document P2, pp 6–8
23. Clarke to Wakefield, 23 May 1843; Wakefield to Clarke, 24 May 1843, BPP, vol 2, apps, pp 325–326

### 8.3.7 Comments by Clarke

Crown counsel referred to a private letter by Clarke to his father, the chief protector, of 1 April 1844.[24] In it, Clarke discussed the status of reserves created by both the New Zealand Company and the Government. In the course of this discussion, he suggested that the Government purchase a tract of country or take surplus lands from a private purchase and let them for the benefit of Maori. He continued:

> but to all this it may be objected that there is a large portion of land within the district unsurveyed – and which therefore belongs to the natives and which they can cultivate – granted – but what is the nature of this land and where situated? By far the greater part could not be surveyed on account of its comparative inaccessibility and most of the remainder is utterly useless.

Crown counsel then states that Clarke continued in a jocular vein:

> Now you must not laugh at me for filling a sheet with bad logic, remember it is the 1st of April – we have no lunatic asylums and I may rave as much as I please.

We have not found anything in this letter up to this point which could be described as 'jocular'. On the contrary, Clarke had been writing in a serious vein and disagreeing with views held by his father, hence his attempt at this point to lighten the tone of his letter.

Crown counsel argued that Clarke's discussion in this section of the letter is not specific to Port Nicholson and that there is nothing to indicate that 'his focus had suddenly narrowed to Port Nicholson' when he referred to the unsurveyed land.[25] This is true, but neither is there any reason to think that he was excluding Port Nicholson. In fact, it is not at all clear to which areas he was referring: areas 'purchased' by the company, areas purchased by the Crown, or both? He referred simply to 'the district', by which he may have meant the district for which he acted as protector, which included the Port Nicholson block.

Crown counsel also pointed out that Clarke drew a contrast between Government purchases, which left Maori with 'an immense surplus of land that they have never sold', and company purchases, where Maori were left with no land except their reserves. However, Clarke's discussion of this point is prefaced by the qualification 'admitting *for the sake of argument* that the Company's arrangements were valid' (emphasis added).[26] The Tribunal has found that the company's Port Nicholson deed of purchase was invalid. It therefore follows that neither the company nor the Crown had acquired any 'surplus' in the Port Nicholson block above the land released by Maori in the deeds of release. As we have made clear, the extent of the land released by Maori was set out in the schedule to the deeds.

24. Clarke junior to Clarke senior, 1 April 1844, qms/CLA/1822-71, vol 7 (doc C1(g), pp 65–68) (cited in doc P2, pp 27–28)
25. Document P2, p 28
26. Clarke junior to Clarke senior, 1 April 1844, qms/CLA/1822-71, vol 7 (doc C1(g), p 66)

Two points emerge from Clarke's letter of 1 April 1844. First, it appears that Clarke is of the opinion that unsurveyed land (of which there was upwards of 137,000 acres in the Port Nicholson block) still belonged to Maori. Since Clarke was their protector, it is likely that this is what Maori also believed. Secondly, the factors mentioned by Clarke – the inaccessibility and relative 'uselessness' of the unsurveyed land – may well explain why Wakefield was prepared to settle for the purchase of some 67,000 acres, described in the schedule to the deeds of release, which were suitable for settlement.

A more unambiguous statement of what Clarke understood to have been released by Maori as a result of the 1844 deeds came in another letter to his father. In June 1844, Clarke formally reported to his father on the progress made in his proceedings on behalf of Maori in the Port Nicholson district. He stated that on the arrival of FitzRoy in January he was directed by the Governor to resume his negotiations with Wakefield, which had for some time been suspended, and that 'we finally concurred in awarding the sum of 1500*l* to the natives, as compensation for their unsatisfied claims in the surveyed district of Port Nicholson and the vicinity'.[27] This letter confirms that the payments to Maori were limited to the surveyed lands only. That Spain had a similar understanding is indicated by his statement in his April 1844 report to FitzRoy that:

> In all my interviews with the natives, I have always explained to them that all the land comprised in the Schedule agreed to by Mr Clarke and Colonel Wakefield would go to the Europeans; and, in my interview with Taringa Kuri, I distinctly told him that no alteration in these boundaries would be permitted by your Excellency.[28]

It is also worth noting that, in June 1844, Samuel Brees wrote in a letter to Wakefield that he had not laid out the land around the mouth of the Wainuiomata River, 'Mr Clarke the Protector of Aborigines having requested that it might be *left for the Natives*' (emphasis added).[29] This is further evidence of an understanding shared by both Clarke and company officials that land which was not within the areas surveyed by the company was to remain with Maori.

### 8.3.8 The exterior boundary of the Port Nicholson block

Mr Sinclair for the Crown noted that Forsaith, when reporting to chief protector Clarke on the signings on 26 February, stated that they marked 'the surrender of all [Maori] claims to Land within the boundaries surveyed by the Company in the vicinity of Port Nicholson (excepting their pa's, cultivations, "wahi tapus", and the native reserves)'.[30]

27. Clarke junior to Clarke senior, 29 June 1844, BPP, vol 4, pp 464–465
28. Spain to FitzRoy, 13 April 1844, BPP, vol 5, p 137
29. Brees to Wakefield, 24 June 1844 (doc E6, p 130g)
30. Forsaith to Clarke, 26 February 1844, IA1/44/40 (quoted in doc E5, p 498)

Counsel commented that this 'introduces a slight note of ambiguity since the perimeter of the block had not been surveyed'.[31] Nevertheless, he suggested that it was probable that Forsaith intended to refer to the boundaries of the Port Nicholson block. Mr Green in reply noted that the boundary of the Port Nicholson block had not yet been surveyed, whereas Forsaith expressly referred to the 'boundaries surveyed by the Company', by which he could be referring only to the surveyed sections.[32] We accept Mr Green's submission and note that Forsaith was in close touch with the proceedings and it is highly significant that he understood the deeds of release to relate only to claims of Maori to land within the boundaries surveyed. It follows that the much greater unsurveyed area of land within the Port Nicholson deed boundaries was not in issue.

It was only after the signing of deeds of release at Te Aro, on which Forsaith was reporting to Clarke, that Spain requested an exterior boundary survey of the Port Nicholson block. Crown counsel invoked a passage in a letter Spain wrote to FitzRoy on 13 April 1844:

> Considering it highly desirable that I should obtain, as quickly as possible, a correct plan of the lands in the Port Nicholson district, *contained in the Schedule* agreed upon between Mr Protector Clarke and the Principal Agent of the New Zealand Company, (and for which the sum of (1,500*l*) . . . had been determined by those gentlemen to be paid to the aborigines, in full discharge and satisfaction of *all their claims*), in order that such plan might be annexed to the grant from the Crown to the Company; I proposed to Colonel Wakefield that he should appoint a surveyor and six men on the part of the Company, to meet Mr FitzGerald and six men on the part of the Government, and that the two parties should proceed at once to make such survey, and to cut the necessary boundary line. Colonel Wakefield immediately acceded to my request, and the two surveyors and the 12 men proceeded to commence their work soon after you left this port, and they have ever since been actively engaged in it; and Mr Assistant-surveyor FitzGerald reports to me, that upwards of five miles of boundary line has already been cut. *I considered the cutting a boundary absolutely necessary, as defining the line of demarcation between the Europeans and the natives, and calculated to prevent future disputes between them . . .*
>
> When the survey of the external line has been completed, I propose instructing Mr FitzGerald to mark all the sections comprised in the Schedule as belonging to the Company, and all the native pahs, cultivations, burying-grounds and other reserves for the natives, as well as the Government reserves, when the plan of this district will be perfect. [Emphasis added by Crown counsel.][33]

We note that Spain sought a correct plan of the lands in the Port Nicholson district contained in the schedule. To obtain this, he required a plan showing the exterior boundary of

31. Document P2, p 16
32. Document Q11, p 62, para 161
33. Spain to FitzRoy, 13 April 1844, BPP, vol 5, pp 132–133 (quoted in doc P2, pp 19–20)

the lands encompassed by the Port Nicholson deed of purchase. Up to that time, there had been no such survey. The western boundaries, as somewhat vaguely described in the deed of purchase, did not extend to the western coast. However, as is discussed further at section 8.7.1, the surveyors extended the boundary to the west coast in 1844. Crown counsel produced with his submission a plan dated 7 October 1844 showing the new, enlarged 'Boundaries of the Port Nicholson Purchase', which was said in 1848 to contain 209,247 acres.[34] The boundary plan (reproduced here as map 6) includes within it the surveyed sections – amounting to some 71,900 acres – which are the sections included in the schedule to the deeds of release signed by Te Aro and other Maori.[35] The plan also shows the very extensive area of unsurveyed land not included in the schedule (which amounted to 137,347 acres, being the difference between 209,247 acres and 71,900 acres). In short, the plan commissioned by Spain shows:

- the amended enlarged western boundary of the 1839 deed of purchase;
- the plan of the 71,900 acres of surveyed sections contained in the schedule to the deeds of release, for which, subject to certain exceptions, Maori were to be paid £1500; and
- the extensive unsurveyed area not included in the schedule to the deeds and unsold by Maori.

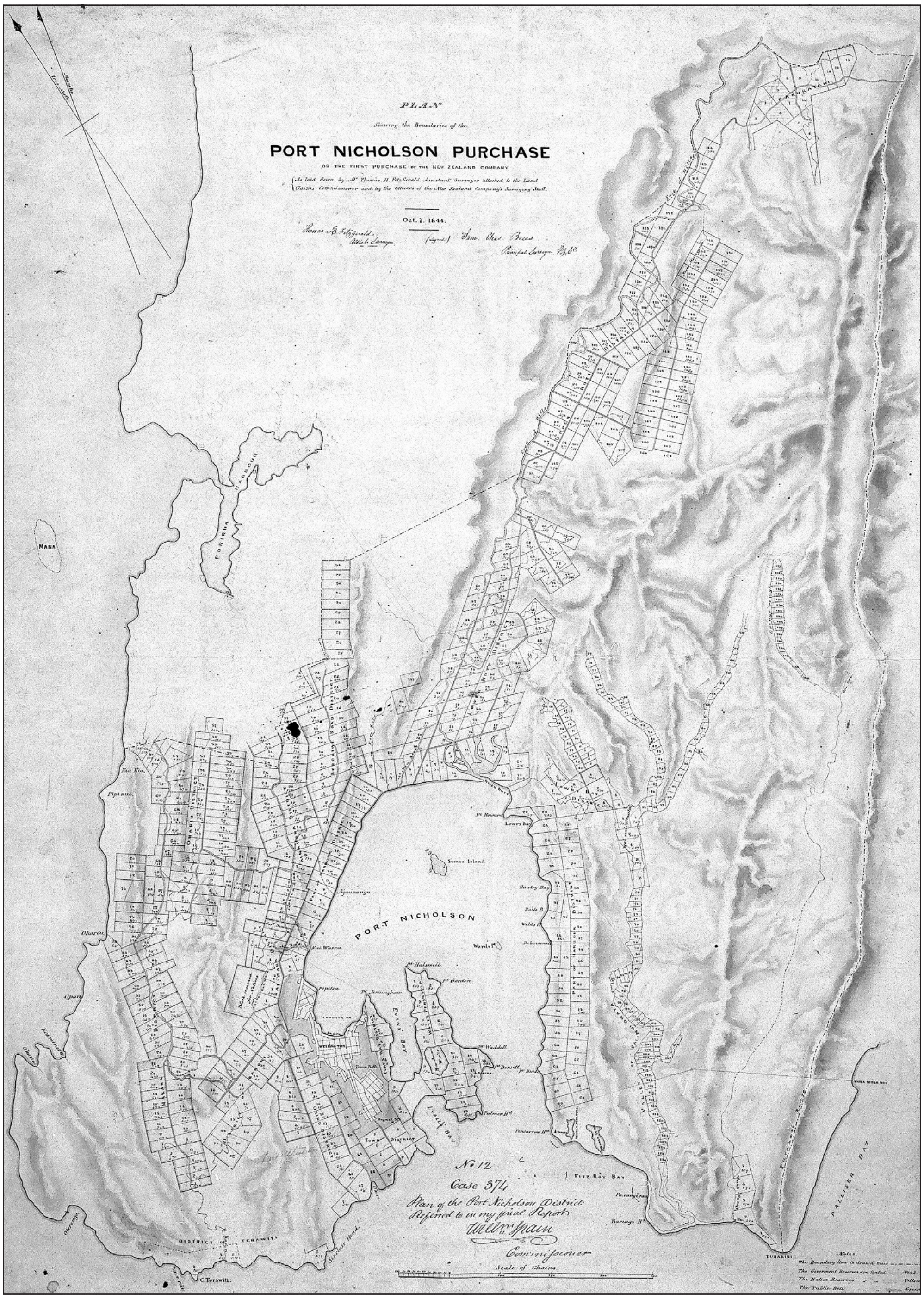
Crown counsel contended that, in 'describing this boundary as a "line of demarcation between the Europeans and the natives", Spain obviously meant that the line divided Maori land (outside the line) from land to which Maori claims had been extinguished (the land inside the line)'.[36] In our opinion, this is by no means obvious. We believe that the primary purpose of defining the external boundary was to settle the precise limit of the land which was the subject of the Port Nicholson deed of purchase. As Mr Green noted in his reply, it was necessary for the Port Nicholson block to be differentiated from the contiguous blocks, such as the Wairarapa and Porirua blocks.[37] In addition, the plan showed the surveyed sections, most of which were being purchased by the company for £1500 and were already occupied by company settlers, as being within the exterior boundary of the Port Nicholson block. This allowed the demarcation between those lands and the remaining unsurveyed and unsold Maori lands to be clearly established. Spain hoped that this demarcation would prevent future disputes between Maori and Pakeha, provided that, in addition, the surveyor marked all the sections comprised in the schedule belonging to the company and all the Maori pa, cultivations, burial grounds, and reserves, as well as the Government reserves. This, he thought, would perfect the plan of the Port Nicholson district.

34. Document P2, document bank, p 1; earlier produced as doc I3(d)

35. In February 1844, when the schedule was drawn up by Clarke, 14,700 acres out of the 71,900 acres had not been surveyed. By October 1844, when the plan was produced, much of this additional land had been surveyed (most obviously at Pakuratahi and Wainuiomata). However, no sections had been surveyed at Ohaua or Oterongo, even though 15 sections in these districts were 'reserved' in the schedule, and it is also apparent that at Pakuratahi far fewer sections than the 50 set out in the schedule had been surveyed.

36. Document P2, p 20

37. Document Q11, pp 64–65




Map 6: The boundaries of the Port Nicholson purchase. AAFV997, W4. (Archives, New Zealand/Te Whare Tohu Tuhituhinga o Aotearoa, Head Office, Wellington). Plan of the Port Nicholson block boundaries, 7 October 1844. This was the map which Spain referred to in his final report.

Shortly after the passage from his letter cited by Crown counsel, Spain took credit for the progress made:

> The whole site of the town, upon which thousands of pounds have been expended by the settlers, and to which the Company's title was most defective, has been for ever secured to the Europeans, together with a considerable country district; and the only part of the land contained in the before-mentioned Schedule now disputed . . . being the upper part of the Hutt.[38]

It is noteworthy that Spain is here defining the land acquired or yet to be acquired as a result of the deeds of release signed or to be signed as the site of the town (subdivided into one-acre sections) and a 'considerable' country district (subdivided into 100-acre sections), as contained in the schedule to the deeds of release. If, as Crown counsel has contended at some length, by these transactions Maori had released not merely the 'site of the town' and 'a considerable country district' but almost all of the land within the exterior boundary, surely Spain would have so informed FitzRoy? The schedule contained some 71,900 acres of town and country sections, but the enlarged Port Nicholson district encompassed some 209,000 acres.

Moreover, if Crown counsel's arguments are sound, why in his final report of 31 March 1845 did Spain state merely that the external boundary was intended to enclose 'all the lands claimed by the New Zealand Company in that district'?[39] There is no mention in Spain's final report of native title being extinguished over the whole of the Port Nicholson block.

### 8.3.9 Crown counsel's 'two discourses' argument

The crux of Crown counsel's submission on the 1844 deeds of release is that the deeds were the product of two separate 'discourses' and were intended to achieve two separate ends. On the one hand, for a payment of £1500, Maori were to give up all their claims in the whole of the Port Nicholson block, with the exception of pa, cultivations, urupa, and reserves, an area of roughly 200,000 acres. On the other hand, the company was to acquire some 67,000 acres, also for a payment of £1500. The difference between the area released by Maori and the area acquired by the company was to go to the Crown. This argument is based on a reading of the terms of the deeds and associated schedule and an interpretation of the events surrounding the deeds which we do not find persuasive. We conclude our consideration of the extensive submissions of Crown counsel on the deeds of release by addressing some additional problems with the 'two discourses' argument.

As Mr Green pointed out, the argument that the schedule to the deeds meant one thing to Maori and something quite different to the company, with the Crown seemingly 'capable

38. Spain to FitzRoy, 13 April 1844, BPP, vol 5, p 133
39. Spain's report to FitzRoy, 31 March 1845, BPP, vol 5, p 18

of interpreting the schedule in both ways', 'flies in the face of all principles concerned with interpretation of documents'.[40] Moreover, if Crown counsel's argument were correct, then Maori could not have given their informed consent, because they would have been kept in the dark about key aspects of the transaction.

There are also grave problems with the idea that, as a result of the deeds of release, some 137,000 acres went to the Crown. In January 1843, Spain wrote in a letter to Colonial Secretary Shortland that the proposed arbitration and compensation arrangements would, of necessity, confine his inquiry to land which the company had already selected, or was about to select, under Pennington's award. Spain continued:

> the native title to those lands only having been extinguished, it will be for the British Government to pursue a similar course of proceeding, in extinguishing the native title to any districts comprised within the limits of those immense tracts of country which the Company originally claimed, under their deeds of conveyance from the natives, that it may be deemed expedient to vest in the British Crown.[41]

Mr Green rightly points out that this passage is distinguished from others in that 'it is devoid of ambiguity'.[42] It states clearly that Spain's arbitration would relate only to the land selected by the company under the Pennington award (which, at Port Nicholson, effectively equated to the area 'surveyed or given out for selection') and that the remaining land claimed by the company under the Port Nicholson deed (or other deeds) could be acquired by the Crown only if it made further payments to Maori to extinguish native title. Nothing in any later statement or arrangement contradicted or superseded this clear understanding on Spain's part.

If, as Crown counsel contends, the deeds of release effected a surrender of more than 137,000 acres to the Crown, we would expect to find a clear statement in the deeds to that effect. However, there is no mention in the deeds of the Crown. The only parties to the deeds were the New Zealand Company and Maori. Nor did the Crown pay any money for the land, which, in Crown counsel's submission, it somehow acquired under the deeds of release. We agree with Mr Green that it is not apparent why the New Zealand Company should pay to extinguish native title over land which was to be acquired by the Crown.[43]

For all the reasons given above, we cannot agree with the proposition that the deeds of release and attached schedule had two different, but coexisting, meanings. Nor can we agree that one result of the deeds was the extinguishment of native title over almost the whole of the Port Nicholson block, with 137,347 acres going to the Crown, which was not a party to the deeds and had made no payment to Maori for their lands.

40. Document Q11, p 60
41. Spain to Colonial Secretary, 29 January 1843, BPP, vol 2, apps, p 72
42. Document Q11, p 55
43. Ibid, pp 66, 69

### 8.3.10 Finding of the Tribunal

The Tribunal finds that the deeds of release related only to the 71,900 acres of land specifically referred to in the schedule attached to each of the deeds and not to the remaining land included in the 1839 Port Nicholson deed of purchase, as extended in 1844.

## 8.4 Additional Deeds of Release are Signed

In March 1844, efforts were made by Spain, accompanied by Clarke junior and Forsaith, to obtain signatures to deeds of release by other Maori communities at Te Whanganui a Tara and environs. Discussions were first held with Te Rauparaha and Te Rangihaeata at Porirua on 8 and 9 March. The officials were unable to persuade the Ngati Toa chiefs to sign any deed of release of their interests in the Port Nicholson block (and specifically at Heretaunga). However, an agreement was reached with Te Rauparaha in November 1844, and a conditional agreement with Te Rangihaeata in March 1845. These negotiations are discussed in chapter 9.

### 8.4.1 Ngauranga and Petone

On 15 March 1844, Spain, Wakefield, Clarke, and Forsaith attended a meeting with Petone and Ngauranga Maori, who were present in considerable numbers.[44] Since the death of the Ngauranga chief Te Wharepouri, Ngauranga Maori looked to Te Puni as their superior, and they followed his advice.[45] Ngauranga Maori told Spain that they would act in accordance with Te Puni's decision, and they accompanied Spain to the meeting at Petone.

Spain explained to Te Puni that he had come to pay him £30 which Clarke had set apart for him as a present (not as payment for land). Te Puni refused to accept, saying he never asked for a second payment for the land which he had already sold. He complained that the sum was so much less than the £200 paid to Pipitea and Kumutoto Maori and he would not accept a lesser sum than they had received. Te Puni's decision meant that Ngauranga Maori also refused to take the £30 offered to them. Spain closed the meeting, stating that the money would be paid into a bank on behalf of Te Puni. Spain's party then went to Waiwhetu.

### 8.4.2 Waiwhetu

On arriving at Waiwhetu, Clarke displayed the £100 he had said he would bring. Several Waiwhetu Maori rejected the offer as too little. Wiremu Kingi, described as 'the principal young chief', said the sum was so small they could not accept it. He wished to know whether

44. Forsaith's record of this meeting is in BPP, vol 5, pp 34–35.
45. Spain's final report to FitzRoy, 31 March 1845, BPP, vol 5, p 19

any reserves would be made for them, because the reserves allotted to them by the company (the tenths) were 'wholly unfit for their use, being swampy or covered with water'. He asked whether they would be changed. Spain replied that if, after inspection, it was found the reserves were not suitable, others would be substituted.

Further protests were made at the inadequacy of the sum offered, at which point:

> Mr Clarke rose and addressed them; he reminded them of the length of time he had been striving to obtain justice for them; that he had done so, and now offered them a fair and equitable compensation, and that the amount now offered would not be increased, though they should continue to strive about it; that he should not return to them again, or make any further offer, but tell the Europeans that he had done all that justice demanded, and that they might now take their lands.
>
> This had no effect in stopping their demands for more money . . .
>
> Mr Spain then said, through Mr Forsaith, 'I shall now leave you, but before I do so, I will make you my final offer; . . . if you refuse I shall offer you nothing further, but award the land to the Europeans, and hand the money over to the Government, to be laid out for your benefit; I wish you to remember what you formerly said, that you would leave the question of compensation for your lands entirely with me, and abide by my decision. I am very much surprised at your present conduct, so contrary to your former professions. I shall now bid you farewell.
>
> On preparing to leave, Wiremu Kingi requested us not to be in haste; that if they could be sure of having certain lands reserved, which he named, they would take the payment. Some conversation was then held on the question of these reserves . . . the Commissioner assured them that the surveyor should mark out a sufficient quantity of eligible land for them, but he could not at present say precisely where . . . The deed was then produced, read, and the usual question put by the Commissioner to the Protector; after which it was signed, and the money delivered over to them. The meeting then broke up.[46]

It is difficult to escape the conclusion that, notwithstanding the assurances that sufficient suitable land would be made available for them, the Waiwhetu Maori were subjected to considerable duress both by their protector Clarke and by Spain. Clarke, ostensibly there to protect their interests, refused to contemplate any further negotiation and washed his hands of them, making it clear that the Europeans could now take their land. Spain was equally intimidating, saying that he would offer nothing further and would award the land to the Europeans if they did not accept the £100. Only after a further intervention by Wiremu Kingi did Spain undertake that additional land would be marked out for them.

We have no reason to believe that the Waiwhetu Maori had any more knowledge than those at Lambton Harbour of the contents of the schedule attached to the deed of release.

46. Forsaith's record of the meeting, BPP, vol 5, p 35

Wiremu Kingi had made it clear that the company reserves were worthless. Governor Grey found it necessary two years later to purchase an additional section of land for the Waiwhetu people, because Spain failed to implement his promise that a 'sufficient quantity of eligible land' would be marked out for them.[47]

### 8.4.3 Kaiwharawhara and Pakuao

On 20 March 1844, Spain and Forsaith went to the Hutt, having learned that Taringa Kuri had commenced cutting a boundary line there. Taringa Kuri told them that he was acting in accordance with the directions of Te Rauparaha. The conflict over Ngati Tama's activities in the Hutt is discussed in chapter 9.

On 25 March, Spain and Forsaith met with Taringa Kuri again, this time to discuss the compensation to be paid to Ngati Tama of Kaiwharawhara Pa. At this meeting, Taringa Kuri's objections to the smallness of the sum offered (£40) were 'combated and overruled'. Taringa Kuri also gave the lack of suitable reserves as a reason for refusing the offer. At Spain's request, Forsaith responded by pointing out on the company's plan the 500-acre block reserved for Kaiwharawhara Maori 'principally on account of their having selected a portion of it themselves as a cultivation ground', as well as two 100-acre reserves with foreshore frontage which were likewise reserved for them. After much discussion, Taringa Kuri agreed to sign the deed. The next day, at Kaiwharawhara:

> the deed was read and the boundaries explained by Mr Clarke and the usual questions put by the Commissioner after which two of the resident Chiefs whom 'Taringa Kuri' had appointed to receive the money signed the deed.

Taringa Kuri objected to affixing his signature, but Spain insisted that he would not pay the money unless Taringa Kuri signed, which, 'at length', he did. The money was then paid over. The Maori of Pakuao kainga were also present, and they signed a deed of release and accepted £10 'without objection', according to Forsaith.[48]

Here again, the Maori owners were 'combated and overruled' when objecting to the smallness of the amount being awarded. Taringa Kuri was left with little option but to sign. In this case, Forsaith notes that at Spain's request the reserves were pointed out to Taringa Kuri on the company's plan. This appears to be the only instance in 1844 in which Forsaith, who regularly reported on the signing of the deeds of release, refers to the company's plan being shown to Maori. It is also notable that in this case the boundaries were said to have been 'explained' by Clarke, although what such explanation entailed is not clear.

47. Early in 1846, Governor Grey purchased Hutt section 19 for Waiwhetu Maori for the sum of £350, thus fulfilling Spain's promise at this meeting, although Grey appears to have been unaware of this earlier undertaking (see s 10.4.1 below).

48. Forsaith's record of the meeting, IA1/1844/1696 (doc C1(a), pp 178–180)

### 8.4.4 Waiariki

On 28 March 1844, Spain, Clarke, and Forsaith journeyed out to the west coast to settle claims at Waiariki, Oterongo, Ohaua, and Te Ikamaru. Clarke had already visited the west coast settlements around 19 and 20 March to make preliminary arrangements.[49] Forsaith reported that, on the morning of 29 March, Spain opened his court at Waiariki and that Clarke informed the assembled Maori that he had come to pay the £20:

> which he had previously informed them had been awarded as compensation for their claims. No objections were made the Deed and Schedule containing the boundaries of Land for which they were receiving compensation were read and after the usual questions put by the Commissioner as to whether they perfectly understood the engagement they were making, the deed was signed by all the principal men of the place and the money delivered to them.[50]

We note that Forsaith records that 'the Deed and Schedule containing the boundaries of Land for which they were receiving compensation were read'. The schedule was identical with the schedule attached to the Te Aro deed and all the other deeds of release signed by Maori in the Port Nicholson block.[51] There is in fact nothing in the deed or in the schedule, which forms part of the deed, to indicate the boundaries of the land for which they were being compensated. Forsaith makes no reference to any plan being shown them. Moreover, as we have seen, the schedule has six columns listing the numbers of surveyed and reserved sections apart from the list of 'districts'. The latter includes Oterongo and Ohaua but not Waiariki. Waiariki appears to have been part of the Terawhiti 'district', but Maori would not have known this unless it was explained to them. It is problematic as to how well, if at all, they understood the document they signed.

### 8.4.5 Oterongo, Ohaua, and Te Ikamaru

At Oterongo, Clarke briefly addressed the assembled Maori, displaying the £20 which he had earlier informed them was the amount they were to receive, but, as Forsaith reported:

> They commenced objecting to the smallness of the sum many speeches were made and the usual argument adduced as reasons for their refusing to accept the offer. Mr Clarke told them that he was exceedingly surprised . . . as they had given him to understand that they would accept the sum awarded them when he visited them a few days ago for the purpose of making the preliminary arrangements, assuring them that the sum would not be increased, and that the Land would be awarded to the Europeans whether they consented or

49. Forsaith to Clarke senior, 8 April 1844, IA1/1844/1696 (doc C1(a), p 116)
50. Forsaith's record of the meeting, IA1/1844/1696 (doc C1(a), pp 182–183)
51. See the deeds of release, as published in Turton's *Deeds*, in doc A10(a), pp 2:1–2:7

not. Mr Forsaith followed Mr Clarke using every endeavour to point out the injury they were doing themselves by this rejecting the offers made them. Mr Spain also through Mr Forsaith told them that he should make them no subsequent offer, nor again visit their settlement, wishing them clearly to understand that the land excepting their Pas, cultivations, reserves etc would be awarded to the Europeans.

They however continued obstinate in their refusal and we left them and proceeded to Ohaua. The same result awaited us here, violent objections were made to Mr Clarke's offer, the same arguments and persuasions were employed but without success.

We found the principal Natives of Te Ikamaru assembled at this Pa and they immediately communicated to Mr Clarke their readiness to receive the £10 which he had decided to be the amount of compensation to which they were entitled, when the usual questions having been put and the forms gone through, they signed the deed and the amount of £10 was paid.

Spain, Clarke, and Forsaith started home and stayed the night at Oterongo. However, early in the morning they were advised that Maori at both Oterongo and Ohaua had changed their minds, and wished to receive the payment. Accordingly, the officials went to Oterongo Pa, where:

after going through the usual forms the Natives signed the deed and the £20 was paid to them.

About four hours afterwards the principal men of Ohaua arrived and the deed being signed the money, £20 was paid to them and we returned direct to Wellington.[52]

This is yet another instance in which Maori, in this case the Oterongo and Ohaua people, were given the non-negotiable options of accepting the proffered compensation or seeing the land go to the New Zealand Company without their receiving any payment. Again, the question remains as to whether they understood the contents of the deeds they signed and, in particular, whether they knew what land they were 'selling' and what land was being reserved for them or was expressly excluded from the sale.

### 8.4.6 Ohariu and Makara

A deed of release was also signed by Maori from Ohariu and Makara, but, because the Maori of those pa had been absent in 1844, this deed was not signed until 27 August 1846.[53] While the 1844 deeds specified 'all the places at Port Nicholson and in the neighbourhood of Port Nicholson', the Ohariu and Makara deed specified instead 'all the Places at "Ohariu" and

52. Forsaith's record of the meetings, 1A1/1844/1696 (doc C1(a), pp 182–188). Te Ikamaru was not listed in the schedule attached to the deeds of release but was probably considered to be part of the Ohaua 'district'.

53. Spain's final report, 31 March 1845, BPP, vol 5, pp 19–20

"Makara" and in the neighbourhood of Port Nicholson'.[54] In other respects, however, this deed was not materially different to the 1844 ones. Major Richmond (the superintendent of the southern district) sent a covering note with the deed to the Colonial Secretary in Auckland in which he stated that he paid Ohariu and Makara Maori £100. Their reserves were pointed out to them, and they were given a plan of these reserves. Richmond concluded that 'they have expressed themselves perfectly satisfied with the whole of the arrangements and with the Compensation paid over to them'.[55]

### 8.4.7 Schedule of sums awarded

On 16 April 1844, Clarke junior wrote to Wakefield referring to the sum of £1500 which the latter had sent him on 8 February 1844 for the purpose of compensating Maori claimants. Clarke enclosed a schedule showing the manner in which the £1500 had been appropriated.[56]

| Names of places. | Sums awarded. | | |
|---|---|---|---|
| Paid: | £ | *s* | *d* |
| Te Aro | 300 | — | — |
| Kumutoto | 200 | — | — |
| Pipitea | 200 | — | — |
| Tiakiwai | 30 | — | — |
| Pakuao | 10 | — | — |
| Kaiwarawara | 40 | — | — |
| Waiwetu | 100 | — | — |
| Waiariki | 20 | — | — |
| Oterango | 20 | — | — |
| Ohaua | 20 | — | — |
| Te Ikamaru | 10 | — | — |
| Unpaid: | | | |
| The Hutt | 300 | — | — |
| Oharui [*sic*] | 190 | — | — |
| Pitoone | 30 | — | — |
| Ngauranga | 30 | — | — |

On 29 June 1844, Clarke reported to his father. In discussing a copy of this schedule, he mentioned those groups of Maori who had not been compensated in the Port Nicholson case. The Maori of Petone and Ngauranga, he said, were of minor importance, 'their principal chiefs having been the most active in treating with Colonel Wakefield in 1839'. He noted that the majority of the Ohariu Maori had been absent for some months on visits to the

54. Deed of release for Ohariu and Makara, IA1/1846/1239 (doc C1(b), pp 303–304, although this copy is almost entirely illegible)
55. Richmond to Colonial Secretary, Auckland, 1 September 1846, IA1/1846/1239 (doc C1(b), pp 301–302)
56. Clarke to Wakefield, 16 April 1844, BPP, vol 4, pp 476–477

tribes on both sides of the Cook Strait, so at that time there had been no opportunity to negotiate with them.

Clarke, after noting his discussion with Taringa Kuri concerning the latter's occupation of part of the Hutt, advised that he had awarded £300 as compensation to Te Rauparaha and Te Rangihaeata. He considered this sum a 'full and ample remuneration for their claims'. However, they declined to accept it at that time.[57]

The total amount actually paid out to Maori for the release of their interests in the land set out in the schedule to the deeds of release was £1510. This includes the £60 for Petone and Ngauranga which, it appears, they never agreed to accept but which was to be paid into a bank account for their benefit. It also includes the actual sums paid both to Ngati Toa for their interests in Heretaunga, and to Ohariu and Makara Maori, which were £400 and £100 respectively.

## 8.5 Was the Protectorate Independent of the Crown?

### 8.5.1 Spain's criticism of Clarke junior

In his final report of 1845, Spain discussed the proposed division by Clarke of the £1500 and noted that he had, in conversation with Governor FitzRoy, criticised certain sums which Clarke considered should be made to some Maori. According to Spain, because Clarke had agreed with Wakefield on the sum of £1500, the Governor had assumed that Clarke had made the necessary arrangements with Maori to receive the respective amounts that he had decided upon. Spain's duty, therefore, was only to witness the payments.[58] Later in his report, Spain emphasised that, in every interview with Maori concerning the deeds of release, he had not only assisted Clarke in persuading them to accept the sums he offered but virtually adopted the division of the money as his own.[59]

Spain went on to express surprise that, with hardly an exception, at every meeting with Maori that he attended, instead of finding that the parties had agreed to accept the sums offered, he had to talk over the subject precisely as if it had been the commencement of a negotiation. He continued:

> At the same time I am quite aware of the great difficulties Mr Clarke had to contend with in the fickleness of the native character, and the extravagant demands they invariably advance at first; but I cannot disguise the fact that Mr Clarke, in his various communications with me, acting as the advocate and arbitrator on the part of the natives, was in the habit of

57. For details of a payment of £400 made to Te Rauparaha on 12 November 1844 and accepted by Te Rangihaeata in 1845, see chapter 9.

58. Spain's final report to FitzRoy, 31 March 1845, BPP, vol 5, p 17

59. Ibid, p18

making very extensive assurances as to his success with the natives, which I scarcely ever found realized when I afterwards met them.

This caused me scarcely any surprise, from having observed the very little intercourse he held with the natives, and the very great difficulty I experienced in getting him to use the slightest personal exertion to endeavour to carry our object into effect. Instead of his going forward to smooth the way for me, I found it difficult to get him to attend to my appointments with the natives, and then I was obliged to wait his own time, such was the tedious way in which he conducted the negotiation.[60]

These criticisms must of course be weighed against Clarke's criticism of Spain's overbearing attitude and interference with him in his dealings with Maori, which we have recorded in section 7.7.2 .

Spain's strictures do, however, raise serious questions as to how well Clarke managed to explain to Maori the nature of the transactions for which he was seeking their agreement and how much time he spent with them. As we noted earlier, the Crown had not heeded Spain's proposal in his first report of September 1843 that, in any further negotiations, Clarke should be accompanied by a more experienced official, because Clarke's role of acting for Maori was far too difficult and onerous for him to carry out on his own (see s7.5.3).

Clarke had resumed his negotiations with Wakefield on 29 January 1844, following FitzRoy's meeting with Wakefield on that day. Only 10 days later, they completed their discussions, and Clarke settled on a schedule which increased Brees's 51,650 acres of land surveyed and under survey to 71,900 acres and included new areas at Terawhiti, Oterongo, Ohaua, Ohariu, Lower Hutt, Upper Hutt, Lowry Bay, Wainuiomata, and Pakuratahi (see s7.5.3). Clarke advised Wakefield that £1500 was the amount required to compensate Maori.

Given the very short timeframe, the question arises as to whether, before he settled the matter with Wakefield, Clarke consulted the various Maori groups about the inclusion of the 71,900 acres in his schedule and the share of the total sum of £1500 that the various groups would receive or whether he held discussions with them after Wakefield had advised him on 8 February that he would 'at once' provide the £1500 required?

At some stage, before settling the compensation figure of £1500, Clarke must have assessed the sums to be 'awarded' to Maori at the various pa. As we have seen, these ranged from £300 for Te Aro to £10 each for Pakuao and Te Ikamaru. Some pa, particularly those on the south-west coast, were quite distant from Wellington. It is by no means clear, given the absence of any evidence as to times and places of meetings between Clarke and the various scattered Maori groups, whether he had discussions with any of them between 29 January and 7 February, when he sent his schedule to Wakefield. This may well explain why he and Spain experienced such difficulty, without resort to threats, in persuading Maori to accept the sums specified in various deeds of release.

60. Spain's final report to FitzRoy, 31 March 1845, BPP, vol 5, p18

Forsaith's report on the Ngauranga, Petone, and Waiwhetu meetings on 15 March 1844 noted that Clarke junior had gone to these communities the day before the meetings 'to arrange the preliminaries, and obviate, as far as possible, any difficulties that might arise'.[61] In reporting on the meeting Spain and Forsaith held with Taringa Kuri and his people on 20 March, Forsaith noted that Clarke was absent at Ohariu, 'making the preliminary arrangements for compensating the Natives of that and other adjacent settlements on the [west] coast'.[62] But Clarke, as we have recorded, was back on 26 March at the latest, as he was present then when Taringa Kuri signed the Kaiwharawhara deed of release.

In his private correspondence with his father the chief protector, Clarke expressed concern for Maori, whose interests it was his duty to protect. This is in marked contrast to his attitude to the people of Te Aro at the meeting on 23 February 1844, when, in the presence of the Governor, he called them 'self-deceiving people' and people 'of small consequence', and told them he would offer them nothing further (than the sum of £300). It was Clarke who, in the presence of Spain, told the Waiwhetu people that the £100 offered would not be increased, and that he would not return or make any further offers but would tell the Europeans they might now take the land. He said virtually the same to the people of Oterongo and Ohaua when they refused the £20 offered them.

### 8.5.2 Were the protectorate's duties incompatible?

The Wellington Tenths Trust claimants allege that the Crown, 'in establishing the office of the Protectorate of Aborigines in 1841 and requiring the Chief Protector to protect Maori interests and to facilitate the purchasing of Maori land, gave the Protectorate two fundamentally discordant assignments', thereby putting the protector in conflict with his duty to protect Maori interests.[63]

We have earlier noted instances of Spain requiring Clarke actively to cooperate with Wakefield and of FitzRoy instructing Clarke to consider it his sacred duty to be as moderate as justice would allow and to impress on the minds of Maori the comparatively valueless nature of their lands when the settlement at Port Nicholson was formed. Clarke was torn between his duty to protect Maori when negotiating with them for the purchase of their land and the need to respond to Spain's pressure to reach a speedy settlement with Wakefield. We have referred to instances of Spain interfering, in an overbearing manner, when Clarke was negotiating on behalf of Maori. In short, Clarke found himself in the invidious position of being required to serve two masters, whose interests were by no means compatible. Maori wished to continue living in the Port Nicholson block, while the European settlers were attempting to drive them off the lands which the settlers had ostensibly purchased from the

61. Forsaith's minutes of 15 March 1844 meetings, BPP, vol 5, p 34
62. Forsaith to Clarke senior, 8 April 1844, IA1/1844/1696 (doc C1(a), p 116)
63. Claim 1.2(d), para 8.7

company. The Crown became increasingly anxious to facilitate the removal of Maori from sufficient of their land to accommodate the pressing needs of several thousand settlers to obtain title to Maori land.

The invidious position of Clarke was revealed during the various meetings with Maori from different pa. There, he found it necessary on a number of occasions to ensure that the deeds of release were signed by publicly denigrating Maori or by threatening that they would not be paid for their lands and that the land would instead be handed over to the settlers. We have no doubt that these admonitions by Clarke (reinforced by Spain and other officials) contributed to Maori being persuaded to sign the deeds of release.

### 8.5.3 Tribunal finding of Treaty breach

The Tribunal finds that the Crown acted in breach of its Treaty duty actively to protect Maori who were parties to the deeds of release by not ensuring that the protector was at all times free to act independently of the Crown and was not subjected to pressure by Crown officials to facilitate the purchase of Maori land by the New Zealand Company, and as a consequence such Maori were prejudicially affected.

## 8.6 Did Maori Freely and Knowingly Consent to the Signing of the Deeds of Release?

We will consider the question of whether Maori freely and knowingly consented to the signing of the deeds of release under two heads: did Maori fully understand the nature and scope of the deeds of release and were they subjected to undue pressure to sign the releases?

### 8.6.1 Did Maori understand the nature and scope of the deeds of release?

We have earlier found that the 1839 Port Nicholson transaction failed to meet the elementary requirements of a valid deed of purchase. Richard Barrett's attempt to translate and explain the meaning of the deed, including the provision for tenths, was totally ineffective. Moreover, we believe that at that time the Maori of Te Whanganui a Tara had no meaningful comprehension of the very notion of the 'sale' of land; it was a totally alien concept to them. At most, some might have realised that a relatively small number of Pakeha might come to live among them on mutually advantageous terms. They could have had no conception that it was the company's intention to oust them from their pa, cultivations, and burial grounds, and to cut them off from their other ahi ka use rights.

For the next four years, Maori were subjected to increasing pressure from the settler community, which sought to remove them from their land. It became obvious even to Spain by

early in 1843 that, apart from the isolated instance of Te Puni at Petone, the 1839 deed lacked validity. Instead of finalising his inquiry with its inevitable outcome, he chose to collaborate in an imposed arbitration. This procedure was based on an essentially false premise – that there had been a sale but that it had defects which could be cured by compensating Maori for their claims. How much, if any, of this sophistry was explained to Maori we do not know. In the period from 1840 up to FitzRoy's arrival in Wellington in January 1844, Maori were increasingly on the defensive in seeking to prevent the settlers from wrongfully occupying their land. Not all were successful. At Kaiwharawhara, settlers let their livestock wander onto Maori cultivations, thus driving Tarangi Kuri and his Ngati Tama people off their land and causing them to move to the Hutt Valley.

It is probable that the language of the deeds led Maori to interpret them in a rather different way to Crown and company officials, particularly in relation to the areas which were to remain with Maori. We note that 'ngakinga', the word used in the deeds to mean 'cultivations', can also mean 'clearings'.[64] Instead of 'burial grounds' (the terminology used by Spain, Clarke, Wakefield, and FitzRoy in their various exchanges in 1843–44), the words 'wahi tapu' ('sacred places') were used in the deeds. 'Wahi tapu' could be interpreted much more broadly as including not only burial grounds but any place which Maori considered tapu. The 'places reserved' (the tenths reserves) were rendered in Maori as 'wahi rongoa'. 'Rongoa' can mean 'to preserve', but can also refer to remedies or medicines, and Maori may have understood 'wahi rongoa' as meaning places for gathering medicinal plants.[65] Whether Maori were informed of FitzRoy's definitions of 'pah' and 'cultivations' we do not know, but they were not consulted when these definitions were agreed upon by Crown and company representatives. In the absence of full consultation with Maori on these and related matters (such as the extent of their burial grounds), it is unlikely that there could have been a common understanding between Maori, the Crown, and the company on these important matters. Moreover, Maori could not have understood that they were to lose their other use rights to resources such as forests and fisheries.

While Spain and others assured Maori that they would retain their pa, cultivations, and wahi tapu, these were not surveyed off. Priority was given by the New Zealand Company to surveying the lands it wished to acquire from Maori for settlement through the so-called arbitration process. Not all such lands had been surveyed at the time the deeds of release were signed. Additional lands at Wainuiomata and Pakuratahi and on the west coast were sought by Wakefield and included by Clarke junior in the schedule of land the subject of the deeds of release. Given the short timeframe, it is unlikely that Maori were consulted at the time about the late inclusion of these lands in the schedule. It was clear from the comments of the Te Aro people at the first meeting with FitzRoy and his officials that they had little

64. H W Williams, *Dictionary of the Maori Language*, 7th ed, Wellington, Legislation Direct, 1971, p 228
65. Ibid, p 346

understanding of the nature and scope of the deed of release which they were eventually pressured into signing.

There is a further question as to whether Maori were informed that the company had agreed to pay £1500 for the land detailed in the schedule. It seems clear that the schedule was never shown to them. Being in English only, there would have been little point, because they would have required an explanation in Maori of its purpose. Forsaith makes no reference to their having seen it, nor to any translation of the schedule being provided. Were they told of the agreement reached between FitzRoy and Wakefield in their absence, or of the terms of the subsequent agreement between Clarke and Wakefield, which were adopted by Spain? There is no evidence that they were; if they had been, Forsaith would surely have recorded it. Without their full, free, and knowing consent, Clarke, as protector, had no mandate to bind Maori to the disposition of substantial areas of their land.

Maori were being asked to sell valuable land to the New Zealand Company, the Crown having waived its right of pre-emption. The Crown was under an obligation to ensure that Maori knew with reasonable certainty the land they were retaining and the land they were being asked to sell. We are not satisfied that those Maori who signed the deeds of release were adequately informed on these matters. Over 150 years later, this Tribunal has heard very lengthy, detailed, and sophisticated arguments from Crown counsel that Maori, by signing the deeds of release, surrendered their interests in the great bulk of their land which was the subject of the invalid 1839 deed of purchase. In turn, detailed submissions were made by counsel for the Wellington Tenths Trust claimants to the contrary. This Tribunal has been obliged to deal at considerable length with the irreconcilable arguments advanced before us. If the meaning and scope of these deeds can give rise to such complex and, at times, highly legalistic argument today, what prospect did Maori have in 1844 of understanding the deed which many of them were pressured to sign? We believe the Maori signatories had minimal understanding.

### 8.6.2 Did the Crown exert undue pressure on Maori to sign the releases?

Our short answer to the question of whether the Crown exerted undue pressure on Maori to sign the releases is 'Yes'. We have seen that the settler pressure on Maori to vacate their land steadily increased. Maori resisted principally on the ground that they had not sold their land. They strenuously resisted – though not always successfully – attempts by settlers to occupy and utilise their land. They clung to their cultivations as best they could and jealously guarded their pa and urupa. However, the Crown permitted Spain to abandon his inquiry into the validity of the 1839 deed and instead appointed him to oversee a deal which would ensure that the company's settlers gained title to the land ostensibly bought by Wakefield. In this way, ownership of some 67,000 acres of prime Maori land was to pass to the company and its settlers.

In the result, as we have found, Maori were left with no reasonable alternative to becoming involved with the protectorate, which, on Crown instructions, and lacking independence, was being urged to facilitate the sale by Maori of valuable parts of their land at Te Whanganui a Tara and environs. The burden of proving their claim to their land (which they had not sold) had been shifted to Maori. As a result, they came under irresistible pressure to compromise their rangatiratanga over their land.

### 8.6.3 Tribunal findings of Treaty breaches

The Tribunal finds that the Crown acted in breach of its Treaty duty actively to protect Maori living in the Port Nicholson block by failing to ensure that they freely and knowingly signed the deeds of release and, in particular, that they understood the nature and scope of such deeds and were not placed under pressure to sign them. As a consequence, Maori who were parties to the deeds of release were prejudiced thereby.

The Tribunal further finds that Crown officials threatened many Maori who were parties to the deeds of release that, if they did not agree to accept the sum of money offered in compensation for signing the deeds, no higher offer would be made and their land would go to European settlers without the consent of Maori. In so doing, the Crown acted in breach of its Treaty duties actively to protect the rangatiratanga rights of Maori under article 2 of the Treaty and to act reasonably and in good faith towards them. As a consequence, such Maori were prejudiced thereby.

### 8.6.4 Did the company acquire an interest in land under the deeds?

It remains to consider whether the New Zealand Company acquired an interest in certain lands within the Port Nicholson block under the 1844 deeds of release. As our findings above indicate, the Tribunal is left with serious misgivings about whether Maori may be said to have genuinely consented to the 1844 transactions evidenced by the deeds of release.

Counsel for the tenths trust claimants referred us to several statements by Professor Alan Ward relating to the arbitration procedures conducted by Spain and Clarke and the resulting deeds of release, which were reflected in Spain's award.[66]

Ward notes that the arbitration process raises some serious concerns in relation to Treaty principles. He states that from time to time Maori certainly told Crown officials that they were willing to have them resolve the disputes between Maori and the company, 'but that does not amount to agreeing to accept a defined level of monetary compensation'. Ward continues:

66. Document 02, pp 194–200

> The imposition of the compensation payments under threat that the company would be given occupancy anyway, was a very strong action, clearly accepted with reluctance by the Port Nicholson Maori and firmly rejected by others. This was less than the full and free consent by Wellington tribes to the purchase – rather a reluctant acquiescence in an imposed award, on trust that somehow the Crown would provide for their future wellbeing.
>
> While it may be accepted that Maori had indeed given settlers possession of some of the disputed lands, the question of *which* lands exactly they had given over was not closely defined. The general or blanket nature of the arbitration cut across that. Spain had given up trying to separate the sold from the unsold land; instead Maori were assured of retaining their pah and cultivations, though these were as yet still imperfectly defined. Nor were the Native Reserves, and the external boundary of the whole purchase, defined at the point of the arbitrations. As Moore comments, these 'remained a matter of pledges and policies which Maori apparently accepted largely on trust'. [Emphasis in original.][67]

Ward also notes that the compensation payments made were, in themselves, very small. (Wakefield calculated that he had paid sixpence an acre.) As Ward points out, the real payment to Maori was intended to be the reserved 'tenths', but Maori did not receive a full tenth of the land awarded to the company by Spain (see s 8.8.1).[68]

While retaining serious doubts about the integrity of the 1844 deeds of release, the Tribunal is left with the impression that, although they were improperly pressured by Crown officials, including Governor FitzRoy, Maori felt compelled to accept the proposals. They could not ignore the presence at Port Nicholson of several thousand settlers who seemed very unlikely to depart. Maori acceptance of the deeds of release nevertheless occurred with limited understanding of the deeds and with grave dissatisfaction at the small amounts paid for their very valuable land. In a number of cases, the inadequacy of the compensation offered was the principal, if not the only, objection raised by Maori to signing the deeds of release.

In chapter 10, we discuss the agreements which Colonel McCleverty arranged with Maori whereby they surrendered most of their cultivations on settler-claimed land in exchange for other lands. Maori appear to have accepted in the McCleverty arrangements that the settlers had been awarded lands under the 1844 deeds of release.

## 8.7 Surveying is Carried Out

The New Zealand Company could acquire title to the land which it had purchased under the deeds of release only by the issue to it of a Crown grant, and several matters needed attention before such a grant could be issued. Surveying needed to be done of both the exterior

67. The quote from Moore is from doc E5, p 532
68. Alan Ward, *National Overview*, 3 vols, Wellington, GP Publications, 1997, vol 2, pp 90–91

boundary and those sections of land purchased by the company but not yet surveyed. In addition, the rural tenths still owing to Maori, the roads and other land required for public purposes, and Maori pa, cultivations, and burial grounds, which were to be retained by Maori, all had to be surveyed. Surveys of these areas started at various times after the first release deeds were signed.[69] The company also had teams of surveyors setting out rural lots for colonists on the eastern side of the harbour, and in the Pakuratahi, Wainuiomata, and Orongorongo Valleys. (These were some of the additional lands agreed upon by Clarke and Wakefield for inclusion in the schedule to the deeds of release.)

### 8.7.1 Exterior boundary survey completed

By September 1844, the survey of the exterior boundary of the Port Nicholson block had been completed. The survey plan prepared by Land Claims Commission surveyor T H Fitzgerald and principal New Zealand Company surveyor Samuel Brees was dated 7 September 1844. The copy attached to Spain's final report was dated 7 October 1844 (see map 6).[70]

A notable feature of the plan was the extension of the boundary to the south-west coast. As described in the 1839 deed, the so-called western Rimurapa ridge line went down to the south coast at Sinclair Head, but the boundary shown on the 1844 plan extended out to the west coast at Kia Kia (just north of Pipinui Point) and was almost at a right angle to the line recorded in the 1839 deed. As a result, some 40,000 to 50,000 additional acres were added to the deed of purchase area.[71]

In his schedule of 31 January 1844, which was forwarded to Clarke, Brees included 44 sections (4400 acres) of surveyed and selected lands at Ohariu, as well as an estimated 350 acres of part-sections which were intersected by the western boundary line at 'Tukapu, Ohariu Districts, &c'. Brees noted that, because the land between the Rimurapa Range and the west coast was 'included in some other purchases of the New Zealand Company', there had been no attempt to adhere to the boundaries of the Port Nicholson deed when surveying sections for company settlers. The 'other purchases' to which Brees referred were the Kapiti and Queen Charlotte Sound deeds, neither of which was found by Spain to have conveyed land to the company in the Port Nicholson area. Brees stated that he had attempted to sketch in the western boundary along the Rimurapa Range but was unable to do so precisely.[72] He evidently considered that some land at Ohariu came within that boundary.

Clarke then added, in his schedule of 7 February 1844, land even further to the west. After discussion with Wakefield, Clarke included in the schedule which was attached to the deeds of release a total of 16,000 acres at Terawhiti, Oterongo, Ohaua, Makara, and Ohariu.[73] Much

69. Document E5, pp 536–555
70. Ibid, p 544. The map attached to Spain's final report is document I3(d).
71. Document E5, p 540; doc I7, pp 5–6
72. Brees to Wakefield, 31 January 1844, BPP, vol 2, apps, p 418
73. Schedule enclosed with Clarke to Wakefield, 7 February 1844, BPP, vol 2, apps, p 419

or all of this land was clearly beyond the Rimurapa Range, and the boundary was extended to the west coast to accommodate these additional areas.

### 8.7.2 Surveying of pa, urupa, and ngakinga commences

In September 1844, Fitzgerald began the difficult task of surveying Maori pa and burial grounds, and their shifting cultivations. He found this much more time-consuming than ordinary surveying. The cultivations were frequently isolated or unrelated to pa. The surveying of past cultivations which had been left to fallow but were to be protected in Maori ownership was even more troublesome. When he reported on his work in June 1845, Fitzgerald admitted that current cultivations in the Hutt Valley were still unsurveyed, owing to 'intruding Natives'.[74] Numerous other unoccupied cultivations elsewhere remained unsurveyed.[75] Although he subsequently made considerable progress in various areas, Fitzgerald never finished his surveys of the pa, cultivations, and burial grounds.[76]

## 8.8 Spain's Final Report

In the meantime, on 31 March 1845, Spain very belatedly completed his final report to Governor FitzRoy on Port Nicholson.[77] He noted that, at the conclusion of his 1843 report, he had recommended that the Government should implement the arbitration commenced by Wakefield and pay Maori the amount of compensation he declared them entitled to receive. When the arbitration was completed, Spain would make his final report, which would recommend that Crown grants should issue to the New Zealand Company.

Spain outlined the terms of the resumed arbitration, its outcome in the various deeds of release completed, and the sums paid to Maori, and he described the action taken to survey the external boundary line, within which were all the lands claimed by the New Zealand Company in the Port Nicholson district.

### 8.8.1 Spain's award

Spain concluded his report with his 'final' award.[78] In it, he stated that:

- The New Zealand Company was entitled to a Crown grant of 71,900 acres in the settlement of Port Nicholson.

74. The 'intruders' were Ngati Tama and Ngati Rangatahi. We discuss their rights in the Hutt Valley in chapter 9.
75. Fitzgerald to superintendent, Wellington, 1 June 1845, NM45/1162 (doc E7, pp 250k–250n)
76. Document E5, pp 548–555
77. Spain's final report to FitzRoy, 31 March 1845, BPP, vol 5, pp 12–26
78. Ibid, pp 25–26

- This area was made up of country land, comprising 708 sections of 100 acres each (a total of 70,800 acres); and the town land, comprising 1100 acres.
- These lands were described in the schedule agreed upon on 8 February 1844 between Wakefield and Clarke junior. We note that this schedule is, in all material respects, the same as the schedule which formed part of the various deeds of release signed by Maori.
- The lands were also delineated on a plan annexed to his report. This is the plan dated 7 October 1844 prepared by Fitzgerald and Brees.[79] It is endorsed 'Plan of the Port Nicholson District Referred to in my final Report' and signed 'Willm Spain' (see map 6).
- All pa, burial grounds, and cultivations, including all past cultivations used by Maori since the colony was established, were excluded from the grant to the company. However, we note that, because the survey was incomplete, the position and acreage of the cultivations, in particular, remained quite uncertain. Surveying of these excepted areas was never completed, despite clear evidence that they were of the greatest importance to Maori.
- Also reserved for Maori were 39 rural tenths reserves of 100 acres each (3900 acres) and 110 town tenths of one acre each. Spain noted that all these areas were delineated on the plan, except for two reserves of 100 acres each marked on the schedule as 'Native Reserves reserved'.
- Also excepted from the company grant were a piece of land at Te Aro recently granted by the Governor to the Wesleyan mission and several small plots of land to be granted to European traders who had lodged pre-Treaty land claims. These latter areas included a plot near Pipitea Pa granted to Alexander McDonald, the assignee of Robert Tod.

Surprisingly, Spain omitted any reference in his final report to the considerable expansion of the land subject to the 1839 deed of purchase by the extension of its boundary to the south-west coast.

A notable feature of Spain's award is the failure of the Crown to complete the survey of Maori pa, burial grounds, and cultivations. The failure to have all cultivations dating back to 1840, including those not then in use, surveyed was particularly serious because those areas became increasingly difficult to identify with the passage of time. In fact, no such plan was ever prepared. By contrast, the land granted to the company had been surveyed and is shown in the plan dated 7 October 1844 annexed to Spain's report.[80]

Although Spain's long inquiry had come to an end, the position of the Maori reserves was far from settled. Maori had been allocated all of their 110 urban tenths, but only 39 rural

79. Document 13(d)

80. However, as noted in footnote 35 above, the sections shown on the plan do not match up exactly with the sections listed in the schedule. Most obviously, the plan shows no sections at Ohaua and Oterongo, and significantly fewer than 50 sections at Pakuratahi. There may also be other discrepancies. The plan which was attached to the Crown grant in 1848, doc A9(b), does not appear to show any additional rural sections surveyed in the intervening four years.

tenths had been reserved for them in the deeds of release. We discuss the status and early administration of these reserves in chapter 12.

Before calculating the area in acres of tenths reserves which should have been made by Spain, it is necessary to deduct from the 71,900 acres awarded to the New Zealand Company a sum to cover the area of the pa, cultivations, and burial places which were to be reserved from the award. Unfortunately, no survey of these was ever completed by the Crown or the company. The best estimate we can make (and we think it probably favours the company) is to allow 900 acres for the various pa sites, cultivations, and urupa. This would leave 71,000 acres, of which one-tenth – 7100 acres – should have been reserved as Maori tenths.

The company scheme allowed for 110 town reserves of one acre each in and around the Lambton Harbour area. These were reserved in the deeds of release along with 39 rural tenths reserves of 100 acres each, or 3900 acres. The total area of tenths reserved in the deeds of release awarded by Spain amounted to 4010 acres. This left a shortfall of 3090 acres from the 7100 acres (say, 31 rural sections) which should have been reserved as Maori tenths.[81]

This somewhat attenuated discussion serves to illustrate that the Crown paid scant regard to protecting the position of Maori. The Crown failed not only to ensure that the appropriate number of tenths were surveyed and reserved for Maori but also to ensure that all Maori pa, burial grounds, and cultivations were surveyed and reserved.

After the signing of the first four deeds of release on 26 February 1844, the Crown took speedy action to secure the signatures of other Maori. By 30 March 1844, Maori had signed a further seven deeds of release, albeit often under pressure. The signing of the deeds was followed in April by Spain's instructions for the external boundary of the Port Nicholson block to be surveyed and, when that was completed, for all the sections belonging to the company, and all the pa, burial grounds, cultivations, and other Maori reserves, to be included in the survey plan. However, while the surveying of the company sections had been finished by the time the surveying of the exterior boundary of the Port Nicholson block was completed in September, comparable progress had not been made with the surveying of the areas to be reserved for Maori. The required number of tenths had not been surveyed, while the survey of Maori pa, burial grounds, and cultivations did not even commence until September 1844 and was never completed.

It is apparent from Duncan Moore's account of the surveying of the Port Nicholson block from 1844 that the Crown gave priority to surveying the exterior boundary and various public works rather than to completing the survey of Maori pa, cultivations, and urupa. As a consequence, Maori were left in the precarious position of the company's settlers being in possession of, or claiming the right to, thousands of acres of surveyed sections, many of which encroached upon Maori cultivations. Nor did the Crown make any effort to ensure that the full quota of tenths reserves were surveyed for Maori.

81. We have noted in section 5.3.6 that there appear to have been 43 rural tenths by December 1845, but this does not significantly alter our findings about the inadequate provision of tenths reserves.

Had the Crown wished to ensure that Maori rights to their land were adequately protected, it should have first ensured that all their pa, burial grounds, cultivations, and rural tenths reserves were promptly surveyed following the signing of the deeds of release. This would have enabled the Crown to ensure that all company sections which encroached on Maori land were resurveyed so as to avoid any such encroachment. Then all could have been included in the plan showing the surveyed exterior boundaries. The Crown would then have been able to award appropriate Crown grants to both Maori and the company.

### 8.8.2 Tribunal findings of Treaty breaches

The Tribunal finds that the Crown acted in breach of its Treaty duty actively to protect Maori who were parties to the deeds of release by failing to ensure that their rights to their pa, burial grounds, and cultivations (reserved to them under the deeds of release) were adequately protected by inclusion in an approved surveyed plan and any Crown grant made in respect of such lands and that, as a consequence, such Maori were seriously prejudiced thereby.

The Tribunal further finds that the Crown acted in breach of its Treaty duty actively to protect all Maori having customary rights in the Port Nicholson block at 1840 by failing to ensure that the full number of rural tenths to which they were entitled were reserved to them under the deeds of release. The shortfall amounted to some 3090 acres, comprising 31 rural tenths. As a consequence, such Maori were seriously prejudiced thereby.

### 8.8.3 FitzRoy's Crown grant

Before he could issue the New Zealand Company with an effective Crown grant for the Port Nicholson block, FitzRoy needed Spain's final award and the completed surveys of all the town and rural tenths to which Maori were entitled within the block. He also needed surveys of all Maori pa, burial grounds, and cultivations, and of the company's sections duly modified to ensure that they did not encroach upon Maori land. However, although Fitzgerald's surveying of pa, cultivations, and urupa was still not complete, FitzRoy chose to issue his grant to the company on 29 July 1845.[82] The grant closely follows the terms of Spain's final award and granted to the company 'all that . . . parcel of land . . . said to contain 71,900 acres, more or less,' in the district of Port Nicholson, comprising 708 sections of 100 acres and town land of 1100 acres. Excepted from the grant were:

> All the pahs, burial-places and grounds actually in cultivation by the natives, situated within any of the said lands hereby granted to the New Zealand Company as aforesaid; the limits of the pahs to be the ground fenced in around the native houses or huts, including

82. Enclosed with FitzRoy to Stanley, 1 August 1845, BPP, vol 5, p 123

> the ground in cultivation or occupation around the adjoining native houses or huts without the fence, and the cultivations being those tracts of land which are now used by the natives for vegetable productions, or which have been so used by any aboriginal natives of New Zealand since the establishment of the colony; and also excepting the 39 native reserves of 100 acres each, and the 110 town acres, which said reserves for the natives are shown upon the plan endorsed hereon; and excepting two other native reserves of 100 acres each.

Though the nature of the pa, burial grounds, and cultivations was carefully defined, their locations were not specified since many of them were still unsurveyed. Nor was provision made for all the rural 100-acre tenths reserves to which Maori were entitled. The grant also excepted from the company area various small pieces of land which had been granted to other pre-Treaty purchasers and land set aside as Government reserves. However, the grant was silent on the land within the Port Nicholson block over and above the 71,900 acres granted to the company (less the exceptions listed). We discuss this additional area of some 137,347 acres in chapter 10.

## 8.9 The Position of Maori in Wellington in 1845

We can sum up the position in Wellington in mid-1845 when FitzRoy issued his Crown grant to the New Zealand Company by referring to Spain's final report. This contrasted the situation in 1839 with that in 1845. When William Wakefield arrived to purchase the land in 1839 he found at Te Aro 'a large pah thickly inhabited by natives' and, proceeding northwards around the harbour, a succession of other pa: Kumutoto, Pipitea, Tiakiwai, Kaiwharawhara, Ngauranga, Petone, and Waiwhetu. But by early 1845 the situation had been transformed. Again, Spain started at Te Aro – 'chosen by the merchants as the most eligible part of the harbour for mercantile purposes' – and proceeded northwards, 'whence there is an almost uninterrupted line of houses to Pepitea'. Spain noted that Kumutoto Pa, recently destroyed by fire, and Pipitea Pa were 'surrounded by European buildings'. He also noted that the local Maori, who practised a shifting form of cultivation, required a much larger area of land than they would have needed 'if they cultivated according to the plan pursued by civilized nations'. Moreover, they were unwilling to move to land that might have been allocated to them as tenths reserves when this was within the territory of other groups.[83] It seems evident from this that by 1845 the pa, burial grounds, and cultivations belonging to Maori, in addition to such tenths reserves as had been made, were increasingly being pressured by European occupation, especially of the favoured commercial sites along the harbour front. These concerns would have to be dealt with by those who had to give fuller consideration to Spain's award and FitzRoy's defective Crown grant, as we shall see in chapter 10.

83. Spain's final report to FitzRoy, 31 March 1845, BPP, vol 5, p 15

CHAPTER 9

# NGATI TOA, NGATI RANGATAHI, NGATI TAMA, AND EVENTS AT HERETAUNGA

## 9.1 Introduction

In chapter 10, we will examine the final stage in the complex process by which the New Zealand Company acquired the Port Nicholson block. First, however, we need to deal with the interests of Ngati Toa, Ngati Rangatahi, and Ngati Tama in Heretaunga (the Hutt Valley). For a time, the assertion of these interests threatened to upset the company's plans to put its settlers in possession of a considerable portion of this very fertile valley. This chapter is concerned with events in Heretaunga from 1839 through to the battles of 1846. These events resulted in the withdrawal of Ngati Toa, Ngati Tama, and Ngati Rangatahi from the valley. Each of these three groups has submitted claims of Treaty breaches relating to the Crown's actions in Heretaunga in this period. The essence of these claims is that the Crown failed to recognise the rights in Heretaunga which they had developed by Maori custom, and that the Crown took active steps to extinguish those rights and to force these groups from the valley.

The chapter begins by looking at the situation in Heretaunga to 1840, and particularly at the question of whether Ngati Rangatahi were present in the valley prior to 1841. We then discuss the Kapiti deed, by which the New Zealand Company claimed to have acquired some 20 million acres from Ngati Toa, and subsequent events related to that deed, most notably the clash between Ngati Toa and the company at the Wairau Valley in the northern South Island. While these events fall outside our inquiry area, they form an important part of the context for the conflict which developed over Heretaunga. The Crown did not accept the company's assertion that it had purchased all of Ngati Toa's interests within the immense area covered by the Kapiti deed, and Crown officials set about trying to arrange the release of Ngati Toa's interests at Port Nicholson in exchange for compensation. These negotiations foundered, however, on the question of Heretaunga, which the Ngati Toa chiefs Te Rauparaha and Te Rangihaeata refused for many months to include within the area which they were to release. It was not until November 1844 that Te Rauparaha agreed to release his interests in Heretaunga. Te Rangihaeata held out even longer, not consenting to the release until March 1845. Even then, his agreement was conditional on the reservation of land for the Maori occupying Heretaunga.

Since 1841 and 1842 respectively, Ngati Rangatahi and Ngati Tama had been living and cultivating land in Heretaunga, and these resident Maori continued to pose a problem for the Crown and the company (which wanted to install its settlers on land being cultivated by Maori). Although they had initially gone to Heretaunga under the mana, and probably at the direction, of Te Rauparaha and Te Rangihaeata, Ngati Tama and Ngati Rangatahi were acquiring their own rights to land and becoming increasingly independent of Ngati Toa. Throughout 1845, Crown officials and Te Rauparaha alike were unsuccessful in persuading Ngati Rangatahi and Ngati Tama to leave Heretaunga. However, following the arrival of the new governor, George Grey, in February 1846, the Crown took a more forceful approach to the dispute. Grey persuaded Ngati Tama to abandon the valley in exchange for a promise of compensation, but Ngati Rangatahi were compelled to leave in March 1846 under threat of attack by a large military force. Armed conflict then broke out in the valley, and subsequently spread north to Porirua. Ngati Rangatahi were forced to move to Rangitikei, and were never compensated for their losses.

We conclude the chapter by making findings on the claims of Ngati Toa, Ngati Rangatahi, and Ngati Tama.

## 9.2 Heretaunga to 1840

While it is impossible to delineate precisely the extent of Heretaunga, the area is defined by certain geographic features: the two lines of hills between which the valley lies and the Heretaunga (Hutt) River, which runs the full length of the valley. It includes the areas known today as Petone, Lower Hutt, and Upper Hutt and extends as far as Pakuratahi. Heretaunga lies at the northern end of Te Whanganui a Tara, and stretches for a considerable distance inland. When the New Zealand Company colonists arrived at Te Whanganui a Tara, they found two Te Atiawa pa, Pito-one and Waiwhetu, beside the beach in the areas which became known as Petone and Lower Hutt respectively. From a mile or so inland, however, the valley was densely covered with forest, and Ernst Dieffenbach reported that Maori living around the harbour had little knowledge of Heretaunga, having avoided it out of fear of 'Ngati Kahungunu'. While the forest cover presented an obstacle to Pakeha settlement, Pakeha commentators were lavish in their praise of the valley's rich soil, which made it a very desirable location for settlers once the land had been cleared.[1] The desirability of Heretaunga to Maori and Pakeha alike was to lead to the conflicts with which we are concerned in this chapter.

In chapter 2, we established that the Ngati Ira related hapu of Ngati Kahukuraawhitia and Rakaiwhakairi were resident in the valley until the mid-1830s, when successive waves of incoming Ngati Mutunga, Ngati Tama, and Te Atiawa finally drove them out. In 1835, Ngati

1. Document M3, pp 2–5

Mutunga left as a group for the Chatham Islands, so forfeiting their ahi ka and take raupatu at Te Whanganui a Tara. Many Ngati Tama also went to the Chatham Islands in 1835, but a significant number chose to remain in the Port Nicholson block area. Ngati Rangatahi appear to have visited Heretaunga seasonally from the early 1830s also (see s 9.2.1). However, they were temporarily banished from Heretaunga by a rahui (a prohibition from using a particular area) around 1839. Ngati Rangatahi were originally in the valley under the mana of Ngati Toa, who had an interest at Heretaunga because they had fought there in the early raids on the district, and perhaps particularly because they wished to protect access to and from Pauatahanui and the west coast of Te Upoko o te Ika. Before 1840, the valley was most likely viewed as something of a pataka (storehouse) for various groups whose rights were not firmly established.

As set out in chapter 2, by 1839 Ngati Tama were living at Kaiwharawhara and Ohariu and environs, and Te Atiawa were living around the shores of Te Whanganui a Tara. Te Atiawa had not established ahi ka in Heretaunga beyond a mile and a half inland from the Petone shore, although both Ngati Tama and Te Atiawa had take raupatu from which they could further develop ahi ka at Heretaunga. Some Ngati Kahungunu continued to harass Te Atiawa in the valley up to and including 1840, at which point a peace treaty was concluded. Under the terms of this treaty, Ngati Kahungunu were to be confined to the east of the Tararua and Rimutaka Ranges and the incoming tribes to the west of these same ranges (see s 2.3.13).

By treating with only those Maori whom they found in physical occupation at and around the shores of Te Whanganui a Tara in 1839, the New Zealand Company contributed to the solidification of settlement patterns within the Port Nicholson block. Company officials were oblivious to the fact that settlement patterns there were of recent origin. Ngati Rangatahi (who were temporarily absent from the valley in 1839) and Ngati Toa were not parties to the 1839 Port Nicholson deed, though Ngati Toa were soon involved in the much larger, cover-all Kapiti deed, which included Port Nicholson. Some Ngati Tama and Te Atiawa marked the Port Nicholson deed, although, as has earlier been established, they lacked any real understanding of it.

### 9.2.1 Ngati Rangatahi

Ngati Rangatahi are a hapu of Ngati Maniapoto. Before moving into Te Upoko o te Ika, they were resident in the Ohura Valley near Taumarunui. They had kinship links to Te Rauparaha, and a group of Ngati Rangatahi under Kaparatehau joined the heke into Te Upoko o te Ika under Te Rauparaha's leadership in the early 1820s.[2] According to Crown prosecutor R D Hanson, writing in 1846, Ngati Rangatahi helped Ngati Toa wrest the upper part of Heretaunga from 'Ngati Kahuhunu'. Ngati Rangatahi gained occupation rights in the valley

2. Document H4, pp 2–9; doc M1, pp 31–32

(although they made little use of it for cultivation), and paid tribute of canoes, eels, and birds to Te Rauparaha and Te Rangihaeata. However, one of the Ngati Toa chiefs became upset at his exclusion from sharing in Ngati Rangatahi's tribute and placed a rahui on the district.[3] This rahui continued for at least two years, but by 1841 Ngati Rangatahi had returned to the valley.[4] Ngati Rangatahi took no part in the 1839 New Zealand Company transaction, although Taringa Kuri invited them to the feast after the deed signing.[5]

### 9.2.2 Crown submissions on Ngati Rangatahi's occupation of Heretaunga

Crown counsel, in closing submissions, suggested that little evidence exists that Ngati Rangatahi were in fact reviving earlier claims with their migration to the Hutt in 1841. He submitted that Ngati Rangatahi were 'almost certainly sent' to the Hutt in 1841 by Te Rauparaha, and that:

> Ngati Rangatahi could not create a new customary right based upon disputed occupation after 1840 – disputed, that is, by the Ngatiawa tribes around the harbour . . . The position would, of course, be different if Ngati Rangatahi's occupation in 1841 was the resumption of rights that had been conferred or established before 1840.[6]

Crown counsel therefore contended that much 'depends on R D Hanson's account of the early occupation of the Hutt . . . it seems that all roads lead to this one source'.[7] But Hanson is not the only authority suggesting that Ngati Rangatahi were in the valley prior to 1840. Crown historian Bob Hayes cites in detail native reserves commissioner Edmund Halswell's remarks to Wakefield that Ngati Rangatahi had been in the valley 'formerly', and notes that one James Crawford, who gave evidence before the 1844 select committee on New Zealand, also suggested that Ngati Rangatahi had been in the valley well before 1840.[8] Halswell's remarks are worth quoting at length:

> You are aware the E Kuri, (Taringa Kuri) spoken of by Mr Swainson, is the chief of Kaiwarawara Pah, and is closely connected with the Ngatirangatahi tribe, who have lately crossed over from Porerua, and settled themselves on the Hutt, and who have frequently been referred to by me in my former communications . . .
>
> These people have been sent by Te Rauparaha and Rangihaiata, with the avowed object of extorting further payment, and to drive away the white people by force.

3. Hanson to FitzRoy, 24 July 1846 (doc M3(a), s 18, doc 2, p 10)
4. Document M3, p 5
5. Document H4, p 24; doc H7, p 27
6. Document P6, pp 8, 11–12
7. Ibid, p 12
8. Document M3, p 7; J C Crawford, evidence before select committee on New Zealand, 18 June 1844, BPP, vol 2, p 164 (cited in doc M3)

> It appears that the Ngatikahuhuni tribe were the original possessors of Wanganui Atera, (Port Nicholson) and the Ngatirangatihi [*sic*] formerly occupied the upper part of Eretaunga (Hutt district); that a great battle was fought between these tribes; that the two principal chiefs of the latter were killed and eaten with many others; and that the remainder of the tribe were dispersed to Wanganui, Porerua, Kapiti, and other places. Sometime after this Te Rauperaha came down upon the conquerors, and killed and ate the principal chiefs of these Ngatikahuhuni, the greater part fled to Mahia, (Hawk's Bay) but have since come back to Wararapa, (Palliser Bay) where they now are.[9]

This account differs from Hanson's in that it suggests that Ngati Rangatahi were driven out of Heretaunga by Ngati Kahungunu before the valley was reconquered by Te Rauparaha, but both accounts agree that Ngati Rangatahi were in Heretaunga prior to 1840. Further evidence of prior occupation can be found in Te Rangihaeata's statement in 1845 that Ngati Rangatahi had been sent to Heretaunga 'by the direction of Te Rauparaha and himself to hold possession after the expulsion of the Ngatikahuhunu before the arrival of any Settlers'.[10] The Ngati Rangatahi claimants before this Tribunal also strongly asserted that Ngati Rangatahi were in Heretaunga before 1840.[11]

The Tribunal accepts that Ngati Rangatahi were present in the valley for some years prior to 1840, on a seasonal basis, under the Ngati Toa chiefs to whom they paid tribute. It appears that they did not live continuously in the valley, and that their cultivations there were confined to small patches to supplement their food supply, but they had acquired occupation and use rights in Heretaunga.

## 9.3 The Kapiti Deed

As discussed in chapter 3, the Port Nicholson deed was followed by several other deeds by which the New Zealand Company claimed to have purchased vast areas of land from Maori. After leaving Te Whanganui a Tara in October 1839, Colonel Wakefield went first to Kapiti, where he hoped to obtain 'ratification of the purchase of Port Nicholson, that no future question shall arise as to the company's right to that territory'.[12] On 25 October, Te Rauparaha and other Ngati Toa chiefs signed what became known as 'the Kapiti deed', by which the company purported to purchase some 20 million acres in both the North and the South Islands, including the area covered by the Port Nicholson deed. Wakefield appeared unconcerned by the strong indications, recorded in his journal, that the sale was not all it seemed:

9. Halswell to Wakefield, 28 August 1842 (doc A29, p 511)
10. H Tacy Kemp to superintendent, 23 July 1845, NM8/1845/307 (doc M3(a), s 2, doc 11)
11. Claim 1.6(b), p 1; doc H27, p 1; doc H29, pp 2–3; doc H30, pp 3–4; doc N6, pp 3–4; doc Q5, pp 2–6
12. Wakefield's journal, 14 October 1839 (doc A29, p 417)

9.3.1

> Various rumours reached me of the opinion of the natives as to the sale and payment. Some said that they had sold land which did not belong to them, alluding to the districts occupied by the Ngatiawas, which I have yet to purchase of that tribe; whilst others betrayed a notion that the sale would not affect their interests, from an insufficiency of emigrants arriving to occupy so vast a space, to prevent them retaining possession of any parts they choose, or of even reselling them at the expiration of a reasonable period.[13]

It seems likely that Te Rauparaha's aim in signing the Kapiti deed was to obtain recognition of his achievements and mana, and to demonstrate the wide extent of the lands over which he claimed to exercise mana. Te Rauparaha would have seen the deed as an acknowledgement of his rights, not a cession or extinguishment of those rights.[14]

Although much of the vast area covered by the Kapiti deed is the subject of other Tribunal inquiries, the deed is relevant to this inquiry in two ways. First, it led to the Wairau incident, which in turn influenced events at Port Nicholson and, secondly, the Port Nicholson block was included in the land purportedly acquired by the Kapiti deed. Both Wakefield and Te Rauparaha had their reasons for including Port Nicholson within Ngati Toa's general claims, although their reasons were very different. Wakefield included it in order to extinguish rights, while Te Rauparaha included it to have Ngati Toa's rights over Port Nicholson acknowledged, in response to the Te Atiawa chiefs who had just transacted with the company for the same area.

### 9.3.1 The company settlers move in

Ngati Toa did not object to the company pressing its claims in the area immediately around Te Whanganui a Tara, where Ngati Toa accepted that other Maori groups had ahi ka. But when the company began to press its claims to Porirua, the Wairau Valley, and Heretaunga – areas where Ngati Toa believed they had ahi ka and take raupatu rights which could not be overridden by others – they resisted. When settlers attempted, in April 1842, to build houses at Porirua, an armed group of Ngati Toa led by Te Rangihaeata chased the settlers away and destroyed their houses. Angry settlers called for the arrest and punishment of Te Rangihaeata, but Crown officials made it clear that they could take no action until the question of the ownership of Porirua had been decided by Commissioner Spain.[15] Company settlers were learning that the Crown would not always support their claims.

A more serious clash between company settlers and Ngati Toa occurred in June 1843 in the Wairau Valley, in the north-east of the South Island. After the company began surveying

13. Wakefield's journal, 25 October 1839 (p 424). Wakefield considered that the interests of the 'Ngatiawas' were ceded in the subsequent Queen Charlotte Sound deed, which covered the same area as the Kapiti deed.

14. Document M7, pp 193–198

15. Patricia Burns, *Te Rauparaha: A New Perspective* (Wellington: AH and AW Reed, 1980), pp 226–230; Patricia Burns, *Fatal Success: A History of the New Zealand Company* (Auckland: Heinemann Reed, 1989), pp 212–213

the area, Te Rauparaha and Te Rangihaeata went there, together with a large party of Ngati Toa men, women, and children, who began cultivating the land. When an armed posse of company officials and settlers attempted to arrest Te Rauparaha, a battle ensued in which 22 company men and at least four Maori were killed. Among those killed was Te Rangihaeata's wife, Te Rongo.[16] From this point on, each side was more determined than ever not to give in to the other: the company believed that Ngati Toa were a danger to the areas of company settlement, especially at Port Nicholson, while Ngati Toa (and especially Te Rangihaeata) believed that the settlers should be prohibited from occupying areas claimed by Ngati Toa. Crown officials sat uncomfortably between these two positions.

### 9.3.2 Aftermath of the Wairau incident

In August 1843, Clarke junior reported to his father, the chief protector, on a meeting at which Te Rauparaha had spoken about the Wairau incident. He recorded that Te Rauparaha was:

> resolved not to relinquish his claim to the upper part of the Hutt, unless fairly compensated. He had heard that Colonel Wakefield had purchased it from Puni, the chief of Pitone, who had no title to it. The land had been occupied; he had taken it in conjunction with the Port Nicholson natives from the original inhabitants, and for many years he had made his canoes there; since that he had cultivated it, and that was his claim. He would never enter into any arrangement about the land with the New Zealand Company; he had been a fool to allow himself to be deceived, or to trust to the promises of white men, and he would not be deceived again.[17]

From this point on, Crown officials should have been in no doubt that Te Rauparaha claimed interests in Heretaunga.

In September 1843, Spain issued his preliminary report on the company's claims. He stated that the company's action in surveying the Wairau and attempting to obtain possession of a tract of land whose title was disputed and was subject to investigation by Spain could 'only be regarded as an attempt to set British law at defiance'. He also gave his opinion that 'the greater portion of the land claimed by the Company in the Port Nicholson district, and also in the district between Port Nicholson and Wanganui, . . . has not been alienated by the natives to the New Zealand Company'.[18]

On 12 February 1844, the newly arrived governor, FitzRoy, together with Spain, Forsaith, and Clarke junior, met Te Rauparaha and Te Rangihaeata at Waikanae. Both Crown officials and Maori were anxious that the Wairau incident should not develop into further violence.

16. Burns, *Te Rauparaha*, pp 239–243; Burns, *Fatal Success*, pp 229–233
17. Clarke junior to Clarke senior, 16 August 1843, BPP, vol 2, apps, p 339
18. Spain's interim report, 12 September 1843, BPP, vol 2, apps, pp 301, 305

Having heard the Maori point of view, FitzRoy stated that he believed the Maori had been 'hurried into crime' by the actions of the Pakeha, and though he was saddened by the killing of the Pakeha prisoners that had followed their surrender, he would 'not avenge their deaths' because their own actions had caused the bloodshed.[19] FitzRoy was therefore able to allay Maori fears of reprisal by acknowledging that blame for the Wairau incident rested squarely on the company's shoulders, and that Maori had been doing no more than protecting their own land. The company and settlers were outraged by FitzRoy's decision, and he became, along with Te Rauparaha and Te Rangihaeata, the object of intense animosity on the part of many Wellington and Nelson settlers.[20]

## 9.4 Attempts by the Crown to Secure Ngati Toa Agreement in 1844

As we have seen in section 7.5.3, following the meeting between Governor FitzRoy and Wakefield on 29 January 1844, Clarke junior in consultation with Wakefield prepared a schedule of lands already surveyed or to be surveyed for which Maori were to be compensated. It also listed Maori reserves of 39 100-acre rural sections and 110 one-acre town sections. The schedule was sent by Clarke to Wakefield on 7 February and approved by Wakefield the following day. Wakefield agreed to make an immediate payment of the £1500 required by Clarke to compensate the owners of some 67,890 acres (less pa, cultivations, and urupa) which were being surrendered to the New Zealand Company.

### 9.4.1 Preliminary discussions with Ngati Toa

Following Governor FitzRoy's meeting with Te Rauparaha and Te Rangihaeata at Waikanae on 12 February 1844, Clarke remained at Waikanae to discuss with Te Rauparaha the question of paying compensation to Ngati Toa for their interests in land in the Port Nicholson block. These discussions probably resulted from a letter of 3 February 1844 which Te Rauparaha and Te Rangihaeata had jointly addressed to Clarke junior, Spain, and FitzRoy. The two chiefs complained that the Crown was paying the wrong parties for land, and urged that payment should instead be made to them.[21] Forsaith later reported that Clarke had proposed the relinquishment of Te Rauparaha's and Te Rangihaeata's claims to the Hutt, and the removal of Ngati Tama from Heretaunga (see s 9.4.3), and that Te Rauparaha had 'expressed no unwillingness to such an arrangement'.[22] We infer from this that Te Rauparaha expressed neither agreement nor disagreement. There is no record of any discussions which Clarke may have had with Te Rangihaeata.

19. Minutes of meeting at Waikanae, 12 February 1844, BPP, vol 4, p 186
20. Burns, *Te Rauparaha*, p 252; doc K2, p 37
21. BPP, vol 5, p 36
22. Forsaith to Clarke senior, 8 April 1844, IA1/1844/1696 (doc C1(a), p 113)

Clarke replied to the Ngati Toa chiefs' letter on 29 February 1844. He assured them:

> It is quite right, friends, that I have given the payment to the natives of Port Nicholson; and, Rauparaha, remember well my words that you heard from me, part of the payment for Port Nicholson I shall give to you, and part to the natives here. I will not forget that promise.[23]

At that stage, deeds of release had been signed and payments amounting to £730 paid to Maori of Te Aro, Kumutoto, Pipitea, and Tiakiwai Pa on 26 February.

### 9.4.2 Meeting at Porirua, 8–9 March 1844

On 8 March 1844, Commissioner Spain (together with protector Clarke junior, Forsaith, and various other Europeans) held a meeting at Porirua with Te Rauparaha, Te Rangihaeata, Puaha (Te Rauparaha's nephew), and about 200 other Maori. The following account is taken from Forsaith's detailed record of the meeting.[24] Spain specifically addressed Te Rauparaha, and began by stressing that he had been sent to New Zealand to inquire into and decide all disputes about land between Maori and Europeans. He said he had decided that the Maori who owned the land described in the Port Nicholson deed were entitled to a further payment. Spain stressed that Clarke had been appointed protector for Maori, and it was 'his particular province to decide the proportion of the payment that you are to receive for the lands comprised in the Port Nicholson deed'. He advised Te Rauparaha to talk over the matter with Clarke first and, 'when you are agreed, I will hold another court, and finally decide'.

Spain next stated that 'Your pahs, cultivations and burial grounds have been reserved for your use, in addition to the native reserves'. This is clearly a reference to the reservations being made in the deeds of release, some of which had been signed by other Maori at Wellington prior to the 8 March meeting with Ngati Toa. As Spain was referring in his address specifically to 'the lands comprised in the Port Nicholson deed', it is apparent that at this stage he contemplated that Ngati Toa would share in the Wellington tenths reserves.

Spain then withdrew, and Clarke and Forsaith 'used every endeavour to persuade the natives to accede to the terms offered', but without success. Forsaith omits to describe in his account what terms were in fact offered. Following further failure the next morning, Spain was recalled. Te Rauparaha asked Spain to direct his inquiries to Te Rangihaeata, but Spain insisted that Te Rauparaha should respond. Accordingly, Te Rauparaha said his letter of 3 February referred to his claim upon Port Nicholson and he was ready to negotiate that matter, 'but you now want me to give up the Hutt'.

Spain replied that he had come for the express purpose of satisfying Te Rauparaha's claim upon Port Nicholson and that he had 'decided that you [Te Rauparaha] are to receive 300*l*,

23. BPP, vol 5, p 36
24. Ibid, pp 37–39

and you know that the Hutt is included in that district'. Spain suggested to Te Rauparaha that Clarke had talked with him about the subject at Waikanae, and that he had consented to the terms proposed, to which Te Rauparaha replied:

> I understood I was to have a payment for Port Nicholson, and I am now ready to receive it. I had no idea you meant to include the Hutt; if I had so understood Mr Clarke at Waikanae, I should have told him then that I would not consent.

At this point, Spain asked Clarke if he had spoken to Te Rauparaha about compensation for his claims upon the Hutt and 'the removal of his party' from around the Hutt River. Clarke replied that 'he had spoken of his claim under the general term of Port Nicholson; but that the Hutt was clearly understood to have been included'. Te Rauparaha's response was that he considered 'Port Nicholson' to mean all the land seaward of Rotokakahi (see map 7), but that the land beyond Rotokakahi would be retained by Maori.

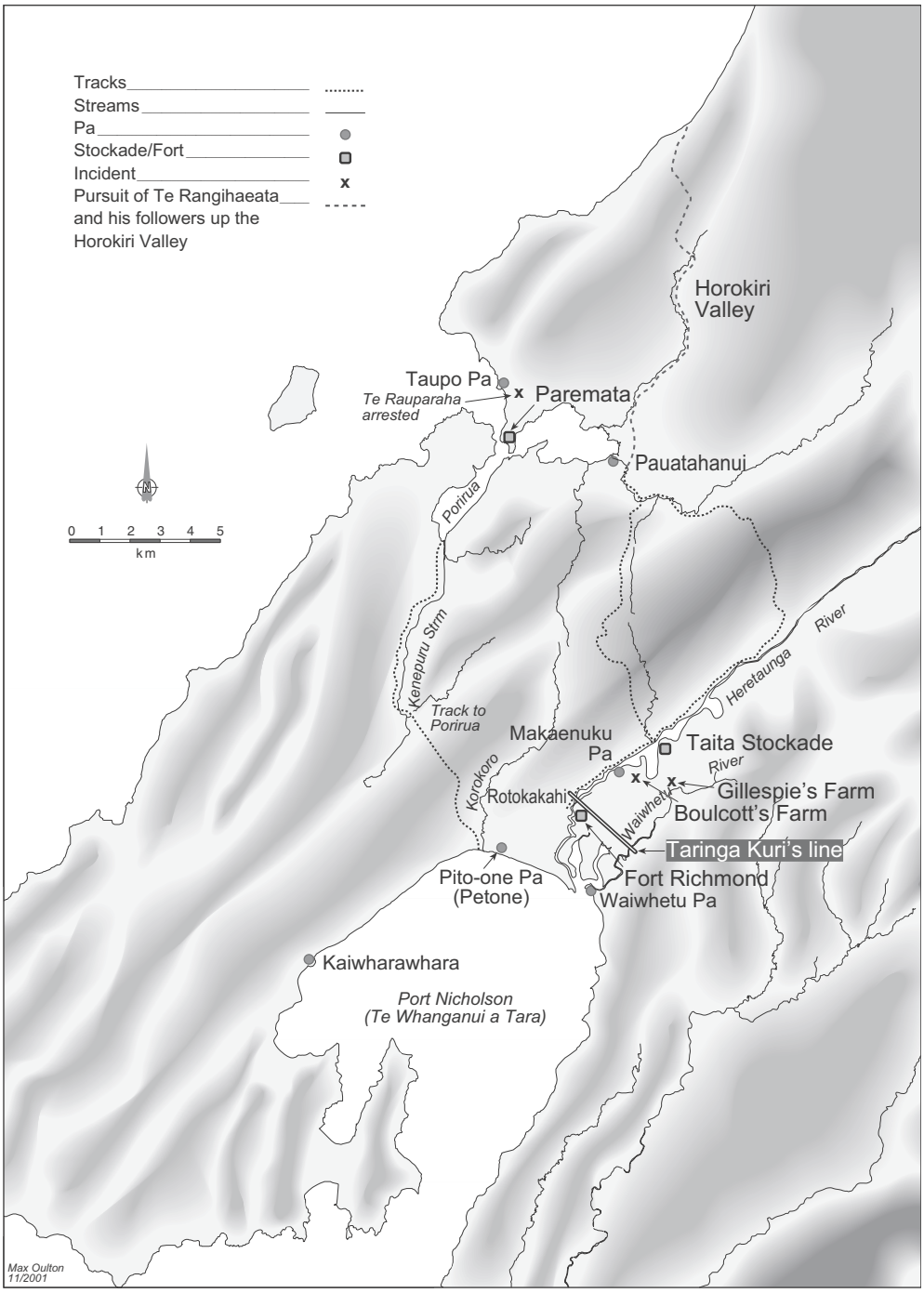
Spain, whose mind appeared to have been firmly made up from the commencement of the meeting the previous day, told Te Rauparaha that the 'boundaries already fixed upon must be considered final; and the sum awarded (300*l*) will not be increased'. He added that Clarke had been specially appointed to arrange these boundaries and that they had been fixed after much careful deliberation. Spain had decided the sum offered was just and equitable and more than Te Rauparaha (and Ngati Toa) was 'really entitled to'.

Te Rauparaha responded that he could not interfere 'and Rangiaiata will not consent to your proposals'. After further discussion, Spain announced his final decision:

> I have decided that you should have 300*l* for the lands included in the boundaries fixed upon by Mr Clarke, upon consideration of Taringa Kuri and his party immediately removing from the Hutt; but not wishing to deprive them of the means of living, I have taken upon myself to award a further sum of 100*l* for the crops, but which you are to understand is entirely distinct from the compensation awarded for the land; and this is my final decision, which will never be altered. I now bid you farewell.

We note that nowhere in Forsaith's account of the foregoing proceedings before Commissioner Spain is there any description of the boundaries to the lands said to have been fixed by Clarke and adopted by Spain. We believe that these boundaries relate to the various sections and native reserves set out in the schedule attached to the various deeds of release.

It is apparent from the foregoing and Forsaith's full transcript of the proceedings that no meaningful negotiations occurred at this Porirua meeting. Spain and, it appears, Clarke, had arrived with a fixed and non-negotiable position with which the two Ngati Toa chiefs would be required to agree. Moreover, while it was plain that Te Rangihaeata had the principal interest in the Hutt, Spain refused to recognise his interest or to let him speak. He acted throughout as if Te Rangihaeata was of no consequence.




**Map 7: Conflict over Heretaunga**

Clearly, the parties had been talking past each other. To the Crown, the Port Nicholson district included the fertile and flat Hutt Valley, but to Ngati Toa, Port Nicholson did not include Heretaunga, by which Ngati Toa meant all land in the valley north of the Rotokakahi Stream. Each party was talking in its own terms, and the use of terms such as 'Hutt Valley' by the

Crown and 'Heretaunga' by Ngati Toa reflected their different understandings of what was involved. According to Ngati Toa, Te Atiawa could alienate their customary rights around the harbour, including those in Heretaunga, but the extent of their rights in the valley was highly contested. Te Atiawa did not accept Ngati Toa's claims to Heretaunga and Ngati Toa did not accept Te Atiawa's claims further than a mile and a half or thereabouts from the harbour shore.

Clarke reported on his understanding of the situation developing at Heretaunga in a 29 June 1844 report to his father, the chief protector. Clarke stated:

> The right to occupy and cultivate the Hutt has been for some years disputed between the Port Nicholson branch of the Ngatiawa tribe, and the Ngatirangatahi, under Te Rauparaha and Rangihaeata; a small number of the latter occupied part of the district about two years after the arrival of the New Zealand Company's preliminary expedition, and afterwards at the instigation of Rangihaeata. 'Taringa Kuri,' a chief of Kaiwarawara, located himself on a section which was to some extent previously occupied by Mr Swainson. On inquiry into the case, 'Taringa Kuri' informed me that his reasons for establishing himself on the Hutt were the insufficiency and comparative inferiority of the native reserves, and the destruction of his crops near Kaiwarawara, by cattle belonging to the settlers. He acknowledged that he had no right himself to any portion of the district except through Rauparaha and Rangihaeata, I therefore awarded to the latter, as compensation (300*l*) three hundred pounds, to the best of my judgment, a full and ample remuneration for their claims.
>
> I subsequently accompanied Mr Spain to Porirua, and offered them the proposed sum, but after conferring with them for two days they declined to accept of it, urging as their principal reasons the inadequacy of the payment, and my confounding the Hutt with what they termed the District of Port Nicholson.[25]

It is apparent from Clarke's letter that he accepted that Te Rauparaha and Te Rangihaeata had an interest in the Hutt and that his 'award' of £300 compensation was intended, in part at least, to cover their interest there. We note that Clarke makes no reference to having first consulted with Te Rauparaha and Te Rangihaeata on his 'award', either in respect to their willingness to sell or as to the amount of compensation. Nor does he say what, if anything, they had agreed to.

### 9.4.3 Ngati Tama in Heretaunga

As Clarke junior mentioned in his letter to his father, Ngati Tama under Taringa Kuri had moved to Heretaunga in 1842, in response to settlers' cattle trespassing on their land at Kaiwharawhara. There was plenty of land available at Heretaunga for them to clear and cultivate and, more importantly, Taringa Kuri believed that he had not alienated any Port Nicholson

25. Clarke junior to Clarke senior, 29 June 1844, BPP, vol 4, p 465

land to the company and had given it only anchorage rights in the harbour.[26] The land had not yet been confirmed to the New Zealand Company or its settlers, and this did not finally occur until the company received a Crown grant in 1848. Taringa Kuri was happy enough to acknowledge that his was an opportunistic move, but he believed that he had the right to move into the valley.[27] By March 1844, Taringa Kuri had begun to cut a line at Rotokakahi, on the lower western side of the valley, around a mile and a half from the foreshore. This line was intended to define what he considered to be the limits of the Port Nicholson deed of purchase area with respect to Heretaunga. Forsaith and Spain both believed that Taringa Kuri had been ordered to do it by Te Rauparaha, in order to shore up the latter's claims to the valley.

On hearing that Ngati Tama were cutting the line at Rotokakahi, Spain and Forsaith went to Heretaunga to meet Taringa Kuri. According to Forsaith's record of the meeting, Taringa Kuri said that the line was being cut in accordance with Te Rauparaha's directions. Spain responded that the land at Heretaunga had already been sold, and that he had a deed bearing Te Rauparaha's signature acknowledging receipt of payment (presumably a reference to the Kapiti deed). He continued that, since it was his task to investigate these purchases, he had decided that Te Rauparaha should receive additional payment in compensation, but the payment offered had been declined. Spain requested that Taringa Kuri desist from cutting the line, but the Ngati Tama leader refused.[28]

Spain then wrote to Te Rauparaha expressing his 'astonishment' at Taringa Kuri's actions, for which Spain blamed Te Rauparaha, accusing him of 'reprehensible' conduct in the face of European generosity. Spain maintained that Te Rauparaha had broken his word to the Government by refusing to accept the commissioner's decision, and called on him to direct Taringa Kuri to cease cutting the line and to leave Heretaunga immediately.[29] In reply, Te Rauparaha insisted that it was not he but Te Rangihaeata ('the man to whom the land belongs') and Taringa Kuri who were withholding Heretaunga. Moreover, he was adamant that he had told Clarke that the boundary was to be at Rotokakahi.[30]

In his final report on the company's Port Nicholson claim, Spain expressed his frustration over Taringa Kuri's actions, describing him as Ngati Tama's 'principal man, that crafty and troublesome native who is now, and has been for a long time, acting as Rauparaha's first lieutenant upon the Hutt'. He could not, he wrote, accept that Taringa Kuri and Ngati Tama had even 'the shadow of a claim' to Heretaunga.[31] In stating that Taringa Kuri had no rights in Heretaunga and was simply acting on behalf of Te Rauparaha, Spain showed his limited understanding of customary tenure. According to Maori custom, a group could move and

26. Document H7, pp 23–25
27. Ibid, pp 42–47
28. Forsaith to superintendent, southern division, 21 March 1844, BPP, vol 5, pp 39–41
29. Spain to Te Rauparaha, undated, BPP, vol 5, pp 41–42
30. Te Rauparaha to Spain, 27 March 1844, BPP, vol 5, pp 42–43
31. Spain's final report, 31 March 1845, BPP, vol 5, pp 18–19, 23

establish new rights if not successfully opposed by other Maori. Te Atiawa did not turn Ngati Tama out of the Hutt, while the only other inhabitants in the large valley, Ngati Rangatahi, welcomed them and probably even invited them.[32] Taringa Kuri may indeed have chosen to act on Te Rauparaha's behalf, although Te Rauparaha denied any personal desire to withhold Heretaunga. In any case, it is clear that neither Taringa Kuri nor Te Rauparaha accepted the company's and the Crown's insistence on including Heretaunga within 'Port Nicholson'.

### 9.4.4 A November 1844 agreement?

Following the standoff over the Rotokakahi line, Crown officials continued to display a lack of understanding of the stance of those Maori occupying Heretaunga. In April 1844, Forsaith wrote to Clarke senior saying that 'there can be no doubt that Wharepouri & Epuni sold the Hutt', but he did not ask if it was theirs to sell. He continued: 'It is equally clear that the resident Natives on the Hutt have no claim whatever to that District their sole object in going to reside and cultivate there being "to hold possession of the land for Te Rauparaha"'.[33] Forsaith did not set out why he believed that Maori could not reside in a location where no group had established exclusive rights and go on to develop occupancy rights there. It appears to the Tribunal that Te Wharepouri and Te Puni did not have as much right to sell Heretaunga north of Rotokakahi as did Te Rauparaha and Te Rangihaeata. In addition, Ngati Rangatahi and Ngati Tama were living in Heretaunga from 1841 and 1842 respectively and were acquiring rights there and could not be ignored. As we suggested at section 2.6.7, the ability to further develop ahi ka rights in Heretaunga belonged to the collective with take raupatu (namely, Te Atiawa, Ngati Toa, Ngati Tama, Taranaki, and Ngati Ruanui). Ngati Rangatahi, who had been in irregular occupation for some time, were also in a position to develop ahi ka rights in the valley.

On 8 October 1844, Wakefield noted that Te Rauparaha was now willing to take the payment offered in March, 'but Rangihaeata still declines to accept anything or to withdraw his people from the district'.[34] On 4 November 1844, FitzRoy arrived at Waikanae and met with the missionary the Reverend Octavius Hadfield from the Church Missionary Society and Te Rauparaha. J W Hamilton, FitzRoy's secretary, noted that the 'Hutt business may probably be settled'. The following day, FitzRoy met with Te Rauparaha, Te Rangihaeata, Puaha, and Matene Te Whiwhi (Te Rangihaeata's nephew) to discuss the settlement of the Hutt. FitzRoy had with him the £400 promised in March (£300 for Ngati Toa's interests in the land plus £100 for Ngati Tama's crops), but the two chiefs declined to accept the money. On 6 November 1844, FitzRoy again met with Te Rauparaha and Te Rangihaeata, but they again declined

32. Document H4, p 25
33. Forsaith to Clarke senior, 8 April 1844, IA1/1844/1696 (doc C1(a), p 124)
34. Wakefield to secretary, New Zealand Company, CO208/102, pp 387–388 (quoted in doc M3, p 28)

to accept the £400, not wishing, it was said, to quarrel with 'Rewarewa', an elderly chief of Waikanae.[35] FitzRoy departed the same day, presumably leaving the money with Clarke.

In a letter to his father dated 11 November 1844, some five days after FitzRoy's departure, Clarke said that he was now settling the most difficult part of the Port Nicholson land question, the Hutt.[36] He mentioned that he had been staying with Hadfield for the past 10 days and that he was 'afraid he [Hadfield] will not live long he has been in bed the last four or five days'. This may explain why Hamilton records Hadfield as being present at FitzRoy's meetings only on the first day.

On the same day, Clarke also wrote to Hamilton asking that he advise FitzRoy that Clarke had 'settled the question of the Hutt with Te Rauparaha and Rangihaeata'. He added that it might be necessary to allow those Maori occupying the Hutt to remain until they could take up their crops.[37] This letter and the letter to his father were written by Clarke in anticipation of his reaching a settlement, but it was not until the following day, 12 November 1844, that Clarke paid the £400. A 'receipt' for this payment was issued, the English translation of which stated:

> Let all men know the contents of this document. We two consent to surrender Heretaunga to the Governor of New Zealand on behalf of the NZd Company. We have received £400 in payment. Hence our names and marks are written below, on this day, the 12th day of November in the year of our Lord, One Thousand Eight Hundred and Forty-four.
>
> Na Te Rauparaha x his mark.
> Na Te Rangihaeata x his mark.
>
> In the presence of—
> Henere Matine Te Wiwi
> Tamihana Katu[38]

Bob Hayes comments that the receipt was apparently not signed by Te Rangihaeata and that it is not clear whether Te Rauparaha himself or his son Tamihana signed it.[39] Matene Te Whiwhi later admitted that he had signed for Te Rangihaeata and that he had done so without the latter's knowledge.[40] It would seem that the younger chief was anxious to resolve matters and marked the receipt to get around the fact that Te Rangihaeata was still sticking to his determination that those Ngati Rangatahi and Ngati Tama resident in Heretaunga should be dealt with separately.

35. Hamilton, memorandum, 4–6 November 1844, ATL MS2302 (quoted in doc M3, p 29)
36. Clarke junior to Clarke senior, 11 November 1844, qms/CLA/1822-71, vol 7 (doc C1(g), pp 72–73)
37. Clarke junior to Hamilton, 11 November 1844, qms/CLA/1822-71, vol 6 (doc C1(g), pp 6–7)
38. *Turton's Deeds* (doc A27), p 98
39. Document M3, p 32
40. H Tacy Kemp to superintendent, 23 July 1845, NM8/1845/307 (doc M3(a), s 2, doc 11). This letter is quoted at section 9.4.5 below.

The document is surprisingly sparse and informal. It is not a deed but is best characterised as a receipt. It gives every indication of having been drawn up in haste. As such, it is gravely defective. It was not in fact signed or marked by Te Rangihaeata (although this is claimed), while Mr Hayes says it is unclear whether Te Rauparaha signed the deed. The purported acknowledgement of the receipt of the £400 (or a part) by Te Rangihaeata is erroneous. It is well established that he declined to take any of the purchase money at that time and for many months thereafter. The money was received only by Te Rauparaha.

The receipt did not guarantee Ngati Toa a share in the reserves within the Port Nicholson block, notwithstanding Spain's assurance at his March 1844 meeting with the two chiefs that their pa, cultivations, urupa, and native reserves would be secured to them. This was the provision in all the 1844 deeds of release.

There is no description of the boundaries of Heretaunga to indicate what lands were being 'surrendered'. It had been made abundantly clear that the Ngati Toa chiefs claimed all the Heretaunga Valley beyond Rotokakahi. Only the land seaward of Rotokakahi was acknowledged by them as part of Port Nicholson.

In their reply to the Crown's closing submissions, counsel for Ngati Toa, Tom Bennion and Deborah Edmunds, characterised the receipt (correctly in our view) as being very simplistic even by the standards of the day, especially since the receipt makes no mention of boundaries or terms and conditions. Counsel emphasised that the Treaty imposed duties to act in good faith and to protect Maori interests at all times. Lord Normanby's instructions to Governor Hobson likewise included requirements that contracts with Maori be fair and equal and that adequate Maori reserves be provided. Mr Bennion and Ms Edmunds were also highly critical of the inadequacy of the document when compared with other sale documents for Maori land prepared around the same time. We agree with counsel that the almost complete absence of material content makes the receipt extremely difficult to interpret in a meaningful way.

Counsel for Ngati Toa submitted that the Crown, in its submissions to the Tribunal, makes no attempt to justify the fact that no terms, conditions, or boundaries were set and that there was no reference to compensating Taringa Kuri and no reference to the fact that £100 of the £400 was for Ngati Tama's crops. We would add that neither was there any reference to compensating Ngati Rangatahi. Total reliance, counsel submitted, must be placed on the one word 'Heretaunga', and any ambiguity should be resolved in favour of Ngati Toa.[41] We discuss this further in section 9.7.2.

### 9.4.5 Was an agreement concluded between the Crown and Ngati Toa?

Crown counsel contends that an agreement had been concluded on 6 November 1844 'to which Te Rauparaha and Te Rangihaeata were both party', but that payment was not made

41. Document Q10, paras 96–97, p 30

on the spot at the request of those chiefs. Crown counsel submitted that the payment was made by Clarke, and the receipt signed (on 12 November) in good faith and pursuant to the agreement that had just been made. He said that Clarke certainly thought that the question had now been finally put to rest.[42]

Crown counsel also relied on Hamilton's brief notes as evidence that an agreement was concluded on 6 November.[43] These notes were, however, lacking in any detail of what precisely was agreed upon, although Hamilton did record that Te Rauparaha and Te Rangihaeata had promised to recall Taringa Kuri from the Hutt. Crown counsel next refers to elliptical notes by acting protector J J Symonds from which it is impossible to infer any agreement as having been made.[44] A quotation of 19 December 1844 from FitzRoy is also invoked, in which he states that 'Rauparaha and Ranghiaita accepted the compensation money (400*l*) previously refused, and promised me that the valley of the Hutt should be given up entirely to the New Zealand Company for settlers'.[45] It is not clear when this promise was made. If it was on 5 or 6 November 1844, almost a week was to elapse before the receipt was 'signed' on 12 November. That document speaks simply of a consent to 'surrender Heretaunga'; no reference is made to the evacuation of Ngati Rangatahi or Ngati Tama.

Finally, Crown counsel invoked a reported response by Hadfield in July 1845, some nine months later, to an inquiry by Matthew Richmond (the superintendent of the southern division) as to whether the November 1844 agreement was conditional on the reservation of land for Ngati Rangatahi.[46] Richmond reported that Hadfield's recollection of the meeting between Te Rauparaha, Te Rangihaeata, and FitzRoy, which had taken place at his house, was 'totally at variance' with a report by protector H Tacy Kemp (from which we quote below). According to Richmond, Hadfield 'agreed most distinctly that there was no condition stipulated for such as that now advanced by Rangihaeata all he affirms was fairly and fully explained to him, and as fully agreed to'. Richmond felt that Te Rangihaeata's claim was made 'more with a view of delaying the business' than because of any genuine belief on Te Rangihaeata's part in the validity of his claim.[47] It is not clear at what stage of the discussions of 4 to 6 November 1844 all was 'fairly and fully explained' to Te Rangihaeata and 'as fully agreed to' by him. No such statement was recorded by Hamilton in his sketchy notes made at the time (as noted above).

42. Document P6, pp 24–25
43. Ibid, pp 21–22
44. Ibid, p 22
45. FitzRoy to Stanley, 19 December 1844, BPP, vol 4, p 479 (cited in doc P6, p 22)
46. Richmond, formerly the chief police magistrate at Wellington, was made the superintendent of the southern division by FitzRoy early in 1844. The superintendent had some executive powers, including the power to give orders for 'the march and distribution' of the military detachment stationed within the southern division (which covered the whole of New Zealand south of a line between Cape Egmont and the mouth of the Wairoa River): see A H McLintock, *Crown Colony Government in New Zealand* (Wellington: Government Printer, 1958), pp 164–165.
47. Richmond to FitzRoy, 29 July 1845, NM10/2, pp 89–94 (doc M3(a), s 1, p 29)

9.4.5

Counsel for Ngati Toa referred us to Kemp's report to Richmond, made on 23 July 1845, to which Richmond was responding in the letter from which we have just quoted.[48] In the quotation which follows, Kemp reports on statements made by Te Rangihaeata during a five-day meeting at Porirua in July 1845. Regarding the Hutt, Kemp reported:

> Rangihaeata in presence of several of the Chiefs gave a minute account of what transpired at the Time of the Purchase made by His Excellency the Governor at 'Waikanae' in which he affirmed in the strongest manner the opposition he made to the Sale of the Hutt to the exclusion of the Tribe of the Ngatirangatahi Natives who he stated had been sent there by the direction of Te Rauparaha and himself to hold possession after the expulsion of the Ngatikahuhunu before the arrival of any Settlers and who therefore in strict observance of their Native Customs could not be dispossessed by any act to which They were not parties. He stated that he declined to accept a share of the Money unless a portion of Land was guaranteed to the Tribe alluded to and he is still under the Impression that His Excellency was willing to entertain his request, altho' Te Rauparaha objected at the Time to their Claim being considered and promised to use his Influence in removing Them to another Settlement. He referred very particularly to the Signature attached to the Deed of Sale, and most positively denied it to be his or to have been affixed by his authority. On this point his Evidence seems to be borne out by the Testimony of several Witnesses *and more especially by the confession of Martin [Matene] grandson of Te Rauparaha who signed for him in the hope that his uncle Te Rangihaeata would ultimately become reconciled and approve of the Transaction*. In this respect he seems to have been disappointed and the difficulties with which Your Honor has had to contend go much to prove that the voice of Te Rangihaeata was of equal consideration with that of his uncle.
>
> Having however but only now agreed to accept the Share of the Payment sent to him by Rauparaha he (Rangihaeata) after much discussion finally settled and proposed That a portion of Land should be allotted to The Ngatirangatahi for the purposes of Cultivation, and I understood from some to the Young Men belonging to that Tribe that in the event of this being granted They would quietly resign the Pa's and Plantations now in their occupation at the Same time. It was unanimously agreed that the Wanganui Natives should leave the District. [Emphasis added.][49]

Kemp promised Te Rangihaeata that he would faithfully report his speech to FitzRoy and Richmond. We note particularly the explanation given by Matene Te Whiwhi; namely, that he signed the receipt for his uncle Te Rangihaeata in the hope that the latter would ultimately become reconciled and approve the transaction. It is clear from this account that, at the time that the receipt was executed, Te Rangihaeata had not agreed to the transaction.

48. Document Q10, p 29
49. Kemp to superintendent, 23 July 1845, NM8/1845/307 (doc M3(a), s 2, doc 11)

In closing submissions, Crown counsel referred to the above quotation in terms of the evidence which it provided about a difference of opinion between Te Rauparaha and Te Rangihaeata over the position of Ngati Rangatahi. Crown counsel stated that 'a serious rift' had developed between the two chiefs, and that Te Rangihaeata 'clearly saw the presence of Ngati Rangatahi in the Hutt as being an important lever in this internal conflict'.[50] We do not accept Crown counsel's suggestion that Te Rangihaeata's statement should be seen solely as part of a power play between these two Ngati Toa chiefs. Te Rangihaeata clearly believed that the rights of those Maori resident in the valley had to be considered, as did Ngati Tama and Ngati Rangatahi themselves. As for Te Rauparaha, while he appears to have been more willing to accommodate the Crown and the company, he made it clear that he lacked the authority to alienate land at Heretaunga without Te Rangihaeata's consent.[51]

The Tribunal has given careful consideration to the relevant evidence and submissions of counsel for Ngati Toa and the Crown. We conclude that no agreement binding on Ngati Toa can be said to have been consummated on 12 November 1844, given the refusal by Te Rangihaeata to sign, his reason for so refusing, and his rejection of half the £400 paid to Te Rauparaha. The fact that Te Rauparaha accepted the £400 and may have signed the receipt could not bind Ngati Toa, because Te Rauparaha himself recognised that it was Te Rangihaeata who held the principal interest in Heretaunga on behalf of Ngati Toa. Te Rangihaeata's agreement was essential, and he consistently maintained from that time that he would consent to the transaction only if land were reserved for Ngati Rangatahi in Heretaunga. As our account of subsequent events will show, Te Rangihaeata never resiled from that position. We consider the Treaty implications of this and related matters below.

## 9.5 Developments in Heretaunga after November 1844

From November 1844, the primary focus of events moved from the coast to Heretaunga, as the Ngati Tama and Ngati Rangatahi resident in the valley became increasingly determined that their rights, which were now developing independently from Ngati Toa, had to be maintained. They also became aware that they had a champion in Te Rangihaeata. Only a few days after Te Rauparaha accepted the payment, superintendent Richmond had a stormy meeting in the Hutt with Taringa Kuri, who denied that Te Rangihaeata had received any payment and refused to leave the valley. Throughout November and December, Clarke, Forsaith, and Richmond tried to persuade Ngati Tama and Ngati Rangatahi to go, but their efforts seemed to result in a renewed determination to remain.[52] Ngati Rangatahi and Ngati Tama now had

50. Document P6, p 16

51. Ian Wards, *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand, 1832–1852* (Wellington: Government Printer, 1968), p 226

52. Document M3, pp 32–39

their own maturing rights to defend and were determined to remain, regardless of Te Rauparaha's wishes.

### 9.5.1 The 1844 'agreement' is modified

In December 1844, Richmond arranged with Te Rauparaha that the Maori in the Hutt should have until March 1845 to finish cultivating their crops and leave the valley. Te Rauparaha's son Tamihana, his great-nephew Matene Te Whiwhi, and his nephew Puaha visited the valley to inform the Maori resident there of this new agreement. Richmond informed FitzRoy on 24 December that the resident Maori 'appeared sullen and discontented and would not acquiesce [in the arrangements made with Te Rauparaha] before me'.[53] Richmond could not recognise that the Maori living in the valley no longer accepted that Te Rauparaha, or any other non-resident chief, had any right to make arrangements about them. From this point on, any resolution of the situation would have to be negotiated primarily with those resident in the valley. Ngati Rangatahi made this point to Richmond in late December, when, contrary to Te Rauparaha's agreement, they began to clear and cultivate more land in the valley. When challenged by Forsaith, their chief, Kaparatehau, responded that 'we do not intend to leave the Hutt without being paid, as to Rauparaha ordering us off, and saying we are only slaves, we are highly indignant at his conduct, and shall pay no attention to him. If he wants us to go, he must come and drive us [off].'[54] Kaparatehau was indicating clearly his view of customary tenure: he and his Ngati Rangatahi now held ahi ka rights in the valley, and they could be removed from Heretaunga only by force. This view fits with our own understanding of customary tenure as enunciated in chapter 2: that is, once established, ahi ka could be extinguished only if those who possessed it abandoned their land or were driven off.

By March 1845, little had changed in the valley. Ngati Rangatahi and Ngati Tama were still in occupation and cultivating potatoes for sale at the Wellington settlement. Their numbers were augmented by others from Ohariu and Whanganui (probably Ngati Tama from Ohariu and Whanganui people with kinship links to Ngati Rangatahi). Te Rauparaha suggested that land at Pakuratahi and Waiariki be set aside for the Maori occupying Heretaunga, but Richmond refused.[55] However, there was an important change in Te Rangihaeata's position. In March 1845, he accepted his share of the 'compensation' payment already accepted by Te Rauparaha in November 1844. Richmond interpreted Te Rangihaeata's move in this manner:

> Rangihieata has at last taken a share of the compensation, and although he is not exerting himself to get his followers off, yet, it is believed he will offer no opposition, nor encourage them in remaining. So far, the matter is more satisfactory than I anticipated but it is

53. Richmond to FitzRoy, 24 December 1844, NM10/2, pp 32–37 (quoted in doc M3, p 35)
54. Forsaith to Richmond, 28 December 1844, MA/W 1/1, pp 77–79 (quoted in doc M3, p 36)
55. Document M3, p 46

> evident neither of the Chiefs will take any active measures to expel the Intruders. They appear to consider their part fulfilled by not opposing and leave the completion of the business to Your Excellency and the Troops. In the meantime, many of the Natives continue their cultivation in the 'Hutt' as usual, only latterly they have gone to work armed and say it is better to die there than leave their lands.[56]

Te Rangihaeata had accepted payment for his customary rights in part of Heretaunga, but subject to the condition that land should be reserved for Ngati Rangatahi there, a condition which was not met. Moreover, as we discuss at section 9.7.2, Ngati Toa had surrendered their customary interest only in the sections covered by the schedule to the deeds of release. We do not consider that they had surrendered their take raupatu over the remainder of the land in Heretaunga.

### 9.5.2 Conflict in Heretaunga escalates

In December 1844, Richmond had suggested for the first time that force might be required to evict Ngati Tama and Ngati Rangatahi from Heretaunga.[57] Historian Ian Wards writes that Richmond displayed a limited knowledge of customary tenure:

> In July 1845 he wrote, '. . . no individual native or portion of the Tribe [Ngati Rangatahi] can substantiate a right to any part of this valley – it was unthought of as a native location – no ancient pas nor cultivations exist – the dense Forests remained undisturbed till the axe of the European and European labour and perseverence opened out and displayed the capability of the district.' He forgot, or had never known, that a tribe would fight for a cherished eel weir situated within an empty forest, or for a sunny and well favoured spot for growing early kumara in the midst of miles of seemingly waste land, or for the right to snare birds or pick the berries of the karaka or the kahikatea. He made no allowance for any rights that Kaparatehau or Taringa Kuri may have accrued, and gave no thoughts to the future location of these chiefs and their people. Through all the negotiations it is clear that Richmond held only Te Rauparaha and Te Rangihaeata were properly involved in the dispute, and insufficient consideration was given to the possibility that the decisions of these two were limited by circumstance, by custom, and by the little heeded and less comprehended 'mana' of all the chiefs concerned.[58]

In late March 1845, news reached Wellington of Hone Heke's success in his war in the north with the sacking of Kororareka. While Te Rauparaha immediately wrote to Richmond to assure him that he wished to remain at peace with the settlers, Te Rangihaeata was said to have sent word to the Hutt telling the resident Maori there that they should remain in the

56. Richmond to FitzRoy, 19 March 1845, NM10/2, pp 63–66 (doc M3(a), s 1, p 18)
57. Document M3, p 35
58. Wards, p 228. Wards quotes here from Richmond to FitzRoy, 29 July 1845, NM10/2, p 92.



Figure 5: *Makaenuku Pa, District of the Hutt 1845?* Ngati Tama's Makaenuku Pa in Heretaunga. The presence of the soldiers suggests the tense situation which existed in the valley between 1844 and 1846. It is not clear whether the picture is supposed to depict Ngati Tama's departure from Heretaunga in 1846. Drawing by Samuel Charles Brees (1810–65), hand-coloured engraving by Henry Melville. Reproduced courtesy Alexander Turnbull Library, Wellington, New Zealand (E-070-007).

valley and that if they were attacked by Europeans he would support them.[59] Te Rangihaeata was clearly still prepared to insist that the rights of Maori in the Hutt should be recognised by the Crown. Richmond's response was to build a series of forts and stockades. He also allowed Te Puni and his Te Atiawa to build a stockade at Kaiwharawhara for their own protection but would not allow them to take any active part in the dispute.[60] At FitzRoy's request, more troops were sent to Wellington, but the Governor gave instructions that they were to remain on the defensive.[61]

April was a time of some panic in the Wellington settlement, but, following FitzRoy's advice, Richmond refused to take the action that Wakefield had requested against Ngati Rangatahi and Ngati Tama.[62] Forsaith tried to persuade Ngati Rangatahi to leave Heretaunga in exchange for £100, but, because Kaparatehau insisted that they be given time to harvest their crops and that they be paid before they vacated the valley – conditions that Forsaith rejected – he had no success.[63] Then, on 15 May 1845, Te Rauparaha went to the Ngati Tama pa at

59. Document M3, pp 48–49
60. Wards, p 232
61. Ibid, pp 235–236
62. Document M3, p 58; Wards, p 236
63. Document M3, pp 52–54

Makaenuku and attempted to order the resident Maori to leave. In the presence of many Pakeha settlers who had come to watch the spectacle, Ngati Tama pointedly ignored him. Te Rauparaha then went to see Te Rangihaeata, who was encamped nearby with some 60 armed men. Forsaith recorded that, after an impassioned speech by Te Rauparaha, Te Rangihaeata 'declared that he considered himself slighted by Te Rauparaha, who had consented to give up the Hutt without his concurrence, and that now he was determined to return the slight and lower the reputation of Te Rauparaha by maintaining the Hutt with his life'.[64] The visit was a clear demonstration of the limits of Te Rauparaha's authority, and of the determination of Ngati Tama, supported by Te Rangihaeata, to maintain their position in Heretaunga.

Shortly after Te Rauparaha left the Hutt, a large group of Ngati Kahungunu arrived to support Te Rangihaeata.[65] Ngati Kahungunu and Ngati Toa were old enemies, although they had been at peace since the 1830s (see ch 2). Te Rangihaeata was therefore setting aside old grudges in order to gather around him others who wished to maintain their rangatiratanga by defending Maori custom and mana. However, it appears Te Rangihaeata still wished for peace, and, at a great meeting at Porirua in July 1845, declared his wish to remain peaceful as long as Ngati Rangatahi were given a portion of the valley. (We have quoted Kemp's report of his comments on this occasion at section 9.4.5.) Te Rangihaeata was willing to forgo his protest as long as Ngati Rangatahi's rights were recognised, but Richmond continued to refuse to consider this option, remaining convinced that the 'intruding natives' should be required to leave Heretaunga, and should be compelled to do so by force if necessary.[66]

The remainder of 1845 saw tensions remaining high but with little change in the situation. On 2 October 1845, Richmond informed FitzRoy that Te Rangihaeata still insisted that land be provided for Ngati Rangatahi and that Te Rangihaeata's followers were threatening to cut a boundary near Boulcott's farm, with the aim of retaining the upper part of the valley for themselves (see map 7).[67] However, a week later Te Rauparaha wrote to Richmond saying that Te Rangihaeata had agreed to let Te Rauparaha decide what was to happen at Heretaunga.[68] Despite Te Rangihaeata's apparent change of heart, Kemp reported the following month that Ngati Rangatahi had renewed their cultivations, adding that 'They seem to have acquired a right in the Soil that makes them very unwilling to Surrender and this Conduct on the whole is so consistent that they cannot I think be considered an annoyance to The Settlers'.[69] Kemp's view that Ngati Rangatahi appeared to have a right to the soil they were cultivating was not shared by other Crown officials, who continued to treat the Maori occupying Heretaunga as 'intruders'.

64. Forsaith to Richmond, 17 May 1845, NM8/1845/195 (quoted in doc M3, pp 61–62). For a fuller account of Te Rauparaha's visit to Heretaunga, see document M3, pp 60–66.
65. Document M3, p 66
66. Richmond to FitzRoy, 29 July 1845, NM10/2, pp 89–94 (doc M3(a), s 1, p 29)
67. Document M3, pp 78–79
68. Ibid, p 76
69. Kemp to Clarke senior, 2 November 1845, MA/W 1/1 (doc M3(a), s 3, p 16)

## 9.6 The Arrival of Governor Grey

Perhaps the most significant event for the future of the valley was the recall of FitzRoy and his replacement as governor by George Grey. FitzRoy had been reluctant to resolve the Hutt dispute through the use of force and had tried, not always successfully, to understand the motives of Te Rauparaha and others. Grey, however, held a different opinion on how to deal with any challenge to the Crown's sovereignty, coupled with more wide-ranging powers, more substantial finances, and significantly stronger military forces than those which FitzRoy had had at his disposal.[70]

Grey arrived in the colony in November 1845. He immediately focused his attention on the northern war and, after establishing peace there, turned to the issue of the Hutt. Richmond gave Grey the background to this 'embarrassing question' on 6 January 1846, and added his opinion that 'daily experience strengthens my conviction that until the disputed district is vacated by them [Maori], and the Settlers put in possession, permanent peace cannot be looked for in this Division of the Colony'.[71] On 19 January, Te Rauparaha and other Kapiti chiefs wrote to Grey seeking reassurance from him and requesting the appointment of a 'friendly adviser' who understood the customs of both Maori and Pakeha.[72] A few days after his arrival in Wellington on 12 February 1846, Grey replied, assuring the chiefs that:

> Maoris and Europeans shall be equally protected, and live under equal laws; both of them are alike subjects of the Queen, and entitled to her favour and care; the Maoris shall be protected in all their properties and possessions, and no one shall be allowed to take any thing away from them or to injure them.[73]

However, it transpired that Grey's guarantee did not extend to Ngati Rangatahi's properties and possessions in the Hutt.

On the day he arrived in Wellington, Grey visited the Hutt, concluding that there would be no difficulty in expelling the 'intruding' Maori if necessary.[74] Two days later, Taringa Kuri visited Grey and promised that Ngati Tama would leave the valley the following week. He asked for compensation for Ngati Tama's crops and houses, but Grey declared that Ngati Tama were not justly entitled to compensation because their original occupation of Heretaunga was illegal and he could consider such representations from Ngati Tama only after they had left the valley.[75] By 17 February, Grey was reporting that almost all the fighting men, estimated to number 300, had left the valley together with their families, leaving only about 20 remaining.[76] However, as Wards comments, 'In fact, the situation was virtually unchanged,

70. Wards, pp 170–174; John Miller, *Early Victorian New Zealand: A Study of Racial Tension and Social Attitudes, 1839–1852* (Wellington: Oxford University Press, 1974) (first published 1958), p 92
71. Richmond to Grey, 6 January 1845, NM10/2, pp 102–104 (quoted in doc M3, p 81)
72. Ngati Toa, Ngati Awa, and Ngati Raukawa chiefs to Grey, 19 January 1846, BPP, vol 5, pp 416–417
73. Grey to Ngati Toa, Ngati Awa, and Ngati Raukawa chiefs, 16 February 1846, BPP, vol 5, p 417
74. Grey to Stanley, 12 February 1846, BPP, vol 5, p 413
75. Grey to Stanley, 14 February 1846, BPP, vol 5, p 415
76. Grey to Stanley, 17 February 1846, BPP, vol 5, p 418

for peaceful occupation of the valley could be accomplished only with the consent of Kaparatehau, whom Grey had not yet seen, and of Te Rangihaeata'.[77]

### 9.6.1 Grey sends troops to Heretaunga

Ngati Tama having left the valley, Grey sent police magistrate Henry St Hill to put the company settlers in possession of the sections which Maori had been occupying. The Maori who remained in the valley resisted, driving a number of settlers away, and as a result Grey sent a 340-strong military force to the Hutt on 24 February. The troops occupied a large potato field, and Grey sought to meet with Kaparatehau. With the Reverend Richard Taylor acting as go-between, negotiations reached an impasse: Kaparatehau would not agree to leave unless Ngati Rangatahi were paid compensation for their crops, and Grey would not pay compensation until Ngati Rangatahi had left. However, when Grey issued an ultimatum that the Maori would face immediate attack if they did not move by noon on 25 February, they were persuaded by Taylor to leave.[78]

On the evening of 25 February, 'low Europeans', as Taylor described them, plundered Ngati Rangatahi's houses and even desecrated their chapel. The next day, Grey withdrew 140 troops from the valley. On 27 February, troops burned the deserted pa (including the chapel and the fences around the urupa).[79] Wards comments that, 'as Grey kept such a tight rein on the actions of his military officers', this burning was presumably carried out under his instructions. He goes on to observe that, 'In view of Kaparatehau's promise . . . to accept compensation, and his actual removal, this hasty and ill-considered act put Grey irretrievably in the wrong'.[80]

In closing submissions, Crown counsel disputed the allegation that Grey ordered or condoned the actions of his troops. Counsel asserted that 'There is conflicting evidence about who was responsible for the destruction . . . There is no evidence that Grey issued any orders to destroy the pa and it is hard to see what he could possibly expect to gain from such an action.'[81] However, the evidence that soldiers burned the pa is quite clear. Bob Hayes suggested that Taylor had reported that the fire was accidental.[82] In fact, Taylor recorded having told Te Rangihaeata that he 'had obtained a promise the church should be spared, that it was a pure accident and that the Governor was very sorry for it'.[83] This suggests that, even if the burning of the church was unintended, the burning of the pa (with the attendant risk of fire

77. Wards, p 241
78. Document M3, pp 85–88
79. *New Zealand Spectator and Cook's Strait Guardian*, 7 March 1846 (doc M3(a), s 35); the Reverend Richard Taylor, journal, 1 March 1846, ATL qms1987 (doc M3(a), s 22, doc 3); Hanson to FitzRoy, 24 July 1846 (doc M3(a), s 18, doc 2, p 7)
80. Wards, p 245
81. Document P6, p 34
82. Document M3, p 92
83. Taylor journal, 2 March 1846, ATL qms1987 (doc M3(a), s 22, doc 3)

spreading to the church and urupa) was a deliberate act of war. Justice Henry Chapman, referring in a letter to his father to the 'intruding natives on the Hutt', also mentioned that Grey had 'sent up 350 troops and burned their pah'.[84] Regardless of whether or not Grey ordered or condoned the actions of his troops, the Crown must accept responsibility for the unjustified destruction and desecration carried out by its military forces. The Crown can also be held responsible for failing to protect the property of Ngati Rangatahi from plunder. It is difficult to believe that a military force of 340 men was unable to prevent the ransacking of Ngati Rangatahi's houses and church by 'low Europeans'.

These actions allowed events to spiral out of control at a time when Maori had already unwillingly compromised their rights significantly by agreeing to leave the valley. In response to the actions of the soldiers and settlers, Ngati Rangatahi plundered settler houses, and Kaparatehau explained to Taylor that they felt justified in doing so because they had been wronged by the Governor.[85] Taylor reported to Grey that Ngati Rangatahi believed that they had suffered injustice, but Grey would not countenance this claim and said 'they must be put down'.[86] By 1 March, settlers were withdrawing to town, and, under pressure from the settlers, Grey sent more troops to the Hutt on 2 March. He had also intended to issue a declaration of martial law on the same day, but was prevented from doing so by Crown Prosecutor Hanson's legal opinion that Ngati Rangatahi's rights to their cultivations were guaranteed under FitzRoy's Crown grant to the company.[87]

When Taylor met Te Rangihaeata at Porirua on 2 March, he found the chief enraged by the burning of Maori property, particularly the fences around the urupa. Nevertheless, he told Taylor that, if the Government would only give Kaparatehau some land, there would be peace.[88] On 28 February, Te Rangihaeata had written to Grey, repeating his earlier request to FitzRoy that the Governor 'cut off a portion [of land] for the natives'. Te Rangihaeata said that Grey could chose where the portion should be, but that it should be significant, and that the Governor should 'arrange some place for Kaparatehau and Taringa Kuri'.[89]

Grey disregarded Te Rangihaeata's request, and on 3 March, after receiving advice from Justice Chapman which contradicted Hanson's opinion, he went ahead with his declaration of martial law. This followed the ransacking of settlers' homes at Waiwhetu, and a skirmish between Maori and British troops at Boulcott's farm. Despite such incidents, it appeared that Ngati Rangatahi had withdrawn to Porirua and that the valley was largely empty of Maori. Grey therefore sailed to Porirua, but returned to Wellington on 10 March with little achieved, as Te Rangihaeata had refused to come on board but sent word to say he desired peace and would not fight unless attacked. Grey then went up the valley himself and confirmed that

84. Chapman to his father, 14 March 1846, ATL qms0418 (quoted in doc M3, p 93)
85. Document M3, pp 91–92
86. Taylor journal, 2 March 1846 (quoted in doc M3, p 92)
87. Wards, pp 246–247; doc M3, pp 92–93
88. Wards, p 247
89. Te Rangihaeata to Grey, 28 February 1846, MA7/1 (quoted in doc M3, p 90)

it had been abandoned. He decided to await reinforcements from Sydney before inflicting any punishment on Ngati Rangatahi. The troops were left on the defensive, and Grey lifted martial law on 12 March, leaving for Wanganui on 13 March.[90] Thus, by early March 1846, Ngati Rangatahi appeared to have abandoned Heretaunga.

### 9.6.2 Assessment of compensation

Once Ngati Tama had left Heretaunga in late February, Grey gave orders for a valuation of Ngati Tama's and Ngati Rangatahi's crops in the valley. Wards suggests that Grey became aware of the exceptions to FitzRoy's 1845 Crown grant to the New Zealand Company (which, as discussed in section 8.8.3, guaranteed that Maori could keep their pa, cultivations, and burial grounds) and consequently accepted that the Maori occupying Heretaunga would have to be compensated for their cultivations.[91] However, Grey never considered allowing Ngati Rangatahi and Ngati Tama to retain their land for as long as they wished, a right guaranteed to them in article 2 of the Treaty.

On 26 February 1846, police magistrate St Hill and assistant surveyor T H Fitzgerald carried out the valuation. St Hill and Fitzgerald differed as to the value of the crops, but superintendent Richmond considered Fitzgerald's higher valuation to be 'the most equitable'. Fitzgerald valued Ngati Tama's 17 acres of cultivations at £89 and Ngati Rangatahi's 85 acres at £451.[92] This assessment was based purely on the value of the crops in the ground: no compensation was assessed for houses or other buildings or for the livestock that had to be left behind. Most importantly, no compensation was assessed for Ngati Tama's and Ngati Rangatahi's land: not only the land which they were cultivating at the time of their departure from the valley but all the land which they had cleared, including their pa sites. Neither was compensation assessed for their rights to use the resources of the surrounding area.

On 2 March, Grey approved payment of £371 compensation for crops. This figure bore no relationship to either St Hill's or Fitzgerald's valuations. Taringa Kuri was to get £120 , together with £80 in goods, and £70 was to be reserved 'in case of their wanting food'. The remaining £101 may have been intended for Ngati Rangatahi. It was noted that Ngati Tama under Taringa Kuri and a group of Whanganui Maori under 'Tapito' comprised 100 men, while Ngati Rangatahi under Kaparatehau amounted to 120 men.[93] On the same day, Clarke

90. Wards, pp 247–248

91. Ibid, pp 241–242

92. In his letter of 27 February 1846, Fitzgerald gives a valuation of £331 for Ngati Rangatahi's crops. However, this did not include compensation for 21½ acres 'above the Camp' which were included by St Hill. Another note from the same file, undated and unsigned but clearly based on Fitzgerald's valuation, gives the figure of £451 for 85 acres: St Hill to Governor, 27 February 1846; Fitzgerald to Governor, 27 February 1846; file note by Richmond, 27 February 1846; undated and unsigned note concerning compensation for Ngati Rangatahi and Ngati Tama, G13/1, no 15 (doc M3(a), s 8, docs 2, 3, 5).

93. Grey, memorandum, 2 March 1846, NM8/1847/712 (doc A40, p 143). It is not clear who the Whanganui Maori were, but they were probably people related to Ngati Rangatahi who had come to support their kin.

junior was authorised to purchase goods worth £80 to give to the Whanganui Maori and those under Taringa Kuri as compensation for crops.[94] It is not clear how much compensation Ngati Tama actually received, but in June 1846 Grey reported that, since leaving the Hutt, they had received goods worth about £70 'in part remuneration for their crops', and had also been given tools for clearing and cultivation. In the same dispatch, Grey reported on an arrangement whereby Ngati Tama received land at Kaiwharawhara as a settlement of 'the whole of the claims to land of this tribe'.[95] Grey may have considered that the provision of this land to Ngati Tama (which we discuss further at section 10.4.2) obviated the need for any further compensation to be paid to them for their cultivations in Heretaunga.

There is no evidence that Ngati Rangatahi were ever paid compensation and, given the circumstances of their departure from Heretaunga, we conclude that they were not compensated. During the standoff on 25 February, Grey asked Taylor to convey the message to Ngati Rangatahi that 'if they quietly abandoned the place he would . . . not suffer them to be losers', but that he would not pay compensation until they departed the valley.[96] With 340 troops and two cannon at his back, Grey insisted on dictating terms, regardless of Ngati Rangatahi's Treaty-guaranteed right to retain their land or, if they wished to sell it, to do so on terms and at a price freely agreed to by them. Kaparatehau refused to accept Grey's terms, and Ngati Rangatahi were persuaded to leave only under threat of attack by Grey's soldiers. They were then further punished for their 'defiance' by being denied compensation for their crops, their other possessions, and, above all, for their land.

### 9.6.3 The move to war

If Ngati Rangatahi's departure had been followed by payment of fair compensation, the conflict may have come to an end. Instead, the arrest and trial in late March of two Maori accused of participation in the plunder of settlers' possessions, followed by the killing of a settler called Gillespie and his son just north of Boulcott's farm on 2 April, reignited the conflict. Te Rauparaha immediately sent word to Grey to say that Gillespie's killers were not connected with Ngati Toa, insisting they were instead Whanganui Maori. He encouraged Grey to send men to Porirua to arrest them, but, when Grey did so, the alleged killers fled into the bush. Grey himself then went to Porirua, where Te Rauparaha tried to convince him that most of the Maori on the coast wanted peace.[97] As Wards observes:

> Te Rauparaha was following a line that was consistent with his behaviour during the protracted negotiations of the previous year, that his preference was for all to live in peace, that

94. Richmond to Clarke, 2 March 1846, NM10/5, fol 269 (doc M3(a), s 6)
95. Grey to Gladstone, 20 June 1846, BPP, vol 5, p 574
96. Taylor journal, 25 February 1846, ATL qms1987 (doc M3(a), s 22, doc 3)
97. Wards, pp 248–251

he would use the influence he had to this end, but that the final solution lay with Te Rangihaeata whom he would not encourage, but whom he would not himself directly oppose.[98]

Te Rauparaha himself delivered letters from Grey to Te Rangihaeata and other disaffected chiefs asking them to surrender Gillespie's killers, but the chiefs refused.[99] Te Rangihaeata had built a stockaded pa at Pauatahanui, and Grey responded by establishing a garrison at Paremata.[100] Grey also ordered the construction of a military road from Wellington to Porirua. Researcher Joy Hippolite comments that 'The Hutt conflict was providing an ideal opportunity for opening up access to Porirua, something that Te Rangihaeata had actively resisted in 1841–42'.[101]

On 16 May 1846, the military outpost at Boulcott's farm was attacked by Maori led by the Whanganui chief Te Mamaku (who had Ngati Rangatahi affiliations). Six soldiers were killed in the skirmish, but Maori casualties were not confirmed.[102] Wards expresses uncertainty as to Te Rangihaeata's role in the attack. There is no direct evidence that he was there, but a bugle taken from the soldiers was later found with Te Rangihaeata's men. Wards also speculates that Ngati Toa support would have been necessary to make up the numbers in Te Mamaku's 200-strong attacking party.[103]

However, Wards also states that Te Rangihaeata remained consistent in his position throughout events in the Hutt: he 'would not actively oppose the Government in the dispute over the Hutt Valley, neither would he discourage the sub-tribes in their claims, which he considered to be just'.[104] In contrast to Te Rauparaha, who was prepared to compromise with the Crown and who acquiesced in Crown policy on Heretaunga, Te Rangihaeata was seemingly more concerned with ensuring that Maori custom was maintained. He was very aware of the cultural imperative of maintaining ahi ka if Maori rights were to be upheld, and he had the example of the Wellington settlement to remind him that, when Maori and settler aspirations clashed, the Crown would not remove settlers resident on land, even when the Crown acknowledged that the land had not been rightfully purchased.

Crown counsel claimed that Te Rangihaeata sought to cause mischief in the Hutt Valley, and, by implication, that he was to blame for the events of 1845 and 1846.[105] Crown counsel stated that Te Rangihaeata had resiled from the November 1844 agreement, but, as we have earlier found, Te Rangihaeata was not a party to that agreement. When he did finally accede to it, he did so on terms that only his ahi ka rights were thereby compromised, not those of Ngati Rangatahi and Ngati Tama. He never resiled from his position that Ngati Rangatahi's

98. Ibid, p 251
99. Ibid
100. Ibid, p 253
101. Document H4, p 39. See Wards, pp 255–256, 260–265, concerning the construction of the road.
102. Wards, pp 266–267; doc H4, p 39
103. Wards, p 267
104. Ibid, p 252
105. Document P6, p 46

rights to land in the upper valley (and Ngati Tama's before they gave them up) had to be recognised separately from and independently of his own. Crown officials, however, failed to understand the nature of Maori customary rights and the fact that an agreement with Te Rangihaeata was not binding on Ngati Tama or Ngati Rangatahi.

Following the attack on Boulcott's farm, the settlement at Wellington was thrown into panic. Militia were called out and there was talk of attacking Te Rangihaeata. Even Te Rauparaha (who probably wanted to keep the conflict away from Porirua) told Richmond that the Government should fight at Heretaunga, and that he would assist in an attack on Te Rangihaeata. Similarly, Puaha, who was working on Grey's military road with his section of Ngati Toa, said he would support the Government. However, Grey decided to await further troops before taking decisive action. Grey and Richmond also agreed to arm some Te Atiawa and Ngati Ruanui from Wellington, whose chiefs had promised to help defend the settlement.[106] Te Atiawa may have seen their willingness to fight as a way of asserting their own interests in Heretaunga, as against those of Te Rangihaeata.

### 9.6.4 Events to late 1846

In June 1846, there were more skirmishes in Heretaunga with Te Mamaku's men, but by mid-1846 the conflict was moving out of the valley and becoming focused on the Porirua area. Grey arrived back in Wellington on 2 July and decided to attack Te Rangihaeata's pa at Pauatahanui.[107] He also decided that capturing Te Rauparaha would provide the victory that was eluding him with Te Rangihaeata, and would satisfy the clamouring Wellington public, who had never been fond of Te Rauparaha. Accordingly, Te Rauparaha was captured at Porirua and detained on 23 July 1846. He remained a captive of the Governor for 18 months but was never charged or tried and was eventually released to his tribe after the sale of Wairau and Porirua.[108] However, Grey's capture and detention of Te Rauparaha falls outside the parameters of this inquiry, and the Tribunal therefore makes no finding on it.

On 1 August, a force composed of militia, police, and the Government's Maori allies attacked Pauatahanui, but Te Rangihaeata and his followers abandoned the pa and were pursued up the Horokiri (or Horokiwi) Valley (see map 7). By September 1846, Te Rangihaeata had escaped with the bulk of his followers to the swamps of Poroutawhao in Manawatu, where the Government left him alone.[109]

As Wards notes, Grey had achieved his immediate aim: 'The Wellington settlement was secure, the whole area was pacified and all approaches well garrisoned'.[110] Pakeha settlers taking up their sections in Heretaunga no longer had to contend with 'intruding' Maori,

106. Wards, pp 268–273
107. Ibid, p 273–275
108. Burns, *Te Rauparaha*, pp 277–285
109. Wards, pp 282–288
110. Ibid, p 288

although in the short term returning to the valley was an unappealing prospect. William Swainson, writing in October 1846, described the devastation wrought by the conflict:

> The Hutt looks wretchedly – houses empty, fences broken down, roads over fields and through crops and all the traces of military despotism ie Martial Law. I am now the only 'gentleman settler' for the Riddifords have gone, Stillings is going and most of the other settlers above me had gone to other districts.[111]

The resolution of the Hutt conflict had come at a heavy price, and those who paid most dearly were the evicted Ngati Rangatahi.

### 9.6.5 The fate of Ngati Rangatahi

Grey's 'pacification' of the Wellington district meant that Ngati Rangatahi were unable to return to Heretaunga. Their allies had left the area: Te Rangihaeata had retreated to the Manawatu, while Te Mamaku and his men returned to Whanganui. With no land and no supporters in the Wellington district, Ngati Rangatahi were also forced to depart, and they moved to Rangitikei. There they appear to have stayed, although Kaparatehau had returned to Heretaunga by 1850.[112] Ngati Rangatahi were never compensated for the loss of their land and cultivations in Heretaunga, nor were they allocated any reserves there by Colonel McCleverty (see chs 10, 11). However, it appears that at some point Grey promised land at Heretaunga to Kaparatehau, and that this promise was the basis for native reserves commissioner Charles Heaphy's 1878 decision to assign rents from the tenths reserve Mangaroa section 132 to two Ngati Rangatahi claimants.[113]

## 9.7 Ngati Toa Claims of Treaty Breaches

### 9.7.1 Ngati Toa submissions

Many of Ngati Toa's claimed Treaty breaches in their Wai 207 statement of claim are wider than the scope of the Port Nicholson block inquiry and will thus be considered in the course of other Tribunal inquiries. In closing submissions for Ngati Toa, counsel formulated three main claims against the Crown.[114] The second of these alleged that the Crown 'took active steps to suppress Ngati Toa interests in the period 1840 to 1848 to the prejudice of Ngati Toa'.

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111. Swainson to Walter Mantell, 11 October 1846, in G M Swainson (ed), *William Swainson, Naturalist and Artist: Family Letters and Diaries, 1809–1855*, 1992, p 128 (quoted in doc K2, p 95)

112. Document H4, p 46

113. Document M3, pp 98–99. Unfortunately, this section of this report is not referenced. It may be that Mangaroa 132 was the section on which Kaparatehau was reported to be living in 1850. It is not known how long Kaparatehau remained in the Hutt in the 1850s.

114. Document N8, p 38

This claim relates almost entirely to a sequence of events between 1846 and 1848 which, for the most part, are beyond the scope of our inquiry.[115] These events are best left to be considered in a later Tribunal inquiry.

The first of the other two main claims by Ngati Toa is that the Crown 'failed to adequately recognise, investigate or take into account the full scale and nature of the Ngati Toa interests in the Port Nicholson area'.[116] Ngati Toa's third main grievance is that the Crown 'failed to adequately compensate Ngati Toa for its loss of interests or ensure Ngati Toa gained an equitable share of the Wellington reserves, and subsequently failed to remedy, rectify or ameliorate this situation'.[117] Because they are interrelated, we now consider these two claims together.

In support, counsel for Ngati Toa stressed, among other matters, that Ngati Toa were not a party to the 1839 Port Nicholson deed of purchase. They were not consulted about the abandonment of Spain's inquiry and the change to arbitration, nor did they consent to the change. Counsel also stressed that Spain did not adequately consider Ngati Toa customary interests within the Port Nicholson block, and that neither the Crown nor Spain undertook a full and proper investigation of customary title.[118]

### 9.7.2 Tribunal consideration

The Tribunal has considered in section 2.6.2 the nature and extent of the Ngati Toa customary ahi ka and take raupatu rights in the Port Nicholson extended block area as at 1840. Those rights remained firmly in place when, as noted in section 9.4, discussions took place with Clarke in February 1844, with Spain in March 1844, and with FitzRoy in November 1844.

Spain's attempt to impose a settlement on the two leading Ngati Toa chiefs by a formal offer of £400 failed because neither would agree to sell their interests in Heretaunga, despite Spain's offer to reserve their pa, cultivations, and burial grounds, as well as to provide 'native reserves'. In making this offer, in terms which were identical with those in each of the deeds of release signed by Maori in the Port Nicholson block both before and after the March 1844 meeting with Ngati Toa, Spain clearly contemplated that Ngati Toa would share in the native reserves provided for in the deeds of release. We have seen in chapter 8 that the deeds of release each had attached an identical schedule. The total gross area of the sections to be acquired by the New Zealand Company under the deeds was 71,900 acres. From this area was to be deducted the native reserves (tenths), which comprised 4010 acres, and the pa, cultivations, and sacred places. As Ngati Toa had no pa, cultivations, or urupa in the Port Nicholson block, those provisions would not apply to them.

As noted at section 8.8.1, the Crown failed to make the full provision of one-tenth of the rural lands acquired by the company under the deeds of release. The shortfall amounted to

115. Document N8, pp 44–48
116. Ibid, para 79.1, p 38
117. Ibid, para 79.3, p 38
118. Ibid, p 40

3090 acres. But, clearly, the common provision for 'native reserves' would apply to Ngati Toa, given the rights we found in chapter 2 that they possessed in the Port Nicholson block in 1840. (These rights remained intact in 1844.) In short, Spain promised Ngati Toa that, if they accepted his offer of £400, they, along with other Maori who had customary interests in the block, would share in the tenths reserves provided for in the deeds of release.

Following this promise, Spain further assured the two Ngati Toa chiefs and their people that:

> There is plenty of land left for you, besides that which has been sold to the Europeans, so that both races can live peaceably and quietly together as subjects of the Queen of England . . . When Europeans purchased Port Nicholson, they did not wish to take possession of it all, and drive you away. No, my friends, that would have been very bad; but they reserved lands for you as well.[119]

The Ngati Toa chiefs and their assembled people must have assumed from Spain's assurances that reserves of land had been provided for them in the Port Nicholson block and in Heretaunga in particular. In fact, none had. Nor is there any evidence that arrangements were made subsequently for Ngati Toa to share in the income generated from the tenths reserves. It is clear that, in speaking as he did, Spain recognised, however reluctantly, that Ngati Toa had customary rights in the Port Nicholson block and that they were entitled to share in the tenths reserves, which amounted to some 3900 rural acres and 110 town acres. However, Spain's unequivocal undertaking that reserves had been made for them was not in fact honoured by the Crown.

Spain's assurance of such reserves appears to have been lost sight of when negotiations were resumed in November 1844, by which time only Heretaunga was in issue. Although Ngati Toa were by then willing to recognise the ahi ka rights of Te Atiawa, Taranaki, Ngati Ruanui, and Ngati Tama in Te Whanganui a Tara, the lower Heretaunga, and the Ohariu and Makara districts, they had not abandoned or alienated their own customary rights in those areas, or in Heretaunga inland from Rotokakahi.

In section 9.4.4, we agreed with the criticism of counsel for Ngati Toa of the 'agreement' evidenced by the receipt dated 12 November 1844, under which payment was said (incorrectly) to have been made to Te Rauparaha and Te Rangihaeata, and which was said to have been signed by them both. Counsel noted the inadequacy of the document when compared with the deeds of release in relation to the Port Nicholson block. After discussing the numerous defects of the document referred to as a receipt, in which two Ngati Toa chiefs were said to have surrendered Heretaunga, we noted that any ambiguity should be resolved in favour of Ngati Toa. We now consider this matter further.

One obvious omission from the document is the absence of any provision for reserves for Ngati Toa, despite Spain's assurance at his March 1844 meeting that these would be provided

119. Forsaith's minutes of meeting at Porirua, 8–9 March 1844, BPP, vol 5, p 37

for, as they were in the various deeds of release. Counsel for Ngati Toa criticised the absence of any description of the boundaries to indicate which lands were being 'surrendered'. The total area of the Port Nicholson block was some 209,247 acres. Under the schedule attached to the deeds of release, some 67,890 acres gross were surrendered by various Maori groups within the block to the New Zealand Company. Of this acreage, some 18,000 acres were in the districts described as Lower Hutt and Upper Hutt (ie, Heretaunga).[120]

Given the complete absence of any definition in the November receipt of Heretaunga or of the extent and location of the lands being surrendered, we can assume only that, as with all other Maori having customary rights in the Port Nicholson block, Ngati Toa surrendered their interests only in the land set out in the schedule to the deeds of release. In Ngati Toa's case, that means that at most they should be presumed to have surrendered their customary interest in some 18,000 acres in Heretaunga. Their take raupatu rights in the remainder of the land in Heretaunga, and elsewhere in the Port Nicholson block, remained unaffected, as did the take raupatu rights of the Maori who had signed the Port Nicholson deeds of release. We consider this matter further in chapter 10.

### 9.7.3 Tribunal finding of Treaty breach

The Tribunal finds that the Crown failed adequately to recognise, investigate, or take into account the full scale and nature of the Ngati Toa interests in the Port Nicholson block area; that it failed adequately to compensate Ngati Toa for its loss of such interests; and that it failed to ensure that Ngati Toa gained an equitable interest in the rural and urban tenths reserves. As a consequence, the Crown failed to act reasonably and in good faith and failed to protect the customary interests of Ngati Toa in and over the Port Nicholson block and, in particular, Heretaunga, and Ngati Toa were prejudiced thereby.

## 9.8 Ngati Rangatahi Claims of Treaty Breaches

### 9.8.1 Ngati Rangatahi's customary rights in the Hutt Valley

Ngati Rangatahi claim that the Crown breached Treaty principles in some nine respects. Their first claim alleges that the Crown failed to recognise and protect the rights of Ngati Rangatahi to their lands, cultivations, and other properties in the Hutt Valley which they had acquired pursuant to Maori custom.[121] Other claims are contingent upon an affirmative finding on this claim, which necessitates a determination of the nature and extent of Ngati Rangatahi rights in the Hutt Valley.

120. To be precise, the schedule showed 18,000 acres of settler sections already surveyed in Lower and Upper Hutt, and an additional 900 acres not yet surveyed. Also within Heretaunga were the sections to be surveyed at Pakuratahi.

121. Claim 1.6(b), para 18.1

In chapter 2, we set out our understanding of customary tenure. We noted that ahi ka implies rights over an area in which a group resided, cultivated, or made use of resources, and where they were not successfully challenged by other Maori. Clearly, such rights can develop only over time. The longer they are exercised, the stronger they become. Maori customary law was not frozen as at 1840. While Ngati Rangatahi could not have established take raupatu from 1840 on, according to Maori custom they could develop ahi ka rights by peaceful means. That Ngati Rangatahi had settled in Heretaunga is evidenced by their having established a pa including houses, a chapel, and a fenced urupa. Counsel for Ngati Rangatahi submitted, correctly, that there was no evidence to show that Ngati Rangatahi continued to pay tribute to Ngati Toa chiefs or anyone else after their return to Heretaunga early in 1841.[122]

Crown counsel submitted that Ngati Rangatahi could not create a new customary right based upon disputed occupation after 1840 – disputed, that is, by Te Atiawa living around the harbour.[123] In fact, while Te Atiawa at Petone may have continued to verbally assert interests in the upper Hutt Valley, Ngati Rangatahi lived there and traded in the markets in Wellington for a period of some five years, and did so peacefully until the arrival of Governor Grey in Wellington in February 1846. During this time, their customary rights were maturing to the point where they were independent of Ngati Toa.

While Ngati Toa recognised the interest of Te Atiawa in the lower Hutt Valley seawards of Rotokakahi, they strongly asserted their own customary rights north of there. It is evident that both Spain and FitzRoy recognised the rights of Ngati Toa in Heretaunga. From at least 1844 onwards, Te Rauparaha conceded that Te Rangihaeata, not he, was the principal holder of rights in Heretaunga. As we have seen, Te Rangihaeata in turn by 1844 not only recognised Ngati Rangatahi's rights to live in Heretaunga but insisted that Ngati Rangatahi's rights there should be respected by the Crown. Had the Crown done so, the tragic events which occurred after Grey's arrival in 1846 may well have been avoided.

In his lengthy review of Maori customary interests in the Port Nicholson block, Professor Alan Ward expressed some doubts about the strength of Ngati Rangatahi's rights in Heretaunga, raising the question of what rights were conferred by their five years of cultivation in the valley.[124] He did not express a decided view on this matter, but during questioning by counsel he suggested that such rights should be seen in terms of a band or continuum of occupation: 'It was simply something that grew over time, and the longer the period of continued occupancy, the stronger it was.'[125]

After a consideration of the relevant evidence and submissions of counsel for Ngati Rangatahi and the Crown, the Tribunal is satisfied that, by late 1845, Ngati Rangatahi had acquired ahi ka customary rights to land in the Hutt Valley independent of Ngati Toa.

122. Document N6, p 4
123. Document P6, p 11
124. Document M1, pp 176–178
125. Transcript 5.5, p 32

### 9.8.2 The expulsion of Ngati Rangatahi from the Hutt Valley

Ngati Rangatahi claim that Governor Grey acted in breach of the Treaty principle of active protection in ordering their expulsion from the Hutt Valley in February 1846 and the destruction and pillaging of their property after they had agreed to vacate their lands there.[126]

We have discussed these events at section 9.6.1 and find the claims justified. Instead of negotiating with Ngati Rangatahi for the purchase of their lands in the upper Hutt Valley, Grey required them to vacate the land forthwith and only then would he consider offering them some compensation for the loss of their crops. At no time was he prepared to compensate them for the loss of their land. In the event, they received no compensation at all for the loss of their land, homes, crops, and other possessions. (We note that in 1846 their crops alone were valued at £451.) Nor were any lands reserved for them in the Hutt Valley. They were rendered landless. We have also discussed the burning of the deserted Ngati Rangatahi pa, their chapel, and the stake fences around the graves of the Maori dead by troops under the control of Grey.

Ngati Rangatahi also claim that their expulsion from the Hutt, and consequent relocation to Rangitikei, resulted in cultural, social, and economic impoverishment. They claim that, as a result of their expulsion from their cultivations, they lost the opportunity to realise the full economic potential from the sale of their crops to the thriving markets in Wellington, and thus the means by which they could have developed a strong economic base for themselves in the developing colony.[127] We consider these claims to be justified. In particular, it is a matter of common knowledge that, once cleared of bush, the upper Hutt Valley proved to be highly productive land for cropping, a situation which pertained for the next 100 years until housing encroached on much of the fertile and productive land.

### 9.8.3 Tribunal finding of Treaty breaches

The Tribunal finds that the Crown breached the Treaty principle of active protection of the article 2 rights of Ngati Rangatahi by:

- failing to recognise and protect their rights to their lands, cultivations, and other properties in the Hutt Valley, which were acquired pursuant to Maori custom;
- ordering their expulsion from the Hutt Valley in February 1846;
- allowing the destruction and pillaging of their property after they had agreed to vacate their lands in the Hutt Valley (which included the burning of their pa by the military forces of the Crown);
- failing to award compensation for the loss of their lands and valuable cultivations following their expulsion in 1846; and
- failing to reserve lands in the Hutt Valley for their future use and enjoyment.

126. Claim 1.6(b), paras 18.3, 18.4
127. Ibid, paras 18.8, 18.9

The Tribunal further finds that, as a consequence of such Treaty breaches, Ngati Rangatahi were seriously prejudiced thereby.[128]

## 9.9 Ngati Tama Claims of Treaty Breaches

There were two Ngati Tama claimant groups before this Tribunal. Both groups raised similar claims of Treaty breaches regarding the Crown's actions in Heretaunga. The Wai 377 claim brought on behalf of the Ngati Tama Te Kaeaea Trust claimed that they were prejudiced by the failure of the Crown:

- to recognise Ngati Tama's right to move to the Hutt when settlers forced them from their land at Kaiwharawhara;
- to recognise the rights that Ngati Tama established to the land which they occupied in the Hutt;
- adequately to compensate Ngati Tama for the loss of their land in the Hutt.[129]

The claimants further state that they were prejudiced by the Crown's actions in removing Taringa Kuri and other members of Ngati Tama from their land at Heretaunga without adequate consultation or a freely negotiated agreement.[130]

The Wai 735 claimants brought similar claims, and their counsel relied principally on the evidence of the Wai 377 historian, Tony Walzl.[131]

We note that a number of matters raised by the respective claimants in their submissions are considered by the Tribunal in other chapters. These include the validity of the 1839 deed of purchase of the Port Nicholson block; Spain's transition from a commission of inquiry to an arbitration; the pressure on Ngati Tama to sign the 1844 deed of release; and the McCleverty 'exchanges'.

### 9.9.1 Tribunal consideration

At various points in this chapter, we have discussed the arrival of Ngati Tama under Taringa Kuri's leadership into the Hutt and subsequent developments. In brief, the following appear to be the salient facts which emerge from our earlier discussion, and from certain preceding chapters:

- The destruction of crops at Kaiwharawhara by cattle belonging to settlers and the failure of the Crown to control the activities of the settlers forced Ngati Tama to move to the Hutt Valley in 1842.

128. We make no finding on the claim that the Crown dishonoured the terms of FitzRoy's Crown grant to the company (claim 1.6(b), para 18.2) because this grant was a nullity (see ch 10).

129. Claim 1.7(c), para 47(i)–47(k)

130. Ibid, para 47(n)

131. Claim 1.19, para 5.4(f); doc N4, pp 29–30

- Ngati Tama believed that they had not alienated any Port Nicholson land to the company and had given it only anchorage rights in the harbour. In fact, at the time of their removal to the Hutt, neither the company nor the settlers had any legal or proprietary rights to land in the Hutt. These rights were not to be gained until Grey's Crown grant in 1848. There was no active opposition to Ngati Tama's removal to the Hutt from other Maori. Accordingly, there was no constraint under either English or Maori law on their right to occupy and cultivate land in Heretaunga.
- At his meeting with Te Rauparaha and Te Rangihaeata on 8 and 9 March 1844, Spain made a final offer to pay Ngati Toa £300 for their lands in boundaries fixed by Clarke junior, 'upon consideration of Taringa Kuri and his party immediately removing from the Hutt'. He added that he would award a further £100 for Ngati Tama's crops in the Hutt, but stressed that this was to be compensation for the crops, not for the land they were cultivating. This offer was rejected by Te Rauparaha, who stated that he could not interfere and that Te Rangihaeata would not consent to Spain's proposals (see s 9.4.2) While the boundaries said to have been settled by Clarke were not described, they were presumably the lands set out in the schedule to the deeds of release, some of which had been signed by Te Atiawa, Taranaki, and Ngati Ruanui.
- On 26 March 1844, Taringa Kuri was persuaded to sign a deed of release on behalf of Ngati Tama at Kaiwharawhara. This deed contained the standard clause surrendering all their lands in Port Nicholson and the neighbourhood of Port Nicholson referred to in the attached schedule, but excluding their pa, cultivations, sacred places, and reserves (see s 8.4.3).[132]
- There is no description of the area or location of the cultivations referred to in the deed. However, as we noted at section 7.5.1, Governor FitzRoy on 29 January 1844 defined 'cultivation grounds' to be 'those tracts of country which are now used by the natives for vegetable productions, or which have been so used by the aboriginal natives of New Zealand since the establishment of the colony'.[133] While his term 'cultivations' is used in the English version, the Maori versions of the deeds signed by Maori used the word 'ngakinga', which means both 'cultivations' and 'clearings' (see s 8.6.1).
- At the time that the deed of release was signed by Taringa Kuri and other Ngati Tama chiefs, a large body of Ngati Tama under Taringa Kuri's leadership was cultivating land in the Hutt. It is clear that in 1844 these cultivations, including previous cultivations then being rested, were reserved to Ngati Tama under the deed of release, but, because they had not at the time been surveyed, no acreages were given in the schedule to the deed of release. The deed of release did not specify that the reservation applied only to cultivations at Kaiwharawhara.

132. See also the Kaiwharawhara deed of release (doc A10(a), p 2:5)
133. Minutes of conference held at Major Richmond's house on Monday 29 January 1844, BPP, vol 5, p 28

- Ngati Tama resisted efforts by Crown officials to persuade them to leave the Hutt. Officials such as Richmond consistently refused to recognise that Ngati Tama's right to their cultivations at Heretaunga had been reserved to them in the deed of release, or that they had acted in terms of Maori customary law in moving to the Hutt when driven out of the Kaiwharawhara district by settlers who possessed no rights to their land (see ss 9.4.3, 9.5).
- When Te Rauparaha adopted a conciliatory stance with the Crown, Te Rangihaeata, who had the principal interest in Heretaunga, continued to support the right of Ngati Tama to cultivate lands in the Hutt.
- When Governor Grey arrived at the Hutt in February 1846, he lost no time in requiring Ngati Tama to abandon their land and cultivations there. He refused to discuss whether he would make any payment to them for their 'crops, houses, &c', which he insisted must remain on their land. Only after they had departed would he hear representations from them (see s 9.6).[134]
- Within a matter of days, Ngati Tama and their allies withdrew, abandoning their houses, church, cultivations, and grounds, as well as livestock of considerable value. Early in March, Grey agreed to pay Ngati Tama and the Whanganui Maori compensation for their crops of £120 cash plus £80 in goods and £70 for a reserve for food. However, in June 1846 he reported that Ngati Tama had received only goods worth some £70 plus agricultural tools as compensation for their crops. Grey did not consider compensating Ngati Tama for the loss of their cultivation grounds at Heretaunga, which were reserved to them under the 1844 deeds of release (see s 9.6.2).

Counsel for the Ngati Tama claimants have invoked the Crown grant issued by FitzRoy on 29 July 1845, which closely followed Spain's final award.[135] It granted the New Zealand Company 71,900 acres, saving and excepting Maori pa, burial grounds, cultivation grounds, and reserves (see s 8.8.3). The company refused to accept this grant, and no effect was given to it by the Crown (see ch 10). In effect, it was a nullity. However, the fact that the Crown chose not to implement the FitzRoy grant in no way nullifies the provisions of the March 1844 deed of release. We do not know whether Grey was ignorant of the reservation of Ngati Tama's cultivations in the March 1844 deed of release or simply chose to ignore it.

The Tribunal is satisfied that the Crown was under an obligation to honour the reservation to Ngati Tama of their cultivations in the deed of release and to protect their right to hold them for so long as they wished. If this was seen as interfering with settlers' 'rights' (which received no legal recognition until 1848), the onus was on the New Zealand Company or the Crown (or both) to compensate the settlers.

134. See also Grey to Stanley, 14 February 1846, BPP, vol 5, p 415
135. Document N4, p 29

### 9.9.2 Tribunal finding of Treaty breaches

The Tribunal finds that the Crown failed to protect the rangatiratanga of Ngati Tama by:

- failing to prevent them from being driven from their land and cultivations at Kaiwharawhara;
- failing to recognise their right to resort to the Hutt to cultivate land for their sustenance and livelihood;
- failing to honour the provisions in the March 1844 Kaiwharawhara deed of release reserving to them all their cultivations and cleared land (ngakinga) for so long as they wished to retain them; and
- requiring them in February 1846 to surrender their cultivations, houses, and other property in the Hutt Valley without any consultation or a freely negotiated agreement, and without adequate compensation for the loss resulting from their expulsion.

As a consequence of the foregoing, Ngati Tama were prejudicially affected thereby.

CHAPTER 10

# THE McCLEVERTY TRANSACTIONS

## 10.1 Introduction

Once the conflict over Heretaunga was at an end, only one further obstacle remained to the New Zealand Company's gaining of secure title for the settlers who had purchased land at Port Nicholson from the company. Despite the clear understanding reached at FitzRoy's meeting with Wakefield in January 1844 that pa, cultivations, and urupa were to be excepted from land released by Maori (an understanding reflected in the deeds of release and Spain's award), the company rejected FitzRoy's 1845 Crown grant, principally because it provided for the retention by Maori of their pa and cultivations on sections purchased from the company by settlers. This chapter examines the Crown's efforts to overcome this difficulty by way of deeds signed in 1847 by Maori at each of the main pa, whereby Maori gave up their cultivations on 'settlers' sections' in 'exchange' for other land which was reserved for them. These transactions were arranged by Lieutenant-Colonel William Anson McCleverty, who had been specially appointed to assist in settling the company's land claims, and they left Maori with some 20,000 acres of reserved land. We discuss this land further in later chapters.

Once McCleverty's 'exchanges' had taken place, the way was clear for a Crown grant to be issued to the company. However, instead of granting only those lands which the company had acquired under the deeds of release and Spain's award, Governor Grey in 1848 granted the whole of the Port Nicholson block, comprising some 209,247 acres, apart from certain reserved and excepted land. The result was that the company acquired some 120,626 acres in addition to the land which Maori had surrendered in the 1844 deeds of release. We discuss the reasons for the company's acquisition of this land and make findings on the Crown's actions in granting it to the company. Finally, we look at the collapse of the New Zealand Company in 1850, which resulted in the company's land becoming vested in the Crown.

## 10.2 The New Zealand Company Rejects FitzRoy's Crown Grant

On 8 August 1845, superintendent Richmond tendered to Wakefield a copy of FitzRoy's Port Nicholson Crown grant to the New Zealand Company, which Wakefield declined. Wakefield

indicated that he would have to refer the grant to the company's directors,[1] and shortly thereafter he published a letter in the *New Zealand Gazette and Wellington Spectator* in which he explained his objections to the grant. He claimed that the Crown had breached its agreement with the company that individual Europeans who had been claimants before Spain's inquiry would be compensated in cash instead of being granted land which Spain found they had validly purchased from Maori. Wakefield also described as erroneous FitzRoy's interpretation of the arrangements in respect of Maori cultivations agreed to during the Governor's meeting with Wakefield on 29 January 1844 (see s 7.5.1). According to Wakefield, FitzRoy had 'specially excepted' from lands to be retained by Maori any cultivation ground 'if included in those lands which the Commissioner [Spain] should report to have been fairly purchased'.[2]

It is clear that Wakefield was misstating the agreement reached with FitzRoy. At the 29 January 1844 meeting, Wakefield had agreed that he was 'prepared to make a fair compensation to the natives who may be entitled to receive it, without including their pahs, their burying places, and their grounds actually in cultivation' (see s 7.5.1).[3] As Crown historians David Armstrong and Bruce Stirling note, 'It was quite clearly the intention of the Crown to ensure that pa and cultivations were reserved from all land sales by Maori'.[4]

On receipt of a letter from Wakefield enclosing FitzRoy's Port Nicholson grant and Wakefield's letter to the *Spectator*, the company secretary wrote to the new Secretary of State for the Colonies, W E Gladstone, on 28 February 1846 along lines similar to those earlier advanced by Wakefield. The company strongly objected to the granting of valuable town land to non-company European claimants and to the extent of the cultivated lands excepted from the grant. In support, they referred to a private letter from 'a person wholly unconnected with the company, and of undoubted authority', who asserted that these reservations 'will exclude from the grant at least one-sixth, and not improbably one-fourth' of that part of Wellington township on which buildings had been erected.[5]

In March 1846, Gladstone sent copies to Governor Grey of the correspondence from the New Zealand Company. He requested that Grey ascertain whether the reports made by Wakefield were accurate, and, if so, authorised Grey to take such measures for the relief of the company as might be within his power to adopt.[6]

1. Richmond to Wakefield, 13 August 1845, BPP, vol 5, p 331; Wakefield to Richmond, 9 August 1845, BPP, vol 5, p 330
2. *New Zealand Gazette and Wellington Spectator*, 13 August 1845 (also reproduced in the New Zealand Company's twentieth report) (quoted in doc C1, p 231)
3. FitzRoy went on to define 'cultivation grounds' more broadly as including any land which had been cultivated by Maori since the establishment of the colony.
4. Document C1, p 231
5. Harrington to Gladstone, 28 February 1846, BPP, vol 5, pp 329–330
6. Gladstone to Grey, 21 March 1846, BPP, vol 5, p 329

## 10.3 The Appointment of McCleverty

The genesis of Lieutenant-Colonel McCleverty's appointment is to be found in correspondence between Lord Stanley and the directors of the New Zealand Company in July and August 1845. In the course of this correspondence, Stanley proposed, with a view to facilitating the final selection of land by the company 'with the least possible delay', to:

> despatch forthwith to the colony a properly qualified person, whose duty it should be to give his best assistance to the Company in their selection of land, to aid in surveying the exterior boundaries of such selections, and to judge of the reasonableness of the terms of any purchase which the Company may make from the natives, with reference to the Company's right to reimbursement in land in respect of moneys paid for such purchase.[7]

The company agreed to Stanley's proposal.[8]

On 15 August 1845, Stanley informed Grey that he intended to dispatch such a person, repeating the description given in his letter to the company of the role which this person was to perform in New Zealand. He added that he was adopting that course not from any distrust of the capacity or integrity of local officers but rather 'to facilitate and accelerate the selection of land by the New Zealand Company' and to afford Grey 'some relief amidst the many arduous duties imposed upon [him]' by providing him with assistance in settling the company's land claims.[9]

It was decided that it would be advantageous to appoint a military officer to this position, and Stanley was advised by the War Office of McCleverty's appointment on 15 December 1845.[10] McCleverty, who had been born in England around 1806, had attended Sandhurst and served in India and Gibraltar. With the rank of lieutenant-colonel, he assumed command of the troops in the southern district of New Zealand upon his arrival in September 1846. He was promoted to colonel in 1854 and returned to England in 1857.[11]

Shortly after he learned of McCleverty's selection, Stanley wrote to Grey notifying him of the appointment. In addition to his military duties, McCleverty was to have those civil duties relating to the selection of land by the company which were outlined in Stanley's dispatch to Grey of 15 August 1845. McCleverty was given extracts of the relevant company–Colonial Office correspondence to make him 'aware generally of the nature and object of the civil duties which will be required of him in New Zealand'. Grey was also to give him such particular instructions as the Governor might consider necessary. Stanley left it to the New Zealand Company to decide how, and to what extent, it would make use of McCleverty's assistance in selecting land. Having ascertained the company's views, Grey was to direct McCleverty to

7. Hope (for Stanley) to Ingestre, 7 August 1845, BPP, vol 4, p 591 (replying to Ingestre to Stanley, 24 July 1845, BPP, vol 4, pp 587–588)
8. Young to Stanley, 8 August 1845, BPP, vol 4, p 596
9. Stanley to Grey, 15 August 1845, BPP, vol 5, p 253
10. Document C1, pp 235–236
11. Ibid, p 237

'take such steps as may appear most advisable for the purpose of rendering them the assistance they may desire'.[12]

Stanley's letter advising of McCleverty's appointment reached New Zealand in June 1846. Wakefield was duly advised of the appointment, and he promised to cooperate cordially with McCleverty on the basis of Stanley's description of McCleverty's role in his dispatch to Grey of 15 August 1845. In a letter of 18 July 1846 to the company, Wakefield reported that he had received verbal assurances from Grey that McCleverty would be instructed to facilitate the acquisition of land excepted from the Port Nicholson block Crown grant. Two months later, Wakefield wrote to the company expressing hope that McCleverty would adjust the 'objectionable clauses' in the company's Crown grant. According to Grey, local Maori were also hoping that McCleverty would adjudicate on their claims against the company.[13]

## 10.4 Grey Provides Additional Land to Maori in Port Nicholson

Before Grey learned of McCleverty's appointment, he took action to meet certain grievances of Waiwhetu Maori and Taringa Kuri of Ngati Tama. He reported to Gladstone on these two matters in separate dispatches, each dated 20 June 1846.

### 10.4.1 Land for Waiwhetu Maori

In the first dispatch, Grey noted that, when he arrived at Port Nicholson in February 1846, he found two distinct tribes for whom a sufficient quantity of land had not been reserved, and that Waiwhetu Maori especially were 'left without land to raise the necessary supplies'.[14] For various reasons, many native reserves were not available for use by Maori, and thus some Maori had instead been cultivating sections purchased from the company by Europeans. The result was that:

> as the Europeans took possession of the lands to which they were fairly entitled, it was found that some of the natives were left without land suited for their cultivation, or upon which they could have entered without incurring the hostility of some neighbouring tribe.

In fact, the reason why Waiwhetu Maori were left with insufficient land is apparent from our discussion of the 'negotiations' at Waiwhetu in 1844, when Spain and protector Clarke subjected the Maori people to considerable duress to induce them to sign the deed of release. During the meeting, Wiremu Kingi, the principal chief, asked whether any reserves would be made for them and said that the company reserves (tenths) were wholly unfit for use, being

12. Stanley to Grey, 18 December 1845, BPP, vol 5, p 259
13. Document C1, pp 239–240
14. Grey to Gladstone, 20 June 1846, BPP, vol 5, pp 572–573

swampy or covered with water. Only after further protest by Wi Kingi did Spain agree that the surveyor would mark out a sufficient quantity of eligible land for Waiwhetu Maori, although he could not then say precisely where (see s 8.4.2).

It is evident that the Crown failed to implement this undertaking, and it was left to Grey to honour it more than two years later by purchasing 106 acres of land from a settler. The land Grey acquired was Hutt section 19, which in 1847 was included in McCleverty's Waiwhetu award. Surveyor Fitzgerald described this section as one of the best in the Hutt.[15]

Grey, who was apparently unaware of Spain's 1844 undertaking, gave his own justification for his action. After noting that the Waiwhetu Maori had appealed to him, he said:

> as I felt the hardship of their case and the strong claims that they had upon the sympathy of the Government, and as I was at the same time compelling the natives to abandon land which had been fairly purchased by the Europeans, and they, with apparent justice, requested me to deal fairly and to turn the Europeans off the land which had been reserved for the natives, and thus to give them a sufficiency of land for their cultivation, the best mode of arranging the difficulty appeared to me, to purchase in the market, in the usual manner, a section of land suited to the purposes of these people, and which they would consent to take in liquidation of any claims for lands which they might have; I accordingly adopted this course.
>
> It will be seen that I was compelled to pay the sum of 350*l* for this section of land. Port Nicholson being situated in one of the Company's districts, the local Government had no land of its own in that portion of the colony. I thus could obtain land by no other means than purchase; and I propose that this sum of 350*l* should be subsequently refunded from the Native Trust Fund.
>
> The good effect of this arrangement has already been evinced by the Waiwetu natives having been among the first to tender their assistance to the Government during the recent disturbances.[16]

This statement is significant in several respects:

- Grey admitted to compelling Maori to abandon land which had been purchased by Europeans. However, there is no evidence that he compelled settlers to vacate land on which there were cultivations reserved to Maori under the 1844 deeds of release.
- Grey considered that, because Port Nicholson was situated 'in one of the Company's districts', the Government 'had no land of its own in that portion of the colony'. Accordingly, he authorised the purchase of land for Maori, believing that the Crown had no other option. This, he proceeded to authorise. This raises the question of whether Grey was aware of the limited scope of the 1844 deeds of release, which related to no more

15. Document 18, p 134

16. Grey to Gladstone, 20 June 1846, BPP, vol 5, pp 572–573. The 'recent disturbances' refers to the conflict in Heretaunga, discussed in chapter 9 above.

than 71,900 acres. Grey's statement leaves open the question (given the existence of the 1844 deeds of release and Spain's clear award) of who he believed owned the remaining 137,347 acres in the Port Nicholson block. He does not here suggest that it was 'waste land' belonging to the Crown; on the contrary, he clearly believed that the Crown had no land in the Port Nicholson district. We return to the question of the ownership of this extensive area at sections 10.8.4 and 10.8.5.

- Grey proposed that the land's purchase price of £350 should be refunded from the native trust fund. In other words, the Crown would not in fact pay for the land which had been promised by Spain and which should have been reserved; the money was to come from a fund held in trust for Maori. There is no evidence that Waiwhetu Maori were informed that the section was to be paid for out of Maori trust funds; nor, had they known, is it likely they would have considered Grey to have been acting fairly or justly. It is not clear whether any of the cost of purchasing this section was, in fact, refunded from the native trust fund, although this seems unlikely, since there was little money in this fund in the 1840s (see ch 12).

### 10.4.2 Land for Ngati Tama at Kaiwharawhara

In the second dispatch of 20 June 1846, Grey reported to Gladstone on the additional land that had been made available to Taringa Kuri and the Ngati Tama people at Kaiwharawhara, who had been forced to leave their cultivations there because the adjoining settlers were permitting their cattle to graze on Ngati Tama land.[17] They moved to the Hutt Valley, from where they were later induced to leave (see ch 9). After their departure from the Hutt, Taringa Kuri wrote to Grey asking him to provide Ngati Tama with land.[18] Grey avoided the need to purchase settler land by relinquishing a section of 100 acres which had been reserved for a country house for the Governor and by 'giving' Ngati Tama 200 acres from a block of five rural tenths reserved for Maori, as shown in the schedule to the 1844 deeds of release. In short, Kaiwharawhara Maori were assigned two 100-acre tenths reserves to which Maori were already entitled and, in addition, the 100 acres previously reserved for the Governor. The 100-acre Governor's reserve was not included in the 1844 deeds of release; it was Maori land which had been appropriated, without payment. An additional 100-acre section, Harbour section 4, was purchased for Ngati Tama at Kaiwharawhara later in 1846 at a cost of £350.[19] All the land discussed in this section was subsequently awarded to Kaiwharawhara Maori by McCleverty.[20]

17. Grey to Gladstone, 20 June 1846, BPP, vol 5, pp 574–575
18. Document H7, pp 90–92
19. Document C1, p 243
20. Document I8, pp 186–188

## 10.5 Grey's Instructions to McCleverty

On 14 September 1846, shortly after McCleverty arrived in New Zealand, Grey gave him quite detailed instructions.[21] They were intended to show the manner in which Grey proposed 'to relieve the Company from the difficulties arising from the loose exceptions which have been made in their grants of all native pahs, cultivations, &c'.[22] In his instructions, Grey recounted the difficulties which had arisen owing to the failure of the Crown to survey the pa and cultivations reserved for Maori. He indicated that the survey was now nearing completion and that the amount of land involved was estimated at about 380 acres. This estimate proved to be inaccurate, and McCleverty was later to cite 576 acres as being the approximate area of Maori cultivations on sections which were claimed by settlers.

Grey also outlined the origins of the problem which had arisen concerning Maori cultivations. The company had, he reported, mainly sold land at Port Nicholson to absentee proprietors, with the result that Maori were able to continue establishing their cultivations where they pleased. They made little use of the native reserves and, as a result, the administrators of the reserves let them on very long leases to Europeans, with the object of raising money for the benefit of Maori. When Pakeha settlers began to arrive and take up their sections, the Government was therefore unable to put Maori in possession of their reserves, and Maori continued occupying parts of sections which had been purchased from the company by the settlers. This led to 'constant and violent disputes' between Maori and Pakeha.

Grey next described action he had taken in the meantime to remove Maori from lands claimed by settlers:

> as there have been no reserves at my disposal on which the natives could be placed, I have purchased, at the expense of the Government, lands for them in spots selected by themselves, and of such extent and quality as to render them good and obedient citizens, by giving them a valuable and permanent interest in the prosperity of the country, and having made over these lands to them, I required them to surrender to Europeans the properties to which they were justly entitled.

The only instance in which we are aware of Grey following this procedure in relation to Port Nicholson land is in respect of the purchase of Harbour section 4 for Ngati Tama, as noted earlier. His dealings with the Waiwhetu people consisted simply of making good Spain's omission by ensuring that they had some cultivatable land.

Grey considered that, where Maori had sufficient land for their wants (exclusive of those parts of their cultivations required by Europeans), they should be persuaded to sell their cultivations on settler-claimed sections at a moderate price. Where Maori would be left with

21. Instructions issued by Grey to McCleverty, enclosed with dispatch from Grey to Gladstone, 14 September 1846, BPP, vol 5, pp 610–612

22. Grey to Gladstone, 14 September 1846, BPP, vol 5, p 609

insufficient cultivation land if they gave up their cultivations on land claimed by Europeans, Grey recommended that:

> the settler or the Company should be required to pay to the Government such sum as Colonel M'Cleverty may think proper, and that he should thereupon recommend the Government to purchase for the natives some portions of land selected by themselves, which should be given to them in lieu of those cultivations required by the Europeans. And it would be essential that every exchange of this kind should be one which is rather advantageous to the natives than otherwise, not only for the purpose of securing their immediate and cheerful acquiesce[nce] in the exchange, but with a view to securing, together with their comfort, their attachment to the form of Government under which they live.

We are not aware of Grey having adopted any of these procedures in the very few direct interventions he made in respect of land in the Port Nicholson block. As will be seen, McCleverty himself adopted quite different procedures, which involved little expenditure by the company or the Crown. Grey noted that any expenditure on purchasing land to give to Maori in exchange for their cultivations could be recouped by appropriating the proceeds of the sale of native reserves (tenths). Grey pointed out that many of these reserves were unavailable to Maori, either because they had been leased to Pakeha or because they were not well suited to Maori methods of cultivation, and so Grey proposed in effect to exchange these reserves for 'lands adapted to their wants'.

In the event, McCleverty avoided the need to purchase land (and hence avoided the need for the Crown to sell off Maori tenths to recoup the purchase price). However, some settlers or absentee owners received money in compensation for land selected by them but assigned by McCleverty to Maori: namely, the Te Aro Pa sections, and the parts of Harbour sections 7, 8, and 9 where Ngauranga Maori had cultivations which they refused to give up.[23] In general, McCleverty adopted the much simpler procedure of vesting in the Maori of particular pa certain reserved tenths already held in trust for Maori collectively in 'exchange' for the release by them of their cultivations on land claimed by settlers. He did this notwithstanding Grey's opinion that few suitable tenths reserves were available for such exchanges. In some cases, settlers living legitimately on tenths reserves as lessees were compensated for having to move off those reserves when they were assigned by McCleverty.[24] The other, and more extensive, method adopted by McCleverty was to 'exchange' for Maori cultivations on settler land other (unsurveyed) land owned by Maori which he erroneously considered to be 'waste' land belonging to the Crown.

Counsel for the Wellington Tenths Trust claimants noted that the ostensible reason for the New Zealand Company's rejection of FitzRoy's grant was that the the extent of the Maori

23. Document 18, pp 108, 143–144
24. Document C1, pp 270–271

cultivations had not been properly defined. Grey appeared to accept this objection, even though, as counsel further observed, it was the Crown which had failed to survey these cultivations prior to the issuing of the grant. However, counsel submitted that the actual reason behind the company's refusal to accept the grant was not the lack of an adequate survey but the fact that Maori would retain highly valuable lands in the heart of the new settlement, lands that the company was determined to acquire.[25] Our discussion of McCleverty's activities which follows lends very considerable support to this view. Indeed, as will be seen, McCleverty admitted that he was removing Maori from much of their most valuable land in both the town and the country and that he felt obliged to offer larger areas of less valuable land as compensation.

### 10.6 McCleverty Commences his Inquiry

A few days after receiving Grey's instructions of 14 September, McCleverty proceeded to Wellington. There, he became engaged on military duties for a time.[26] On 18 December 1846, he wrote to Wakefield outlining the approach he proposed to adopt. This letter has not been located, but Wakefield's reply on the same day acknowledged McCleverty's letter 'on the subject of land required for the use of natives of this District who now hold cultivations on sections allotted to Europeans'. Wakefield agreed with McCleverty's opinion that it was desirable to facilitate the 'willing removal [of Maori] from land required by the settlers' and concluded:

> I am prepared, on the part of the New Zealand Company, to assent to the selection, under your direction, of a block or blocks of land (in addition to the native reserves unchosen) in the unsurveyed land within the Port Nicholson Grant.[27]

It appears from this statement that Wakefield considered that the company owned the unsurveyed land, which clearly it did not.

McCleverty, who had become the officer commanding the troops in New Zealand, was then delayed for some months by further military duties. In the meantime, since McCleverty was unavailable, Grey had proceeded to settle the Porirua and Wairau claims. A new purchase of Porirua was necessary because Spain had disallowed the company's entire Porirua claim.[28]

25. Document 03, pp 217–219
26. Document c1, pp 252–253
27. Wakefield to McCleverty, 18 December 1846, CO208 (doc c1(c), p 407)
28. Document c1, pp 254–255

### 10.6.1 McCleverty's preliminary report

McCleverty's undated preliminary report was received by Grey on 8 April 1847. It surveyed the Maori population and the area of Maori cultivations and discussed the problems involved in removing Maori from their cultivations on 'settler' lands. The report was based on the assumption that the settlers, not Maori, owned the land which Maori were or had been cultivating since 1840. This is notwithstanding the fact that all such cultivations, along with Maori pa and urupa, and tenths reserves, were expressly recognised as the property of Maori in the agreement reached between FitzRoy and Wakefield on 29 January 1844. This agreement was given effect to in each of the 1844 deeds of release signed by Maori. It is significant that neither Grey nor McCleverty gave any indication of ever having seen these deeds, including the attached schedule, which formed the basis of Spain's award and FitzRoy's grant.

We note here the principal matters discussed by McCleverty in his report:

- The Maori population resident at Petone, Waiwhetu, Ngauranga, Kaiwharawhara, Pipitea, Kumutoto, and Te Aro Pa was given as 633. There were no permanent residents at Tiakiwai. McCleverty commented that the population varied owing to frequent visitors.
- Maori belonging to the above pa were assessed as occupying 528 acres on sections 'belonging to settlers'. A further 111 acres of cultivations of Maori of these seven pa were either unsurveyed land or Maori reserves. This meant that 639 acres of land under cultivation were available for the Maori population of 633 adults and children. At Ohariu and Makara, there were 48 acres of cultivations on land said to belong to settlers and, in addition, some 185 acres on unsurveyed land and Maori reserves; in all, some 233 acres. No population figures were given for the occupants of these Maori lands being cultivated on the west coast of the Port Nicholson district.
- McCleverty pointed to the difficulty of finding land comparable in quantity and quality, and with ease of access from where Maori lived, so as to induce them willingly to relinquish the 576 acres of their cultivations on 'sections of European settlers'. It appears to have been taken for granted that it was Maori, not the settlers, who would have to move.
- All the existing Maori cultivations were composed of good land, suitable in terms of aspect and in other respects for their wants, and chosen on that account.
- To compensate for the 576 acres under cultivation on 'settlers' sections', at the very least 12 sections of 100 acres each would be required in exchange.
- Another difficulty was to obtain blocks of suitable land within a reasonable distance of town. McCleverty said that Maori naturally complained that, if they gave up their cultivations in the immediate vicinity of the town for others at a greater distance, the expense of time and labour to reach the port with their produce would be greater.
- In some cases, property was held in common between individuals of different pa at distances from each other; for instance, Maori at Pipitea had cultivations in the Hutt in

partnership with some Waiwhetu Maori, and they also had some shared cultivations with Te Aro Maori.

- Some patches of the town belt (amounting to about 62 acres) were being cultivated by Maori of Pipitea, Kumutoto, and Te Aro Pa (guaranteed to them by 'FitzRoy's arrangement'). Given the great difficulty of obtaining land in good situations, McCleverty recommended that an additional part of the town belt, not exceeding 150 acres, should be relinquished to Maori.

McCleverty then stated:

> In recommending a portion of the Town Belt . . . to be given to the natives in exchange for other lands required for the settlers, which have been purchased by them from the New Zealand Company, I merely recommend an extension of the occupancy which they hold under Captain FitzRoy's arrangement of 29th January, 1844, *and in the belief that the Town Belt is to be considered as waste land and belonging to the Crown*.
>
> In this I have been guided by the grant to the New Zealand Company of the Port Nicholson district and the objection thereto, in which no allusion is made to the Town Belt or unsurveyed lands within the limits of that grant. The area is 209,372 acres within the boundaries, part of which only, viz, 71,900 acres, are surveyed by, and granted to, the Company, accepted by that body, and acknowledged hitherto as part of 1,300,000 acres granted by Lord Stanley in liquidation of expenditure, &c.
>
> An objection is raised by the principal agent of the Company, *not to the quantity granted within the boundaries of the Port Nicholson district* , but as to its distribution in favour of certain bodies of natives on settlers' sections and the Town Belt; the 71,900 acres are defined, viz, 70,800 acres of country sections of 100 acres each, and 1100 town sections of one acre each, and in which the Town Belt is not included. I conceive, the balance, . . . viz, 137,472 , includes the Town Belt and other unsurveyed lands *as waste and pertaining to the Crown* . [Emphasis added.][29]

Accordingly, McCleverty recommended the award of part of the town belt to Maori in the belief that this was waste land belonging to the Crown. It is clear from the foregoing passage that McCleverty recognised that Wakefield was objecting not to the fact that the FitzRoy grant included only 71,900 acres but rather to the reservation in favour of Maori of their cultivations on 'settlers' sections and the Town Belt'. In concluding that 137,472 acres which were not included in FitzRoy's grant were waste land belonging to the Crown (and not the property of the company or of Maori), McCleverty was laying the ground for the 'exchanges' which he was shortly thereafter to make. McCleverty would persuade Maori to surrender their cultivations on 'settlers' land', in 'exchange' for such 'waste land'. We will later

29. W A McCleverty, 'Report on Port Nicholson Cultivations', enclosed with Governor Grey to Earl Grey, 21 April 1847, BPP, vol 6, [892], pp 38–42

demonstrate that McCleverty was wrong in concluding that the 137,472 acres excluded from the FitzRoy grant were waste land of the Crown (see s 10.7). On the contrary, this land was still owned by Maori (although part of it had been taken by the Crown as public reserves, as discussed in chapter 6). As a consequence, as 'compensation' for the valuable cultivations which they were persuaded to surrender in favour of the European settlers, Maori were awarded land which they already owned. In short, Maori received no compensation, apart from a very few purchases by Grey.

### 10.6.2 Grey's comments on McCleverty's preliminary report

On 21 April 1847, Grey sent a copy of McCleverty's preliminary report to the Secretary of State for the Colonies, Earl Grey.[30] After commenting on some aspects of the report, Grey concluded that, pending hearing from Earl Grey on the subject, on the whole it appeared to contain nothing which would cause him to modify his earlier instructions to McCleverty.

Grey referred to McCleverty's proposal that additional land should be awarded to Maori from the town belt, which McCleverty considered to be waste land. While recognising that some European residents of Port Nicholson were opposed to that proposal, he felt compelled to act contrary to their wishes. As justification, Grey noted that Commissioner Spain had disallowed the company's original Port Nicholson purchase, and while thus 'not admitting the rights claimed by the purchasers, he, at the same time, gave the natives certain rights, which must be respected'. He concluded that the necessity of the case compelled him to approve McCleverty's recommendation concerning the town belt.

Grey also referred to McCleverty's calculation that at least 12 sections of land, of 100 acres each, would be required to compensate Maori for the land which it was thought desirable they should give up, noting that McCleverty in fact thought an even larger area would be necessary. Grey then referred to a comment by McCleverty that:

> *the Port-Nicholson district not belonging to the Government*, they have no land there applicable to the contemplated purpose, and that this renders it nearly impossible to put the natives in possession of the land requisite to effect an equitable exchange, without purchasing it from the Europeans. [Emphasis added.]

In fact, McCleverty did not, as Grey suggests, refer to 'the Port-Nicholson district not belonging to the Government'. On the contrary, as we have noted, McCleverty expressed his belief that 'the Town Belt is to be considered as *waste land and belonging to the Crown*' and that the 137,472 acres which were within the boundaries of the Port Nicholson district but were excluded from FitzRoy's grant 'includes the *Town Belt and other unsurveyed lands as waste and pertaining to the Crown*' (emphasis added). This being so, there was, as

30. Governor Grey to Earl Grey, 21 April 1847, BPP, vol 6, [892], pp 36–38

McCleverty subsequently demonstrated, no need for him to purchase any land. He simply used Maori land in the belief that it was waste land owned by the Crown.

### 10.6.3 Deeds of exchange are signed

During 1847, McCleverty held discussions with Maori belonging to pa at Kumutoto, Te Aro, Waiwhetu, Ngauranga, Petone, Pipitea, Kaiwharawhara, and Ohariu. As a result, eight deeds of exchange were signed by Maori. Except for the Kaiwharawhara deed, they largely followed a common form.[31] The Waiwhetu deed is typical. The English translation of the material part stated:

> We the Landholders and Chiefs residing at and belonging to Waiwetu on the River Hutt, agree on the thirtieth day of August one thousand eight hundred and forty seven to give up to Her Majesty's Government all those cultivations which we have hitherto had on sections in the Harbour and Hutt Districts or elsewhere belonging to European Settlers on our receiving from Lieutenant Colonel McCleverty, subject to the approval of the Governor or Lieutenant Governor, portions of land which we have seen and agree to receive in the Hutt District. [Details of the land follow.]

In each deed, Maori agreed to give up all their cultivations on lands said to belong to European settlers, although an exception was made in the case of the Ngauranga deed for parts of three Harbour sections where Ngauranga Maori refused to give up their cultivations. In exchange, specific pieces of land in stated localities were to be assigned to them. Some pa sites – Te Aro, Pipitea, Waiwhetu, Kaiwharawhara, and 'Tiakiwai' (actually Pakuao) – were specifically guaranteed to Maori in the deeds, although in fact all the pa sites where deeds of exchange were signed were reserved by McCleverty for the Maori of those pa. We provide further details of the land assigned by McCleverty to each pa in chapter 11.

To his final report, dated November 1847, McCleverty attached four forms.[32] Forms A and B described lands 'excepted and reserved' by McCleverty; that is, lands which would not be included in any grant to the New Zealand Company. Apart from minor exceptions, these lands were excluded from the 1848 Crown grant to the company. Forms C and D showed the total amount of land under Maori cultivation at Port Nicholson and the area cultivated on 'settlers' sections' by the Maori of each pa. These two forms served to 'elucidate the cause of Lands, in unsurveyed Districts and on the Town Belt, being extended in quantity to the Natives, beyond what they originally possessed'. Maori relinquished all cultivations on 'settlers' sections' except for 109½ acres of cultivations which Ngauranga Maori refused to give up.[33]

31. See document A10(a), s 3, for the texts of the eight deeds.

32. W A McCleverty, 'Final Report on the Port Nicholson District', 20 November 1847. An abridged version of this report is in Turton, *Epitome* (doc A26), s D, p 13. The full report is in document C1(c), pp 262–280.

33. McCleverty's final report, 20 November 1847, CO208 (doc C1(c), pp 262–265)

It is clear that McCleverty envisaged the arrangements he had made as 'exchanges' – Maori cultivations on 'settler' sections were being relinquished in 'exchange' for Maori reserves and unsurveyed lands. He reported that:

> The Natives are now put in possession of certain tracts of lands which the Government had at disposal, either by purchase, or by a proprietary title to the waste lands, or through the means of the Native Reserves; the Natives relinquishing their cultivations, and in one case a small Pah on Settlers country sections.[34]

The Wai 145 claimants allege that, in breach of the Treaty, the Crown did not ensure that Maori were allowed to choose the lands which they would receive in exchange for the lands desired by the New Zealand Company.[35]

As we have noted at section 10.5, Grey had directed McCleverty that the lands to be acquired to replace cultivations 'required' by settlers should be lands selected by Maori themselves. Grey added that every such exchange should be 'rather advantageous to the natives than otherwise'. Claimant counsel referred to Anderson and Pickens as commenting that:

> Replacement lands were to be selected by Maori themselves, but whether this directive was carried out is obscured by the lack of minutes or reports on the negotiations. There are indications, however, that this was not the case. McCleverty and Grey rejected the Maori request that they should be given lands within company subsidiaries larger than the 100 acres that were supposed to comprise the country sections. And although Maori expressed a wish to stay near the town, most of the land[s] allocated to them were in outlying areas.[36]

Crown counsel submitted that the arrangements were consensual.[37] However, as we have noted above, McCleverty found it difficult to find land comparable in quantity and quality, and with ease of access from where Maori lived, so as to induce them willingly to relinquish the 576 acres of their cultivations on sections said to belong to settlers. McCleverty also noted that Maori naturally complained at being asked to give up their cultivations close to town.

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34. McCleverty's final report, 20 November 1847, CO208 (doc C1(c), p 271)
35. Claim 1.2(d), para 12.7
36. Document I2, pp 48–49 (cited in doc O3, p 242). The option of Maori being given lands in 'company subsidiaries' larger than 100 acres was an idea mentioned by McCleverty in his preliminary report. Since many rural sections were actually between 110 and 130 acres in size and the land orders purchased from the New Zealand Company were for only 100 acres, McCleverty suggested that settlers could be confined strictly to 100-acre sections and the difference of some 10–30 acres could be used by Maori for cultivation. Grey, however, rejected this suggestion, saying that this difference in acreage was 'a question between the Company and their settlers': McCleverty, 'Report on Port Nicholson Cultivations', enclosed with Governor Grey to Earl Grey, 21 April 1847, BPP, vol 6, [892], p 41; Governor Grey to Earl Grey, 21 April 1847, BPP, vol 6, [892], pp 37–38.
37. Document Q1, pp 27, 29; doc P1, pp 78–82

McCleverty claimed that he had adhered to Grey's instruction that 'the exchange should be in favor of the Natives'. He considered that, 'as far as practicable, and in convenient localities of their own selection', he had 'reserved sufficient for their future wants, as to Cultivations, fishing stations, facilities for obtaining firewood and their future attention to cattle'.[38] However, he followed this statement by noting that the greater part of the land assigned to Maori:

> is only available for fishing purposes, or to depasture cattle, to which I believe it is advisable to attract, if possible, the native population. The Lands now relinquished by the Natives are the very best selected on account of soil, aspect, and vicinity to their homes, and are therefore scattered over a large extent of country. The Land they receive in exchange, has not these advantages, and it was therefore necessary to obviate some difficulty arising from this, by reserving for them large Blocks.[39]

We would observe that exchanging a greater quantity of inferior land in more remote localities for the best land in convenient places does not, on its face, constitute a fair exchange.

The underlying principle in Grey's instructions to McCleverty was that Maori should be persuaded to relinquish the Maori cultivations 'required by the settlers'. It is apparent that Maori were placed under great pressure by McCleverty to relinquish much of their high quality cultivation land and to move, for the most part, to more distant and less fertile land, much of it suitable only for fishing purposes or the depasturing of cattle. The Tribunal cannot escape the conclusion that, given a free and unpressured choice, Maori would have elected to retain their existing cultivations, many of which were in close proximity to their homes and to the sea. Save for a few exceptional cases, no effort was made by the Crown or its agents to persuade, whether by financial or other inducement, the settlers to give up the Maori cultivations, or to remove to inferior and more remote land. Maori, not the settlers, were required to give way.

### 10.6.4 Tribunal finding of Treaty breach

The Tribunal finds that the Crown failed to ensure that Maori who were parties to the McCleverty deeds were given a free and unpressured choice as to whether they wished to relinquish their cultivations in favour of the settlers and a free and unpressured choice as to any land they might receive in exchange. By such failure, the Crown failed to protect the rangatiratanga of such Maori in and over their cultivations, as required by article 2 of the Treaty, and the Crown further failed to act reasonably and in good faith towards them. As a consequence, they were prejudicially affected thereby.

38. McCleverty's final report, 20 November 1847, CO208 (doc C1(c), p 268)
39. Ibid (p 269)

### 10.6.5 Land granted to Maori

Of the total area of land granted to Maori as a result of the McCleverty awards – nearly 20,000 acres – the largest portion came from outlying unsurveyed lands.

The four largest outlying blocks, which contained some 14,340 acres, were Orongorongo (6990 acres), Korokoro (1214 acres), Parangarau (Wainuiomata) (4704 acres), and Opau (Ohariu) (1431 acres).[40] These four blocks, all on unsurveyed land, amounted to nearly three-quarters of the lands awarded by McCleverty, who commented that they 'may appear large in extent, but in reality they possess little land available for cultivation, particularly those at Orongorongo and Parangarau'. McCleverty also noted that nearly half of the Orongorongo block was not within the Port Nicholson deed of purchase area, being east of the 'Turakirai range' (that is, the Rimutaka Range, which meets the sea at Cape Turakirae and which formed the eastern boundary of the Port Nicholson block).[41]

McCleverty reported that Maori were cultivating 62 acres of the town belt at the time of the January 1844 agreement and that he had assigned 219 acres of the town belt to Maori, leaving more than 1300 acres available for public purposes.[42]

The third source of land 'exchanged' by McCleverty was the New Zealand Company's native reserves (tenths), which were expressly reserved to Maori in the schedule attached to the 1844 deeds of release: 39 country sections of 100 acres each (3900 acres) and 110 town sections of one acre (110 acres), totalling 4010 acres. McCleverty awarded to individual hapu 45 town acres and 3162 country acres which had been held in trust for all Wellington Maori. As a result, these reserves were taken out of the administration of the trustees for the tenths reserves and were vested in hapu members. Once assigned by McCleverty, these reserves were no longer known as tenths. Along with the land assigned by McCleverty from the town belt and unsurveyed land, they became known as 'McCleverty reserves'.

In summary, the so-called 'McCleverty exchanges' came almost exclusively from three sources:

- the town belt, 219 acres of which were vested in Maori;
- company tenths Maori reserves which were converted to specific hapu reserves; and
- unsurveyed land, of which 14,340 acres, or nearly three-quarters of the total land 'exchanged' by McCleverty, was appropriated, which land McCleverty erroneously considered to be waste land belonging to the Crown.

The Tribunal considers, for reasons which we next discuss, that almost all of the land said to have been given to Maori by McCleverty in fact already belonged to them. As a consequence, the valuable Maori cultivations were obtained at virtually no cost to the Crown or the company but at considerable cost to Maori, who lost much of their best land.

40. Schedule included with McCleverty's final report, 20 November 1847, CO208 (doc C1(c), p 278)
41. McCleverty's final report, 20 November 1847, CO208 (doc C1(c), pp 265–266)
42. Ibid (pp 269–270)

## 10.7 Whose Land Was Exchanged for Maori Cultivations?

### 10.7.1 The town belt land

The Tribunal has found in chapter 6 that the town belt was never validly purchased from Maori but was taken by the Crown without Maori consent, in breach of article 2 of the Treaty. Accordingly, in purporting to exchange part of the town belt for certain of their cultivations which Maori were asked to surrender, the Crown was doing no more than offering to Maori land which they had never willingly or knowingly parted with, and which they still rightly owned.

### 10.7.2 The company tenths Maori reserves

As we have seen, clause 13 of the November 1840 agreement between the Crown and the New Zealand Company stated that the Crown was to ensure the provision of the tenths reserves for Maori referred to in the Port Nicholson deed of purchase (see s 5.4.2). In 1844, Lord Stanley instructed FitzRoy that the Government was to reserve one-tenth of all lands acquired from Maori in Port Nicholson for the benefit of Maori.[43]

The Tribunal finds in chapter 12 that Port Nicholson Maori were the beneficial owners of the tenths reserves (see s 12.4.3). We consider it to be plain that the Crown was obliged to ensure that the company provided the tenths reserves for Maori on any land it acquired in the Port Nicholson district. As we have seen, 39 such reserves of 100 acres each and 110 one-acre reserves were provided for in the schedule agreed upon by Wakefield and Clarke which formed part of each of the 1844 deeds of release.

However, most of these reserves, which were intended to be held in trust for Maori in the Port Nicholson block, were assigned by McCleverty to individual hapu. In short, the Crown assigned to the hapu reserves of which Maori were already the equitable owners.

### 10.7.3 The unsurveyed lands assigned to Maori

As we have seen, McCleverty made several references to the unsurveyed land in the Port Nicholson deed of purchase district as being waste land belonging to the Crown. It is apparent that he felt justified in awarding such land to Maori as compensation for the surrender of their rights to their cultivations on 'settlers' land'. It is clear that McCleverty did not consider that the unsurveyed land from which such 'exchanges' were made belonged to the New Zealand Company; rather, he believed that it was waste land and Crown demesne.

Crown counsel submitted that the Crown acquired ownership of this unsurveyed land as a result of the 1844 deeds of release. We have examined and rejected this submission in chapter 8, where we found that the deeds of release related only to the 71,900 acres of land

43. Stanley to FitzRoy, 18 April 1844, BPP, vol 2, apps, p 77

specifically referred to in the schedule attached to each of the deeds. They did not relate to the remaining land, comprising some 137,347 acres, and such remaining land had not been sold by Maori either to the New Zealand Company or to the Crown (see s 8.3.10).

We agree with Crown counsel's submissions that the term 'waste lands' has several meanings depending on the context: 'It was applied generally to unallocated Crown lands (after the extinction of native title). It could also refer to the doctrine that certain lands inhered in the Crown by virtue of its sovereignty because no other party could show title to them.' In the New Zealand context, some officials questioned whether Maori could substantiate claims to every part of the country and argued that, where Maori could not substantiate claims, the land would vest in the Crown without any need to negotiate the extinction of the native title. However, Crown counsel further submitted that it is well established that a policy of identifying waste lands was never implemented in New Zealand.[44] Yet, this is what McCleverty assumed had occurred. For something close to a decade, various secretaries of state for the colonies (particularly Earl Grey) found it difficult to accept that no waste land existed in New Zealand.

### 10.7.4 'Waste lands'

The subject of waste lands in New Zealand in relation to the Treaty of Waitangi has been authoritatively considered by Peter Adams.[45] The following abbreviated discussion is based on his seminal work *Fatal Necessity*. In the following passage, Adams, after citing various authorities, describes the relationship of Maori to their land:

> There is no doubt that in 1840 the Maoris claimed the ownership of the whole of the islands of New Zealand. In a country where the amount of habitable land was limited by climatic, geographic, and resource factors, competition between numerous tribes and subtribes had led, within the historical pattern of Maori settlement, to the establishment of more or less well-defined areas of tribal ownership. In these areas land was used both for cultivation and for the produce that lived and grew naturally upon it, or in the streams, lakes, and swamps which watered it: flax, timber, and fern root, rats, birds, eels, and fish. Partly because the Maoris practised shifting agriculture, but chiefly because the scarcity of edible flora and fauna demanded the full use of natural food resources to be found in the forests and swamps, any European distinction between 'cultivated' and 'waste' land was essentially inappropriate. Land and water, whether wild or tamed, provided the necessities of life.

44. Document P1, p 9
45. Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830–1847* (Auckland: Auckland University Press, 1977), ch 6; see also Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 2, s 5.3

> Beyond its economic utility, however, land had emotional and societal values. It conferred dignity and rank, providing the means for hospitality, the battlefield where prowess might be displayed and honour won, the resting place for the dead, and the heritage of future generations. It carried on its back the *pa* and the *marae*, the *wahi tapu*, or burial grounds, and the sacred places. Land was a giver of personal identity, a symbol of social stability, and a source of emotional and spiritual strength.[46]

Lord Normanby, early in his instructions to Hobson, noted that the title of Maori 'to the soil and to the sovereignty of New Zealand is indisputable, and has been solemnly recognised by the British Government'.[47] Hobson was accordingly instructed that he was 'to obtain, by fair and equal contracts with the natives, the cession to the Crown of such *waste lands* as may be progressively required for the occupation of settlers resorting to New Zealand' (emphasis added). Normanby clearly envisaged that the 'waste lands' would have to be purchased from Maori. He also directed Hobson that he was not to purchase from Maori any territory 'the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence'.[48]

However, in November 1840 the charter providing for the separation of New Zealand from New South Wales, which was drafted with Lord John Russell's approval, safeguarded the rights of Maori only to 'the actual occupation or enjoyment . . . of any lands in the said colony now actually occupied or enjoyed by such natives'.[49]

The 1844 report of the House of Commons select committee inquiring into the state of the colony of New Zealand included among its resolutions a finding that the Treaty of Waitangi was 'injudicious'. A further resolution recommended that means be found for establishing the exclusive title of the Crown to 'all land not actually occupied and enjoyed' by Maori.[50]

On 13 August 1844, Stanley sent FitzRoy a copy of the 1844 select committee report. He noted that the report proceeded on the assumption that 'the uncivilized inhabitants of any country have but a qualified dominion over it, or a right of occupancy only'.[51] However, he thought it inappropriate to apply this assumption to Maori, given their superior ranking among native peoples. Moreover, to restrict the rights of Maori to 'lands actually occupied for cultivation' appeared to him 'wholly irreconcilable with the large words' of article 2 of the Treaty of Waitangi.[52]

Later in 1844, in a dispatch to FitzRoy, Stanley again discussed the topic of 'waste land' with reference to the position of the New Zealand Company:

46. Adams, p 177
47. Instructions from the Marquis of Normanby to Captain Hobson, 14 August 1839, BPP, vol 3, p 85
48. Ibid, p 87
49. 'Royal Charter for Erecting the Colony of New Zealand', 16 November 1840, BPP, vol 3, p 154
50. 'Report from the Select Committee on New Zealand', 29 July 1844, BPP, vol 2, pp 12–13
51. Stanley to FitzRoy, 13 August 1844, BPP, vol 4, p 145. The words quoted are actually from a speech Governor George Gipps of New South Wales made on 9 July 1840 and were quoted approvingly by the select committee on New Zealand: BPP, vol 3, p 185; 'Report from the Select Committee on New Zealand', 29 July 1844, BPP, vol 2, p 6.
52. Stanley to FitzRoy, 13 August 1844, BPP, vol 4, pp 145–147

> There is no doubt, that at the time of entering into the original undertaking, it was believed that there was an immense extent of territory, the claims to which had been previously obtained by fair purchase on the part of the Company, or to which no one could assert a valid claim. But subsequent experience seems to show that much more land than was supposed is owned in New Zealand according to titles well understood, either by some individuals, or at all events by some tribes.[53]

Stanley's successors took a more hard-line approach. Gladstone had only a brief tenure at the Colonial Office and his successor, Earl Grey (as Lord Howick), had chaired the 1844 House of Commons select committee on New Zealand. Adams notes that Earl Grey was determined, on becoming Secretary of State, to put the select committee's principal recommendation into practice. Accordingly, Earl Grey instructed Governor Grey in December 1846 to undertake the registration of land titles (something his predecessors had also been urged to do), on the basis that Maori owned only those lands which they occupied and cultivated; the remainder (the 'waste lands') would belong to the Crown.[54] A new royal charter for New Zealand, sent with Earl Grey's letter, was accompanied by lengthy royal instructions, chapter 13 of which set out provisions for the settlement of the waste lands of the Crown.[55]

Grey prevaricated in responding to Earl Grey's explicit instructions to compile a register of land titles. He did, however, advert to the topic of waste lands in a dispatch to the Secretary of State in April 1847.[56] He enclosed a letter from Wakefield in which the New Zealand Company agent was critical of Grey's action in purchasing the Porirua district from Ngati Toa while McCleverty was absent on military duty.[57] This followed Commissioner Spain's earlier finding that the company was not entitled to a Crown grant of any land in the Porirua district.

A principal justification of his purchase was given by Grey as follows:

> the position I understand to be adopted by the New Zealand Company's Agent, that if tracts of land are not in actual occupation and cultivation by natives, that we have, therefore, a right to take possession of them, appears to me to require one important limitation. The natives do not support themselves solely by cultivation, but from fern-root, – from fishing, – from eel ponds. – from taking ducks, – from hunting wild pigs, for which they require extensive runs, – and by such like pursuits. To deprive them of their wild lands, and to limit them to lands for the purpose of cultivation, is in fact, to cut off from them some of their

53. Stanley to FitzRoy, 30 November 1844, BPP, vol 4, p 205

54. Adams, p 187. See Earl Grey's dispatch to Governor Grey, 23 December 1846, BPP, vol 5, pp 520–528, where, in a lengthy discourse, Earl Grey opines that 'From the moment that British dominion was proclaimed in New Zealand, all lands not actually occupied in the sense in which alone occupation can give a right of possession, ought to have been considered as the property of the Crown in its capacity of trustee for the whole community': pp 524–525.

55. 'The Queen's Instructions … Accompanying the New Zealand Charter', ch 13, BPP, vol 5, pp 540–543

56. Governor Grey to Earl Grey, 7 April 1847, BPP, vol 6, [892], pp 14–17

57. Wakefield to superintendent, southern division, 25 March 1847, BPP, vol 6, [892], pp 17–18

> most important means of subsistence, and they cannot be readily and abruptly forced into becoming a solely agricultural people. Such an attempt would be unjust, and it must, for the present, fail, because the natives would not submit to it: indeed they could not do so, for they are not yet, to a sufficient extent, provided even with the most simple agricultural implements; nor have they been instructed in the use of these. To attempt to force suddenly such a system upon them must plunge the country again into distress and war; and there seems to be no sufficient reason why such an attempt should be made, as the natives are now generally very willing to sell to the Government their waste lands at a price, which, whilst it bears no proportion to the amount for which the Government can resell the land, affords the natives (if paid under a judicious system) the means of rendering their position permanently far more comfortable than it was previously, when they had the use of their waste lands, and thus renders them a useful and contented class of citizens, and one which will yearly become more attached to the Government.
>
> I am satisfied, that to have taken the waste lands I have now purchased by any other means than those I have adopted, would once more have plunged the country into an expensive war, which, from its supposed injustice, would have roused the sympathies of a large portion of the native population against the British Government, and would thus probably have retarded for many years the settlement and civilization of the country.[58]

Although, in this passage Grey does not appear to dispute the notion of waste land, he is at pains, in the case of the Ngati Toa people, to limit its scope. In recognising the need for Maori to be left with their 'wild lands' (which he appears, somewhat confusingly, to include in their 'waste lands'), Grey justifies his decision to purchase the whole of Ngati Toa's land at Porirua rather than arbitrarily take possession of those lands which Ngati Toa were not occupying and cultivating. As will later appear, Grey had no such inhibitions in granting title to the company over much of the Maori land in the Port Nicholson district which was of a similar character to that purchased by him at Porirua. No effort was made by McCleverty to purchase the extensive lands belonging to Maori which the Crown had not acquired in the Port Nicholson block. Nor did Grey require that he should do so.

Grey finally, and very belatedly, responded to Earl Grey's instruction of December 1846 that he compile a register of land titles. In a letter to Earl Grey of 15 May 1848, he expressed his dissent from the opinions of 'high authorities' in the northern part of the North Island that 'there is no waste land in this colony which can be appropriated to the Crown without purchase'. He stated that, even in the most densely inhabited parts of the northern part of the island, 'there are very large tracts of land claimed by contending tribes to which neither of them have a strictly valid right'. He forecast that, when these tracts of country came to be occupied by Europeans, Maori would 'cheerfully relinquish their conflicting and invalid

58. Governor Grey to Earl Grey, 7 April 1847, BPP, vol 6, [892], pp 16–17

claims in favour of the Government, merely stipulating that small portions of land, for the purposes of cultivation, shall be reserved for each tribe'.[59]

As to chapter 13 of the royal instructions, which dealt with the settlement of waste lands of the Crown, Grey stated that he had found it expedient to move slowly in relation to the registration of Maori land. He considered a requirement that Maori should register their claims to land within a certain time limit would almost certainty meet with strong resistance. Unless a general survey of the island was undertaken, and the boundaries of the different claims mapped, the registration of claims by Maori would provide little information and be of little use. It would be preferable not 'to disturb the present tranquillity of the country' by requiring Maori generally to register their claims. Instead, he followed a practice of purchasing Maori land 'for a trifling consideration' in advance of actual needs of European settlers.[60]

Adams concludes that, during the first seven years of the Crown colony in New Zealand, the Colonial Office politicians either failed to understand or were reluctant to accept the full implications of what article 2 of the Treaty guaranteed to Maori, though by the end of the period they were prepared to let the matter be decided in New Zealand.[61]

As we have seen, Grey was equivocal. He appeared to consider that some waste land existed in New Zealand, while at the same time stating that Maori should not be stripped of their 'wild land'. Rather than asserting the Crown's right to assume such waste land as he considered might exist, he preferred to purchase Maori land in the interest of peace and tranquillity. For this reason, he declined to establish a register of land occupied by Maori, as required by Earl Grey.

Grey thought it essential to purchase the land in the Porirua district from Ngati Toa, yet he dealt very differently with equivalent land in the adjoining Port Nicholson block. He allowed McCleverty to assign to Maori, in 'exchange' for their valuable cultivations, land which they already owned and which they had never surrendered. McCleverty did so in the erroneous belief that such land was 'waste land' belonging to the Crown. In addition, as we discuss at section 10.8.4, Grey granted to the company in 1848 some 120,626 acres which had never been purchased from Maori either by the company or by the Crown. Given Grey's assurances to Earl Grey that the appropriate course in New Zealand was to purchase from Maori the land required for settlement, we would have expected him to follow this course in the Port Nicholson district as he had done in the adjoining Porirua district.

### 10.7.5 Tribunal finding of Treaty breach

The Tribunal finds that the land assigned to Maori by McCleverty, in exchange for the release by Maori in the Port Nicholson district of their cultivations on land claimed by settlers, was

59. Governor Grey to Earl Grey, 15 May 1848, BPP, vol 6, [1120], p 24
60. Ibid, pp 24–25
61. Adams, pp 188–189

not waste land belonging to the Crown, nor did it belong to the New Zealand Company. This land (comprising portions of the town belt, tenths reserves, and the unsurveyed lands) was in part reserves held in trust for Maori, while the remainder was land belonging to Maori having customary interests in the Port Nicholson block. As a result, the Crown failed to protect the article 2 Treaty rights of such Maori to their land, and they received no compensation for the release of their valuable cultivations to the Crown.

The Tribunal further finds that, as a consequence of the foregoing, the Crown failed to fulfil its obligation under article 2 of the Treaty to protect the rangatiratanga of Maori in and over their land by ensuring that their tenths reserves remained intact and that they received adequate compensation for the surrender of their valuable cultivations, which had been expressly reserved to them. As a consequence, Maori having customary rights in the Port Nicholson block were seriously prejudiced thereby.

## 10.8 Grey's 1848 Port Nicholson Crown Grant

McCleverty's final report of 20 November 1847 was sent by Lieutenant-Governor Edward Eyre to Wakefield. Eyre urged the company agent to accept a Crown grant in terms of the report.[62] Wakefield replied promptly, accepting such a grant.[63]

Early in December, Eyre advised McCleverty that Wakefield had agreed to accept a Crown grant for 'that portion of the Port Nicholson claim which is comprised within the limits of the *surveyed lands*, subject to the exceptions and reservations marked in Schedules A and B . . . to your report' (emphasis in original).[64] However, Eyre was shortly thereafter to revise his initial decision to confine the company's grant to the surveyed lands only.

On 24 December 1847, Eyre wrote to Grey concerning the Port Nicholson Crown grant, informing him that:

> In consequence of the recent arrangements entered into between Her Majesty's Government and the New Zealand Company by which the demesne lands of the Crown are for three years to be placed entirely in the hands of the Company, I have directed the Crown Solicitor in preparing the Deed of Grant to let it embrace the whole area comprised within the limits of the purchase (excepting the lands reserved) without reference to any specific quantity to which the NZ Company laid claim or which had been awarded to them in that particular district. I have adopted this arrangement upon the consultation with the Special Commissioner Lt Col McCleverty.[65]

62. Eyre to Wakefield, 23 November 1847, CO208 (doc C1(c), pp 250–261)
63. Wakefield to Eyre, 29 November 1847, CO208 (doc C1(c), pp 281–284)
64. Eyre to Wakefield, 2 December 1847, Turton, *Epitome* (doc A26), s D, p 14
65. Eyre to Grey, 24 December 1847, NM4/1/47/96, pp 122–124 (doc E7, p 271e)

### 10.8.1 The Loans Act 1847

To understand Eyre's reference to 'recent arrangements' between the Crown and the company, it is necessary to refer to the Loans Act 1847, which was passed by the British Parliament. On 19 June 1847, Earl Grey sent to Governor Grey a copy of the Loans Bill, which was later enacted on 23 July 1847.[66] It is evident that this reached Grey (and Eyre) by December 1847, if not earlier.

In 1847, the directors of the New Zealand Company, frustrated at the long delay in obtaining title to the lands on which their settlers were living and by associated problems, sought compensation from the British Government. They asked that 'the Government relieve them of the enterprise which it has marred, and take to itself both their liabilities and their assets'.[67] Earl Grey's response was to admit that the company had established a claim against the Government. He outlined proposals by which the company would be enabled to carry on trading for a further three years, at which time it could elect whether or not it wished to continue.[68] These proposals formed the basis of the Loans Act 1847.[69]

The principal relevant provisions of the Loans Act were:

- The provisions on the settlement of the waste lands of the Crown in chapter 13 of the royal instructions of 23 December 1846 (except those relating to the registration of land title, the means of ascertaining the demesne lands of the Crown,[70] the claims of Maori to land, and the restrictions on the conveyance of Maori land to persons other than the Crown) were suspended for three years until 5 July 1850 (s 1).
- The demesne lands of the Crown in the province of New Munster were vested for three years in the New Zealand Company in trust and were to be administered in the best way to promote the efficient colonisation of New Zealand (s 2).[71]
- A minimum price of £1 per acre was fixed for any land so vested in the company which it wished to sell, with the exception of land to be used for public purposes (s 3).

66. Earl Grey to Governor Grey, 19 June 1847, BPP, vol 5, pp 663–665
67. Harrington to Earl Grey, 23 April 1847, BPP, vol 5, p 654
68. Hawes (for Earl Grey) to Harrington, April 1847 (sent 10 May 1847), BPP, vol 5, pp 656–659
69. The Loans Act 1847, 10 and 11 Victoria, c 112 (doc E7, pp 312–317)
70. The phrase 'demesne lands of the Crown', which is used on several occasions in the instructions, is not defined. The demesne lands of the Crown are defined in W J Byrne's *A Dictionary of English Law* (London: Sweet and Maxwell, 1923) at page 293 as being:

> those which belong to the sovereign in his public capacity, that is, by succession from his predecessors, or by escheat, etc, as opposed to his private estates, namely, such as have been acquired by him by moneys out of his privy purse, or by gift or inheritance from any person other than his predecessors in their public capacity. The demesnes are under the management of the Commissioners of Woods, Forests, and Land Revenues, and their revenue forms part of the Consolidated Fund.

In short, 'demesne lands of the Crown' are those held in the name of the monarch in her or his public capacity in contrast to being the monarch's personal private property. They are administered by public officials, and any revenue from them is public property. They may include land from which the native title has been extinguished or where no other party could show a claim to them.

71. New Munster was made up of the South Island, and the southern part of the North Island (including Port Nicholson).

- The Treasury was authorised to advance up to £136,000 to the company over the three-year period. This was in addition to £100,000 earlier authorised to be paid to the company, and all such advances were to be free of interest (s15).
- The company was able to relinquish its undertaking if it thought fit, in which event all company lands in New Zealand would revert to and become vested in Her Majesty as part of the demesne lands of the Crown (s19).

It appears that Eyre either believed or adopted McCleverty's belief that the remainder of the 209,247 acres in the Port Nicholson block, beyond the 71,900 acres covered by the deeds of release and Spain's award, were demesne lands of the Crown and hence covered by the Loans Act 1847. We are unaware of any basis for such a belief. It may be that Eyre simply adopted McCleverty's assumption or that he misinterpreted the Loans Act's provisions.

### 10.8.2 Grey signs the Port Nicholson Crown grant

Six days after Eyre's letter to Grey, Daniel Wakefield, the Crown solicitor for New Munster, sent a draft Crown grant to Wakefield for his perusal. This draft purported to grant 168,000 acres to the company and to exclude from the grant certain reserves and exceptions.[72] Although approved by Wakefield, it was subsequently amended by substituting 209,247 acres for 168,000 acres, and was duly signed by Grey on 27 January 1848.[73]

It is apparent that Grey agreed with his deputy Eyre that the Crown grant should embrace the whole area of the 209,247 acres contained within the limits of the 'purchase' (excepting the lands reserved), 'without reference to any specific quantity to which the NZ Company laid claim or which had been awarded to them in that particular district'.[74] We infer from Eyre's instruction and Grey's concurrence that neither of them was concerned with the fact that both Spain's award and FitzRoy's Crown grant were limited to 71,900 acres (less the Maori tenths reserves and pa, cultivations, and urupa). Nor were they concerned that all that Maori surrendered under the 1847 McCleverty deeds were their cultivations on lands said to belong to European settlers, which amounted to some 467 acres.[75]

At most, Maori may be said to have released the 67,890 acres covered by the deeds of release, less pa, urupa, and any cultivations not surrendered under the 1847 McCleverty deeds. Neither Eyre nor Grey is on record as explaining how land which Maori had never willingly or knowingly sold or alienated had, in his opinion, become demesne lands of the Crown and hence subject to the provisions of the Loans Act 1847. Nor is there any basis for such an assumption.

72. Daniel Wakefield to William Wakefield, 30 December 1847, CO208 (doc C1(c), pp 299, 301–304)

73. William Wakefield to Daniel Wakefield, 31 December 1847, CO208 (doc C1(c), p 300); Port Nicholson Crown grant (doc A10(a), pp 10:1–10:2)

74. Eyre to Grey, 24 December 1847 (cited at s 10.8)

75. According to McCleverty, there were 576½ acres of Maori cultivations on settler-claimed sections, but Ngauranga Maori refused to surrender 109½ acres of these cultivations, leaving 467 acres which were surrendered in the 1847 deeds.

### 10.8.3 Land reserved for Maori under the 1848 Crown grant

Attached to the Crown grant were two plans. The first was a plan of the town of Wellington.[76] The second was a map of the Port Nicholson district showing the country sections and the land excepted from the Crown grant to the company.[77] From these plans and the schedules endorsed on them, it appears that the total quantity of land reserved for Maori was some 20,070 acres, as shown in the following table.

Area left to Maori under 1848 Crown grant

| Categories of reserved land | | Area | | |
|---|---|---|---|---|
| | | Acres | Roods | Perches |
| 1 | Reserves in town of Wellington, cultivations on town belt, Te Aro Pa | 335 | 3 | 13 |
| 2 | Pa and cultivations not surrendered on rural 'settlers' sections' | 113 | 2 | 18 |
| 3 | Reserved blocks on unsurveyed land | 14,340 | 3 | 28 |
| 4 | Country Maori tenths reserves | 4200 | – | – |
| 5 | West coast additional reserves * | 770 | – | – |
| 6 | Grey's purchase of Hutt section 19 (106 acres) and Harbour section 4 (104 acres), and surrender of Kaiwharawhara district Government domain (100 acres)† | 310 | – | – |
| | **Total** | **20,700** | | |

* McCleverty excepted from the land to be granted to the New Zealand Company 20,600 acres on the south-west coast of the Port Nicholson district to enable land to be reserved for the smaller Maori settlements on the coast between Cape Terawhiti and Ohariu. These communities were on unsurveyed land and had no cultivations on sections claimed by settlers. McCleverty proposed in his final report that their cultivations be surveyed, as well as convenient blocks for future cultivations as selected by them (McCleverty's final report, 20 November 1847, CO208 (doc C1(c), pp 270–271)). Moore states that in June and July 1848 McCleverty returned to the west coast settlements and surveyed and assigned Maori reserves of 400 acres at Waiariki, about 20 acres at Oterongo, and 350 acres at Ohaua/Te Ika a Maru. The remainder of the 20,600 acres excepted from McCleverty's award (19,830 acres) was effectively claimed by the Crown and thus went to the Company under the Loans Act 1847 (Moore, doc I7, pp 7, 44).

† See sections 10.4.1 and 10.4.2 above. Although the 100-acre Government domain was assigned to Kaiwharawhara Maori by McCleverty, it was still shown as a public reserve in the schedules to the 1848 Crown grant.

In round figures, Maori were reserved some 20,000 acres out of the 209,247 acres in the Port Nicholson district. It should be noted, however, that almost none of the land reserved for Maori had ever been purchased from Maori by the company or the Crown. The 106 acres for Waiwhetu Maori was purchased by the Crown from a settler, but this purchase did no more than meet Wiremu Kingi's insistence, before signing the 1844 deed of release at Waiwhetu, that Spain provide land for cultivations. Spain neglected to do so, and Grey simply met the obligation unmet by Spain. The only other section purchased for Maori from a settler was Harbour section 4, which was purchased for Kaiwharawhara Maori. Thus, the

76. SO10408 (doc A9(a))
77. SO10456 (doc A9(b))

reservation of some 20,000 acres for Maori was not an act of generosity on the part of the Crown, since almost all this area was already Maori land.

### 10.8.4 The terms of Grey's 1848 Port Nicholson Crown grant

The preamble to the 1848 grant, made in the name of Queen Victoria, recited that:

> Whereas it hath been made to appear to Us that the New Zealand Company hath acquired from certain aboriginal Natives in the Province of New Munster in the Colony of New Zealand entitled in that behalf a full and valid cession of all the right of such aboriginal Natives to the lands hereinafter particularly described (subject to the reservations hereinafter made) . . .

There then followed a description of the boundaries of the 'District of Port Nicholson or Wanganui Atera', which were estimated to contain 209,247 acres. Excluded from this area were the reserves and exceptions described in the two plans and in the schedules to the plans attached to the grant. The plans are those referred to in section 10.8.3.[78]

The preamble claims that the New Zealand Company acquired from certain Maori 'a full and valid cession of all the right' of such Maori to the lands in the Port Nicholson district. It does not state in what manner the company acquired such 'full and valid cession' of those lands. The company did not acquire it by means of the so-called 1839 Port Nicholson deed of purchase or as a result of the McCleverty 'exchanges', which, with minor exceptions, 'exchanged' Maori land for Maori land. Nor was the land acquired under the 1848 Crown grant waste land or demesne land of the Crown.

In calculating the area acquired by the New Zealand Company under the 1848 Crown grant, allowance must be made for the 4010 acres of tenths reserved for Maori under the 1844 deeds of release. In addition, the land occupied by Maori for their pa, cultivations, and urupa within the lands set out in the schedule to the deeds of release was probably of the order of 900 acres. If these areas are deducted from the 71,900 acres, Maori may be said to have released some 67,000 acres to the New Zealand Company under the deeds of release. We assess the area of land acquired by the New Zealand Company under the 1848 Crown grant as set out over.[79]

On the assumption that Maori agreed to release to the company some 67,000 acres under the 1844 deeds of release for £1500, the question remains whether Maori willingly and knowingly agreed to release the balance of the 187,626 acres effectively granted to the company.

78. Documents A9(a), (b)

79. Figures for public reserves taken from the schedules on the plans attached to the Crown grant (docs A9(a), (b)), and enclosed with Wakefield to secretary, New Zealand Company, 28 February 1848, CO208 (doc C1(c), pp 312–319). Although these schedules list the 100-acre Government Domain as a public reserve, this is not included in our figure for public reserves because this land had been assigned to Kaiwharawhara Maori and is counted as land reserved to Maori in section 10.8.3 above.

| | | | | | |
|---|---|---|---|---|---|
| Gross area of grant | | | | | 209,247 acres |
| Less | (1) | Area left with Maori as per table in section 10.8.3 | | 20,070 acres | |
| | (2) | Public reserves | | | |
| | | Country | 180 acres 1 rood 25 perches | | |
| | | Town | 49 acres 3 roods 22 perches | | |
| | | Town belt | 1320 acres 2 roods 34 perches | 1551 acres | |
| | | | | 21,621 acres | 21,621 acres |
| | | | | | **187,626 acres** |

**Area acquired by the New Zealand Company under the 1848 Crown grant**

That balance reduces to 120,626 acres after deducting the 67,000 acres released under the deeds of release.

It is clear that Maori received no payment for this large remaining unsold area of 120,626 acres. As we have seen, the McCleverty deeds did no more than require Maori to give up Maori cultivations to the Government 'in exchange' for land they already owned. That was the only land they surrendered. The McCleverty deeds are silent about the remaining 120,626 acres of land, which Maori have never willingly or knowingly surrendered and for which they were never paid. Such lands were neither 'waste lands' nor demesne lands of the Crown. Nor were they within the scope of the Loans Act 1847.

### 10.8.5 To whom did the remainder lands belong?

We need to determine who had rights in the 120,626 acres (the 'remainder lands') included in Grey's Crown grant to the New Zealand Company of 27 January 1848 (see map 8). These lands were never sold by Maori, nor were they paid for them.

In chapter 2, the Tribunal gave detailed consideration to the question of which Maori groups had customary rights as at 1840 to the lands within the Port Nicholson block (as extended to the south-west coast in 1844). At section 2.6.7, we concluded that those with take raupatu were the independent groups who were members of the collective which conquered Te Whanganui a Tara and its environs. This take raupatu, which covered all lands within the Port Nicholson block which were not covered by ahi ka rights at 1840, gave them the potential to further develop ahi ka rights within the block.

The Tribunal in section 2.7 made a finding that:

- At 1840, Maori groups with ahi ka rights within the Port Nicholson block (as extended in 1844 to the south-west coast) were:
  - Te Atiawa at Te Whanganui a Tara and parts of the south-west coast;
  - Taranaki and Ngati Ruanui at Te Aro;
  - Ngati Tama at Kaiwharawhara and environs, and parts of the south-west coast;
  - Ngati Toa at Heretaunga and parts of the south-west coast.

- These Maori groups also had take raupatu over the remainder lands of the Port Nicholson block.

At this point in time, some 150 years after the 1844 deeds of release were signed, it is impossible to determine with any precision the lands in the Port Nicholson block over which Maori had ahi ka rights. The closest the Tribunal can get to resolving this question is to assume that Maori had ahi ka over those lands which were surrendered under the deeds of release as described in the schedule to such deeds, plus the pa, cultivations, urupa, and tenths reserves which were reserved to them.

In the case of Ngati Toa, we have used the same touchstone in section 9.5.1 in concluding that, when in 1845 Te Rangihaeata finally acceded to the November 1844 'agreement', he surrendered Ngati Toa's ahi ka rights to the lands allotted to the New Zealand Company under the schedule to the 1844 or later deeds of release, subject to the condition that land be reserved for Ngati Rangatahi in Heretaunga. But Ngati Toa retained their take raupatu over the remaining land in Heretaunga and elsewhere in the Port Nicholson block over which the other Maori in the Port Nicholson block also had take raupatu (see s 9.7.2).

### 10.8.6 Tribunal findings of Treaty breach

The Tribunal finds that:

- As at January 1848, when Grey issued his Crown grant to the New Zealand Company, Ngati Toa, Te Atiawa, Taranaki, Ngati Ruanui, and Ngati Tama had customary take raupatu rights over the remainder lands of some 120,626 acres in the Port Nicholson block.
- Maori having rights in this block had not, as the 1848 Crown grant claims, made a full and valid cession of all their rights to the land in the Port Nicholson district. In particular, such Maori had not relinquished their take raupatu rights over some 120,626 acres or thereabouts included in the grant to the New Zealand Company.
- As a result, the Crown failed to act reasonably and in good faith towards its Treaty partners in disposing of the remainder lands without making any payment to or gaining the consent of such Maori and, further, failed actively to protect the rights of such Maori having an interest in such lands under article 2 of the Treaty of Waitangi, and such Maori have been seriously prejudiced thereby.

## 10.9 The Collapse of the New Zealand Company

By 1850, the affairs of the New Zealand Company were in a critical state. On 18 June, the directors of the company wrote to Earl Grey complaining that, in the three years allowed, the company had not been able to recoup its losses. It had anticipated that large tracts of demesne land of the Crown would have been made available to it, but this had not occurred. It sought

an extension of time and a variation of the terms of the Loans Act 1847.[80] Appended to the letter was a statement showing that between April 1847 and June 1850 the company had sold only 2⅝ acres to private individuals in Wellington.[81]

An interim reply to this letter from the Colonial Office advised the company that Earl Grey would not be able to recommend to Parliament any alteration in the terms of the agreement embodied in the Loans Act.[82] This letter was followed by a letter of 4 July from the directors to Earl Grey, enclosing a formal notice under section 19 of the Loans Act, in which the company advised that it was 'ready to surrender the Charters of this Company to Her Majesty, and all claim and title to the lands granted or awarded to them in New Zealand'.[83]

Section 19 of the Loans Act provided that, if the company advised the Crown by no later than 5 July 1850 that it was ready to surrender its charter and lands in New Zealand, then, among other consequences, all the company's lands in New Zealand would 'thereupon revert to and become vested in Her Majesty as Part of the Demesne Lands of the Crown'. On 5 July 1850, company secretary T C Harington wrote to William Fox, who had succeeded the late Colonel Wakefield as the company's principal agent in New Zealand, enclosing a copy of the section 19 notice and advising that, as a consequence, the company had discontinued its colonising operations in New Zealand as from 5 July 1850.[84]

Soon after the cessation of the company's business, several shareholders wrote to Earl Grey seeking a reprieve.[85] Earl Grey responded to this letter, sending a copy to the company, on 22 July 1850.[86] He denied that the British Government had in any way caused or contributed to the company's lack of success. He then dealt with the directors' complaint that they had expected that a large area of demesne lands would be placed at the company's disposal clear of native titles. As to this, he said:

> That it was anticipated from the first that there were native titles to land in New Zealand, which would require to be extinguished, and that this could only be effected by purchases by the Company, is abundantly clear. The Act of Parliament [ie, the Loans Act 1847] (section 6.) expressly states that the compensation, if any, to be made to the aboriginal inhabitants of New Zealand, for the purchase or satisfaction of their claims, rights, and interests in the demesne lands, is to be regarded as among the first charges on the Company's income to be derived from the sale of them. Consequently, it clearly was not contemplated that the demesne lands would, or could, pass at once into the Company's hands free of all pecuniary liability for the extinction of native titles. And in the despatch communicating the agreement to Governor Grey (June 19th, 1847), his Lordship informed the Governor 'when

80. Harrington to Earl Grey, 18 June 1850, BPP, vol 7, [1398], pp 5–10
81. BPP, vol 7, [1398], p 11
82. Hawes (for Earl Grey) to Harrington, 1 July 1850, BPP, vol 7, [1398], pp 11–12
83. Harrington to Earl Grey, 4 July 1850, BPP, vol 7, [1398], pp 2–3
84. Harrington to Fox, 5 July 1850, BPP, vol 7, [1398], p 4
85. Drane and others to Earl Grey, 9 July 1850, BPP, vol 7, [1398], pp 15–18
86. Hawes (for Earl Grey) to Drane and others, 22 July 1850, BPP, vol 7, [1398], pp 18–23

> any transactions of this sort,' that is, for the purchase of lands from the natives, 'are concluded in the southern province, the New Zealand Company will provide the means of payment from funds placed at their disposal, and have the disposal of the lands so acquired.'[87]

As we have seen, £1500 was provided by the company and expended by the Crown in 1844 in respect of some 67,000 acres (after allowing for tenths reserves, cultivations, pa, and urupa). No additional funds were provided by the company (or the Crown) for the further 120,626 acres owned by Maori which were vested in the New Zealand Company by Grey's 1848 Crown grant. Grey failed to ensure that the 120,626 acres were first purchased from Maori before granting them to the company, and he also failed to obtain the necessary funds from the company to effect such a purchase.

As a consequence of the New Zealand Company ceasing business in New Zealand, its lands, including those awarded to the company by Grey in the 1848 Port Nicholson Crown grant, became vested in the Crown. Maori in the Port Nicholson block have never been paid for the 120,626 acres granted to the company and subsequently vested in the Crown on the company's collapse.

87. Ibid, p 20

CHAPTER 11

# THE McCLEVERTY RESERVES AND WELLINGTON MAORI

## 11.1 Introduction

The previous chapter discussed the way in which Lieutenant-Colonel William McCleverty dealt with the question of Maori cultivations on sections claimed by settlers. McCleverty assigned land to Wellington Maori in 'exchange' for their cultivations, but the Tribunal has found that no genuine exchange took place, because the land assigned to Maori by McCleverty belonged to them already. The McCleverty arrangements were followed by the 1848 Crown grant to the New Zealand Company, which awarded the company the whole of the Port Nicholson block, with the exception of public and Maori reserves. As a result, Maori were left with only their reserves to support them. These reserves were now of two types: the tenths reserves and those awarded by McCleverty. The remaining tenths reserves were held in trust for Maori, and were administered on their behalf by the Government. The reserves awarded by McCleverty were assigned to the Maori of particular pa, and were largely managed by those Maori themselves. The administration and alienation of both types of reserve are discussed in later chapters of this report.

This chapter is concerned with the question of whether or not the land reserved by McCleverty was sufficient for the needs of Wellington Maori. It looks at the land assigned by McCleverty to the Maori of each pa and assesses the adequacy of this land in relation to the long-term requirements of these communities. It also discusses trends in Maori agriculture, economic position, population, and health, as well as the shift of the Maori population to the Hutt Valley and the departure of many Maori from the Wellington district altogether. Finally, the chapter examines the claim that the McCleverty arrangements led to a decline in Maori agriculture and population in Wellington.

## 11.2 The Land Reserved by McCleverty

Governor Grey evidently intended that Maori should live on and cultivate the land assigned to them by McCleverty, and that these reserves would be a permanent land base for Maori in Wellington. In his instructions to McCleverty in 1846, discussed in the previous chapter (see s10.5), Grey explained that his aim was to provide Maori with lands 'of such extent and

quality as to render them good and obedient citizens, by giving them a valuable and permanent interest in the prosperity of the country'. Grey added that every exchange should be advantageous to Maori in order to secure their comfort and 'their attachment to the form of Government under which they live'. Maori were to be placed in possession of 'lands adapted to their wants', and Grey urged McCleverty to ensure that both existing cultivations not on settler-claimed sections and adequate land for future cultivation should be included in the land to be assigned to them.[1] McCleverty believed that he would be carrying out Grey's instructions by attempting to ensure that the land which he assigned to Maori could be used for cultivation or other purposes, and by guaranteeing them their pa sites.

The Wellington Tenths Trust's statement of claim alleges that 'The Crown granted land to Maori following the McCleverty awards which was generally situated far from pa and far from the commercial centre of the township'.[2] Claimant counsel's closing submissions strongly suggest that the land reserved for Maori by McCleverty was inadequate in both quantity and quality and that, as a result, Maori agriculture and population at Port Nicholson suffered serious declines after 1847.[3] Ngati Tama claimants have also argued that the land assigned by McCleverty to Ngati Tama was inadequate, although they acknowledge that Ngati Tama fared better than some other Wellington Maori.[4] In response, the Crown contends that Maori would not have agreed to the McCleverty arrangements if they had not seen them as being in their favour, and that McCleverty compensated for the remoteness of much of the land which he assigned to Maori by reserving areas of land which were much larger than the areas already under Maori cultivation.[5]

The question of whether or not the McCleverty arrangements contributed to a decline in Maori agriculture and population is addressed at section 11.4, but this section outlines the land reserved by McCleverty and attempts to assess its adequacy for Maori needs. The urban and rural McCleverty reserves are shown in maps 9 and 10.

### 11.2.1 The McCleverty deeds

The first deed signed by McCleverty and Wellington Maori was that signed at Te Aro Pa on 22 March 1847. It assigned Te Aro Maori land in town and in the town belt, together with land some distance from the town, on the Ohariu and Porirua Roads. It also guaranteed their pa. In addition, a second deed, signed on 7 October 1847, assigned half of Ohiro section 26 to Te Aro Maori. This supplementary deed followed complaints by Maori at Te Aro that they lacked suitable land for kumara cultivation. In total, Te Aro Maori received 579 acres.[6]

1. Grey's instructions to McCleverty, 14 September 1846, BPP, vol 5, p 611
2. Claim 1.2(d), para 12.15
3. Document O3, pp 238–250, 253–255
4. Document H39, pp 21–24; doc N4, pp 30–31
5. Document P1, p 82
6. Document I8, pp 104–131; Te Aro deeds and plans in doc A10(a), pp 3:1–3:5, 3:7, 3:11–3:12

The Waiwhetu deed, signed on 30 August 1847, reserved for Waiwhetu Maori their pa and two areas of land in Lower Hutt, one reasonably close to their pa and the other more distant. They also shared Lower Hutt section 20 with Petone Maori, but it is not clear how this section was allocated between the two groups. Much of the land they received was good quality, and it had good road and river access. Exclusive of Hutt section 20, Waiwhetu Maori received a total of 250 acres.[7]

The Kumutoto deed was signed on 23 September 1847. It guaranteed Kumutoto Maori an urban tenth reserve containing their pa site, plus an area of land which they were cultivating in the town belt, on the present-day site of the Wellington Botanical Gardens, giving them a total of 54 acres.[8]

The Ngauranga deed, signed on 4 October 1847, assigned Ngauranga Maori a section and several adjoining part-sections on the western side of the harbour. This land, totalling 222 acres, included their pa and cultivations.[9]

Petone Maori signed their deed on 13 October 1847 and were assigned a total of 6926 acres. They were assigned harbour sections in the Hutt (including their pa site), together with a large area of land just to the north of the harbour sections, as well as two sections in Lower Hutt some distance away from their pa. McCleverty also reserved for them the large Parangarau block in the southeast of the Port Nicholson district, which was far away from their pa but which, according to McCleverty, contained 'extensive cultivations', eel ponds, and fishing stations.[10]

The deed for Ohariu, signed on 18 October 1847, reserved for Ohariu Maori a large area of land around their pa, another area somewhat further away but still within the Ohariu district, and a section of the Kaiwharawhara block closer to the town. It included the site of their pa and land already under cultivation, and covered some 2282 acres.[11]

Signed on 1 November 1847, the Pipitea deed reserved a number of town sections (including the Pipitea Pa site) and an area of the town belt which Pipitea Maori were already cultivating. Further out of town, McCleverty reserved part of the Kaiwharawhara block and two sections on the Porirua Road for Pipitea Maori. They were also assigned the large Orongorongo block in the south-east, around Turakirae Head, much of which was outside the Port Nicholson deed of purchase boundary. This block was very remote from Pipitea Pa and contained little land suitable for cultivation. The total area reserved for Pipitea Maori was 7436 acres.[12]

The land reserved by McCleverty for Kaiwharawhara Maori was recorded on an undated memorandum attached to a plan of the reserves. They were guaranteed their pa at

7. Document I8, pp 132–139; Waiwhetu deed and plans in doc A10(a), pp 3:6–3:8
8. Document I8, pp 98–103; Kumutoto deed and plans in doc A10(a), pp 3:28–3:29
9. Document I8, pp 139–145; Ngauranga deed and plans in doc A10(a), pp 3:8–3:10
10. Document I8, pp 145–164; McCleverty's final report, 20 November 1847, CO208 (doc C1(c), pp 265–266); Petone deed and plans in doc A10(a), pp 3:12–3:16
11. Document I8, pp 165–180; Ohariu deed and plans in doc A10(a), pp 3:16–3:18, 3:21
12. Document I8, pp 189–207; Pipitea deed and plans in doc A10(a), pp 3:19–3:22, 3:24

Kaiwharawhara and Pakuao, together with an area of land near the Kaiwharawhara pa and a share in the Kaiwharawhara block. In all, they were assigned 451 acres.[13]

In addition, McCleverty reserved land for the Maori communities on the south-west coast, although Maori at these pa did not have cultivations on settler sections, so the reserves in this area were not considered to be 'exchanges', as the other McCleverty reserves were. The 1848 Crown grant excluded 20,600 acres on the south-west coast pending the reservation of pa and cultivation land for the Maori communities there. McCleverty visited these settlements in June and July 1848, reserving 400 acres at Waiariki, 20 acres at Oterongo, and 350 acres at Ohaua/Te Ika a Maru.[14] There is little information available about the quality of this land.

### 11.2.2 Adequacy of McCleverty reserves

All the Maori communities which participated in the McCleverty arrangements had their pa sites reserved for them, and most were assigned some land which they were already cultivating. Otherwise, the amount and quality of the land they were assigned varied widely. The two tables on the facing page set out, in both absolute and per capita terms, the amount of land reserved by McCleverty for different pa. There are two reports on the record of this inquiry which attempt to estimate how much of the land reserved by McCleverty was cultivatable. These reports, one a Crown report by Armstrong and Stirling and the other an essay by a J Pyatt which was originally submitted for a university course, base their estimates on surveyors' reports and McCleverty's own comments. The figures for cultivatable acres in these two reports differ, but in most cases not markedly. The main differences are in their assessments of those awards which included large blocks of unsurveyed land, where estimates of the amount of cultivatable land are pure speculation. Even for the other McCleverty reserves, about which there is more information, any attempt to assess the amount of cultivatable land must be very speculative.

The amount, quality, and location of the land received by different pa varied enormously. At one end of the scale, Petone Maori were assigned a comparatively large area of land close to their pa, together with a very large block which, although it was far away from their pa, contained cultivations, eel weirs, and fishing stations. They were assigned more than 50 acres per person, and, even if only cultivatable land is counted, they probably received something in the order of 10 acres per person. At the other end of the scale, Maori at the most populous pa in the Port Nicholson district, Te Aro, were assigned somewhat more than three acres per head, of which the cultivatable land came to less than two acres per head, a pitiful amount. It is little wonder, then, that Kemp found in 1850 that Petone Maori 'in point of comfort and

13. Document 18, pp 181–188; Kaiwharawhara memorandum and plans in doc A10(a), pp 3:23–3:24
14. Document 17, p 44

Land reserved by McCleverty for pa in the Port Nicholson block

| Pa | Population* | Granted (acres) | Cultivatable (acres) | |
|---|---|---|---|---|
| | | | Armstrong and Stirling† | Pyatt‡ |
| Te Aro | 172 | 579 | 320 | 301 |
| Waiwhetu | 60 | 250§ | 212 | 183 |
| Kumutoto | 23 | 54 | 52 | 52 |
| Ngauranga | 68 | 222 | 176 | 166 |
| Petone | 134 | 6926 | 1000+ | 3837 |
| Ohariu | 160¶ | 2282 | 665 | 965 |
| Pipitea | 116 | 7436 | 1000+ | 381 |
| Kaiwharawhara | 60 | 451 | 227 | 324 |
| Waiariki | 44\|\| | 400 | N/A | N/A |
| Oterongo | 20** | 20 | N/A | N/A |
| Ohaua/Te Ika a Maru | 30** | 350 | N/A | N/A |
| **Total** | **887** | **18,970** | **3652+** | **6209+** |

* Except where indicated, population figures are from McCleverty's 'Report on Port Nicholson Cultivations', enclosed with Governor Grey to Earl Grey, 21 April 1847, BPP, vol 6, [892], p 39. Other sources of information on population are given at section 11.3.2.

† Armstrong and Stirling (doc C1), p 282

‡ Pyatt (doc A18), p 31

§ Not including Waiwhetu's share of Hutt section 20.

¶ Population figure estimated by averaging Kemp's 1850 figure of 119 and Spain's 1844 figure of 200. Kemp noted that, by the time of his visit to Ohariu, a number of people had left for Taranaki with Wiremu Kingi in 1848 and the pa had suffered high mortality from disease.

|| Kemp's 1850 figure; only 20 residents were recorded in Spain's report in 1844.

** Population figures from Spain's 1844 report.

N/A Not available

Land reserved by McCleverty, per person

| Pa | Acres granted per person | Cultivatable acres per person | |
|---|---|---|---|
| | | Armstrong and Stirling | Pyatt |
| Te Aro | 3.4 | 1.9 | 1.7 |
| Waiwhetu | 4.2 | 3.5 | 3.0 |
| Kumutoto | 2.3 | 2.3 | 2.3 |
| Ngauranga | 3.3 | 2.6 | 2.4 |
| Petone | 51.7 | 7.5+ | 28.6 |
| Ohariu | 14.3 | 4.2 | 6.0 |
| Pipitea | 64.1 | 8.6+ | 3.3 |
| Kaiwharawhara | 7.5 | 3.8 | 5.4 |
| Waiariki | 9.1 | N/A | N/A |
| Oterongo | 1.0 | N/A | N/A |
| Ohaua/Te Ika a Maru | 11.7 | N/A | N/A |

wealth are better off than any of the Port Nicholson Natives', while Te Aro Maori would struggle over the following decades just to sustain their community.[15] In 1847, Te Aro Maori told McCleverty that none of the land assigned to them was suitable for planting kumara. As a result, McCleverty reserved an additional 50 acres of Ohiro section 26 for them. However, surveyor Fitzgerald described this section as 'unfit for the purposes of agriculture', it being almost devoid of soil. It was thus clear from the outset that Te Aro Maori had insufficient cultivation land. By the late 1870s, commissioner of native reserves Charles Heaphy found that Te Aro Maori had 'not much land fit for cultivation', and he consequently arranged for £96 to be distributed among the heads of families there.[16] Other pa were better able to meet their immediate subsistence needs, and may even have been able to continue engaging in commercial agriculture for a time, but overall the McCleverty awards did not provide well for the future needs of Maori.

In his first report to Grey, McCleverty estimated that, in order to compensate Maori for the 580 acres they were cultivating on settler-claimed sections, they would need to receive 'at the very least' twice as much land in exchange – that is, 1200 acres or, very roughly, two acres per person for the 633 Maori living around the harbour. The reports by Armstrong and Stirling and Pyatt both use this figure of two acres per person as a benchmark for assessing the adequacy of McCleverty's provision for Maori.[17] However, McCleverty made no claims to having assessed either the current or the future needs of Maori; he was simply trying to estimate how much land he would need to find in order to make a one-for-one exchange of cultivatable land for land already under cultivation on settler-claimed sections. His figure of 1200 acres was based on the assumption that, even if all the land in a particular section were good, in many cases Maori would be able to cultivate only half of it owing to their methods of cultivation. Moreover, earlier in the same report he wrote that, assuming that 1800 acres of tenths reserve land were suitable for cultivation (that is, very roughly three acres per person), 'this quantity is insufficient for the wants of those in the immediate neighbourhood of Wellington', as well as those in the more distant settlements.[18] The figure of two acres per person is, therefore, quite meaningless as a benchmark for either the short-term or the long-term needs of Wellington Maori.

The Ngai Tahu Tribunal heard evidence on the adequacy of reserves and discussed the question in its report. It found that the reserves set aside for Ngai Tahu, which amounted to an average of 12.5 acres per person, were 'so grossly insufficient as to be no more than

15. H T Kemp, 'Report on Port Nicholson District', 1 January 1850, *New Munster Gazette*, 21 August 1850 (doc N3(c), p 595)

16. Document I8, pp 129–130; Fitzgerald to superintendent, Wellington, 24 December 1845, IA1/1847/1557 (doc C1(b), p 349); 'Report of the Commissioner of Native Reserves', 1 July 1879, AJHR, 1879, G-7 (doc A24, p 128)

17. Document A18, pp 18–19; doc C1, p 273

18. W A McCleverty, 'Report on Port Nicholson Cultivations', enclosed with dispatch from Governor Grey to Earl Grey, 21 April 1847, BPP, vol 6, [892], p 40

nominal in character'.[19] At best, these reserves were sufficient for bare subsistence, but the Crown had an obligation to provide more than this bare minimum. The Ngai Tahu Tribunal found that, had the Crown fulfilled its Treaty obligations:

> it would have ensured that, in addition to their kainga and cultivations, Ngai Tahu were left with very substantial areas of good quality land on which to develop side by side, and on at least an equal basis, with new settlers in agricultural, pastoral or dairy farming. In addition, appropriate areas of considerable dimension would have been reserved to provide access to traditional resources, some of which might as development occurred be adapted to conventional farming. In short, generous provision in keeping with the spirit of the Treaty was called for.[20]

We consider it appropriate to adopt this standard for Maori in the Port Nicholson district, and in fact it is strikingly similar to the standard which McCleverty set himself. In his final report, McCleverty remarked that he had endeavoured to reserve sufficient land for the future wants of Maori 'as to Cultivations, fishing stations, facilities for obtaining firewood and their future attention to cattle', noting that it was desirable that Maori should begin to graze cattle on their land.[21] Despite his efforts to provide sufficient land for these various purposes, however, it is quite clear that McCleverty's provision for most of the Wellington pa was even more inadequate than the provision of reserves for Ngai Tahu.

In the case of Port Nicholson, where access to the economic opportunities provided by the growing town of Wellington was important to Maori, and where urban land would outstrip rural land in value, it was also particularly important that Maori be assigned land in or near the town. In this respect, too, the Maori of some pa fared better than others. All the principal urban pa sites were reserved, while Te Aro and Pipitea Maori were assigned an additional 31 and 11 urban tenths respectively, and Te Aro, Kumutoto, and Pipitea Maori were granted portions of the town belt. Other rural sections (in the lower Hutt Valley and in the harbour district, for example) were quite accessible to the town. Nevertheless, McCleverty's provision of reserves in and around the town was far from generous, especially in light of the Tribunal's finding in chapter 6 that the entire town belt had been taken by the Crown without Maori consent and without any payment being made to Maori.

19. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Booker and Friend Ltd, 1991), vol 3, p 828. It is also worth noting that, under the South Island Landless Natives Act 1906, Maori were classified as 'landless' if they had less than 50 acres per adult or 20 acres per child. This Act, which made provision for the allocation of land to such landless South Island Maori in order to increase their holdings to 50 acres (for adults) or 20 acres (for children), was described as a 'cruel hoax' by the Ngai Tahu Tribunal owing to the poor and remote nature of most of the land allocated. Most of the land reserved for Wellington Maori by McCleverty was similarly poor, yet only a few Wellington pa received anywhere near 50 acres per adult. As for the South Island Landless Natives Act, see *The Ngai Tahu Report 1991*, vol 3, ch 20.

20. Waitangi Tribunal, *The Ngai Tahu Report 1991*, vol 2, p 639

21. W A McCleverty, final report, 20 November 1847, CO208 (doc C1(c), pp 268–269)

If viewed as an exchange, the McCleverty arrangements might appear generous, with Maori giving up 467 acres of cultivations in exchange for more than 18,000 acres. However, the Tribunal has found that no such 'exchange' took place, since McCleverty assigned to Maori land which already belonged to them. Moreover, the land assigned to Maori by McCleverty had to meet not only their immediate cultivation needs but also their other requirements in both the short and the long term. To meet their cultivation needs alone, they required several times the amount of land they already had under cultivation, in order to take account of the fact that much land could not be used owing to its poor quality or unsuitability for Maori methods of cultivation and the fact that Maori shifted their cultivations every few years when the fertility of the soil was exhausted. Crown officials were well aware of Maori methods of agriculture and should have taken greater account of such requirements. Maori also needed large areas of land (including forest and foreshore) for such uses as hunting, fishing, and collecting shellfish, and gathering food, firewood, and traditional medicines. In addition, if Maori were to develop on an equal basis with Pakeha settlers, it was essential that they retained very large tracts of land on which they could raise sheep or cattle, so that they were not left behind as pastoralism became the mainstay of the economy.

Wellington Maori, a population of around 900, were assigned some 19,000 acres by McCleverty (this figure includes the south-west coast reserves, which were not viewed as 'exchanges'). They were thus left with about 21 acres per person, and much of this land was of little value for their present or future needs. Three-quarters of the land assigned by McCleverty was in four large blocks of unsurveyed land, which McCleverty himself admitted were mostly unsuitable for cultivation and which were in any case assigned to only three pa. While these blocks could be used for other purposes and could potentially have allowed some Maori to take up pastoralism, this does not make up for the insufficiency of land for cultivation. If Maori were to be assured of a future in Wellington, they needed sufficient land for their present and future cultivation needs (taking into account their methods of cultivation), plus land for gathering food and other resources and enough land to allow them to move into pastoralism, dairy farming, or other land-use activities in due course. Instead, most Wellington Maori were awarded only enough land to meet their short-term subsistence needs, and in at least one case probably not even enough land for that purpose. They also needed land in and around the town of Wellington, so that they could benefit from the economic opportunities which the town provided. Some land near their pa, and accessible to the town, was assigned to Wellington Maori. However, by far the largest area of land reserved for them was in two large, rugged, and relatively barren blocks, located very far away from the town and assigned to only two pa. In summary, then, the reserves set aside for the present and reasonable future needs of Wellington Maori by McCleverty were grossly inadequate. The Crown's failure to ensure adequate reserves for Wellington Maori is particularly egregious in light of the Tribunal's finding in chapter 10 that Maori had neither willingly surrendered nor been paid for over 120,000 acres in Port Nicholson which was awarded to the New

Zealand Company in the 1848 Crown grant. Moreover, of the extensive area of Maori land which was granted to the company gratuitously and in breach of the Treaty, only a very few acres were subsequently sold by the company. This land should have remained in Maori ownership.

### 11.2.3 Tribunal finding

The Tribunal finds that the Crown neglected to protect the rights of Maori living in the Port Nicholson district who were parties to the McCleverty deeds by failing to set aside reserves which left them with an adequate land base for both their short- and their long-term cultivation and resource-gathering needs, and which made adequate provision for Maori to develop on an equal footing with Pakeha (particularly by taking up pastoralism or other farming and land-use activities), and that such Maori were seriously prejudiced thereby.

## 11.3 Maori in Wellington after 1847

In the early years of Pakeha settlement in the Wellington area, Maori proved willing and able to adapt to the changed circumstances and to profit from the new opportunities provided by the settlers' presence. Within less than a decade, however, they had become marginal to the Pakeha economy and to the social life of the growing town of Wellington. Maori population had shifted towards the Hutt Valley, and many Maori had left the Wellington region altogether, returning to their ancestral lands in Taranaki. This section describes these developments, while the next section assesses the impact of the McCleverty arrangements on Maori society in Wellington.

### 11.3.1 The Maori economy

Wellington Maori took to cash-cropping with enthusiasm, and in the early years of the Port Nicholson settlement they came to dominate the markets for potatoes and wheat. They also competed successfully with Pakeha farmers in the market for pigs, although their investment in other livestock was far lower than that of Pakeha.[22] Maori were able to undersell their Pakeha competitors because their production costs were lower: they had no rental or land purchase costs, their labour costs were low because they worked collectively for the hapu, and they did not have to purchase food, clothing, or shelter, which could (at least for a time) be provided from traditional sources.[23] In the long run, however, these advantages were not

22. M K Watson and B R Patterson, 'The Growth and Subordination of the Maori Economy in the Wellington Region of New Zealand, 1840–52', *Pacific Viewpoint*, vol 26, no 3, 1985, pp 525, 533–534

23. Ibid, p 534; W A McCleverty, 'Report on Port Nicholson Cultivations', enclosed with dispatch from Governor Grey to Earl Grey, 21 April 1847, BPP, vol 6, [892], p 40

sufficient to prevent a serious downturn in the fortunes of Maori agriculture, the reasons for which are explored below. In 1847, Maori in the Wellington region outproduced the much larger Pakeha population in wheat and potatoes, but thereafter Maori production declined, while Pakeha production increased for most crops.[24] McCleverty reported in 1847 that Maori were cultivating 872 acres in the Port Nicholson area (including Ohariu/Makara), but in 1850 the Native Secretary H Tacy Kemp recorded only 169 acres of Maori cultivations in the same area, a drop of 80.6 per cent. If the west coast settlements are excluded (because McCleverty provides no population figures for this area), this represents a decline from roughly one acre of cultivation per head of population in 1847 to less than a quarter of an acre per head only three years later.[25]

As their ability to compete in the agricultural produce market decreased, Wellington Maori became more reliant upon casual wage labour to supplement their income from trading. Maori labour had been in demand since the early 1840s, partly because Maori workers were paid less than their Pakeha counterparts, but also because of their skills and capacity for hard work. Maori were employed building houses, constructing roads, clearing bush, building fences, and acting as guides, drovers, porters, and ferrymen.[26] Maori were extensively employed on the construction of the Porirua and Wairarapa military roads in the late 1840s, and the superintendents of those road works commented very favourably on the work of the Maori labourers.[27] Maori worked hard in order to earn money to buy Pakeha goods: in 1847, Maori road workers were reported to be spending their wages on flour, European clothing, agricultural implements, mills, and cooking utensils and, occasionally, on buying breeding cows and mares.[28] The introduction of wage labour into the Maori economy did not, however, break down the communal basis of Maori society, since hapu members still worked together in order to save money for the group. In 1849, it was reported that a group of Ngati Raukawa working on the Wairarapa road had deferred their wages in order to save money to buy a flour mill and that their example had been followed by 'many others, especially the late followers of Rangihaeata'.[29]

Kemp found in his 1850 survey of Maori settlements in the Port Nicholson district that Wellington Maori had acquired some horses and cattle, mills, weatherboard houses, and

24. Watson and Patterson, p 533

25. W A McCleverty, 'Report on Port Nicholson Cultivations', enclosed with dispatch from Governor Grey to Earl Grey, 21 April 1847, BPP, vol 6, [892], pp 39–40; H T Kemp, 'Statistical Table for Port Nicholson District', 15 June 1850, *New Munster Gazette*, 21 August 1850 (doc N3(c), p 605). Researcher Steve Quinn suggests that McCleverty may have underestimated the amount of land in cultivation, in which case the drop in cultivation area may have been even greater: doc 18, pp 50–51. However, Crown counsel has also suggested that Kemp's figures for the area under cultivation are too low and that he probably recorded only the area cultivated on reserves, not the total area cultivated by Maori: doc P3, pp 41–42.

26. Watson and Patterson, p 527

27. See the reports of A Hamilton Russell and T H Fitzgerald (superintendent, military roads, and surveyor respectively), 1 January 1848, 18 April 1849, 1 May 1849, *New Munster Gazette*, 1848, 1849 (doc N3(b), pp 287–288, 304–305)

28. Russell to Grey, 24 June 1847, BPP, vol 6, [892], p 5

29. Report by Fitzgerald, 1 May 1849 (doc N3(b), p 305)

carts, and that they were 'anxious to obtain' more of these items. Kemp reported Maori engaging in a variety of economic activities, including collecting mutton shell (paua) for export, fishing, raising pigs, selling firewood, starting to prepare flax for export, and working for Pakeha for daily wages. He did not mention Maori in the Port Nicholson district selling agricultural produce, however.[30] Thus, by 1850 Maori found themselves in an increasingly marginal economic position. With the collapse of the cash-cropping that had initially seemed to offer them the opportunity to benefit from their proximity to a major town, Maori were left to survive on a mixture of subsistence agriculture, wage labouring, small-scale trading, and, increasingly, renting or selling their reserve land.

### 11.3.2 Population

Population statistics for Maori in the nineteenth century are notoriously unreliable, not least because Maori were highly mobile, but it is clear that in the long run the Maori population in the Port Nicholson district declined dramatically. Edmund Halswell, the commissioner of native reserves, undertook a careful count of Maori in pa around the harbour in 1842 and gave a population figure of 541, but this excluded the south-west coast area.[31] In 1844, Commissioner Spain estimated the population of the various pa in the Port Nicholson block at 922, with another 200 Maori listed as 'Rauparaha, Rangiaiata and natives of the Hutt'.[32] Kemp visited each pa in the Port Nicholson district and took a census of the population at each location, so his population figure of 745 in 1850 can perhaps be regarded as more accurate than most.[33] By 1857, Fenton recorded a population of 583, and while his exact figure is somewhat suspect, the apparent downward trend is consistent with the evidence of population decline presented below.[34] Moreover, census figures for the Maori population of the Wellington district in the latter decades of the nineteenth century make it clear that there had been a very substantial population decline since the 1840s. A Maori population of 161 was recorded in 1874, falling to 118 in 1878, and rising again to 136 in 1881.[35] The dramatic fall in the Maori population of Wellington following Pakeha settlement can be explained by a high rate of mortality from disease, a low ratio of children to adults, and a substantial outflow of Maori returning to their ancestral homelands in Taranaki.

30. H T Kemp, 'Report on Port Nicholson District', 1 January 1850, 'Statistical Table for Port Nicholson District', 15 June 1850, *New Munster Gazette*, 21 August 1850 (doc N3(c), pp 593–595, 605)

31. Halswell to Colonel Wakefield, 4 July 1842 (doc A29, p 494)

32. 'Schedule showing the Proportions of the £1,500 Actually Paid, and . . . Offered to be Paid . . . to the Different Tribes or Families in the Port Nicholson District', 11 April 1844, BPP, vol 5, p 31

33. H T Kemp, 'Report on Port Nicholson District', 1 January 1850, 'Statistical Table for Port Nicholson District', 15 June 1850, *New Munster Gazette*, 21 August 1850 (doc N3(c), pp 593, 605)

34. Watson and Patterson, p 540

35. 'Approximate Census of the Maori Population', AJHR, 1874, G-7, p 17; 'Census of the Maori Population, 1878', AJHR, 1878, G-2, p 25; 'Census of the Maori Population, 1881', AJHR, 1881, G-3, p 26

Maori in Wellington were hit hard by disease in the 1840s and 1850s. Epidemics of influenza and whooping cough took a heavy toll in 1848, and when Kemp visited pa in the Port Nicholson area at the end of the following year he found that there had been a high level of mortality at Ohariu and Pipitea. Kemp also reported that Maori at Te Aro, the most populous pa, were far from healthy, and in his general comments on the condition of Maori in the southern North Island he noted that their health was 'retrograding, and this decline is especially visible in and near the European Towns'.[36] Wellington Hospital had many Maori patients in the first few years after it opened in 1847, and efforts were made to vaccinate Wellington Maori against smallpox, but it seems that European medicine could do little to arrest the decline in the Maori population.[37] The poor state of Maori health was no doubt related to their poor housing, for, although a few weatherboard houses had been built, Kemp described most Maori dwellings as decaying and dilapidated.[38] He also mentioned in his comments on Maori in the southern North Island that there were comparatively few births.[39] The low number of children was particularly apparent in the town of Wellington, where children under 15 made up 21.2 per cent of the total Maori population in 1847, falling to 16.2 per cent in 1850, and 9.5 per cent in 1857. These figures contrasted with those for Lower Hutt, where the Pakeha population was much smaller: in this area, 26.3 per cent of the Maori population were under 15 years of age in 1847, and by 1857 the figure had fallen only to 22.2 per cent.[40] While the exact figures are somewhat unreliable, the downward trend and the difference between the town and its rural hinterland in the Hutt are clear. The combined effects of mortality from disease and an insufficient number of surviving children must have contributed to the drop in the Maori population in the Port Nicholson district. As the Wellington-based Wesleyan missionary James Watkin lamented in 1848, 'the leaves fall off the tree without being replaced'.[41]

The other main reason why the Maori population of the Wellington district decreased is that many Maori returned to Taranaki. Members of the migrant tribes had been going back and forth to Taranaki ever since they first arrived in Te Upoko o te Ika (see ch 2), and Pakeha commentators in the 1840s noted that the Taranaki tribes remained very attached to their ancestral land. Halswell reported as early as 1841 that the inhabitants of Te Aro were contemplating returning to Taranaki, and the following year he claimed that 'The natives are all now

36. John Roberts, *The Wesleyan Maori Mission at Te Aro, 1839–1877*, ca 1991, p 12 (doc E8, p 426); H T Kemp, 'Report on the Port Nicholson District', 1 January 1850, and final report, 15 June 1850, *New Munster Gazette*, 21 August 1850 (doc N3(c), pp 594–595, 603)

37. Derek A Dow, *Maori Health and Government Policy, 1840–1940* (Wellington: Victoria University Press, 1999), pp 27–28, 30, 51

38. H T Kemp, 'Report on the Port Nicholson District', 1 January 1850, *New Munster Gazette*, 21 August 1850 (doc N3(c), pp 594–595)

39. H T Kemp, final report, 15 June 1850, *New Munster Gazette*, 21 August 1850 (doc N3(c), p 603)

40. Watson and Patterson, p 541. See also the comments of the *New Zealand Journal* in 1848 on the small number of children at Pipitea Pa (doc N3(c), p 592).

41. Watkin to Wesleyan Missionary Society, 22 February 1848 (quoted in Roberts, p 12) (doc E8, p 426)

talking of leaving this part of the country for Taranaki'.[42] In 1847, McCleverty noted anxiously that Maori were threatening to migrate to Taranaki if they did not receive land 'in the immediate vicinity of Port Nicholson', a development which he feared would increase 'the difficulty attached to the Settlement of New Plymouth'.[43] That same year, the Te Atiawa chief Wiremu Kingi Te Rangitake announced at a meeting with Governor Grey his intention to leave Waikanae and return with his people to their lands at Waitara in order to prevent the sale of that land. Kingi led 587 Te Atiawa back to Taranaki in 1848, and, although this group came mainly from Waikanae, it also included people from the south-west coast settlements within the Port Nicholson block.[44] The following decade saw increasing conflict between Maori and Pakeha over land in Taranaki, culminating in Kingi's refusal to accept the supposed sale of Waitara in 1859 and the resulting first Taranaki war of 1860–61.[45]

Members of Te Atiawa and other Taranaki tribes in the Wellington region followed events in Taranaki closely, and the need to establish their claims to land in Taranaki was a strong incentive to return, if only temporarily. The strong ties between Maori in Taranaki and those in Wellington meant that travel between the two locations remained a common occurrence, as Kemp noted in 1850:

> The Native population within the district of Wellington, fluctuates very much. Many of their friends come in from Taranaki on long visits, and generally return accompanied by some of their relatives. . . . The whole of the 'Ngatiawas' entertain to this day the strongest attachment for their Native soil, and a desire once more to mingle with their relatives and friends.[46]

Increasingly, however, Wellington Maori migrated permanently to Taranaki. In 1853, most of the remaining inhabitants of the south-west coast settlements of Waiariki, Oterongo, Ohaua, and Te Ika a Maru sold the land reserved for them by McCleverty and moved north.[47] Futher migration occurred once the wars in Taranaki were over: in 1868, a group of Ngati Tama who had been occupying reserves at Pakuratahi returned to Taranaki, and a large group of Te Atiawa moved from the Hutt to Waitara in 1873.[48] It is impossible to

42. Halswell to secretary, New Zealand Company, 11 November 1841; Halswell to Colonel Wakefield, 4 June 1842 (doc A29, pp 484, 494)

43. W A McCleverty, 'Report on Port Nicholson Cultivations', enclosed with dispatch from Governor Grey to Earl Grey, 21 April 1847, BPP, vol 6, [892], pp 38–39

44. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), pp 43, 47; Ann Parsonson, 'Wiremu Kingi Te Rangitake', DNZB, vol 1, p 500. Kemp reported that Maori from Ohariu, Ohaua, and Oterongo Pa had accompanied Kingi's group: H T Kemp, 'Report on the Port Nicholson District', 1 January 1850, *New Munster Gazette*, 21 August 1850 (doc N3(c), p 594).

45. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, chs 2–4

46. H T Kemp, 'Report on the Port Nicholson District', 1 January 1850, *New Munster Gazette*, 21 August 1850 (doc N3(c), p 596)

47. Deed of sale, 18 July 1853, in *Turton's Deeds*, p 414 (doc A27); Judge Mackay, memorandum concerning sitting of Native Land Court in Wellington, 14 April 1888 (doc A39, pp 111–112)

48. Carol M Evans, 'The Struggle for Land in the Hutt Valley, 1840–1875', MA thesis, Victoria University, 1965, p 76 (doc N3(e), p 930)

quantify the extent of the migration to Taranaki, but there can be little doubt that it contributed significantly to the decline in the Maori population of the Wellington district.

### 11.3.3 The place of Maori in Wellington

It is likely that one reason for the migration of Wellington Maori to Taranaki was that Maori came to feel that they had no place in the Wellington district, and particularly in the town of Wellington itself. There were already some 1500 Pakeha at Port Nicholson by June 1840, and the chief Te Wharepouri, shocked at the huge number of Pakeha arriving in such a short space of time, announced his intention to take his people back to Taranaki, though he was quickly dissuaded from doing so.[49] By 1844, there were 4000 Pakeha living around the harbour, outnumbering Maori by more than four to one.[50] Although Maori were initially able to benefit from the influx of Pakeha by selling agricultural produce, as noted above, the collapse of their cash-cropping pushed them into a marginal economic position. Under the McCleverty arrangements, Maori lost much of their best cultivation land in the vicinity of the town. Moreover, they increasingly found themselves living in a Pakeha-dominated settlement, where they had little political influence or social standing. The strong desire of officials and others to remove pa from the town, discussed in chapter 13, indicates that Maori were seen as out of place in an urban environment.

Little wonder, then, that many Maori preferred to move to the more sparsely settled Hutt Valley, if they did not leave Wellington altogether for Taranaki. The marginalisation of Maori in the town was not the only reason for the shift to the Hutt, however, because they also seem to have found the Hutt more suitable for cultivation. Kemp noted in 1850 that Maori from Kumutoto, Pipitea, Kaiwharawhara, and Ngauranga were cultivating land in the Hutt, and he reported that 'The Natives of Wellington have no cultivations to speak of on the lands in the outskirts of the Town – all have hired land from Settlers upon the Hutt'. He believed that Maori would gladly exchange their land in town for land of equal value in the Hutt, since the Hutt soil was better and the environment more suited to their method of agriculture, and he commented that Maori were clearing land owned by Pakeha settlers at such a rate that the valley would very soon be clear of bush and ready for the settlers to lay down pasture.[51] Three years later, a Wesleyan missionary wrote that Maori had generally left town owing to the scarcity of land, while the Wesleyans' Wellington circuit report for 1853 observed that most Maori were now living at the Hutt 'for the purpose of raising food, which many of them

49. Rosemarie V Tonk, 'The First New Zealand Land Commissions, 1840–1845', MA thesis, University of Canterbury, 1986, p 149

50. See the statistics on the British civil population of Wellington in C G F Simkin, *Statistics of New Zealand for the Crown Colony Period 1840–1852* (Auckland: Department of Economics, Auckland University College, 1954) (doc N3(c), p 431)

51. H T Kemp, 'Report on the Port Nicholson District', 1 January 1850, *New Munster Gazette*, 21 August 1850 (doc N3(c), pp 594–596)

do on land which they rent from Europeans'.[52] The extent of the shift away from the town and towards the Hutt is quite astonishing, if Fenton's census of 1857 is to be believed: he recorded 396 Maori living in Lower Hutt, 124 in Upper Hutt, and only 63 in Wellington.[53] By this time, the settlements on the south-west coast were almost deserted.

Maori did not disappear from the town entirely, and foreign visitors still noticed their presence on the streets of Wellington in the 1870s and 1880s, but the centre of Maori life in the Wellington region had shifted to the Hutt.[54] The 1881 census recorded 99 Maori in the Hutt (mainly at Waiwhetu) and 37 at Te Aro and Pipitea.[55] There is some evidence that the situation of the small Maori population in Wellington gradually improved toward the end of the century. The census enumerator for Maori in Hutt County (which included Porirua as well as Wellington) in the 1880s and 1890s described the health of Maori in the district as 'fairly good' and noted that many now lived in wooden houses. In 1886, he speculated that Maori cultivated only small areas of land because they could survive on their rental income, but the area cultivated by Maori in Hutt County increased from 34 acres in 1886 to 228 acres in 1896, and in the latter year the enumerator found that some Maori had 'nice holdings, the produce of which is sufficient for their maintenance, surplus products finding a ready market at the European centres'.[56] The Maori community in Wellington retained strong ties with their relatives in Taranaki, and between the two world wars Taranaki Maori began migrating to Wellington once again. The new migrants, who came looking for work or seeking to present their grievances to the Government, were assisted by those descendants of the Taranaki tribes who had remained in Wellington. The growing numbers of Te Atiawa in the Hutt Valley, and the increasing security of their position, was marked by the opening in 1933 of Te Tatau o te Po meeting house on the Hutt Road.[57] During and after the Second World War, even larger numbers of Maori were attracted to Wellington by the employment opportunities which the capital provided, although the migrants were no longer drawn predominantly from Taranaki.

## 11.4 The Effects of the McCleverty Arrangements on Wellington Maori

The effects of the McCleverty arrangements on Wellington Maori have been the subject of opposing arguments in the closing submissions of the Wellington Tenths Trust and the

52. Aldred to Wesleyan Missionary Society, 8 January 1853, and 'Report of Southern District Meeting', 12 October 1853 (quoted in Roberts, p 13) (doc E8, p 427)

53. Watson and Patterson, p 540

54. David Hamer, 'Wellington on the Urban Frontier', in *The Making of Wellington, 1800–1914*, David Hamer and Roberta Nicholls (eds) (Wellington: Victoria University Press, 1990) pp 231, 306 (fn 21)

55. 'Census of the Maori Population, 1881', AJHR, 1881, G-3, p 26

56. 'Census of the Maori Population', AJHR, 1886, G-12, pp 11, 17; 'Census of the Maori Population', AJHR, 1891, G-2, pp 4–5; 'Census of the Maori Population, AJHR, 1896, H-13B, pp 9, 13. The cultivation figures exclude 'sown grasses'.

57. Angela Ballara, 'Ripeka Wharawhara Love', DNZB, vol 3, p 282

Crown. Counsel for the tenths trust argued that, following the McCleverty arrangements (and, by implication, as a result of the inadequacy of the reserves assigned by McCleverty), both the area cultivated by Maori and the Maori population in the Wellington district suffered sharp declines.[58] Crown counsel maintained that 'The McCleverty arrangements put Maori agriculture on a sounder footing than the 1844 agreement by providing a much greater area for the development of new gardens'.[59] Furthermore, Crown counsel submitted, the movement of the Maori population to the Hutt, and out of the Wellington region altogether, cannot be taken as evidence of the inadequacy of McCleverty's provision for Wellington Maori. This population movement began before the adequacy of the McCleverty reserves had been put to the test, and it can be explained 'in terms of Maori preferences and the exercise of a rational choice'.[60] Two key questions emerge from these submissions:

- Why did Maori agriculture in Wellington decline so rapidly after its initial success?
- Why did so many Maori abandon their McCleverty reserves, either moving to the Hutt Valley or leaving the Wellington region altogether?

### 11.4.1 The decline of Maori agriculture

Because the decline of Maori agriculture coincided with the McCleverty arrangements, it is tempting to conclude that there is a direct causal link between the two events, but a more complex explanation is required. A number of factors, including developments quite unrelated to the McCleverty arrangements, appear to have contributed to the fall in Maori agricultural production.

While the McCleverty arrangements alone cannot take the blame for the decline of Maori agriculture, they must have contributed to it, in part because Maori lost much of their best cultivation land close to the town. McCleverty himself admitted that 'The Lands now relinquished by the Natives are the very best selected on account of soil, aspect, and vicinity to their homes, and are therefore scattered over a large extent of country'. The land which they had received in exchange did not have these advantages, McCleverty pointed out, so he had tried to compensate for this by reserving several very large blocks on unsurveyed land. However, it is hard to see how the sheer size of these blocks could compensate for the loss of prime cultivation sites close to town, since, as McCleverty noted, there was little land available for cultivation on the blocks.[61] The quality of the land assigned by McCleverty varied enormously – from excellent to appalling – but the poor quality of much of the land was only part of the problem. A larger problem was that, following the McCleverty arrangements and the issuing of a Crown grant for Port Nicholson to the New Zealand Company, Maori

58. Document 03, pp 253–255
59. Document P1, p 82
60. Document P3, p 45, and more generally pp 29–45
61. W A McCleverty, final report, 20 November 1847, CO208 (doc C1(c), pp 265, 269)

were locked out of most of Port Nicholson. Where once they had been able to select for themselves the most suitable cultivation land anywhere within their territory, now Maori found themselves restricted to the land assigned to them by McCleverty. Given that Maori had not adopted crop rotation but instead relied on moving their cultivations every few years when the fertility of the soil had been exhausted, this was a serious limitation. Thus, the McCleverty arrangements resulted in Maori losing much of their best cultivation land in favour of the settlers; being assigned in return land which was further from town and was in many cases of poor quality; and losing the freedom to choose for themselves where to cultivate when they needed to shift their cultivations. These consequences of the McCleverty arrangements must have had a detrimental effect on Maori agriculture in Wellington.

A second explanation for the decline of Maori agriculture is that Maori were unable to sustain their initial success in the commercial agricultural market. As the Pakeha community grew in numbers and became more established, the settlers increasingly supplied their own needs and became less reliant on Maori agriculture. Taringa Kuri had foreseen this outcome in 1844, when he explained his refusal to give up land in the Hutt by saying that 'it is very good for the white people to live at Port Nicholson and buy the pigs and potatoes of the natives; but that, if they give up the land to the Europeans to cultivate, the latter will no longer purchase of them'.[62] However, the Pakeha agricultural economy was itself changing, and the bigger picture of agriculture in Wellington provides another reason why Maori agriculture did not fulfil its initial promise. At the foundation of the Port Nicholson settlement, it was anticipated that the economy would be based on growing grain, and indeed in 1845 grain crops made up 57 per cent of the acreage under Pakeha cultivation in the settlement.[63] By 1855, however, grain accounted for only 13 per cent of the cultivated acreage. Wheat had fallen from 45 per cent of cultivated acreage to just 5.4 per cent over the same period, and it had fallen not just in relative but also in absolute terms. While the total area cultivated by Pakeha grew in this period, this was due to a huge increase in the acreage of sown grass, a sure sign that livestock farming, 'initially viewed as an essential adjunct to cropping, . . . had in short order become an end in itself'. As historian Brad Patterson has demonstrated, by the mid-1850s 'a settlement conceived as agriculturally based was already well on the way to becoming one with a rural economy dominated by large sheepruns'. The granting of so much of their land to the New Zealand Company meant that Maori were largely excluded from developing into pastoral farming on any scale. The Wellington region proved unable to compete successfully in the local market with grain imported from Australia and other countries, and it became apparent that grain exports from Wellington were also unviable. Wool

62. Wakefield to secretary, New Zealand Company, 14 March 1844, in *Seventeenth Report of the Directors of the New Zealand Company* (London: New Zealand Company, 1845) (doc N3(a), p 116)

63. The figures quoted here include areas outside the immediate vicinity of Wellington: Wanganui, Rangitikei–Turakina, Wairarapa–East Coast, and Ahuriri. However, even in 1855 these areas made up less than a quarter of the total acreage.

exports, on the other hand, proved very profitable, although most of the sheep were raised outside the Port Nicholson block.[64]

It seems, then, that commercial agriculture of the kind that Maori practised so successfully in the early years of the Port Nicholson settlement was unviable in the long term for Maori and Pakeha alike. As this became apparent, the area cultivated by Maori probably fell, in part because Maori abandoned cash-cropping and returned to subsistence agriculture supplemented by wage labour and rental income. Significantly, Maori failed for the most part to take up pastoralism, which required considerable capital, instead renting their reserve land to Pakeha pastoralists who could use it more effectively by incorporating it into their already large runs. An exception were the Petone Maori who were recorded as running sheep on the Parangarau block in 1867, but a few years later a Pakeha was leasing the block as a sheep run in their place.[65] When Maori agriculture in Wellington is considered within a wider context, it is clear that the fall in the area cultivated by Maori, and the failure of Maori commercial agriculture in the longer term, were only partly due to the McCleverty arrangements. Maori were disadvantaged by being restricted to cultivating land chosen for them by McCleverty (or else renting land from Pakeha), but it is likely that Maori agriculture would have declined anyway owing to the economics of agricultural production in the Wellington district.

### 11.4.2 Maori departure from Wellington

It was originally intended that Maori would live on and cultivate their McCleverty reserves, which would give them an interest in the district and prevent them from returning to Taranaki. Yet, as early as 1850, Kemp reported that many Maori were cultivating not their reserve land around the town but land rented from settlers in the Hutt. By 1867, Maori were living on only a few McCleverty reserves, mainly in the Hutt, and by 1871 even fewer reserves were still occupied by Maori.[66] By this time, a large number of Maori had left the Wellington region permanently.

It is clear from Kemp's 1850 report that Wellington Maori had a strong desire to cultivate land in the Hutt and were keen to swap their land around the town for Hutt land. This was in part because much of the land on the outskirts of the town was no longer of use to Maori, having 'undergone the usual course of Native cultivation', but also because the Hutt had

64. Brad Patterson, 'The Grain Mirage: Ideal and Reality in Early Wellington Agriculture', *Stout Centre Review*, vol 2, no 2, 1992, pp 14–26 (quotes at pp 14, 18); see also Brad Patterson, 'Laagers in the Wilderness: The Origins of Pastoralism in the Southern North Island Districts, 1840–55', *Stout Centre Review*, vol 1, no 3, 1991, pp 3–14

65. Document 18, p 162. Henare Te Puni was recorded as running 1400 sheep at Parangarau in 1869 and 1870: see sheep inspector's reports for the Wellington district in *Wellington Provincial Gazette*, 30 December 1869, p 213, and *Wellington Provincial Gazette*, 18 November 1870, p 133 (doc N3(c), pp 614, 618).

66. 'Return of All Lands Vested in the Governor . . .', 1867, AJHR, 1867, A-17, pp 3–6 (doc A24, pp 37–40); 'Report from the Commissioner of Native Reserves', 1871, AJHR, 1871, F-4, pp 49–52 (doc A24, pp 49–52)

appreciably better soil and was more suited to Maori agriculture.[67] If McCleverty had selected land in accordance with Maori wishes, then it seems that he should have assigned much more land in the Hutt to Maori. McCleverty's hands were tied, however, because Hutt land was also highly prized by Pakeha, so there was little land available there to award to Maori. Apart from a very few cases, no effort was made by the Crown to acquire settler-owned land for Maori, either in the Hutt or anywhere else in Port Nicholson; on the contrary, the McCleverty arrangements were intended to get Maori off land claimed by settlers. The Crown can therefore be held responsible for the fact that Maori did not own sufficient land at the Hutt and had to rent land there from Pakeha, but the decision to move to the Hutt was, in large part, one made voluntarily by Maori because of the advantages which this location offered. In addition to the attraction of the Hutt, there were other reasons why Maori did not end up living on or cultivating most of their McCleverty reserves in the long run, the most notable being the poor quality of much of the land. With commercial agriculture becoming less economically rewarding by the 1850s, Maori may also have found that they could better ameliorate their situation by renting out their land than by living on it and cultivating it themselves.

As for the exodus of Maori from Wellington to Taranaki, this is best explained in terms of a combination of push and pull factors. It is quite clear that Maori were travelling back and forth between Te Upoko o te Ika and Taranaki before the establishment of the New Zealand Company settlement at Port Nicholson, and that some Wellington Maori were already talking about returning to Taranaki in the early 1840s. As Kemp observed, Wellington Maori remained strongly attached to their Taranaki homeland, and, as the conflict over land there intensified, many were drawn back to defend their own interests and those of their kin. At the same time, despite the turmoil there, Taranaki remained a district almost entirely under Maori control until the mid-1860s, and a large area remained independent of Government authority until the suppression of Parihaka in 1881. As Wellington became swamped by Pakeha, many Wellington Maori may have felt more at home in Taranaki than in Pakeha-dominated Wellington. Wellington Maori were increasingly unable to benefit from their proximity to a relatively large Pakeha community, in part because of the McCleverty arrangements but also because of more general problems in Wellington agriculture, and they found themselves increasingly economically and socially marginalised. For many, therefore, the drawbacks of living in Wellington must have started to outweigh the benefits, with the result that returning to Taranaki became an ever-more attractive prospect.

### 11.4.3 Conclusion

The Tribunal considers that the inadequacy of the reserves made by McCleverty was a major contributory factor to, but not the sole cause of, both the decline of Maori agriculture and

67. See s 11.3.3 above, and Kemp to Colonial Secretary, 28 July 1851, NM8/1851/1002 (doc A40, p 359)

11.4.3

the departure of many Maori from the town of Wellington and the wider Port Nicholson area. Furthermore, as a result of the Crown's action in granting more than 120,000 acres in the Port Nicholson block to the New Zealand Company without gaining the consent of Maori or making any payment to them, Maori were left with nothing but these inadequate reserves to sustain them and provide them with an economic base. As we shall see, their only other source of support, the remaining tenths reserves, provided them with little or no income for many decades.

CHAPTER 12

# THE ADMINISTRATION OF RESERVES, 1840–82

## 12.1 Introduction

In earlier chapters, we discussed the survey and selection of company tenths. We also examined the McCleverty 'exchanges', which saw a considerable number of company tenths being assigned to Maori of particular pa, as well as the creation of new reserves from the town belt and unsurveyed land. In this chapter, we are concerned with the administration of the remaining tenths reserves (sometimes referred to as 'unassigned' reserves) and those McCleverty reserves that came under Crown administration in the period 1840 to 1882. We also consider the status of the tenths reserves: that is, whether Maori at Port Nicholson were intended to be the beneficial owners of these reserves. The alienation of Maori reserves between 1840 and 1882 is covered in chapter 13.

In their final amended statement of claim, the Wai 145 claimants allege that the Crown's policies and administration of native reserves at Wellington were in breach of the Treaty in a number of respects.[1] These general breaches are particularised later in the statement of claim and in more detail in Wai 145 claimant counsel's closing submissions. We consider these and the Crown's response below. Crown counsel accepted that the reserves commissioners who administered the reserves until they were transferred to the Public Trustee in 1882 acted '"by or on behalf of" the Crown for the purposes of s 6(1) of the Treaty of Waitangi Act 1975'.[2] Crown counsel acknowledged that the Tribunal therefore has jurisdiction to consider whether the commissioners' actions were in breach of the principles of the Treaty.

## 12.2 Administration of the Reserves to 1869

In the period considered in this chapter – 1840 to 1882 – there was a good deal of policy confusion and indecision, initially on the part of the New Zealand Company and soon afterwards on the part of the Crown. In particular, there was indecision over whether to use the

1. Claim 1.2(d), p 30
2. Document P4, p 36

reserves for Maori occupation or as an endowment which would provide Maori with rental income from leases to settlers. The latter policy came to prevail, almost by default, by the end of the period discussed here, and remained in force thereafter. Policy indecision was also reflected in a failure to define the legal status of the reserves by legislation and to make effective provision for their administration. The status of the tenths reserves is discussed further at section 12.4. At different times, it was asserted that the title to the tenths reserves rested with the New Zealand Company, the Crown, and Maori. In 1841, commissioner of native reserves Edmund Halswell wrote to the company secretary that the reserves 'can only be dealt with at present as the property of the Company'. Governor Hobson, however, was said to treat them as 'the absolute property of the natives'.[3] Despite Halswell's belief to the contrary, the company had no valid claim to the tenths reserves' title. The company had no title to any land in the Port Nicholson block until Grey issued it with a Crown grant on 27 January 1848, and that grant excepted the tenths reserves.

In later years, and especially after the demise of the company, some Crown officials assumed that title to the tenths reserves lay with the Crown, although there appears to have been no express assertion of the Crown's title, either by declaration of a trust or by legislation. Indeed, it was not until the Court of Appeal judgment in the case *Regina v Fitzherbert* in 1872 that the tenths reserves were held to be demesne lands of the Crown. (We discuss *Regina v Fitzherbert* in the next chapter.)

There was further confusion over the McCleverty reserves that were assigned to Maori living at the main pa in the Port Nicholson block. Those Maori or their successors were not usually granted Crown titles to these reserves until the Native Land Court adjudicated ownership under the Native Lands Acts from 1865. The Wai 145 claimants allege in their amended statement of claim that the Crown became involved in the administration of the McCleverty reserves without Maori permission.[4] We accept the Crown's response that there appears to have been only one occasion when this was attempted by the board of commissioners and that the matter was quickly cleared up by an opinion of the Attorney-General.[5]

There was also indecision over whether the reserves should be retained by Maori 'for ever', as the Port Nicholson deed stated, or whether they could be sold by Maori, or by the Crown on their behalf. As we shall see in later chapters, almost all the Maori reserve land in our inquiry area was eventually sold, or taken by the Crown.

Finally, we note that the administration of the Wellington reserves was hampered by the lack of legislative guidance and authority. Indeed, there was no native reserves legislation in force until the New Zealand Native Reserves Act 1856. In the meantime, the reserves came under the administration of a reserves commissioner (originally appointed by the New Zealand Company, later by the Governor), with a board of trustees also playing a role in

3. Halswell to secretary, New Zealand Company, 11 November 1841 (doc A29, p 487)
4. Claim 1.2(d), paras 13.14, 14.2
5. Document Q1, pp 37, 42

managing the reserves for part of this period. However, the administration was for the most part ad hoc and intermittent. We discuss this by reference to successive commissioners.

### 12.2.1 Halswell's administration

Confusion and indecision over the reserves started with the New Zealand Company. Its plans for the administration of its tenths reserves were extremely vague. Its instructions to Colonel Wakefield required him to reserve from every purchase 'a proportion of the territory ceded, equal to one-tenth of the whole' and to hold it in trust 'for the future benefit of the chief families of the tribe'.[6] Wakefield duly included in the Port Nicholson deed a provision stating that 'a portion of the land ceded by them [the chiefs of Port Nicholson], equal to one-tenth part of the whole, will be reserved by . . . [the] Company . . . and held in trust . . . for the future benefit of the said chiefs, their families, and heirs for ever'.[7] Since there were only 16 signatory chiefs, they and their descendants would have become very wealthy had one-tenth of the settlement been reserved to them 'for ever'.

In October 1840, the company appointed Edmund Halswell, a lawyer who had been involved in the establishment of the company, to the office of 'commissioner for the management of the lands reserved for the natives in the New Zealand Company's settlements'.[8] Halswell's instructions from the company secretary were further evidence of the ambiguities of the company's reserves policy. The company directors admitted to being uncertain as to whether the chiefs were qualified to manage the reserves themselves, either by letting or by cultivating the land. They were also unsure about who should benefit from the rental income and whether part of the rent should be 'permanently appropriated as a fund for promoting the moral and religious instruction of the chief families, or the native race generally'. In order to provide the directors with the information necessary to clarify such points, Halswell was instructed to carry out a census of the Maori population and to provide an assessment of their 'habits, character, and manner, and their capacity for instruction and civilization'. He was further instructed to act for Maori in the selection of rural tenths, to report on the quality and natural resources of the reserved land, and to make suggestions for its 'cultivation, improvement, or disposal'.[9]

Halswell arrived in Wellington around April 1841, and in July Hobson appointed him both protector of aborigines and the Crown's commissioner of native reserves in the southern district.[10] These official appointments indicate that the Crown had accepted responsibility for native reserves in the company's settlements. Nevertheless, Halswell's position remained

6. 'Instructions to Colonel Wakefield, Principal Agent of the New Zealand Company', May 1839 (doc A29, p 372)
7. Port Nicholson deed of purchase, 27 September 1839 (doc A29, p 440)
8. Ward to Halswell, 10 October 1840 (doc A29, p 481); Ward to Wakefield, 13 October 1840, CO208 (doc C1(c), p 347). See also Patricia Burns, *Fatal Success: A History of the New Zealand Company* (Auckland: Heinemann Reed, 1989), pp 11, 99, 104, 148, 220–221, on Halswell and his involvement with the New Zealand Company.
9. Ward to Halswell, 10 October 1840 (doc A29, pp 481–483)
10. Document C1, p 77; doc E3, pp 131, 133

ambiguous, since he received instructions on the management of the Port Nicholson reserves from the company's principal agent, William Wakefield, as well as from the Governor and other Crown officials such as George Clarke senior (the chief protector of aborigines), and Willoughby Shortland (the Colonial Secretary). Halswell retained his company salary and tried to serve both masters.[11] He assumed that he should follow company policy for the administration of tenths reserves and Government policy for additional reserves subsequently set aside by the Crown. As Armstrong and Stirling noted, there was to be 'an increasing divergence in the attitude of the Crown and the Company concerning the way in which the reserves were to be utilised'.[12]

The company wanted Maori to vacate pa and cultivations on sections which had been allocated to settlers, and to move to the tenths reserves which had been selected for them. When Hobson visited Wellington in August 1841 he promised Maori that 'they would not be obliged to leave their pas and cultivations, which they had not alienated, [and this] was received by them with great satisfaction'.[13] Halswell adhered to company policy, and, although he admitted in June 1842 that he was having 'great difficulty . . . in persuading [Maori] to remove to lands upon which they have not been accustomed to live', he claimed that he had been 'gradually making them understand the full advantages of the plan of the reserves made for them'.[14]

The Crown, however, preferred a policy of leasing the native reserves to settlers, with the rental income going to the benefit of Maori, rather than encouraging Maori to live on the reserves. In September 1841, Halswell was instructed by George Clarke senior to lease for up to seven years reserves not occupied by Maori. The proceeds were to be used for religious, educational, and health purposes for the benefit of Maori. This indicated that the Crown had abandoned the company's plan to make the chiefs and their families alone the beneficiaries of the tenths and had adopted a trust policy in relation to these reserves. A committee consisting of Halswell, police magistrate Michael Murphy, and Crown prosecutor Richard Hanson was established to superintend the leasing of reserves.[15]

To add to the confusion, some Maori claimed title to the reserves and attempted to lease them independently of the commissioner. Pipitea chief Wairarapa attempted to lease some of the Thorndon tenths in 1841, but Halswell stopped him. Wi Tako Ngatata leased the tenth reserve at Kumutoto, only to find that the rents were collected by the reserves commissioner.[16] Maori also lived on and cultivated some reserves, though probably only those which had already been under cultivation when the reserves were created.

11. Document C1, p 91
12. Ibid, pp 80–81
13. George Clarke senior, 'Report of a Visit to Port Nicholson', enclosed with Hobson to Secretary of State for the Colonies, 13 November 1841, BPP, vol 3, p 522
14. Halswell to Wakefield, 4 June 1842 (doc A29, p 492)
15. Clarke to Halswell, 28 September 1841, Turton, *Epitome* (doc A26), s D, p 1
16. Document 14, p 85; doc C1, p 86

In November 1841, Halswell reported that he had advertised leases of reserves in accordance with his earlier instructions but that no tenders were received because the seven-year maximum term was too short to encourage lessees to erect buildings on urban lots or to clear rural land.[17] Halswell admitted in June 1842 that he was still unable to let the reserves, with the single exception of town acre 514, on which Richard Barrett had erected a hotel, partly on the strength of a claim to the land by his wife's people.[18]

### 12.2.2 New trustees appointed

In June 1842, Halswell was informed by the Colonial Secretary that the committee established to administer the reserves was to be replaced by a new set of trustees.[19] The Anglican bishop of New Zealand, the chief justice, and the chief protector of aborigines were appointed trustees for the native reserves made by the New Zealand Company at Port Nicholson and elsewhere, although the chief justice soon resigned as a trustee because he saw that role as being 'incompatible with his judicial duties'.[20] In appointing the trustees, the Colonial Secretary explained that the tenths were to be vested in them once they had become legally vested in the Crown. Rentals from these reserves were to be vested in the trustees, as was any surplus remaining after the costs of the protector's department had been deducted from the 15 to 20 per cent of the proceeds of Crown land sales which was allocated to Maori purposes. These two sources of revenue were to be used for the education, spiritual care, and social and political advancement of Maori.[21] Halswell and his committee were asked to resign, but Halswell continued as agent for the Wellington town reserves until his replacement the following year.[22] He was subsequently dismissed as the company's commissioner of native reserves, and thereafter the company had no further involvement with the administration of the tenths reserves.[23] The planned vesting of the reserves in the trustees never took place.

In summing up Halswell's administration of the reserves, Wai 145 claimant counsel submitted that Halswell's dual position as company commissioner and Crown protector of aborigines 'led to an inherent conflict of interest, exacerbated by Halswell's apparent disregard for the mana and rangatiratanga of the tangata whenua. The Crown's complicity in creating this conflict of interest also created a Treaty breach.' Claimant counsel also characterised Halswell's attempts to get Maori to move to tenths reserves as:

17. Halswell to Colonial Secretary, 29 November 1841; Halswell to secretary, New Zealand Company, 10 February 1842 (doc A29, pp 488, 490)
18. Halswell to Wakefield, 4 June 1842 (doc A29, p 492)
19. Colonial Secretary to Halswell, 18 June 1842 (doc A29, p 496)
20. Shortland to chief justice, 26 July 1842 (doc A29, p 498); bishop of New Zealand to Arthur Wakefield, 23 May 1843 (doc A29, pp 470–471)
21. Shortland to chief justice, 26 July 1842 (doc A29, p 498)
22. Hobson to trustees of native reserves at Port Nicholson, 27 July 1842 (doc A29, p 498)
23. Document C1, p 100

> a Crown condoned act of continual harassment. The Crown throughout did nothing tangible to stop the company from acting in so cavalier fashion. In its sly acquiescence it breached its Treaty obligations to actively protect tangata whenua.[24]

Crown counsel replied that Halswell was quickly replaced, that he 'met with no success in encouraging Maori to give up their kainga and live on Company reserves elsewhere', and that there 'is no evidence of prejudice to Maori from his official activities'.[25] (We have in earlier chapters discussed the pressure exerted on Maori to vacate their cultivations and pa, which pressure was mainly exerted by the settlers themselves.)

As for Halswell's overall performance as reserves commissioner, we need to remember that he held the position for less than two years at a time when neither the company nor the Crown had established effective administration in Wellington. It is not surprising that there was only a rudimentary administration of the tenths reserves in those early years. However, any prejudice to Maori from an initial failure to let the reserves was compounded the longer they remained unlet.

### 12.2.3 St Hill's administration

In March 1843, a Wellington land agent, Henry St Hill, was appointed by Bishop G A Selwyn (one of the reserves' trustees) to take control of the urban tenths from Halswell. (St Hill had already taken over the administration of the rural tenths.) He was to be paid from rentals from the reserves rather than by the company or the Government.[26] St Hill had little more success than his predecessor in leasing out the tenths reserves. Although the term of the leases for the reserves was varied to up to 14 or 21 years, building covenants may have dissuaded settlers from taking leases. Wakefield also suggested that the failure to lease more than a few reserves was accounted for by the existence of many sections which had been purchased by absentee owners and which were available for lease in competition with the tenths reserves.[27] By mid-1848, only two urban tenths (including the site of Barrett's hotel) and three country tenths had produced any rental income.[28]

In 1844, FitzRoy passed a native trust ordinance, a first attempt to provide legislative backing for the effective administration of reserves and other land or property held in trust for Maori. It provided for the appointment of five trustees – the Governor, the bishop of New Zealand, the Attorney-General, the commissioner of land claims, and the chief protector of aborigines – who could lease trust property for up to 99 years and use the proceeds for educational and other benefits for Maori. Alienation of the property except by lease was

24. Document O1, pp 104–105
25. Document Q1, p 17
26. Document C1, p 109
27. Ibid, pp 108, 111
28. 'Account of Native Reserves', October 1848, BPP, vol 6, [1280], p 125

prohibited, and all mortgages or encumbrances on the estate were declared void. The ordinance did not specifically mention the Wellington tenths, but the tenths would presumably have been vested in the trustees had the ordinance come into operation. It did not, however, because it was never gazetted.[29]

FitzRoy refused to recognise the existing trustees, and as a result Bishop Selwyn ceased to act as a trustee in February 1844.[30] In November 1845, he wrote a long letter to FitzRoy expressing disappointment at the failure of the reserves administration in the Wellington settlement and elsewhere. Selwyn had hoped that the £4000 which had accumulated in the native trust fund would provide for schools, hostels, and hospitals, but not one of these objects had been attained.[31] Instead, the money had been appropriated for what Hobson had described as 'the necessary expenses of the Colony'. Selwyn also complained that the native reserves in the 'Southern Settlements [had] entirely failed' owing to the decline of the settlements and confusion about whether the reserves were to be occupied and cultivated by Maori or let to Pakeha in order to raise money for the benefit of Maori. As a result, 'not one shilling of rental or revenue of any kind was ever received' from the tenths reserves during his time as trustee.[32]

In fact, a few tenths reserves did generate rental income in the period 1842 to 1848, but this was almost entirely swallowed up by St Hill's remuneration. The administration of the Wellington reserves remained with St Hill, on what Armstrong and Stirling called 'a very loose ad hoc basis, given that the trust under which he was ostensibly operating had effectively ceased to exist'.[33] Apart from collecting rents, St Hill's main activity as reserves agent was selecting additional reserves for Maori, both at Port Nicholson and in the other districts where he acted as agent. In December 1847, he described the selection of these reserves as 'the chief expense' of his agency.[34]

By the middle of 1848, £370 in rental income from Wellington tenths reserves had been received, of which £363 had gone to pay St Hill. This was because Bishop Selwyn had authorised St Hill to retain the first £100 of rental income, plus a percentage of any income above £100. The rental income from the tenths reserves never exceeded £100 annually, so, apart from one outlay of £7, the whole amount went to St Hill.[35] This charge against reserves revenue was characterised by Wai 145 claimant counsel as a breach of the Treaty, but Crown

29. Ralph Johnson, *The Trust Administration of Maori Reserves, 1840–1913*, Waitangi Tribunal Rangahaua Whanui series (working paper: first release), August 1997, pp 12–13; Native Trust Ordinance 1844 (doc A21, pp 1–5)

30. Alfred Domett, 'Memorandum on Commissions Received by Agents for Native Reserves', 3 December 1849, BPP, vol 6, [1280], p 122

31. This money had come from the 15 per cent taken out of income from Crown land sales.

32. Selwyn to FitzRoy, November 1845, G19/1, NA, Wellington (doc C1(d), pp 34–46)

33. Document C1, p 224

34. St Hill to Acting Colonial Secretary, 31 December 1847, BPP, vol 6, [1280], p 126

35. Native Reserves Account, October 1848, St Hill's letter of appointment, 1 November 1842, BPP, vol 6, [1280], p 125

counsel said that it was consistent with the Crown's reserves policy and that the rate was not improperly high.[36]

We consider that it would have been more appropriate for St Hill either to have been paid a salary by the Treasury or to have taken a fixed percentage of the rental income as payment for his services as agent. Moreover, St Hill's main activity as reserves agent, apart from collecting the rents from the few tenths reserves which had been leased out, was selecting additional reserves. Some of these were within the Port Nicholson block, but others were at Horowhenua and Manawatu.[37] Thus, the income derived from tenths at Port Nicholson, which should have gone to benefit Port Nicholson Maori, went instead to pay St Hill, in part for selecting reserves elsewhere in the country from which Port Nicholson Maori would derive no benefit.

### 12.2.4 A new board of trustees

On 23 June 1848, Lieutenant-Governor Eyre wrote a 'Memorandum relative to the Native Reserves', which summarised the recent history of the company tenths reserves and made recommendations for their future management. He noted that these reserves were to have been placed:

> under the direction of Trustees, who without the power of alienation might make such arrangements for letting or leasing them as would secure the largest pecuniary return, and this return was to be devoted entirely to objects connected with the general welfare, advancement and improvement of the Native Race.

However, the trustees had found many obstacles preventing the execution of their trust and had ceased to act. Though some reserves or portions of reserves had been let to settlers on 'partial arrangements', these were not legally binding, and very few rents were ever paid. Eyre proposed the appointment of local boards of management which would be charged with 'investigating and considering all questions connected with the management of the Reserves'. These boards would make recommendations to the Government about how the reserves could best be used to generate income to be spent on 'the welfare and civilisation of the Natives'. Eyre considered it important that the Government should retain control of the reserves in order to use some of the tenths land for public purposes. We discuss this part of Eyre's memorandum, and his justification for the proposed appropriation of tenths reserve land, at section 13.2.1.[38]

In accordance with Eyre's memorandum, a board of management for the Wellington

36. Claim 1.2(d), para 13.16; doc Q1, p 38
37. See the columns 'District' and 'By whom chosen' in St Hill's 'Account of Native Reserve Lands in the New Zealand Company's First and Principal Settlement', 31 December 1847, NM8/1850/1151 (doc A40, pp 301–304)
38. Eyre, 'Memorandum Relative to the Native Reserves', 23 June 1848, NM8/1850/1151 (doc A40, pp 311–314)

reserves was appointed which consisted of St Hill, McCleverty, and Attorney-General Daniel Wakefield.[39] The new board had no control over the McCleverty-granted lands other than advising on their alienation and ensuring that Maori retained sufficient land on which to maintain themselves.[40] St Hill remained in charge of the day-to-day administration and leasing of the remaining tenths reserves, which had been greatly diminished as a result of the McCleverty arrangements. Rental income from the tenths reserves was paid into a native reserve trust fund, which was administered by the board of management.

In 1851 and 1852, a total of £503 was paid out from the trust fund to three settlers in Taranaki. Two of the settlers were compensated for having to move off native reserves, while the third was compensated for losses resulting from an attack by Maori.[41] Counsel for the Wai 145 claimants stated that these payments were in breach of the Treaty, while Crown counsel submitted in reply that there was insufficient evidence to enable the Tribunal to reach an informed view on the matter.[42] We consider that there is sufficient evidence before the Tribunal to support the claim that Taranaki settlers were compensated with revenue from the Wellington tenths reserves and that such payments were an inappropriate use of money which was meant to benefit Port Nicholson Maori.

### 12.2.5 The New Zealand Native Reserves Act 1856

Although the board of management provided some guidance to St Hill in the administration of the reserves, he was still operating in a legislative vacuum. The New Zealand Native Reserves Act 1856 finally provided him with some guidance.

The Act was promoted by Henry Sewell, who said that the legislation was required because the Government had failed to manage the reserves for the benefit of Maori. He explained that the Act placed the:

> reserved lands under the management of local commissioners, with whom native chiefs themselves may be associated . . . Out of Funds thus produced provision may be made for schools, Clergy &c in which the Natives themselves will have a voice through their Chiefs.[43]

There was little debate in either House of Parliament when the Bill was introduced.[44]

Although the Act's preamble said that it was expedient to place under effective management lands set apart for the benefit of the 'aboriginal inhabitants', it did not define those

39. Swainson to Native Minister, 21 May 1866, in Turton, *Epitome* (doc A26), s D, p 53
40. Domett to board of management for native reserves, 6 October 1848 in Turton, *Epitome* (doc A26), s D, p 14
41. See native reserves trust fund, board of management of native reserves accounts, NM8/1852/691, NM8/1852/972 (doc A40, pp 429–436); T1 1/1857/609 (doc C1(e), pp 56–64); CS1/1853/1412 (doc E13(a), pp 12–15)
42. Claim 1.2(d), para 13.10; doc O4, pp 329–330; doc Q1, p 35
43. W D McIntyre (ed), *The Journal of Henry Sewell, 1853–7*, 2 vols (Christchurch: Whitcoulls, 1980), vol 1, p 252 (quoted in Johnson, p 24)
44. Document A20, pp 2–4

reserves other than to distinguish between reserves over which the native title had or had not been extinguished. The former were to come under the administration of commissioners of native reserves, but the latter were not to be administered by the commissioners, except 'with the assent of such aboriginal inhabitants'. The New Zealand Company tenths and the McCleverty-assigned reserves were not mentioned in the Act, although Attorney-General Frederick Whitaker referred to the company reserves when introducing the Bill's second reading in the Legislative Council.[45] Officials usually assumed that the tenths came under the Act, but the position of the McCleverty-assigned reserves was not so clear-cut. The Attorney-General observed in 1859 that the McCleverty-assigned reserves were 'not Native reserves within the meaning of "The New Zealand Native Reserves Act, 1856"', and therefore not subject to the control of the reserves commissioners.[46] But, in the 1865 opinion of a later Attorney-General, Henry Sewell, the McCleverty reserves could be brought under the Native Reserves Act with the consent of the owners under section 14 of the Act.[47] (We discuss below an example of McCleverty reserves at Polhill Gully being put under the commissioner's administration by their owners.)

The New Zealand Native Reserves Act 1856 provided for the appointment of commissioners of native reserves and gave them wide-ranging authority over the reserves under their control.[48] They could exchange, lease, sell, or otherwise dispose of such land, provided that any lease of more than 21 years or any other disposition of the land was approved by the Governor. They could also, with the Governor's assent, set aside reserved land for churches, chapels, or burial grounds, or as special endowments for schools, hospitals, or other charitable institutions, for the benefit of the Maori inhabitants. Where land had been set apart for such purposes by Maori themselves, the Governor could, with their assent, grant this land to any person or body corporate, to be held for endowment purposes.

Section 14 of the Native Reserves Act authorised the Governor, with the assent of the Maori inhabitants of reserved land over which the native title had not been extinguished, to declare such lands to be subject to the Act. Such reserves would then be managed by commissioners as if native title had been extinguished. Section 17 required the Governor, in such cases, to appoint a competent person to ascertain the assent of the Maori inhabitants. Section 17 further provided that, whenever such assent had been determined, the land was to be conveyed to the Crown and then to become subject to the provisions of the Act. (The provision requiring such land to be conveyed to the Crown was repealed by section 6 of the Native Reserves Amendment Act 1862.)

45. 30 June 1856, NZPD, 1856, p 237 (doc A20, p 2)
46. Assistant Native Secretary to commissioners of native reserves, 24 September 1859, Turton, *Epitome* (doc A26), s D, p 34
47. Minute by Henry Sewell, 19 June 1865, Turton, *Epitome* (doc A26), s D, p 48
48. The New Zealand Native Reserves Act 1856 (doc A21, pp 6–8)

All moneys received under the provisions of the Native Reserves Act, except those from special endowments, were to be used for the benefit of those Maori for whom the reserves were set apart, although the commissioners could deduct administration expenses. The Governor was also empowered to issue rules to guide the conduct of the reserves commissioners.

### 12.2.6 Commissioners appointed

It was not until 12 April 1858 that commissioners for native reserves for Wellington province were appointed under the New Zealand Native Reserves Act 1856. St Hill was reappointed, along with six new commissioners: S Carkeek, R R Strang, the Reverend T B Hutton, Tamehana Te Rauparaha, Matene Te Whiwhi, and Rawiri Puaha.[49] According to a subsequent commissioner, George Swainson, the active administration of the reserves was undertaken by three of these men: St Hill, Strang, and Carkeek.[50] Wellington was the only province to appoint Maori commissioners, though they do not appear to have been given anything to do.

In April 1859, a land purchase commissioner, William Searancke, drafted a report for the Governor on the Wellington reserves. There are two drafts of this report on the record of this inquiry, although it is not clear whether either was ever sent.[51] Searancke pointed out that 'the discontent now existing among the Natives' had been 'much increased of late by the operations of the Commissioners of Native Reserves'. We comment further on this point below in our discussion of the so-called 'twenty years of silence', said by the Crown to signify the acceptance by Maori of the arrangements made for their reserves (see s13.2.4), but Searancke's report is useful at this point of our discussion for its comments on the state of reserves administration.

Searancke wrote that not one of the urban tenths was 'in the occupation or cultivated by Natives' and, of the pa in the town, only Te Aro remained 'constantly occupied'. Some tenths reserves had been let 'without any beneficial result to the Natives for whom they were said to be reserved', and Maori were 'fully aware that the rents are received by the Board of Commissioners of N Reserves and loudly and openly claim that the Rents received . . . should be paid to them'. Instead, Searancke believed, the rents were 'principally devoted to the support of Hospitals &c'. To overcome the discontent, Searancke suggested that a single commissioner should be responsible for leasing all the reserves not required for Maori occupation, collecting the rents, ascertaining the legitimate beneficiaries for each reserve, and paying the rents

49. C W Richmond, notice of appointment of commissioners of native reserves, 12 April 1858, Turton, *Epitome* (doc A26), s D, p 29

50. Swainson to Native Minister, 21 May 1866, Turton, *Epitome* (doc A26), s D, p 53

51. Draft letter, undated, MA W2218, box 8 (doc N1, pp 300–304); also draft of the same letter dated 20 April 1859, MA W2218, box 8 (doc N1, pp 296–299). The letters are unsigned, but Crown counsel identifies Searancke as the writer (doc P1, p 89), and this appears to be confirmed by comparing the handwriting to that in the signed letter by Searancke in document N1, pp 249–253.

to such beneficiaries.[52] As will be seen, these desirable objectives were not achieved for many years, although a single commissioner was soon to be appointed.

### 12.2.7 The Native Reserves Amendment Act 1862

In 1862, the Wellington reserves commissioners resigned because they could not carry out their duties effectively under the New Zealand Native Reserves Act 1856. As a consequence, the Native Reserves Amendment Act 1862 was passed.[53] This vested in the Governor all powers and authorities previously vested in the commissioners under the 1856 Act but also enabled the Governor by Order in Council to delegate those powers to any person or persons. In this way, the Governor could vest his powers in one or more commissioners, acting where and when he chose.

Section 7 of the 1862 Act stated that, where under the 1856 Act the assent of the Maori inhabitants was required to bring land under the operation of the Act, the Governor could by Order in Council declare such assent to have been ascertained. Thereupon, the title of Maori to the land was deemed to be extinguished and the land vested in the Crown for the purposes of the Act.[54] This provision apparently applied to McCleverty reserves. Wai 145 claimant counsel characterised section 7 as giving the Governor 'sweeping powers allowing him to extinguish Maori title without consent of Maori'.[55] Crown counsel, rightly in our view, contended that section 7 'imposed a positive duty on the Governor to obtain Maori consent to placing their land under the Act'.[56] This is because the Governor remained bound by section 17 of the 1856 Act to appoint a competent person to ascertain whether or not the Maori inhabitants consented to their land becoming subject to the provisions of the Act. We also agree with Crown counsel that, although the legal estate vested in the Crown, that estate was burdened with a trust.

### 12.2.8 Swainson's administration

In October 1862, George Swainson was appointed native reserves surveyor and commissioner of native reserves. However, it was not until September 1863 that the Governor's powers under the Native Reserves Amendment Act 1862 were formally delegated to him.[57] Swainson inherited an administrative nightmare: no annual accounts for the Wellington reserves had been published and there was no annual distribution of rents since there was

52. Draft letter, undated, MA W2218, box 8 (doc N1, pp 300–304); draft letter, 20 April 1859, MA W2218, box 8 (doc N1, pp 296–299)
53. Swainson to Native Minister, 21 May 1866, Turton, *Epitome* (doc A26), s D, pp 53–54
54. The Native Reserves Amendment Act 1862 (doc A21, pp 10–11)
55. Document O4, p 392
56. Document Q1, p 42
57. Document C1, pp 334–336

no list of beneficiaries. To help clear up the mess, Swainson was required to report on both the original New Zealand Company tenths reserves and those reserves provided by the McCleverty arrangements, and to advise on how these could be used with 'most practical advantage to the natives for whom they were reserved'. He was also expected to survey the reserves, 'assist in the work of enquiring into and individualizing native title', and prepare Crown grants, leases, and other documents.[58]

Swainson also found that, as Searancke had earlier observed, Wellington Maori were unhappy with the administration of their reserves. In 1863, when one Hemi Parai and others complained over Governor Grey's alienation of reserved land at Ohiro, Swainson remarked that 'The feeling intended to be evinced by this letter, is the general dissatisfaction expressed by all the Natives to the present management of the Reserves set apart for them'. Swainson added that the intention to spend rental money 'in the erection of a hostelry' was 'strongly opposed by all', since the proposed hostel would be for the benefit of Maori from any part of New Zealand who visited Port Nicholson, rather than for the owners of the reserves alone.[59] This correspondence is further evidence that Wellington Maori were far from silent over reserves administration, though in this instance their protest related to a mixture of unassigned tenths and McCleverty-assigned reserves.

Swainson did not report on the state of the Wellington reserves until May 1866, nearly four years after his appointment. Then, he wrote only a brief report, which distinguished between the remaining Wellington tenths, which were his responsibility, and McCleverty reserves 'let by the Natives independently of the Commissioner'. Swainson noted that he was sometimes called in to settle disputes over the division of rents between owners of McCleverty reserves outside his jurisdiction. He provided little detail on his management of the remaining tenths reserves but admitted that the rental receipts for them amounted to a mere £69 6s. He also mentioned a change in the payment of salaries; Swainson's salary was paid from the general 'fund for Native purposes', while that of his assistant was paid from rental receipts.

Swainson concluded with a brief comment on the suitability of the reserves for Maori purposes and the possibility of selling them:

> As a general principle I would never advocate the sale of a single acre of reserve if it is suitably selected, either in point of value, present or future, or adapted to their own occupation, such as the valuable reserves in the Lower Hutt. But when I see reserves selected twenty-six years ago, which even now are barely accessible, and at any time perfectly unsuited to a Native, my general principle gives way: let such reserves be sold at the market price, and the proceeds be reinvested.

58. Domett to Swainson, 11 October 1862, MA4/5, pp 213–215 (doc E8, p 448)
59. Hemi Parai and others to Grey, 5 January 1863; memo by Swainson, 7 January 1863, MA W2218, box 8 (doc N1, pp 226, 230)

By way of example, Swainson referred to the two rural tenths at Lowry Bay – the first, 'a perfect morass'; the second, 'almost barren clay, which will not grow a potato' – which had been sold and the proceeds invested in reserves in Palmerston North. (We discuss this exchange in chapter 15.) Finally, Swainson vigorously opposed the issuing of Crown grants to Maori for their reserves, without restriction on alienation. 'Far better', he said, to trust 'the judgment and discretion of a Commissioner, who ought to know the nature of every reserve in his district, to recommend a sale, than to put an uncontrolled power in the Natives' hands'.[60]

Although Swainson's administration was characterised by good intentions, it was not always effectual. Nevertheless, apart from half a dozen tenths on the outer fringe of the town in the suburb of Newtown, the remaining unassigned urban tenths were now let. Several unassigned rural tenths were also let, and rentals were paid to named beneficiaries in some cases. In addition, many of the McCleverty reserves were now leased by their Maori owners.[61] Swainson resigned as reserves commissioner in 1867, and was not replaced by a resident commissioner in Wellington for five years.[62] In the interval, the reserves were managed by a succession of rent collectors, acting on the authority of the Native Minister.[63]

### 12.2.9 Summary of reserves administration to 1869

The above account of the administration of the Wellington reserves in the first three decades of their existence is necessarily somewhat sketchy, in part because of gaps in the information available to us about these reserves. However, it is possible to gain a general impression of reserves management over this period, and we pause here to summarise what we see as the key features of the administration of reserves at Wellington to 1869:

- There was a failure to develop consistent and coherent policies and administrative arrangements for the management of reserves.
- Nevertheless, by the end of the 1840s it was generally agreed that the remaining tenths reserves were to be leased out, with the rental income to be spent for the benefit of Maori.
- There was no legislative framework for reserves administration until the passing of the New Zealand Native Reserves Act 1856.
- Unassigned tenths reserves were managed by a succession of commissioners and management boards, while McCleverty reserves were managed by Maori themselves.

60. Swainson to Native Minister, 21 May 1866, Turton, *Epitome* (doc A26), s D, pp 53–55
61. 'Return of All Lands Vested in the Governor by Virtue of the New Zealand Native Reserves Act, 1856, and the Native Reserves Amendment Act, 1862', 1867, AJHR, 1867, A-17 (doc A24, pp 36–40)
62. Document C1, pp 350–351
63. Document E13, p 37

- There was little income from leasing tenths reserves, and much of this income was spent on the reserves' administration. Little of the revenue raised from the tenths reserves appears to have been paid to Maori directly, although some may have been used to subsidise Maori use of the hospital.

There were also two periods when the failure to appoint reserves commissioners appears to have led to problems. Following the passing of the New Zealand Native Reserves Act 1856, it was not until 1858 that commissioners were appointed under the Act. In 1857, land commissioner William Fox wrote to the Wellington superintendent noting that, as a result of the failure to appoint commissioners, 'difficulties affecting such Reserves and involving the relations of the European and Native Races, very frequently occur, which at present there are no means of adjusting'.[64] This gap in administration was claimed by the Wai 145 claimants to be a Treaty breach.[65] There was a further gap in administration between Swainson's resignation in 1867 and Charles Heaphy's appointment in 1869, which Heaphy did not take up effectively until he moved to Wellington in 1872. Heaphy reported that in the period 1867 to 1872 a number of disputes over tenths and McCleverty reserves broke out which he had to resolve when he arrived in Wellington, although he also noted that Maori appeared to be satisfied with Mr Young's performance of his duties of collecting and distributing rents.[66]

We make findings on the administration of the reserves during this period at the end of the chapter.

## 12.3 Heaphy's and Mackay's Administration

Charles Heaphy was the ablest of the reserves commissioners and for the first time put the reserves administration on a secure footing. He knew the Wellington settlement well, having been a draughtsman on Colonel Wakefield's original land-buying expedition and subsequently an assistant surveyor in Wellington. In later years, he made a noted exploration of the West Coast of the South Island, served as a goldfields commissioner at Coromandel, and was employed as a surveyor for the Auckland provincial government and the general government, surveying confiscated Waikato land for the latter. McLean had such experiences in mind when he appointed Heaphy commissioner of native reserves for the whole country.[67]

64. Fox to superintendent, 24 September 1857, WP3/1857/756 (doc E13(a), pp 18–19)

65. Claim 1.2(d), para 14.3

66. Charles Heaphy, 'Report on Native Reserves in the Province of Wellington', 16 August 1872, AJHR, 1872, F-1B (doc A24, p 56); Charles Heaphy, 'Report of Commissioner of Native Reserves', 30 June 1873, AJHR, 1873, G-2 (doc A24, p 58)

67. Michael Fitzgerald, 'Charles Heaphy', DNZB, vol 1, pp 181–183; 'Papers Relating to Major Heaphy's Appointment as Commissioner of Native Reserves . . .', 1870, AJHR, 1870, D-16 (doc A24, pp 42–43)

Heaphy was appointed commissioner of native reserves in 1869 and was originally stationed at Auckland. In 1872, he moved to Wellington so that he could take over the collection and distribution of rents from the Wellington reserves, and also in order to settle disputes which had arisen among Maori claiming interests in reserves around Cook Strait.[68] From this time, Heaphy concentrated on the administration of North Island reserves, while Alexander Mackay administered the South Island reserves.[69] Once he arrived in Wellington, Heaphy set about trying to put the leasing of reserves and the payment of rents to Maori beneficiaries in order. He made considerable progress in these endeavours, but, by the time of his death in 1881, the task of determining the beneficial ownership of the tenths reserves remained incomplete. Heaphy's work was continued for a short time by Mackay, but in 1882 the tenths reserves were vested in the Public Trustee under the Native Reserves Act 1882 (although Mackay remained reserves commissioner for several more years).

### 12.3.1 The Native Reserves Act 1873

Heaphy's administration could have had a firmer legal backing had the Native Reserves Act 1873 been brought into operation. Amongst other things, the Act was a consequence of the Court of Appeal judgment in *Regina v Fitzherbert* (discussed in the next chapter), which demonstrated the need to provide legal security for the Maori reserves.

When he introduced the second reading of the Native Reserves Bill, Native Minister Donald McLean said that it was designed to consolidate and amend the various pieces of legislation dealing with Maori reserves throughout the country. These reserves included the New Zealand Company and McCleverty reserves in Wellington province. The Bill provided a strict definition of 'what really were Native reserves' and 'a legal mode' for setting apart and dealing with certain trusts. It also stipulated that receipts and expenditure relating to reserves should be reported to Parliament each year.[70] McLean admitted that there had been 'a want of definition of title' with respect to the New Zealand Company tenths, which had not been recognised by law. He referred to the judgment in *Regina v Fitzherbert*, by which the tenths reserves were held to be demesne lands of the Crown, and observed that 'Some dissatisfaction arose among Natives at the lands being dedicated to purposes which did not immediately benefit them; and it was necessary that these reserves should be placed in some definite position as Native reserves, and be administered as such'.[71]

68. Charles Heaphy, 'Report on Native Reserves in the Province of Wellington', 16 August 1872, AJHR, 1872, F-1B (doc A24, p 56)

69. Johnson, p 72

70. 7 August 1873, NZPD, 1873, pp 327–328 (doc A20, pp 31–32)

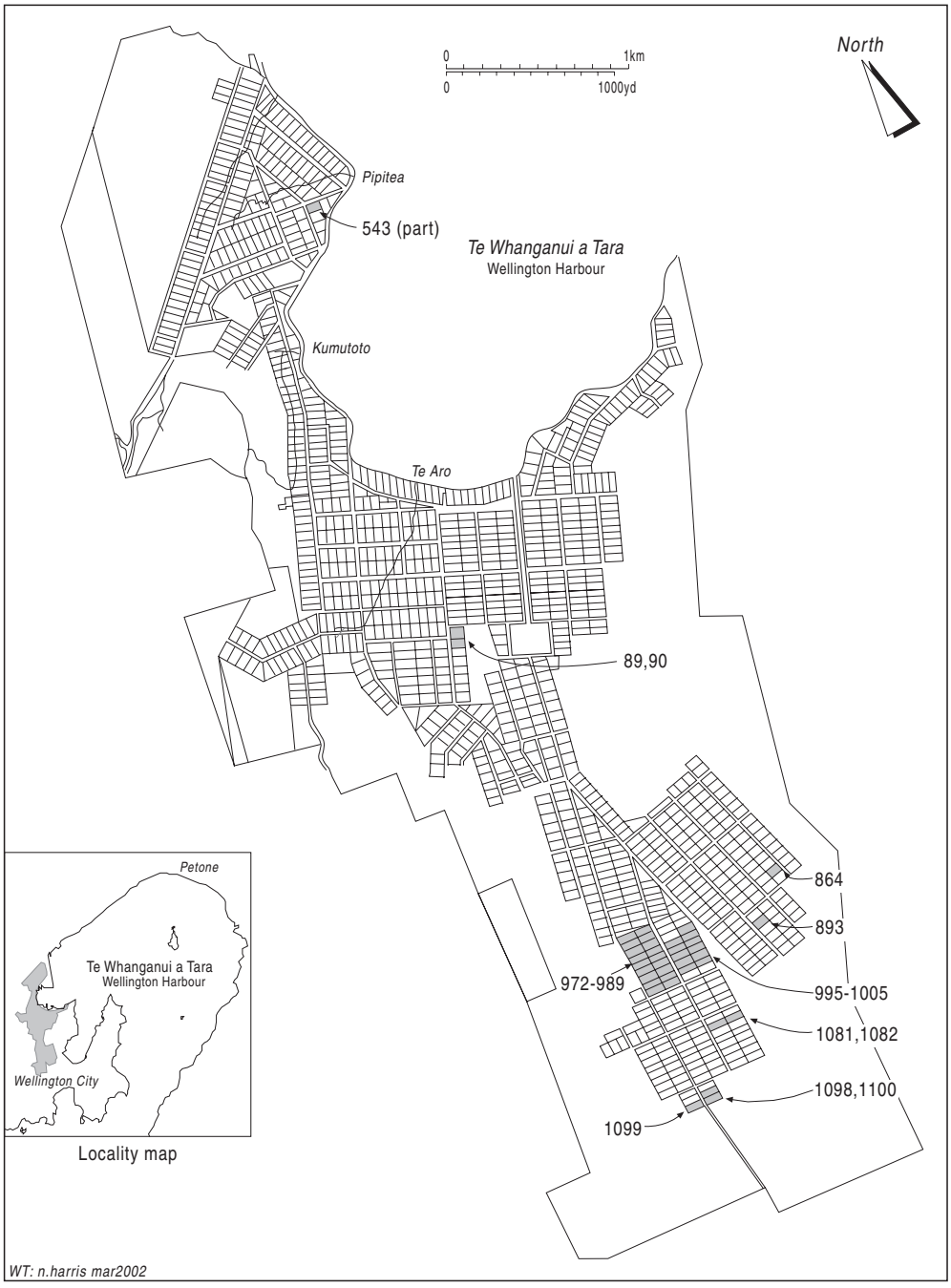
71. 8 August 1873, NZPD, 1873, p 353 (doc A20, p 34). *Regina v Fitzherbert* [1872] 2 NZLR 167 (CA) is discussed at section 13.2.5 below.

The concerns that McLean expressed in the debate were reiterated in the preamble of the 1873 Act.[72] The Act was to provide for 'the better administration of Native reserves throughout the Colony', to overcome difficulties relating to some trusts intended to be created but which were not sufficiently defined, and to assist with the identification of heirs of original beneficiaries. It also repealed previous legislation relating to Maori reserves. The Act provided for a considerably expanded form of reserves administration, with the colony being divided into a number of districts and a native reserves commissioner being appointed for each one. The reserves commissioner was to be a corporation sole and was to be deemed a trustee of the lands vested in him. He was to chair a board otherwise composed of three elected Maori assistant commissioners. The board was to decide by a majority of its members all matters connected with the native reserves in its district, including any sale, lease, or exchange of a reserve. Decisions to sell, exchange or lease also had to be approved by the Governor in Council. The commissioners could lease native reserves for up to 60 years for building purposes and up to 21 years for other purposes. No lease could contain 'any covenant or engagement for renewal'. The Maori assistant commissioners were given substantial powers, and, had the Act been implemented, for the first time since 1840 Maori representatives would have had effective control over reserves in their districts.

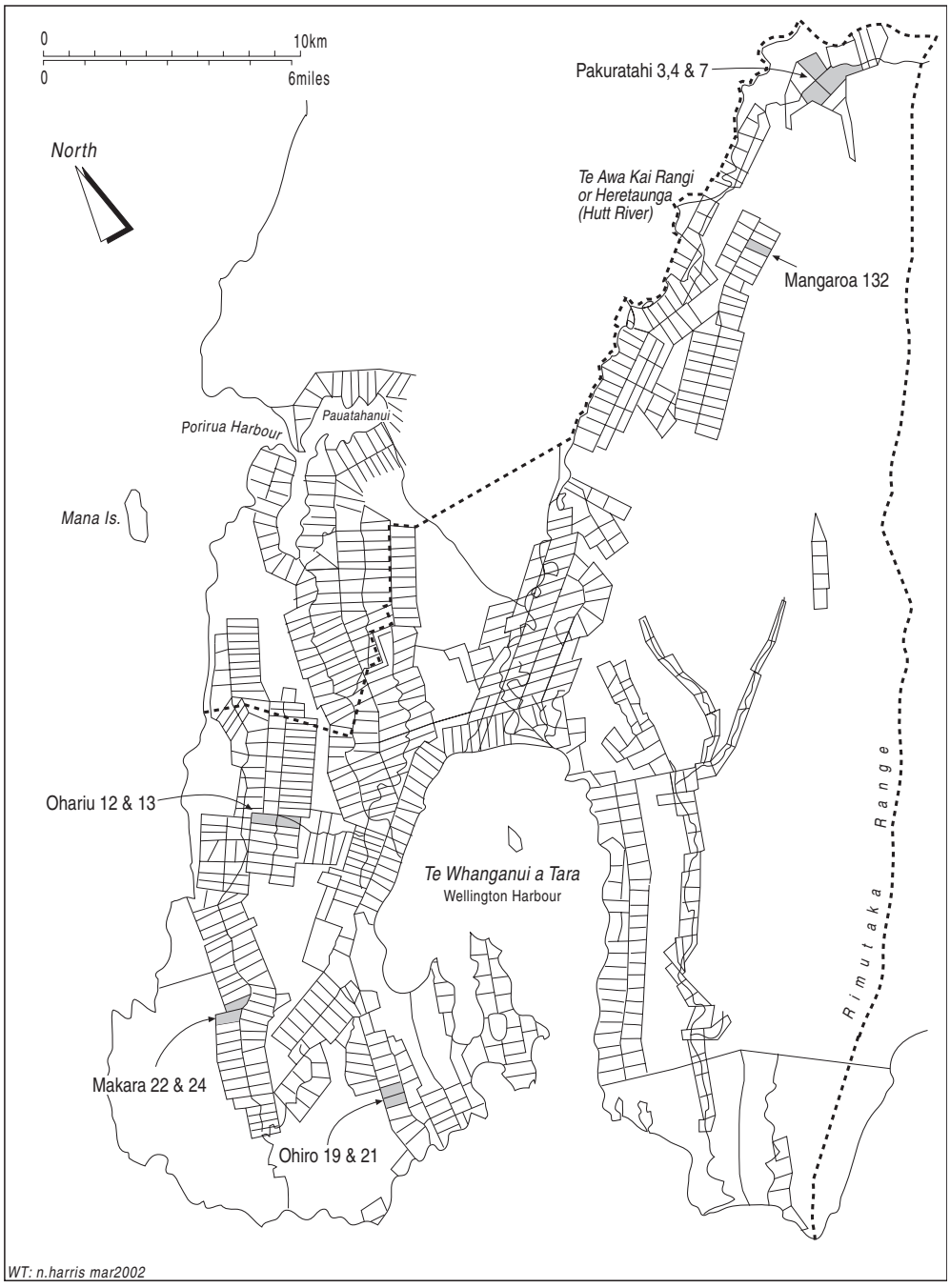
Several of the miscellaneous provisions of the Act referred specifically to the Wellington reserves. Section 53 was designed to set at rest doubts that the company tenths in Wellington and Nelson (listed in schedule D to the Act) were lands set apart for the benefit of Maori and were subject to native reserves legislation. Section 54 validated any sale, exchange, or lease of those lands made by the commissioner under previous legislation. Section 55 laid down that the McCleverty awards hitherto set apart 'for the benefit of the Aboriginal Natives by a simple declaration to that effect' but without the issue of a Crown grant should now be vested 'in Her Majesty or some proper authority in trust for such Natives'. However, because of the lapse of time, it was difficult to be certain who the legitimate owners were, so the reserves commissioner was to apply to the Native Land Court for a determination of ownership and to declare any necessary successions. Once the court had prepared a list of owners, it was to find out from them what purposes they wanted the land to be put to. This information was to be referred to the Governor in Council, who could either 'grant the land to the Native Reserves Commissioner of the district, or to such person or persons as he may think fit, for such purposes accordingly' (s 57). Section 58 allowed the commissioner to apply to the Governor in Council to sell or otherwise dispose of 'separate and isolated pieces' of reserved land in order to facilitate the consolidation of reserved land into larger blocks. The Governor could, with the consent of a majority of the Maori owners, order that the land be sold, have the proceeds invested in trust for the owners, and make further orders, 'with the view of furthering the consolidation of the secured lands of the tribe into one reservation'.

72. The Native Reserves Act 1873 (doc A21, pp 12–28)

12.3.1




Map 11: Remaining urban tenths in 1873




Map 12: Remaining rural tenths in 1873

12.3.1

Schedule D to the Act listed all that now remained of the Wellington tenths. The urban tenths consisted of the middle part of section 543 at Thorndon, sections 89 and 90 in upper Taranaki Street, and 36 tenths in Newtown. There were 10 rural tenths: 175 acres at Ohiro, 200 at Makara, 201.5 at Ohariu, 100 at Mangaroa, and 300 at Pakuratahi (although the Pakuratahi reserves were not in fact original tenths) (see maps 11, 12).[73]

The Act has been characterised as providing for:

> balanced local management and central control; it contained a number of provisions designed to safeguard the interests of the Maori beneficiaries; it gave Maori a large voice in the management of the reserves, amounting to veto rights; the powers and responsibilities of the commissioners were set out clearly; accounting procedures were refined, and the ways in which rental income could be expended carefully defined. In many respects, it was an admirable piece of legislation.[74]

We agree.

However, the Act was never brought into operation, and reserves commissioners continued to function under the 1856 Act. By failing to implement the 1873 Act, the Crown missed an opportunity to improve the administration of the reserves and to provide some recognition of Maori rangatiratanga over those reserves. The Crown has accepted that 'had the 1873 Act been implemented it would have gone some way towards meeting the expressed desire of Maori to have more say in the management of their reserves'. But it adds that 'in practical terms Heaphy did during his commissionership involve Maori in the administration of the reserves'.[75] Crown counsel provided several examples of Heaphy's consultation with Maori over the reserves' administration.[76] We acknowledge this but note that consultation with Maori before reaching a decision differs markedly from allowing them a controlling say, as provided for by section 7 of the 1873 Act. In its overview of administration by the commissioners of native reserves, the Crown has accepted that, 'to the extent that the Maori expectation of greater input into management of the reserves was still frustrated, . . . there may have

73. The history of the Pakuratahi reserves (located near Kaitoke, north of Upper Hutt) is exceedingly complex, and their origins are somewhat obscure. There is no evidence that they were originally New Zealand Company tenths, although they later came to be regarded as such. In the late 1840s or early 1850s, parts of these sections were cultivated by Ngati Tama under the leadership of Teira Te Whetu, who claimed that Grey had promised to give Pakuratahi to him. In the 1860s, Te Whetu and others were given a right of occupation to part of the Pakuratahi land, and, although the land was not granted to them, they proceeded to lease it out. By the time they returned to Taranaki in the early 1870s, it appears that they had leased out all 300 acres. Heaphy investigated the matter in the early 1870s and evidently considered the Pakuratahi reserves to be original tenths. He assigned the rent for part of the Pakuratahi land to particular owners, while rents for the rest went into the general native reserve fund. The Pakuratahi reserves were included in schedule D to the Native Reserves Act 1873 (though they were incorrectly listed as sections 2, 3, and 4 rather than as 3, 4, and 7) and were thereafter treated as rural tenths: see document I11, pp 61–66, and R L Jellicoe, 'Report on Native Reserves in Wellington and Nelson under the Control of the Native Trustee', 26 March 1929, AJHR, 1929, G-1, pp 46–47 (doc A24, pp 314–315).

74. Document I11, p 11

75. Document P4, pp 47–48

76. Ibid, pp 48–49

been a breach of Treaty principles'.[77] Indeed, we believe that there was a serious breach of Treaty principles in this respect.

It appears that the decision not to implement the 1873 Act was due primarily to fears that the powers given to the Maori majority on the reserves boards would be exercised to inconvenience European lessees, especially those who leased urban lots in Greymouth.[78] This point was emphasised by Alexander Mackay, who was asked to prepare a replacement for the Act.[79] Crown counsel suggested that the possible costs of administering the reserves under the 1873 Act may have been another reason why the Act was not brought into operation.[80] As we note below, and as the Tribunal has also noted in its *Ngai Tahu* and *Taranaki* reports, subsequent changes in reserves legislation were usually to the advantage of European lessees rather than Maori lessors.[81]

### 12.3.2 Heaphy's reports

Unlike Swainson, Heaphy submitted regular, detailed reports on the reserves under his administration. His first report on the native reserves in Wellington province included comment on some former reserves that had become trust endowments and were not strictly under his control. These included, as Heaphy put it, urban tenths appropriated by the Government for 'various religious, educational, and charitable purposes, from which Natives, in common with Europeans, might derive a benefit'. They also included the lands on which were located the Native Office and hostelry, the Governor's stables, and a part of the Te Aro (Mount Cook) barracks. Heaphy admitted that the appropriation of these reserves had caused dissatisfaction among Wellington Maori. However, like Eyre, Heaphy thought it reasonable for the Government to take such land in return for the considerable area of land provided for Maori by McCleverty (presumably in the mistaken belief that this land was not in fact owned by Maori).[82] Nevertheless, Heaphy did press the Government over the next few years to compensate Wellington Maori for the urban tenths taken for endowments, and, when the Government decided to pay compensation for these reserves, he provided a valuation (see s13.2.6). Heaphy also negotiated payments to Maori when parts of Hutt Valley reserves were taken for railway purposes (see s17.3.2).

Heaphy's first report also included a schedule of native reserves in the province of Wellington, which provided details of leasing and, occasionally, of sale. His subsequent annual reports carried similar details, as well as accounts of receipts and disbursements. It is not

77. Ibid, p 59
78. Document I11, pp 11–13
79. Mackay to under-secretary, Native Department, 16 August 1876, AJHR, 1876, G-3A (doc A24, p 104)
80. Document P4, p 47
81. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 3, ch 14; Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), s 9.3
82. Charles Heaphy, 'Report on the Native Reserves in the Province of Wellington', 5 May 1871, AJHR, 1871, F-4 (doc A24, pp 45–46)

necessary to repeat or summarise these details, but we select some as examples to illustrate the variety of Heaphy's activities and his exercise of his trust responsibilities. His main activities were the leasing of reserves and the collection of rents, tasks that he appears to have carried out more efficiently than his predecessors.

### 12.3.3 Urban tenths

In negotiating leases and rentals, Heaphy was prepared to stand firm against European lessees who attempted to get favourable terms at the expense of the Maori beneficiaries. By way of example, we look briefly at the struggle over the leasing of the Newtown tenths. These constituted all that was left of the unassigned urban tenths, apart from a tiny fragment of a tenth at Thorndon. There were also two sections at Mount Cook, but these had been occupied, rent-free, by a military barracks since 1848, and were purchased by the Crown in 1874 (see ss 13.2.2, 13.2.6).

Most of the Newtown tenths were in two contiguous blocks containing sections 972 to 989 and 995 to 1005. Sections 972 to 989 had been leased in 1865 to Walter Mantell. When Swainson resigned in 1867, Mantell stopped paying rent on the grounds that he had no properly executed lease, that no boundaries had been pointed out, and that there was no one legally qualified to receive the rent. He said that, if the Government would refund the rent he had already paid and discharge him from further rent payments, he was willing to give up his lease so that Mohi Ngaponga and the Te Aro people could cultivate the land. The Native Department declined to accept this proposal, and in 1871 Mantell was required to pay his rent, though he was given a proper lease for the 15 years remaining on the term of his original lease. In 1873, Mantell assigned his lease to one Alexander Johnston and one Mary Burns.[83] Johnston also leased sections 995 to 1005 from 1873, these sections having previously been leased to Hemi Parai at a nominal rent. In 1877, Johnston's leases were renewed, with rent for sections 972 to 989 set at £35 for the first seven years, £45 for the next seven, and £60 for the last seven. The rent for sections 995 to 1005 was set at £20 for the first four years, £25 for the next seven, £30 for the next seven, and £40 for the final three years.[84]

The fact that Johnston had obtained control of 29 acres of urban reserves on favourable terms for 21 years, at a time of rising land values, was not accepted by Maori without protest. Wi Tako and some Te Aro Maori told Native Minister John Bryce in 1880 that the reserves were theirs and that they wanted the land 'as a permanent place of residence for ourselves'.[85] Later that year, they again protested to Bryce that they wanted to manage the reserves themselves.[86] In response, Heaphy argued that these were 'general' tenths reserves and that, unlike

83. Document C1, pp 351–352; doc I4, pp 232–234; doc I11, p 80
84. Document I11, pp 79–80
85. Wi Tako and others to Bryce, 19 July 1880, 13 August 1880, MA17/6 (doc A35, pp 54, 61)
86. Document I11, pp 81–82

the McCleverty-assigned reserves, they had not been allocated to 'any particular native or family' and the income from them was being allocated to general purposes, not to particular individuals or groups.[87] In 1882, Tamati Te Wera and others petitioned Parliament, claiming that the reserves were not being administered for their benefit and that favourable private arrangements were being made for Johnston.[88] The Native Affairs Committee heard evidence on the petition, and, although it made no recommendation on the matter, its hearing disclosed some disquieting facts about the leasing of Wellington tenths. Mackay (who had replaced Heaphy as reserves commissioner) gave evidence that rents from the Newtown reserves had not been specially assigned to anyone and therefore the petitioners were not entitled to all the rents. He also admitted that the ownership of the land had never been fully ascertained.[89]

It is apparent from researcher Dr Keith Pickens's examination of the dispute that Heaphy did not favour Johnston, but he did not meet the wishes of the Maori complainants either, since he was determined to keep the unassigned tenths under his control.[90] Heaphy was unwilling to allocate the tenths to Maori, preferring to keep the rents in a general purposes fund that included unallocated funds for reserves throughout the North Island. It was not until 1888 that the question of determining the beneficial ownership of the Wellington urban tenths was taken before the Native Land Court. In contrast, Heaphy had compiled lists of beneficiaries for the rural tenths.

Heaphy's handling of the Newtown rents dispute has been cited by Crown counsel as an example of 'conscientious administration in the interests of the beneficial owners'.[91] (Wai 145 claimant counsel made no comment.) We accept the Crown's point but add that Heaphy's 'conscientious administration' did not extend to determining who those beneficial owners were and paying them income from the leased reserves.

In his time as reserves commissioner, Heaphy managed to rent the remaining urban tenths, except for several of the more remote Newtown tenths, one of which was not successfully leased until 1900. Others occasionally became vacant and were not re-let for some time.[92] There was also considerable variation in the rents, with a small portion of section 543 in the commercial centre of Thorndon bringing in £18 per annum in 1875, while five full tenths in the more distant suburb of Newtown were let for £10 per annum the following year.[93] Wellington Maori had long since ceased to occupy urban tenths, and few remained even on the remnants of harbour-front pa land reserved for them by McCleverty at Te Aro and Pipitea. With Heaphy's full approval, most of the Te Aro and Pipitea Pa land was being

87. Heaphy to Lewis, 9 August 1880, MA17/6 (doc A35, p 58)
88. Document I11, p 82
89. Ibid, p 83
90. Ibid, pp 83–85
91. Document P4, pp 54, 54–56
92. Document I11, pp 73–77
93. Ibid, pp 75, 77

alienated, and it was subsequently cut off from the waterfront by harbour reclamations. We discuss these matters in chapters 13 and 18.

### 12.3.4 Rural tenths

It was a different story with the rural tenths. By 1873, these reserves had been reduced to 175 acres at Ohiro, 200 at Makara, 201.5 at Ohariu, 100 at Mangaroa, and 300 at Pakuratahi.[94] By 1876, all these reserves were leased, producing an annual return of £128 14s.[95] Many Maori with rights in these reserves now lived outside the Wellington district, but Heaphy paid rents only to those Maori remaining in Wellington whom he thought entitled to payments. Sometimes, there were disputes over rights to, or rentals from, the reserves. In one such dispute regarding Ohiro sections 19 and 21, Heaphy, in consultation with the Te Aro Maori who claimed ownership of the reserves, drew up a list of 15 persons who were to receive equal shares of the rent.[96] He applied this practice to other rural tenths, thereby creating lists of beneficial owners on whose behalf these tenths were to be held in trust. He did the same with McCleverty-assigned reserves which were handed over for his administration, including the Polhill Gully reserves. His list of owners for the Polhill Gully McCleverty reserves was almost identical with that for the two Ohiro tenths sections, and soon afterwards the Ohiro and Polhill Gully rents were amalgamated into one account. While this amalgamation of the accounts may have simplified their administration, it helped to blur the distinctions between the remaining tenths and the McCleverty reserves. Ohiro 19 and 21, though remaining as rural tenths (and designated as such in schedule D to the Native Reserves Act 1873), were subsequently treated as McCleverty awards until as late as 1912.[97]

### 12.3.5 Polhill Gully reserves

As another example of Heaphy's administration, we now discuss the Polhill Gully reserves, the most important of the McCleverty awards to come under Heaphy's control. They consisted of some 90 acres of land on the edge of the town, including 31 former urban tenths and three town belt blocks assigned by McCleverty to Maori at Te Aro. These reserves were leased by the owners in the late 1860s, but in 1873 the owners placed them, together with other McCleverty reserves at Kinapora and Ohariu, under Heaphy's administration, because, as he put it, they were 'unable to manage them themselves'.[98] A list of 17 owners

94. The origins of the Pakuratahi reserves are explained in footnote 73 above.
95. Document I11, p 90
96. Ibid, pp 21, 23
97. Ibid, pp 23–25
98. 'Return of all Lands Vested in the Governor . . .', 1867, AJHR, 1867, A-17 (doc A24, p 37); Charles Heaphy, 'Report of Commissioner of Native Reserves', 30 June 1873, AJHR, 1873, G-2 (doc A24, p 59); Charles Heaphy, 'Report of Commissioner of Native Reserves', 29 May 1874, AJHR, 1874, G-5 (doc A24, p 84)

was produced, and they agreed to distribute the rentals on a 'share and share alike' basis. In November 1873, Heaphy made a first distribution of Ohiro and Polhill Gully rentals, with each owner receiving £4 1s 2d.[99]

The owners sometimes disagreed with Heaphy's administration of the Polhill Gully reserves, and on one occasion they disputed his ruling that a proposal to lease some of the gully town sections to Alexander Johnston must be opened to public competition. The owners withdrew the sections from Heaphy's administration in order to let the land to Johnston, but subsequently put them back under his control.[100] Heaphy continued to pay out rental income, and in 1875 he reported:

> The collective proceeds of all the Wellington lands so intrusted to me by the owners to let, I divide periodically amongst the people interested. I have induced the chiefs, who generally have other sources of income, to share alike with the inferior people in the division.[101]

Heaphy also noted that the owners of the Polhill Gully land had approved each of the lease arrangements he had made on their behalf, a clear indication that he administered these McCleverty reserves in consultation with their owners.

The Crown has characterised the transfer of Polhill Gully and other McCleverty reserves to Heaphy's administration as an 'indication of the high degree of confidence placed in Heaphy by the beneficiaries'.[102] The point is well made, but it must be remembered that only a few McCleverty reserves were administered by the commissioner. It is clear that most Maori still preferred to retain full control of their McCleverty reserves.

### 12.3.6 Payment of beneficiaries

In the 1870s, Heaphy assigned the rents for all but two of the rural tenths to a small number of Maori families.[103] At this time, the rural tenths brought in more revenue than the urban tenths: two-thirds of the tenths income in 1875–76 came from them. In the same year, administration expenses took about 17 per cent of tenths income, about 50 per cent was paid to beneficial owners, and the remaining 33 per cent was retained in the reserves account. From 1878, rental receipts for the urban tenths, and for other reserves for which there were no identified beneficiaries, were paid into a general purpose account for the whole North Island. This account was used to pay salaries and administrative expenses, but it was also occasionally used to assist needy Maori in Wellington.[104] Although the amounts paid out to beneficiaries were still small, the situation had at least improved since the first three decades

99. Document I11, p 86
100. Ibid, pp 86–87
101. Charles Heaphy, 'Report of Commissioner of Native Reserves', 30 June 1875, AJHR, 1875, G-5 (doc A24, p 91)
102. Document P4, p 49
103. Document I11, p 96
104. Ibid, pp 91–92

of the Wellington settlement, when there was scarcely anything left over after the payment of salaries and administrative costs.

In May 1878, in an endeavour to clear up the confusion over beneficial ownership, Heaphy was appointed a royal commissioner with responsibility to inquire into Maori claims to the New Zealand Company tenths and the McCleverty reserves. By July 1879, the commission had reported on 60 of the 110 cases brought before it, and it had recommended Crown grants for nearly all the claimants. However, Heaphy died in 1881 before issuing a final report.[105] Some of the evidence from Heaphy's commission has survived and was presented to us by the Crown.[106] It provides useful glimpses into Heaphy's procedures. However, most of the surviving documents relate to inquiries into the ownership of McCleverty-assigned reserves. In these instances, Heaphy began with the relevant McCleverty deed, then inquired whether any of the original signatories were still alive, and, if they were not, whether any of their children were alive. Usually, the witnesses before the commission agreed amongst themselves as to the legitimate original owners or their successors.[107] At times, Heaphy was able to supplement their evidence by referring to Native Land Court hearings. Indeed, his own hearings resembled those of the land court, with Maori witnesses supporting their claims to reserves by reference to occupation and whakapapa. (We note that Heaphy had in fact been made a Native Land Court judge in 1878.)

### 12.3.7 Mackay's administration

After Heaphy's death, Alexander Mackay, formerly the commissioner of South Island reserves, replaced him in Wellington. Mackay does not appear to have written an annual report for 1882, though he did produce a statement of receipts and expenditure for the North Island reserves account from 1 April 1880 to 31 March 1882.[108] The rental income from the Wellington reserves was £910 13s 8d for the year to 31 March 1881, and £961 10s 6d for the year ended 31 March 1882. The 'Rents paid to Natives' for the year to 31 March 1881 for the 'Wellington Account' were £735 7s 8d, and for the following year were £726 11s 11d. Substantial expenses for the salaries of Heaphy and his clerk had been deducted from the rents, as had £149 4s 6d of expenses for Heaphy's still incomplete commission of inquiry.

There is little other record of Mackay's administration of the Wellington reserves, though there is evidence that he tried to complete some of the inquiries begun by Heaphy as part of his royal commission. In September 1882, for instance, Mackay's 'Commissioner's Court', as he called it, conducted inquiries into various reserves at Petone.[109] However, the inquiries

105. Charles Heaphy, 'Report of the Commissioner of Native Reserves', 1 July 1879, AJHR, 1879, G-7 (doc A24, p 128); Pickens, doc I11, p 97

106. Documents N1, N2

107. See, for instance, minutes of hearings concerning Polhill Gully, 2–7 August 1878, 23 April 1879, MA W2218, box 31 (doc N1, pp 9–25)

108. 'North Island Native Reserves Account . . .', 19 August 1882, AJHR, 1882, G-6 (doc A24, pp 178–179)

109. Document N1, pp 96–171

were not completed, and it seems that the Crown grants which Heaphy's commission had recommended were never issued.[110] The beneficial ownership of the remaining urban tenths was still unresolved and was not considered until the 1888 hearing of the Native Land Court with Mackay by then the presiding judge. We discuss this in chapter 15.

Mackay's role as reserves commissioner was modified by the passing of the Native Reserves Act 1882, which vested all native reserves previously controlled by the Governor or native reserves commissioners, including the Wellington tenths, in the Public Trustee. (The trustee had already been required by the Public Revenues Amendment Act 1877 to administer the income from native reserves.[111]) Section 27 of the 1882 Act provided for the appointment of a native reserves commissioner who could act on delegated authority from the Public Trustee. Mackay was appointed to this position, but his appointment as a Native Land Court judge in 1884 meant that he ceased to be a commissioner. However, he continued to advise the Public Trustee unofficially for some years.[112] We discuss the Native Reserves Act 1882 further in chapter 14.

## 12.4 The Status of the Wellington Tenths

It is apparent from our discussion of the administration of the Wellington tenths to 1882 that the Crown neglected adequately to define the status of the tenths in this period. We have deferred any detailed discussion until this point, because an account of how the tenths were viewed from 1839 to 1882 is relevant to reaching a conclusion on their status and the Crown's responsibility for them. More specifically, we need to determine who were the intended beneficial owners of the Wellington tenths.

### 12.4.1 Evidence of the status of the Wellington tenths reserves

The following evidence is relevant to our consideration of the status of the Wellington tenths:

- The 1839 deed of purchase concluded with William Wakefield on behalf of the New Zealand Company promised the chiefs of the Port Nicholson district that:

  > a portion of the land ceded by them, equal to one-tenth part of the whole, will be reserved by . . . the New Zealand Land Company . . . and held in trust by them for the future benefit of the said chiefs, their families, and heirs for ever.[113]

110. Document C1, pp 425–426
111. Document I11, pp 13–14
112. Ibid, pp 15–16
113. Document A29, p 440

- In evidence given before a House of Commons select committee in 1840, Edward Gibbon Wakefield advised that the company was very desirous of placing the tenths in a trust for the benefit of Maori and that it would be necessary to create a permanent trust.[114]
- On 10 October 1840, the company appointed Halswell commissioner for the management of native reserves, and Halswell's instructions noted that these reserves were to be held 'in trust for the future benefit of the chief families of the ceding tribes'.[115]
- In chapter 5, we discussed an agreement made between Lord John Russell and the New Zealand Company in November 1840. Clause 13 of this agreement referred to the land to be reserved for Maori by the company and provided that the reservation of such lands for the benefit of Maori was to be undertaken by the Crown in fulfilment of and according to the tenor of the stipulations made by the company (see s 5.4.2). It is apparent that, from November 1840, the Crown assumed responsibility for ensuring that the tenths were reserved and administered for the benefit of Maori.
- On 28 September 1841, Halswell was issued with instructions from Governor Hobson on the management of the native reserves.[116] Halswell was instructed that the reserves could be leased out, subject to certain conditions, and that the rental income from them was to be used for:
  - the education and religious instruction of Maori;
  - the improvement of the Maori churches at Te Aro and Pipitea;
  - the funding of a dispensary and medical advice; and
  - the funding of a schoolmaster and school for Maori children.
- In a report to the company of 11 November 1841, Halswell noted that Governor Hobson 'always appeared to treat the reserves as the absolute property of the natives'. Halswell, however, considered that the reserves were the property of the company, which had been willing to release, in trust for the benefit of Maori, portions of the lands purchased by it.[117]
- On 26 July 1842, Colonial Secretary Shortland advised chief protector Clarke that, once the reserves made by the company had been legally vested in the Crown, the Governor proposed to submit to the Legislative Council a Bill for vesting them in three trustees (the bishop, the chief justice, and the chief protector). Revenue from the reserves was to be applied to the establishment of schools for Maori and 'in furtherance of such other measures as may be most conducive to the spiritual care of the Native race, and to their advancement in the scale of social and political existence'.[118]

114. E G Wakefield, 'Evidence to the House of Commons Select Committee on New Zealand', 16 July 1840, BPP, vol 1, [582], p 25
115. Ward to Halswell, 10 October 1840 (doc A29, pp 481–482)
116. Clarke to Halswell, 28 September 1841, Turton, *Epitome* (doc A26), s D, p 1
117. Halswell to secretary, New Zealand Company, 11 November 1841 (doc A29, p 487)
118. Shortland to chief protector, 26 July 1842, Turton, *Epitome* (doc A26), s D, pp 3–4

- On 10 January 1843, G W Hope (for Lord Stanley) wrote to the New Zealand Company concerning the company's claims under the November 1840 agreement with Lord John Russell. After rejecting a company proposal that settlers who had been unable to obtain particular lands should be compensated from out of the native reserves, Hope advised that:

> Should it appear in consequence of a diminution of the extent to which a title is established by the Company at Wellington, that more than the proper proportion has been set apart as a reserve, Lord Stanley will, of course, not object to the reserve being so reduced as to bring it within the proportion which it ought to bear to the whole, but he can permit no diminution to take place in the amount once definitively ascertained to be the proper proportion.[119]

We note that this makes it clear that, whatever the area of land acquired by the company under the 1844 deeds of release, a full one-tenth of this land would have to be reserved for Maori. In fact, as we have seen, the company failed to meet this requirement, as did the Crown (see s 8.8.1). That it was the Crown's duty to ensure that this requirement was met is reinforced by an instruction from Lord Stanley to FitzRoy dated 18 April 1844:

> Turning now to the subject of the native reserves, there can, I think, be no question that they should be taken out of the Company's lands. The Company had, in former instructions to their agent, provided for reserving one-tenth of all the lands which they might acquire from the natives, for their benefit. By the 13th clause of their agreement of November 1840, the Government was, in respect of all lands to be granted to them, to make reservation of such lands for the benefit of the natives, in pursuance of the Company's engagements to that effect. It seems quite plain, therefore, that the Government is to reserve for this purpose one-tenth of the Company's lands.[120]

- The 1844 deeds of release signed on behalf of the various pa at Port Nicholson reserved in all 39 country sections of 100 acres each and 110 one-acre town sections, being 4010 acres in total, as tenths reserves.
- In 1844, FitzRoy secured the passsage of the Native Trust Ordinance, which he referred to Lord Stanley for royal approval in a dispatch dated 22 October 1844, commenting that, 'Until legal authority is given to those who are ready to act as trustees, no step can be taken in respect of land reserved for the future benefit of the aboriginal race, and no fund can be raised or managed by such trustees for education, or for the care of the sick'.[121]

119. Hope (for Stanley) to Somes, 10 January 1843, BPP, vol 2, apps, p 22
120. Stanley to FitzRoy, 18 April 1844, BPP, vol 2, apps, p 77
121. FitzRoy to Stanley, 22 October 1844, BPP, vol 4, p 422

12.4.1

The preamble to the ordinance stated that it was expedient to appoint trustees for the better administration of lands and moneys appropriated for the advancement of Maori.[122] While not specifically referred to, it is clear that the Wellington tenths were intended to be included in the ordinance and were to be held in trust for the beneficial owners. However, the ordinance was never brought into operation.

- In his final award of 31 March 1845, Spain determined that 39 native reserves of 100 acres each and 110 town acres were to be excluded from the 71,900 acres in the Port Nicholson district awarded to the New Zealand Company. These were the Wellington tenths reserves, which were not vested in the company but, as Lord Stanley had made clear, were to be reserved by the Crown for the benefit of Maori.[123]
- On 29 July 1845, FitzRoy issued a Crown grant of 71,900 acres to the New Zealand Company, with the same exclusion of the tenths reserves as in Spain's award.[124] This grant was rejected by the company.
- McCleverty assigned to the Maori of particular pa some 45 urban tenths and 3162 acres of rural tenths. This left some 65 urban tenths, and 738 acres of rural tenths, from the area reserved to them in the deeds of release.
- Grey's Crown grant of 27 January 1848 reserved for Maori 110 acres of urban tenths and 4200 acres of rural tenths.[125] This was 300 acres more than the 3900 acres of rural tenths reserved under the schedule to the 1844 deeds of release. As we have just noted, most of this tenths land had been converted into McCleverty reserves owned by the Maori of particular pa.
- The preamble to the New Zealand Native Reserves Act 1856 stated:

> Whereas in various parts of New Zealand lands have been and may hereafter be reserved and set apart for the benefit of the aboriginal inhabitants thereof, and it is expedient that the same should be placed under an effective system of management . . .[126]

Neither the New Zealand Company tenths nor the McCleverty-assigned reserves were expressly mentioned in the Act, but, while the Act remained in force (to 1882), officials usually assumed that the tenths came under the Act and that the McCleverty reserves could be brought under section 14 of the Act.

- The Native Reserves Act 1873 was passed in part to overcome the 1872 decision of the Court of Appeal in *Regina v Fitzherbert*, which we discuss in our next chapter. The Wellington tenths referred to in the Act were deemed by section 53 to have been set

122. Document A21, pp 1–2
123. Spain's final report, 31 March 1845, BPP, vol 5, p 25
124. BPP, vol 5, p 123
125. The Crown grant is in doc A10(a), pp 10:1–10:2; schedules of land reserved in urban and rural areas are on the plans attached to the grant (docs A9(a) and (b) respectively).
126. Document A21, p 6

apart for the benefit of Maori. Provision was made for the appointment of a native reserves commissioner, to be a corporation sole, and native reserves were to vest in him.

It is apparent from the provisions of the Act that the Crown recognised that the Wellington tenths reserves were in the beneficial ownership of Maori in the Port Nicholson district. Unfortunately, this Act, like FitzRoy's 1844 ordinance, was not brought into operation. It was not until the passage of the Native Reserves Act 1882, which vested the administration of the Wellington tenths and other Maori reserves in the Public Trustee, that an appropriate legal framework was established. We note that Crown counsel accepts that from 1873 the remaining tenths were lands set apart for the benefit of Maori.[127]

### 12.4.2 Crown submissions on the status of the Wellington tenths

In a review of the history of the company reserves to 1877, Crown counsel made a series of submissions, the general tenor of which was that Maori rejected the company's tenths scheme and showed little interest in these reserves.[128] The main points made by Crown counsel are set out below in italics. Our comments follow each point.

*Maori rejected the tenths reserve scheme and refused to move from their existing pa and cultivations.*

Maori refused to move from their pa and cultivations because from the outset they were emphatic that they had never agreed to sell them. Their lack of interest in the tenths selected on their behalf and without consultation with them was due to the fact that many of the tenths were unsuitable for their then needs when compared with their existing pa and cultivations. They had not, however, agreed to part with their tenths reserves. This is confirmed by the reservation of these reserves in the schedule to the 1844 deeds of release.

*The Crown supported Maori in their rejection of the company's scheme. It assured Maori that they would not be required to leave their pa and cultivations. The Crown assumed control of the company reserves and saw those not occupied by Maori as a source of income for Government expenditure on Maori purposes.*

It is difficult to reconcile this interpretation of events with the provisions of clause 13 of the Russell agreement of November 1840, which provided that the tenths were to be reserved by the Crown for the benefit of Maori.

Nor can it be reconciled with Lord Stanley's statement in the letter of 10 January 1843 referred to above that he could not permit anything less than the full one-tenth of the land acquired by the company to be reserved for Maori. Stanley, as we have seen, reinforced his

127. Document P4, p 3
128. Document P1, pp 101–104

earlier statement by advising FitzRoy in April 1844 that the Government was to reserve such tenths for the benefit of Maori.

In answer to a question from the Tribunal, Crown counsel stated that the 1840 Russell agreement was superseded by a subsequent view that the 1839 deed of purchase was a nullity. But counsel has ignored the clear and unambiguous confirmation by Stanley of the requirement that the Crown was to make provision for the appropriate number of tenths to be reserved for Maori. The full quota of tenths was not in fact reserved in the 1844 deeds of release.

*The 1844 agreements 'apparently' included the company reserves in the lands that would 'remain for' Maori.*

The 1844 deeds of release *expressly* reserved 110 urban tenths and 39 rural tenths to Maori. We are at a loss to understand Crown counsel's reference to this having only 'apparently' been done. It is important to note that Maori had never sold or surrendered the land making up these tenths reserves. Counsel overlooks the fact that, at the meeting between FitzRoy and Wakefield at Wellington on 29 January 1844, it was agreed that 'the pahs, cultivations and reserves' would be excluded from any lands acquired from Maori (see s7.5.1). The tenths reserves were owned by Maori and were, along with their pa and cultivations, reserved for them in the deeds of release.

*The Government continued to see the unoccupied company reserves as a means of raising income.*

The Government was aware that the tenths were to be held for the benefit of Maori, for whom they had been reserved. There is no evidence that the Crown consulted with the Maori beneficiaries as to the use of their reserves.

*There was no Maori awareness of or interest in these reserves at the time.*

The Crown and Maori were well aware that the tenths listed in the schedule to the 1844 deeds of release had been reserved for Maori, but many of the tenths were unsuitable for cultivation by Maori. Accordingly, the onus was on the Crown to take all reasonable steps to ensure that they were let and that Maori were consulted as to the disposition of the rental income.

*The Crown viewed the reserves not selected by Maori in 1847 as being available, as before, to supply income for Maori purposes. It considered that these assets might be used to set off other expenditure on Maori and thought it proper if some were taken and used for the public good.*

There is no evidence that Maori 'selected' the reserves assigned to them by McCleverty in 1847 or that, in agreeing to the McCleverty arrangements, they were giving up any claim to the remaining tenths reserves. Moreover, at no stage did the Crown obtain the consent of Maori beneficiaries to the appropriation of their tenths reserves, nor did the Crown consult

with or obtain the consent of Maori to the use of these reserves to set off other expenditure on Maori.

The Tribunal is satisfied that there is no matter of substance referred to by Crown counsel in reviewing the history of the tenths reserves to 1877 which can reasonably be held to establish that, from November 1840 on, the Crown was not required to ensure that it held and administered the tenths reserves in trust for the benefit of Maori, as directed by Lords Russell and Stanley. The Treaty clearly required consultation with Maori by those charged with the administration of the tenths reserves.

### 12.4.3 Finding on the status of the Wellington tenths

The Tribunal finds that Maori having customary rights in the Port Nicholson block as at 1840 were intended to be the beneficial owners of the tenths reserves to be provided for out of the land in the block acquired by the New Zealand Company, and that these reserves were to be held in trust for such Maori.

This intention was manifested in different ways by the New Zealand Company and by Hobson. Lord Russell in November 1840 and Lord Stanley in 1843 and 1844 made it abundantly clear to the New Zealand Government that the appropriate proportion of tenths was to be reserved for the benefit of Maori. Hence Governor FitzRoy's insistence that the tenths be reserved to Maori in the 1844 deeds of release. These deeds expressly reserved 110 urban and 39 rural tenths to the Maori signatories and those they represented. In his final 1845 award, Spain confirmed the reservation of those tenths, as did FitzRoy in his Crown grant of the same year. So, too, did Grey in his later Crown grant of January 1848.

As we have seen in chapter 9, despite Spain's promise to Ngati Toa that tenths reserves would be set aside for them (see ss 9.4.2, 9.7.2), no such provision was made. In the result, tenths were reserved in the deeds of release for the other Maori having customary interests in the Port Nicholson block; namely, Te Atiawa, Taranaki, Ngati Ruanui, and Ngati Tama (collectively referred to below as 'Wellington Maori'). The Native Land Court did not determine the beneficial ownership of the urban tenths reserves until 1888 and the list of beneficiaries was not completed until 1895. The beneficial ownership of the rural tenths was determined by the court from 1888 onwards (see ss 15.3.1–15.3.3).

It is apparent that, however defective their administration of the tenths, the various Crown officials appointed to carry out that administration acknowledged that the tenths had been reserved for the benefit of Wellington Maori. The Native Reserves Acts of 1856 and 1873 were further evidence that the tenths reserves were to be administered on behalf of the Maori having a beneficial interest in them.

## 12.5 Findings on the Crown's Administration of Reserves, 1840–82

### 12.5.1 The Crown's responsibility

From early in the period of more than 40 years covered by this chapter, the Crown assumed responsibility for the administration and management of the Wellington tenths. The Tribunal recognises that until 1844 the situation in Wellington was confused by the uncertainties as to the respective rights of Maori and the New Zealand Company and its settlers arising under the 1839 Port Nicholson deed of purchase. As a result of the signing of the 1844 deeds of release, the tenths were reserved to Maori. This clarified the Crown's responsibility to ensure that the interests of Wellington Maori were protected in accordance with article 2 of the Treaty of Waitangi, which imposed on the Crown a clear duty actively to protect the beneficial interests of Wellington Maori.

It is to the credit of Governor FitzRoy that, soon after the signing of the 1844 deeds of release, he secured the passage of the Native Trust Ordinance 1844. This received the Queen's assent early in 1845, but the Crown failed to bring the ordinance into operation. This omission occurred notwithstanding the fact that FitzRoy had clearly recognised the need for statutory authority for the appointment of trustees to administer the tenths reserves for the benefit of Wellington Maori. Given that Wellington Maori were the beneficial owners of the reserves, the Crown was under a continuing obligation to respect and protect their mana and rangatiratanga in the land and to consult with and involve them in the management of the reserves.

### 12.5.2 Tribunal findings of Treaty breaches

The Tribunal finds that the Crown failed in its Treaty duty actively to protect the interest of the beneficial owners of the Wellington tenths reserves in the following respects, and that such owners were prejudicially affected thereby.[129]

- For much of the period under consideration, the Crown failed to devise a satisfactory policy to administer the reserves in the best interests of the Wellington Maori beneficiaries.
- Having finally settled on a policy – that the tenths reserves that were not assigned to Maori by McCleverty would be used as an endowment for the benefit of the Maori beneficiaries – the Crown failed to pass legislation that fully defined the legal status of the reserves and provided for their effective administration.

  The sole piece of operative legislation in the period, the New Zealand Native Reserves Act 1856 (as amended in 1862), did not achieve either of these objectives. Its replacement, the Native Reserves Act 1873, which could have met the objectives, as well

129. We make no findings of Treaty breaches in relation to the administration of the McCleverty reserves, which for the most part were managed by Maori themselves.

as giving Maori an effective role in the administration of the reserves, was not brought into operation.

- The Crown failed to make adequate provision for the effective administration of the reserves.

  Though commissioners of native reserves were appointed as agents of the Crown, they usually had numerous responsibilities besides the Wellington reserves, and, on two occasions (1856–58 and 1867–72), there was no commissioner in Wellington. We agree with the submission of the Wai 145 claimants that 'Throughout the 1840s, the management of the reserves was on an ad hoc basis, consequently producing no benefits for Maori', though we would add that that ad hoc administration continued at least until 1862.[130] We do not accept the Crown's view that the reserves were administered in 'a conscientious manner', except for Heaphy's administration from 1872 and possibly Mackay's administration which followed.[131] Prior to Heaphy's arrival in Wellington, there was considerable inefficiency in the keeping of records, the letting of reserves, the collection of rents, and the distribution of income to beneficiaries. Problems with the latter were not even solved in Heaphy's time as commissioner, at least in relation to income from urban tenths.
- The Crown failed to provide adequate continuous supervision of the reserves commissioners by way of a board of trustees or board of management, though such a body was in existence between 1842 and 1844. New trustees were appointed in 1848 but remained in office only for a relatively short period. A board of commissioners was appointed in 1858 and continued until 1862. For the rest of the time, the commissioners of native reserves, when they were in office at all, were left very much to their own devices.
- The Crown failed to consult with Wellington Maori as to the arrangements made from time to time for the administration of their reserves and, further, failed to involve Wellington Maori formally in the administration of the tenths, although some of the prominent chiefs were consulted on an informal basis, usually to help sort out the distribution of rentals to beneficiaries.
- The Crown, through the board of management of native reserves, in 1851–52 wrongly approved several payments out of the native reserves fund to Taranaki settlers who had been required to vacate certain Maori reserves in Taranaki, and in one case for losses sustained by a Taranaki settler due to alleged aggression and interference by Maori.
- The Crown, through its reserves commissioners, was slow to rent reserves not required for Maori occupation, allowed too large a portion of the reserves fund to be used for salaries (including, for much of the period, the full salary of the reserves commissioners), and was slow to pay out any surplus to beneficiaries. We consider the failure to ascertain the beneficiaries for the urban tenths, and therefore the failure to pay them any

130. Document O4, p 287
131. Document Q1, p 33

12.5.2

benefits throughout the lengthy period covered by this chapter, to be a significant breach of the Crown's trusteeship responsibility.

Although it may well have been appropriate for the Crown to take a reasonable percentage of reserves income for the costs of administration (as was to happen later under the Public Trustee's administration of the reserves), there was no justification for taking full salaries. Some or all of those costs should have been met from the Crown's own funds (after the 1852 constitution came into effect, from the Native Department's share of the Civil List).

CHAPTER 13

# THE ALIENATION OF RESERVES, 1840–82

## 13.1 Introduction

In this chapter, we are concerned with the alienation of reserves other than by leasing, which did not become a serious issue for beneficiaries until perpetual leases were gradually introduced from late in the century. Unlike the perpetual leases, the leases for reserves arranged before 1882 did not exceed 21 years and did not appear to entail a permanent form of alienation. We discuss the perpetual leases in chapter 16.

As we have noted in chapter 12, it was assumed that the company tenths reserves would be retained for the benefit of the signatories of the Port Nicholson deed 'for ever'. Though there was indecision initially over whether to use the tenths for occupation by the chiefs and their families or whether to rent them and use the proceeds for the benefit of Maori, the latter policy finally prevailed. Nevertheless, even by 1882, the beneficiaries of many of the reserves had not been defined.

There was a presumption on the part of the Crown that in certain circumstances, such as where land was needed for public works and other public purposes, reserves could be appropriated or sold. The New Zealand Native Reserves Act 1856 gave the reserves commissioners authority to sell, exchange, or lease reserves, though any sale or exchange, or any lease of more than 21 years, required the Governor's assent. The McCleverty-assigned reserves became available for sale under the Native Lands Act 1865 and subsequent legislation, although the Native Lands Amendment Act 1866 required the Governor's permission for sales or for leases of more than 21 years.[1] The Governor's authority to refuse sales was rarely used, so McCleverty reserves began to be sold, although the bulk of the McCleverty reserve land remained in Maori ownership in 1882.

The Crown played a significant role in the alienation of reserves by:

- appropriating them for various public purposes, including the endowment of a public hospital and school;
- sanctioning their sale to local bodies or private purchasers; and
- taking a significant portion of the tenths reserves for the McCleverty awards, which, under the Native Lands Acts from 1865, became available for sale.

1. Ralph Johnson, *The Trust Administration of Maori Reserves, 1840–1913*, Waitangi Tribunal Rangahaua Whanui series (working paper: first release), August 1997, p 51

By 1882, only 36¼ of the original 110 urban tenths reserves had been retained as Crown-controlled reserves. Another 45 of the original urban tenths had been assigned to Wellington Maori by McCleverty, but eight of these had been sold by 1882 and all of the remainder were to follow in later years. Of the 3900 acres of rural tenths reserved for Maori in the 1844 deeds of release, less than 1000 acres remained held in trust for Maori in 1882. Substantial portions of the McCleverty-awarded reserves outside the urban area, including some former rural tenths, had also been sold.

We devote most of this chapter to the Crown's appropriation of some 23 acres of urban tenths for hospital, educational, and religious endowments, which appropriation was done without consulting Maori or obtaining their consent. Most of the tenths taken were in Thorndon, now the administrative heart of the capital, and are of inestimable value. Despite the payment of some compensation in the 1870s, their loss to the Maori beneficiaries constitutes the major breach by the Crown of its obligation to retain the company's original tenths for the benefit of Maori. We also discuss the sale of McCleverty-assigned reserves in urban Wellington, particularly the reserved pa at Pipitea and Te Aro. Because of their waterfront location in central Wellington, these sites were of considerable value, and their retention was essential if Maori were to share in the growing wealth of the settlement as the New Zealand Company had promised. Finally, we comment more briefly on the sale of some tenths and assigned McCleverty reserves outside the central urban district.

## 13.2 The Crown's Appropriation of Urban Tenths Reserves

### 13.2.1 Eyre's memorandum on the native reserves

During his governorship of New Zealand from 1845 to 1853, Sir George Grey assiduously promoted the construction and Maori use of public hospitals and schools. He believed that this would hasten what was called the 'amalgamation' of Maori and Pakeha. Wellington's first public hospital was built in accordance with this policy in 1847. The hospital was built on a tenth reserve, and a few years later more tenths were appropriated by the Government to use as endowment lands for the hospital, for a proposed school, and for the Anglican church. The Government's justification for appropriating these reserves can be found in Lieutenant-Governor Eyre's 'Memorandum Relative to the Native Reserves' of 23 June 1848, to which we referred in section 12.2.4. In this memorandum, Eyre claimed that the Government needed to retain control over the tenths reserves so that it could use some of this land for various public purposes, the Government having no other land available in the Province of New Munster. He contended that no injustice would be done to Maori as a result of such appropriations, because the Government had done much for Maori already:

- It had 'given' them the 100-acre Government domain, which was to have been used as the Governor's residence, and had also purchased other land for them 'in valuable localities'.
- It had 'paid considerable sums to parties occupying Native Reserves, to quit them in order that such Reserves might be given over to the use and possession of the Natives themselves'.
- It had spent 'considerable sums' on institutions which would promote Maori welfare, such as hospitals.
- Since the tenths reserves were first created, it had given them 'many and large additional blocks of land', presumably a reference to the areas of town belt and unsurveyed land reserved for Maori as part of the McCleverty arrangements.

In Eyre's view, therefore, it was 'reasonable and just that the Government having done so much for the Natives, and being left without any lands whatever to appropriate to public objects, should reimburse themselves' from the tenths reserves. This argument can be seen in part as an extension of Governor Grey's suggestion in his instructions to McCleverty that the sale of tenths reserves could 'form a source from whence the Government may reimburse itself' for money spent on buying additional land for Maori.[2] Eyre pointed out that tenths land had already been used for purposes other than those for which the reserves were originally created: some had been given to Maori themselves, some had been exchanged for other land, and some had already been appropriated for public purposes. Accordingly, Eyre felt justified in proposing that the Government should take the tenths reserves it required for public purposes and that 'the Native Reserve Fund should be compensated by the Government allowing a fair and reasonable rate of purchase money for the land taken'.[3] The native reserve fund was to be spent on 'objects having in view the welfare and advancement of the Native Race'. This fund was to be compensated not immediately but only after the money spent by the Government 'in procuring land for the Natives or in promoting objects having in view their welfare & improvement' had been calculated. There would then be a balancing of accounts between the Government and the fund.[4]

It is worth examining Eyre's arguments, because they provided the rationale for the appropriation by the Government of valuable tenths land in the heart of Wellington city, land which was lost to Maori forever. First, Eyre evidently believed that the tenths reserve land was available to the Government to do with as it wished. However, the Tribunal has found in chapter 12 that this land was held in trust for Maori by the Crown, which was obliged to use it for the benefit of Wellington Maori. Any use of this land for more general public purposes was, therefore, a clear breach of this trust.

2. Governor Grey, memorandum, 14 September 1846, BPP, vol 5, p 611. See section 10.5 above on Governor Grey's instructions to McCleverty.
3. Lieutenant-Governor Eyre, memorandum, 23 June 1848, NM8/1850/1151 (doc A40, pp 311–314)
4. Eyre to Domett, 24 June 1848, NM8/1850/1151 (doc A40, pp 308–309)

Secondly, much of the governmental generosity claimed by Eyre turns out to be illusory. The Government domain relinquished by Governor Grey to Kaiwharawhara Maori was land which Maori had never sold or consented to release in the first place, while Grey's purchase of a section for Waiwhetu Maori merely honoured an undertaking made by Spain to provide them with additional cultivation land. The only section which the Crown can legitimately be credited with having purchased for Maori was Harbour section 4, which was purchased for Kaiwharawhara Maori (see ss10.4.1–10.4.2). The compensation paid to settlers for giving up their claims to land assigned to Maori by McCleverty should not stand to the Crown's credit, because this land was already guaranteed to Maori as the site of pa or cultivations. However, the modest sum spent by the Government in compensating lessees of tenths reserves assigned by McCleverty for giving up their leases can be considered a legitimate cost incurred by the Crown.[5] As for the 'many and large additional blocks of land' given to Maori, the Tribunal has found in chapter 10 that the land reserved by McCleverty in the town belt and in the unsurveyed areas was land which Maori had never sold or surrendered, so the Crown was not being generous in awarding to Maori land which was already theirs (see s10.7.5). Finally, it is not clear what Eyre had in mind when he referred to the 'considerable' sums expended on Maori welfare. It is true that Wellington Hospital, opened to Maori and Pakeha alike in 1847, did initially benefit Maori. However, as explained below, the hospital itself was generously endowed by the Government with appropriated tenths reserve land, and Maori use of the hospital declined drastically in later decades.

Clearly, the appropriation of urban tenths land for public purposes was not, as Eyre sought to represent it, a 'reasonable and just' reimbursement for the Government's generosity but rather a response to what Eyre described as 'the anomalous position of a Government in a new Colony without an acre of land at its disposal for the most important public purposes'. In other words, the Crown took land which was supposed to be held in trust for Maori simply because it was convenient for it to do so. We note that, far from being 'without an acre of land', the Crown had in fact taken significant areas of land for the town belt and other public reserves, without gaining the consent of, or making any payment to, the Maori owners of that land (see ch 6). Despite his claims that the appropriation of tenths for public purposes was justified because the Government had done so much for Maori, Eyre himself acknowledged that the tenths reserves were supposed to be used for the benefit of Maori and that, as a result, the native reserve fund would have to be compensated for the land taken. In the event, however, no such compensation was paid at the time of the appropriations, and it was not until the 1870s that Maori received any payment for the tenths land appropriated by the Crown.

It does not appear to have occurred to Eyre or any other officials that, when it required land for hospital, educational, military, and other public purposes, the Crown should have

5. On the compensation of lessees, see document C1, pp 270–271.

purchased or, if necessary, taken (subject to compensation) land which was owned or occupied by settlers instead of appropriating land which was held in trust for Maori.

### 13.2.2 Urban tenths land appropriated for military and endowment purposes

The appropriation of land which would eventually become hospital and college endowments and church sites started a few years before Eyre's memorandum. In 1844, the Royal Engineers received permission to occupy urban tenths reserves in Thorndon as a barracks and parade ground. The engineers requested a Crown grant for six of these sections in 1848, but Eyre denied this request, instead giving them permission to occupy the sections until they were required for other purposes. Other uses for these sections were indeed found, and they formed part of the endowments to Wellington Hospital and Wellington College discussed below.[6] The military also gained more lasting tenure of town acres 89 and 90, two tenths reserves in Mount Cook beside what later became the Buckle Street site of the Museum of New Zealand. These sections, along with an adjacent Government reserve, were requested for a major military post in 1848, and in this case Eyre approved the application for the land to be Crown-granted to the military. However, the grant was not made immediately, and, when the request was repeated in 1850, Eyre asked Attorney-General Daniel Wakefield about the legality of issuing such a grant. Wakefield replied that such reserves 'cannot be granted without the consent of the natives beneficially interested therein'. As a result, Eyre granted only the Government reserve, informing the military that the Government would also convey the native reserves 'as soon as they have the power to do it'. The military continued to occupy these two reserves, apparently paying no rent, and eventually, in 1874, the sections were bought from Maori, as described at section 13.2.6.[7]

In 1847, Wellington Hospital was built on another tenth reserve, town acre 584, which was located at the corner of Pipitea and Murphy Streets. The hospital site, together with other tenths land in Thorndon totalling just over 12 acres, was granted to the hospital in 1851 as 'an endowment for or towards the maintenance and support of a hospital . . . for the relief of the sick of all classes'.[8] It is not clear why this grant was considered legal when, only the year before, the Attorney-General's opinion had been that tenths reserves could not be granted without the consent of Wellington Maori. No such consent was given for the appropriation of the tenths land for the hospital endowment, nor for the granting of further tenths reserves for educational and religious endowments in 1853. Wellington Maori were not even consulted about the taking of this land.

In 1848, the Anglican church was given permission to occupy parts of the tenths reserves on town acres 514 (on Sydney Street East) and 542 (on what became the Mulgrave Street site

6. Ibid, pp 306–310
7. Ibid, pp 310–312
8. Ibid, pp 312–314. The hospital endowment consisted of sections 574, 591, and 636, and parts of sections 514, 539, 545, 580, 584, 592, 594, 601 to 603, and 605 to 608, totalling 12 acres 11½ perches.

of Old Saint Paul's) for a school and cathedral, and this was confirmed by Crown grants in 1853. In that year, almost all the remaining Thorndon tenths (which lay in a rough triangle between Hobson Street, Molesworth Street, and Tinakori Road) and the five tenths between Cambridge Terrace and Tory Street, Te Aro, were granted as an endowment of almost 10½ acres for a college or grammar school which was to be open to all classes and races.[9] As a result, hardly any tenths land remained in trust for Maori in the main commercial districts of Thorndon and Te Aro, although other urban tenths remained further out in Newtown. Maori lost almost 25 acres of valuable urban tenths land through the appropriations for the Mount Cook barracks and the hospital, school, and church endowments (see map 9).

### 13.2.3 Subsequent history of the endowments

We now comment on the subsequent history of these endowments, starting with Wellington College, which benefited in a number of ways. The lands were gradually rented out from 1854 and provided a steady and increasing income to the college, which did not open until 1867.[10] From 1868 until 1874, the school was located in part of the old military barracks on the appropriated tenths land in Thorndon, after which it relocated to an area of land taken out of the town belt, the new buildings being financed by a loan made on security of the 1853 endowment land.[11] (Following the decision in *Regina v Fitzherbert*, which is discussed below, the college by then had secure title to that land.) While the college benefited from the appropriation of Maori land, however, Maori received little, if any, benefit in return. The deed of endowment of Wellington College, signed by Governor Grey in 1853, stated that the college was to admit 'all classes or races' equally.[12] Thus, from the start it was never intended that the school should benefit Wellington Maori specifically, although they were to be allowed to attend the college. In fact, however, very few Maori attended the school, at least in its early years. It appears that only two Maori, one from Taranaki and one from Petone, attended the college between 1867 and 1883.[13] In contrast to the hospital, where Maori were admitted free, Wellington College does not seem to have made any provision for the waiving of school fees for Maori students.[14]

9. Document C1, p 315. The college endowment consisted of sections 270 to 272, 278, 279, and 604, and parts of sections 592, 601 to 603, and 605 to 608, totalling 10 acres 1 rood 32 perches, plus a small area of reclaimed land on Lambton Quay.

10. Frank M Leckie, *The Early History of Wellington College, NZ, from 1867 to 1883* (Auckland: Whitcombe and Tombs, 1934), p 21, and examples of rentals from endowment lands at pp 61, 197. A more recent history of Wellington College is A W Beasley's *The Light Accepted: 125 Years of Wellington College*, Wellington: board of trustees of Wellington College, 1992).

11. Leckie, ch 2, p 120, and see chapter 4 for a discussion of the Thorndon endowment lands.

12. Text of the deed of endowment reproduced in Leckie, pp 17–19

13. See the register of old boys from 1867 to 1883 in Leckie at pages 253 to 276, and the specific mention of the two Maori pupils at pages 142 and 211.

14. See the evidence of Mr Holmes and Mr Bowden to the Religious, Charitable, and Educational Trusts Commission in 1869 – both stated that the only free scholars at the college were the children of masters: doc E8, pp 360–361.

Whereas it is difficult to see how Maori received any benefit from the appropriation of tenths land for Wellington College, the situation with regard to Wellington Hospital is more complex. At first, Maori made great use of the hospital. There were 43 Maori in-patients in 1848, 167 in 1849, and 283 in 1850. Maori comprised around 90 per cent of in-patients and outpatients in each of the four years to 1851, although not all these Maori were from Wellington.[15] Moreover, in the early years the rental of the endowment lands was reportedly insufficient to cover the costs of treatment of Maori at Wellington Hospital, and there is some evidence to suggest that rental income from the remaining tenths reserves was also used to pay for Maori hospital patients.[16] Maori were admitted to the hospital free of charge, while (in theory at least) non-Maori had to pay for hospital treatment, and it was hospital policy never to refuse admittance to Maori.[17]

By the 1860s, however, only a handful of Maori were listed on Wellington Hospital's patient registers, and by the 1890s Maori made up less than one per cent of patients.[18] There are a number of possible reasons for this decline. The hospital's first superintendent, John FitzGerald, had made the treatment of Maori a particular priority, and his departure in 1854 may have resulted in less attention being given to Maori health.[19] In addition, following the opening of a native hostelry, many Maori preferred to stay there, going to the hospital only for medicine rather than as in-patients. The names of such Maori outpatients were not recorded.[20] Perhaps the most important reason for the diminishing numbers of Maori patients at the hospital was the rapid decline in the Maori population of Wellington.[21] Whatever the reason, the result was that Wellington Maori came to receive very little benefit from the tenths land which had been appropriated for the hospital.

The hospital and the non-Maori residents of Wellington benefited greatly, however, with a big increase in the numbers of Pakeha patients from the mid-1850s onwards. While Pakeha were expected to pay for treatment, many of them in fact received free treatment because they were paupers or because they had received certificates exempting them from paying (these were granted liberally by provincial councillors around election time), or simply because they neglected to pay their bills.[22] By the late 1860s, the rental income from the endowment land was being used not only for the treatment of Maori patients but also for the

15. Derek A Dow, *Maori Health and Government Policy, 1840–1940* (Wellington: Victoria University Press, 1999), p 28

16. Document 14, p 194; Charles Knight (Auditor-General) to Colonial Treasurer, 21 September 1856, T1 1/1857/609 (doc C1(e), p 29)

17. Evidence of Alexander Johnston, provincial surgeon in charge of Wellington Hospital, to the Religious, Charitable, and Educational Trusts Commission, 30 November 1869 (doc E8, p 359)

18. Dow, pp 69, 231 (fn 58); doc E13, pp 67–68

19. Robert Donaldson, 'Dr J P FitzGerald: Pioneer Colonial Surgeon, 1840–1854', *New Zealand Medical Journal*, vol 101, 1988, pp 636–638

20. Evidence of Alexander Johnston, provincial surgeon in charge of Wellington Hospital, to the Religious, Charitable, and Educational Trusts Commission, 30 November 1869 (doc E8, p 359)

21. Ibid. See chapter 11 above for a discussion of the decline of the Maori population in Wellington.

22. L H Barber and R J Towers, *Wellington Hospital, 1847–1976* (Wellington: Wellington Hospital Board, 1976), pp 16–17, 36

maintenance of the hospital buildings.[23] Once the hospital gained secure title to the endowment lands as a result of the 1872 decision in *Regina v Fitzherbert*, it was able to take even greater advantage of these lands. The Wellington Hospital Loan Act 1874 allowed the hospital trustees to mortgage or sell the endowment lands in order to raise money to build a new hospital, and in 1876 they sold somewhat over an acre of endowment land for £5100.[24] The endowment lands thus played a very important role in allowing the hospital to move from the former tenths section at Thorndon to new buildings at Newtown in 1881.

In 1873, commissioner of native reserves Charles Heaphy summed up the question of possible Maori benefit from the endowment lands as follows:

> The Natives do not use the Hospital so much as formerly, nor to anything like the extent that the Europeans do. The Native patients in the Hospital do not derive equivalent benefit for the piece of No 542 taken for the cathedral site, in 1853, inasmuch as the services conducted there are not usually in the Maori language. [It had been anticipated that Maori patients at the hospital would make use of the cathedral.] The Natives have derived no appreciable benefit from the College & Grammar School, while for a *Native* College they have long since given extensive reserves at Porirua. [Emphasis in original.][25]

The only institution endowed with tenths reserve land from which Maori received any significant benefit was the hospital, and then only in the hospital's early years. In any event, the appropriation of tenths reserve land, which was intended to be held in trust for the benefit of Wellington Maori, and its conversion into endowment land for institutions open to non-Maori and to Maori from places other than Wellington constituted a breach of trust. This was the clear view of Native Minister James Richmond in 1868, as we note below.

### 13.2.4 Twenty years of silence?

Before we examine the Crown's belated payment in the 1870s of compensation for the appropriated endowment land, we need to comment on what has been called the '20 years of silence'.

It is central to the Crown's case in relation to the appropriation of urban tenths land by the Government, and the administration of tenths land generally, that for almost 20 years Wellington Maori made no protests regarding the tenths not allocated by McCleverty and that, when such protests began in the 1860s, they were stimulated by Pakeha officials. In elaborating on this argument, the Crown's closing submissions made a number of points:

- Crown historians Armstrong and Stirling found that there was no evidence before 1865 of Maori correspondence concerning the tenths not assigned by McCleverty.

23. Evidence of William Fitzherbert and Alexander Johnston to the Religious, Charitable, and Educational Trusts Commission, 15, 30 November 1869 (doc E8, pp 354, 359)
24. Document 14, p 257
25. Charles Heaphy, 'Memorandum on the Wellington "Tenths"', 29 August 1873 (doc A39, pp 209–210)

- Maori corresponded extensively with Crown officials on other matters, especially in relation to their McCleverty reserves, which they were determined to retain in their control.
- The 20-year silence demonstrates that both Maori and the Government probably shared the assumption that the McCleverty arrangements met the Crown's obligation to provide reserves in the Port Nicholson block. As a result, the Crown was free to use the remaining tenths reserves as it saw fit.[26]

The evidence in relation to the so-called '20 years of silence' is rather difficult to interpret, especially since both the remaining tenths and the McCleverty reserves were frequently referred to by officials simply as 'native reserves', so that it is often unclear which type of reserve was being referred to. It is true that Armstrong and Stirling found no evidence of Maori correspondence regarding the appropriation of tenths reserves for endowments before 1865 and that Charles Heaphy in 1873 wrote that he had 'searched diligently amongst the native records' without finding any Maori protests about the building of a hospital on a native reserve.[27] However, this does not constitute definitive proof that Maori were not discontented about the appropriation of tenths land. It is possible that agitation about the tenths began, not with the investigations of Pakeha officials in the 1860s but with the campaign by Wi Tako Ngatata in support of the King movement in 1859. If this is true, it suggests that there was an awareness among Wellington Maori of the tenths reserves, and a sense of grievance in relation to them, which Wi Tako could tap into.

We have already referred in chapter 12 to the two letters drafted in April 1859 by land purchase commissioner William Searancke. These commented on the 'dissatisfaction' existing among Wellington Maori, including 'some of the most influential Chiefs', and noted that King movement emissaries were 'by every means in their power increasing the disaffection of the Natives' in the district. While it is clear from these letters that Maori discontent was focused on issues relating to the McCleverty reserves, Searancke also mentioned that Maori were aware 'from being possessed of Maps of the Town' of those native reserves which they were not actually occupying, and they were likewise aware 'that the rents [for the urban tenths] are received by the Board of Commissioners of [Native] Reserves and loudly and openly claim that the Rents received for lands which they were told were for them should be paid to them'.[28]

The most prominent of the 'influential Chiefs' in Wellington who had become discontented was Wi Tako, who in 1859 was an outspoken advocate of the Kingitanga. As he travelled around the west coast seeking support for the Maori King, Wi Tako frequently referred to grievances over reserves in Wellington. In the same month that Searancke wrote his letters, the Reverend Richard Taylor recorded in his journal that Wi Tako had told Taranaki

26. Document P1, pp 87–92
27. Document C1, pp 324, 353
28. Unsigned draft letters, one dated 20 April 1859 and one undated (doc N1, pp 296–304)

Maori that Maori 'had been cheated out of the reserves pretended to have been made for them by the New Zealand land company at Wellington'. Taylor went on to add that 'I fear there is some truth in his statement, at least there has been [a] miserable policy on the part of Govt in not letting the natives receive the rents of those lands . . . 1/10 of Wellington was nominally reserved for the natives'.[29] It may be, as Crown counsel suggested, that Wi Tako was referring to McCleverty reserves rather than the remaining tenths, but Taylor clearly understood him to be referring to the latter.[30] Quite possibly, Wi Tako was referring to both McCleverty and tenths reserves. Wi Tako subsequently repudiated the King movement, and by late 1859 Walter Buller reported that Wellington Maori were now 'quiet', the 'soreness' about the reserves having been relieved by the Attorney-General's decision that the McCleverty reserves did not come under the New Zealand Native Reserves Act 1856.[31]

Nevertheless, it is quite possible that Maori still had grievances about the tenths reserves which had not been addressed and that it was Maori discontent over the administration and appropriation of tenths land that led to the investigations by Swainson, Mantell, and others in the 1860s into the appropriation of tenths land for the barracks and endowments. Certainly, the Pakeha officials who looked into these appropriations believed that it was important to do so in order to placate Wellington Maori. In 1868, Native Department undersecretary William Rolleston wrote that the alienation of urban tenths reserves was 'a constant source of grievance to the Natives & the cause of much of the discontent & disloyalty which prevails', while Native Minister James Richmond remarked that the irritation of Maori about the appropriation of tenths land was 'an actual and long standing fact'.[32] It is difficult to see what could have motivated such highly placed officials, with an intimate knowledge of Maori affairs, to claim that Maori had a long-standing grievance about the tenths if there was no evidence for such a claim.

The above evidence is by no means a complete refutation of the Crown's '20 years of silence' argument. In the final analysis, however, this argument is, as the Wellington Tenths Trust claimants have suggested, a red herring.[33] As counsel for the tenths trust claimants asked, 'Why should beneficial owners in reserves administered as a trust by the Crown be required to constantly monitor the Crown's actions?'[34] The Crown had an obligation as trustee of the tenths reserves to manage these reserves for the benefit of Wellington Maori, regardless of whether or not Maori took an interest in these reserves or protested the use of tenths reserves for other purposes. Beneficiaries of a trust are not required to keep a watchful eye on the trustee; on the contrary, one of the advantages of a trust is precisely the fact that the

29. The Reverend Richard Taylor, journal entry dated 18 April 1859, ATL qms-1994 (doc N3(d), p 696)

30. See the comments of Crown counsel in document P1 at pages 91 and 92.

31. Walter Buller to Donald McLean, 10 October 1859, ATL MS32/190 (doc N3(d), pp 735–736). Wi Tako publicly repudiated the Kingitanga in 1864: doc E8, pp 437–438.

32. Rolleston, memorandum, 13 February 1868, Richmond, memorandum, 25 February 1868, MA17/1 (doc A34, pp 160, 164)

33. Document Q11, p 45

34. Document O4, p 379

beneficiaries can leave it to the trustee to look after their interests while the beneficiaries get on with their lives. The tenths trust claimants have rightly pointed out that the Crown has produced no evidence that Maori rejected the tenths system and has instead relied on an argument based on a supposed Maori silence.[35] In the absence of any clearly stated rejection of the tenths by Wellington Maori, it must be accepted that they remained the beneficial owners, and that the Crown continued to have an obligation to manage the tenths reserves in the interests of Wellington Maori.

Whatever doubts there may be about when Maori began protesting over the taking of reserves for endowment purposes, there can be little doubt that, by the late 1860s, they, and some Europeans, were aware that Maori had received a raw deal. In 1868, Native Minister Richmond said that the granting of tenths reserves for a hospital and a school was:

> by no means obviously within the meaning of the original reservation . . . It might be at the time hoped that some appreciable advantage would be conferred on the Maori by these institutions. But technically and from the strict point of view which a Trustee should take it cannot be said to have been a proper execution of a trust in favor of one race to use the estate to endow institutions for the indiscriminate use of all races. The intention of the NZ Company and Imperial Government, and of the prospectus of settlement could not be correctly fulfilled, I think, or so as to satisfy a Court of law or equity by throwing this estate so specially dedicated into a general endowment even though large benefits might ensue to the *cestui-que-trustes* [the beneficiaries of the trust; that is, Wellington Maori] among others.[36]

### 13.2.5 *Regina v Fitzherbert*

The legal status of the endowment grants of tenths land was called into question by a rent strike in 1866 by the Native Department, which leased offices on section 514 from the hospital trustees. The dispute did not reach the courts until Charles Izard, counsel for Wi Tako and Mohi Ngaponga, applied for a writ of *scire facias* before the Supreme Court in July 1869.[37] The declaration filed in the court stated that the granting of tenths land to the hospital trustees was prejudicial to the applicants and that consequently the trustees' Crown grant should be cancelled. Since the Government was unwilling to fund the case, Izard's clients had to fund it themselves.[38]

The case was heard before Justice Johnston in the Supreme Court in March 1872. After hearing the parties, he delivered his findings on 20 March, identifying 38 points at issue and

35. Document Q11, p 46
36. J C Richmond, memorandum, 25 February 1868, MA17/1 (doc A34, pp 156–158)
37. *Scire facias*: literally, 'let (the person) know'. A writ of *scire facias* (long since abandoned in New Zealand) is 'a proceeding for the purpose of rescinding or repealing Crown grants, charters and franchises': *Halsbury's Laws of England*, 4th ed (London: Butterworths, 2001), vol 1(1), para 264, p 409.
38. Document C1, pp 370–376

ruling on them in anticipation that the case would be considered further in the Court of Appeal. The case did come before the Court of Appeal and was presided over by Chief Justice Arney later in the year. The judgment was delivered on 4 December 1872.

In the Court of Appeal, the Maori claimants based their right to *scire facias* on two grounds:

> First, That the Crown, at the date of the grant of 1851, held the lands comprised in that grant subject to a trust for the benefit of the aboriginal native owners; and,
>
> Secondly, That the Crown by that instrument assumed to dispose of lands which had never . . . been ceded to the Crown, and over which the Native title has never been extinguished.[39]

As to the first ground, the court ruled that, 'in order to establish a trust in the Crown founded upon the covenant of the Company, it was necessary to prove . . . that the purchase of the lands by the Company from the Natives was duly allowed by Her Majesty'. The court held that there was nothing in the findings of Justice Johnston which amounted to a finding that the purchase of the lands by the company was duly allowed by the Queen.[40]

The court next asked whether it was found in the court below that the lands were ever constituted reserves for the exclusive benefit of the Maori owners.[41] The court noted that finding 23 of Justice Johnston was the most favourable to the claimants. Justice Johnston found that, prior to the 1851 grant, officers of the Crown and of the Colonial Government had frequently, in the discharge of their official duties, treated the sections in question as having been and being reserved, dedicated, or available for Maori only.[42] The court, after referring to certain statutes, and to those sections of the royal charters and instructions of 1840 and 1846 which concerned the waste or demesne lands in the colony, found that 'the creation of Native reserves was not one of the objects specially provided for in the statutes, charter, instructions, and ordinances by or under which the management and disposal of the demesne lands of the Crown was regulated'.[43]

The court next noted that Justice Johnston did not find that the Crown had, by any solemn act, whether by grant or even proclamation, declared the lands themselves to be native reserves. The court then stated:

> The only solemn and valid act in which any officer of the Crown is, upon these findings, shown to be dealing with the Native owners themselves in respect of lands described generally as 'certain lands situate in a bay in the harbour of Port Nicholson, New Zealand, on which a town has been laid by the New Zealand Company,' – and being portions only of the

39. *Regina v Fitzherbert* [1872] 2 NZLR 167 (CA)
40. Ibid, p 168
41. Ibid
42. Ibid, pp 168–169
43. Ibid, pp 169–170

lands described in the deed of 1839, – is that which formed part of an arrangement with the Pa Taranaki Natives, of 29th August, 1840, signed by Willoughby Shortland, Colonial Secretary. The Natives executing that agreement do indeed thereby agree to assign and yield up to Mr Shortland, on behalf of Her Majesty, all their interest in the lands described as above. And, *connected therewith* is a receipt or release signed by seven Natives, of whom three only appear to have signed the document of the 29th August, 1840. The release is executed with much solemnity, the signatures of the Natives being witnessed by Mr Commissioner Spain, George Clarke, jun, Protector of Aborigines; Thomas S Forsaith, also Protector and Interpreter; Samuel Ironside, minister of Te Aro Pa; Arthur T Holroyd, barrister, Wellington; and Thomas Fitzgerald, assistant surveyor attached to Commissioner.

The receipt thus signed is for £300, in full satisfaction and absolute surrender of all title and all claims of the Natives parties thereto in the lands written in the document affixed to the receipt in 'all the places at Port Nicholson and in the neighbourhood of Port Nicholson.' But in this receipt or release the Natives declare that the pas, cultivations, sacred places, 'and the places reserved, will remain alone to us.' Much reliance was placed by the prosecutors on these documents, containing, as they are said to do, an admission by the Crown that lands had been 'reserved,' including those comprised in the grant now impeached, and an agreement with the Crown by the Natives, parties to the document of 29th August, 1840, to yield up to the Crown all their rights and interests in those lands except the reserves. We do not undervalue the importance of this transaction. [Emphasis added.][44]

It is apparent from the opening words of the passage cited that the Court of Appeal thought it was considering a single transaction stemming from the arrangement made by Shortland, the Colonial Secretary, with the Maori at the Te Aro Pa in August 1840. The foregoing is a shortened version of the more detailed finding 36 by Justice Johnston, in which he included the full text of the 1844 deed of release executed on behalf of Te Aro Maori on 26 February 1844. Justice Johnston, however, wrongly dated the 1844 deed as being 26 February *1840*. In this way, he telescoped into one transaction two entirely separate and unrelated transactions, the second of which took place some four years after the 1840 transaction. Although Chief Justice Arney in the Court of Appeal did not cite the date of the receipt for £300, it is apparent that he would have noted the date of 26 February 1840 given by Justice Johnston in his finding 36 and that he was unaware that the separate deed of release signed in 1844 (referred to as a 'receipt') was quite unrelated to the 1840 transaction which fell by the wayside.

Crown counsel, in discussing the Court of Appeal judgment, submitted that it would seem idle to speculate about the possibilities of arriving at a different decision from that reached by the court. He added that unfortunately the court was not supplied with a particularly clear or thorough narrative of the steps leading to the completion of the Port Nicholson

44. Ibid, p 171

purchase. This, he said, did not aid clarity.[45] We endorse Crown counsel's somewhat understated comment. In our view, it is not possible to make sense of the apparently unwitting fusion of these two discrete and unrelated transactions. While the 1840 transaction was of little significance, the 1844 deeds of release, as we have seen, were of critical importance. Neither Justice Johnston nor the Court of Appeal appears to have seen the schedule attached to the Te Aro and other 1844 deeds of release, which, in a separate column, clearly identified the 110 town tenths and the 39 rural tenths expressly reserved to Maori.

Chief Justice Arney, after stating that the court did not undervalue the importance of this transaction, went on to say that substantially 'it appears that the officer of the Crown [Shortland] was acting rather as a mediator between the New Zealand Company and the Natives, than as representing the Crown in the transaction with those Natives'.[46] It is clear that both Justice Johnston and the Court of Appeal, in attributing the execution of the 1844 Te Aro deed of release to Shortland in 1840, were unaware that it was in fact Governor FitzRoy, the Queen's representative in New Zealand, who was responsible for insisting that the tenths reserves and the pa, cultivations, and urupa of Wellington Maori were excepted from the sale of the lands set out in the schedule to the deeds of release. Nor did either court appear to be aware that it was not Shortland but FitzRoy who was present and who pressured Te Aro Maori over three days to sign the deed of release; that Spain, in his final 1845 award, had included the identical schedule showing the tenths reserved to Wellington Maori; or that FitzRoy in his Crown grant to the New Zealand Company of 29 July 1845 had expressly excepted from the grant the 39 native reserves of 100 acres each and the 110 town acres referred to in the schedule to the 1844 deeds of release.

The chief justice next referred to the claimants' second ground of appeal: that the lands had never been ceded to the Crown and that the native title to those lands had never been extinguished. This, he said, could be shortly disposed of on the ground that no formal act of cession to the Crown was necessary. The court considered that, from and after the purchase of these lands by the company (it is not clear whether this is a reference to the 1839 deed of purchase or to the alleged '1840' transaction), the lands became part of the demesne lands of the Crown.[47] Given the absence of all relevant information concerning the true nature of the 1844 deeds of release before the court, it is at least questionable whether the court's finding was sustainable.

Having come to the conclusion that the facts as found did not establish any right which could be recognised and enforced by *scire facias*, the court declined to uphold the appeal. However, the court noted that Grey's Crown grant of 27 January 1848 referred to the sections in dispute as native reserves (although the grant was said to be invalid as being issued four days too late). The court observed that this and other acts certified to by Justice Johnston on

45. Document P1, p 96
46. *Regina v Fitzherbert*, p 172
47. Ibid

issue 23, if they had been known to the Maori interested, may have been accepted by them as guarantees of their supposed rights. If so, the court suggested, Maori had slept upon their rights apparently until the proceedings before the court.[48] Justice Johnston's findings on issue 23 were that:

> Her Majesty never expressly declared any such trust in writing, but officers of the Crown and of the Colonial Government had frequently, before the date of the said grant, in the discharge of their official duties, treated the sections in question as having been and being reserved, dedicated and available for the Natives only; and no claim or action of the Crown at variance with the right of the Natives, to the exclusive benefit of such sections, had been made or done, except the erection in 1847, on a portion of one of the sections, of a hospital for the use of all Her Majesty's subjects.[49]

Given these findings, it is not surprising that the Court of Appeal, while holding against the claimants on legal grounds (based in part on totally erroneous facts), stated that, if Maori had any claims upon the favourable consideration of the Crown, it might be presumed they would be respected when properly represented.[50]

As we have noted in section 12.3.1, the Legislature acted promptly by enacting the Native Reserves Act 1873, which was passed in part to overcome the Court of Appeal decision in *Regina v Fitzherbert* but was never brought into operation. This Act recognised what had long been known – that the Wellington tenths had been set apart for the benefit of Maori. It provided for a native reserves commissioner to be appointed as a trustee for the reserve lands vested in him as a corporation sole.

### 13.2.6 Heaphy values the appropriated tenths

On 29 August 1873, Heaphy completed a memorandum on Alexander Mackay's paper on the origin of the New Zealand Company tenths.[51] He concluded by quoting from Lieutenant-Governor Eyre's memorandum of 23 June 1848, in which Eyre stated that the Government should pay reasonable compensation to the native reserve fund for the reserve land taken for public purposes (see s 13.2.1). Heaphy noted that no such compensation had been paid by the Crown for the land taken, and he concluded by stating that the 'good faith and honor of the Crown appears to be involved in carrying out the intention of the government as expressed in Lieut Governor Eyre's financial minute of 10th May 1849, and his memo of 23rd June 1848'.[52]

48. Ibid, p 173
49. Ibid, p 162
50. Ibid, pp 173–174
51. 'Memorandum by Mr A Mackay on Origin of New Zealand Company's "Tenths" Native Reserves', 29 July 1873, AJHR, 1873, G-2B (doc A24, pp 61–78)
52. Charles Heaphy, 'Memorandum on the Wellington "Tenths"', 29 August 1873 (doc A39, pp 209–210)

In August 1873, Heaphy valued the land taken by the Crown. He included all of the hospital and educational endowments, the Anglican school site on town section 514, and the cathedral site on section 542. He noted two earlier estimates of the value of these sections – a figure of £140 per acre assessed by the town board in 1863 and Swainson's 1866 estimate of £500 per acre – pointing out that land values had increased since Wellington had become the capital of the country in 1865. In estimating the value of the appropriated tenths, Heaphy took account of these earlier estimates and also used some widely varying sales figures for adjoining town sections. On this basis, Heaphy calculated a total value for the 23 appropriated tenths of £10,194, or an average of £444 per acre, adding that this figure 'does not embrace the idea of interest being chargeable'. He also noted Swainson's valuation as being £12,364, which averaged £537 per acre.[53]

Heaphy did not include the two Mount Cook tenths which had been appropriated for a military barracks, but on 24 March 1874 Wi Tako and others signed a deed selling these to the Crown for £500.[54] By this time, Heaphy had decided that Maori should receive only £200 per acre for their appropriated tenths, a figure which he said took into account the legal position of the reserves in the wake of the *Regina v Fitzherbert* decision, the value of the reserves relative to other land of similar character and locality, and the benefits which Maori had obtained or were likely to obtain from the endowed institutions.[55] The £500 paid for the Mount Cook tenths was apparently based on this figure of £200 per acre, plus £100 for lost rental income.[56]

On 20 August 1874, Heaphy sought from land valuer J H Wallace a valuation of the 23 acres taken by the Crown. Heaphy advised that the valuation should be 'of the actual worth at a period say from 1866 to 1869, being previous to the advance in value of real property resulting from the operation of the Public Works scheme'. Having arrived at the actual value of the unimproved land, he sought Wallace's opinion as to what would be a fair amount to give Maori in compensation for the surrender of their interest in the lands. In estimating this amount, he stated that it would be necessary to bear in mind the terms of the original contract with Wakefield and the benefits which Maori were likely to derive from the endowed institutions. Wallace was also enjoined to have regard to the adverse finding of the Court of Appeal in *Regina v Fitzherbert*.[57]

Wallace's valuation, dated 26 August 1874, included sections 89 and 90, the military barracks on Mount Cook.[58] It covered five-year periods from 1840 through to 1870, and then

53. Charles Heaphy 'Valuation of "Tenths" Taken for Public Religious & Charitable Purposes', 30 August 1873 (doc A39, pp 232–239)

54. Deed of sale in *Turton's Deeds* (doc A27), p 123)

55. Heaphy to secretary, Native Department, 19 March 1874 (doc A39, p 175)

56. Document C1, p 415

57. Heaphy, memorandum, 20 August 1874 (doc A39, pp 172–174)

58. The valuations set out below exclude the valuations for sections 89 and 90 used for the military barracks. Wallace's valuations for these two sections together were £200 for 1860–65; £300 for 1865–70; £400 for 1870–72; and £600 for 1872–74.

two-year periods to 1874. We note here his valuations from 1860 to 1874 for the 23 acres of tenths reserves endowed for educational, hospital, and religious purposes:

| | 1860–65 | 1865–70 | 1870–72 | 1872–74 |
|---|---|---|---|---|
| **Valuation** | £10,575 | £13,000 | £15,750 | £18,450 |
| **Value per acre** | £460 per acre | £565 per acre | £685 per acre | £802 per acre |

Wallace stated that the increased value in the last two columns was largely attributable to the Government's public works policy and the Wellington City Corporation's civic improvements. Because he considered that Maori had not contributed to these improvements, Wallace noted that the final result might be subject to some modification. We observe that many non-Maori owners of land in Wellington might equally be said to have made no such contribution to the increase in land values, but it is difficult to believe that Wallace would have thought it appropriate to discount the value of their property.

In arriving 'at a fair valuation or compromise', Wallace took into account the above factor, as well as the claimed benefit to Maori from the hospital and college, and the Court of Appeal's finding that the reserves were demesne land of the Crown. He considered that 'an average of £250 per acre all round would be a fair adjustment on behalf of the Natives'.[59] He thus deducted £550 per acre from the 1872–74 valuation of £802 per acre to arrive at his 'fair' valuation and compromise.

Meanwhile, the day after he requested Wallace to make his valuation of the appropriated tenths, Heaphy wrote to the Native and Defence Minister advising him that his 1873 valuation of the tenths taken by the Crown was £10,194 and Swainson's was £12,364. He stressed that this was the 'actual value' and that it had no relation to the court decision in regard to title. He advised that the court decision has 'so afffected the position of the natives as claimants that it is probable they would be satisfied with a much smaller amount'. He recommended that at £200 an acre the total amount would be £4973, less the £500 paid Wi Tako and others for the barracks site, leaving £4473.[60] This figure was accepted by the Government.

It is surprising that Heaphy should have seen fit to so advise his Minister on the day after he sought a valuation and advice from Wallace and before receiving that advice. A file note by Heaphy dated 24 August 1874 recorded that Wallace had verbally advised him that he thought £250 an acre would be fair but that 'he admits that a slight modification on that amount may be proper'. We are unaware whether Wallace's full valuation was made available to the Native Minister. Heaphy calculated that Wallace's valuation for the 23 acres plus the two barracks sections at £250 per acre would yield £6216, less £500 paid for the barracks site, leaving £5716.[61]

59. J H Wallace, 'Valuation of Native Reserves – "Tenths"', 26 August 1874 (doc A39, pp 152–155)
60. Heaphy to Native Minister and Defence Minister, 21 August 1874 (doc A39, p 171)
61. Heaphy, file note dated 24 August 1874 (doc A39, p 170)

Wi Tako was paid £300 of the compensation money for the 23 acres shortly after the sale of the two Mount Cook tenths, but the remaining £4173 was not paid until January 1877, some 24 years after the last of the land was taken.[62] The receipt, signed by Wi Tako and 35 other Maori, stated that the money was final payment for the rights and interests in the Wellington College and hospital endowment lands of all those Maori for whom the land was originally reserved.[63] The receipt made no mention of the Anglican church endowments of land for a school and cathedral, but, on the basis of £200 per acre, the payment seems to have been intended to cover these part-sections as well. Some 100 Maori gathered at Te Aro Pa prior to the handing over of the compensation, and they agreed that Wi Tako should distribute the money.[64] Based on 1878 census figures, this assembly appears to have been very representative of the Wellington Maori population, but those Wellington Maori who had returned to Taranaki were presumably excluded.[65] In his speech to the meeting, Wi Tako declared that 'The people of Taranaki are not the owners of this land [in] Wellington . . . I asked the Taranaki people to be here at this meeting, but they came not'.[66]

### 13.2.7 The adequacy of the compensation

The Wai 145 claimants in their statement of claim allege that the Crown appropriated urban tenths for public purposes and endowing institutions and, further, that it failed adequately to compensate Maori for such appropriations.[67] In support, counsel for the claimants characterised the compensation eventually received by Maori in respect of the 23 town acres as 'miserly' and charged Heaphy with ensuring that the compensation was as low as possible.[68]

Crown counsel, by contrast, described the compensation paid by the Crown as being 'reasonable and fair'.[69] In support, Crown counsel noted with approval that Heaphy based his calculations on mid-1860s values because he 'wished to avoid later leaps in land values to which these sections had not contributed – the difference between fair compensation and a windfall'. It is difficult to discern the justification for this approach. Clearly, Heaphy wished

62. Document C1, pp 416–419

63. Receipt in doc A39, pp 121–122, and published in *Appendices to the Journals of the Legislative Council*, 1877, no 22 (doc A25, pp 28–29)

64. H Halse to Native Secretary, 20 January 1877, and notes of speeches made at meeting at Te Aro Pa on 13 January 1877 (doc A39, pp 123–128)

65. The 1878 census recorded a total Maori population in Wellington city and the Hutt of 118, of whom 80 were over 15 years of age ('Census of the Maori Population, 1878', AJHR, 1878, G-2, p 25)

66. Notes of speeches made at meeting at Te Aro Pa, 13 January 1877 (doc A39, p 128). Researchers Armstrong, Stirling, and Moore have interpreted Wi Tako's speech as referring to the Taranaki tribe or the people of Te Aro (Taranaki) Pa, which is possible but seems unlikely since the meeting took place at the Taranaki tribe's Wellington turangawaewae, Te Aro Pa: doc C1, p 420; doc I4, p 286.

67. Claim 1.2(d), paras 13.8 and 13.9. The statement of claim refers to '77 acres of town native reserves and cultivations', but this includes the 52-acre Kumutoto McCleverty reserve, discussed at 13.4 below.

68. Document O4, p 362

69. Document Q1, pp 34–35

to avoid recommending that the Crown should compensate Maori for the current value of the land. According to Wallace's valuation, the value of the appropriated tenths had been escalated by market forces from £10,575 to £18,450 in the period between 1860–65 and 1872–74. By 1876, it appears that values had further increased. During that year, the hospital trustees sold for £5100 five small endowment parcels in Thorndon totalling a little over 1¼ acres.[70] This was more than Wellington Maori finally received for 23 acres in 1877. The apparent approval by Crown counsel of Heaphy's refusal to allow Maori their 'unearned' increment from increased land values contrasts with his justification of the Wesleyan Church's profiting from a similar increase in land values when it sold the former Kumutoto McCleverty reserve, which had been granted to the Wesleyans for a school (see s13.4).

In fact, as Crown counsel acknowledged, the amount finally paid for the hospital, church, and educational endowment tenths land was, at £200 an acre, less than half its estimated value, even in 1865. We note that it was a mere quarter of the 1874 market value and, almost certainly, significantly less than a quarter two years later, given the continuing rise in value evidenced by the above-mentioned sale of 1¼ acres of former tenths land for £5100 in 1876.

As Crown counsel also acknowledged, Heaphy 'required that allowance be made for benefits conferred on Maori by the use of the land as endowments'.[71] Elsewhere, Crown counsel describes this as 'capitalisation of a benefit', while concluding that the final payment of 'nearly £5,000' was 'reasonable and fair'.[72] That final payment included the £500 earlier paid for the Mount Cook barracks sections, and thus the sum paid for 23 acres of endowment land amounted to £4473.

The 'capitalisation of a benefit' referred to here can relate only to hospital treatment, since no evidence has been presented of any educational benefits arising from the creation of Wellington College. Crown counsel submitted that 'Maori derived significant benefit from the hospital (including free treatment – Europeans had to pay) while they remained a significant presence in Wellington'.[73] As the figures of Maori use of the hospital cited earlier show, there was considerable usage in the early years but very little by the 1860s. However, the 'free' treatment of Maori was funded by the rental income from the appropriated hospital endowment land, for which Maori had not yet been paid. This income should have gone to Maori but instead went to the hospital for the benefit of Maori and Pakeha alike. We are not satisfied that in the circumstances it was reasonable to discount the compensation on this account.

The Tribunal considers that there was no justification for reducing the compensation on the basis of the Court of Appeal decision in *Regina v Fitzherbert*. In 1868, the Native Minister, James Richmond, considered it an improper execution of a trust in favour of one race to use the estate to endow institutions for the indiscriminate use of all races. The prompt action of the Legislature in passing the Native Reserves Act 1873 to rectify the judgment of the Court

70. Document 14, p 257
71. Document P1, p 99
72. Document Q1, p 35
73. Ibid, p 32

of Appeal demonstrated its anxiety to make it clear that the Wellington tenths were intended to be held in trust for the beneficial owners.

The Tribunal is in no position to make an independent assessment of the value of the 23 acres of appropriated tenths land as at the time when the Government agreed to pay compensation in 1874. However, we consider that the compensation to the beneficial owners should have been no less than the £18,450 assessed by land valuer J H Wallace as the 1874 value of the land. We further consider that the Crown should have compensated the beneficial owners for the loss of rental income from these reserves since the time when they were taken by the Crown. In reaching this conclusion, we have borne in mind that:

- for almost a quarter of a century, Maori had been deprived of these valuable tenths without compensation being paid and without having given their consent to the appropriations;
- by the passage of the Native Reserves Act 1873, the Crown recognised that the Court of Appeal decision in *Regina v Fitzherbert* should be rectified; and
- an important reason for the tenths being reserved to Maori was that this would enable them to share in the growth and development of Wellington.

In concluding our consideration of the alienation of urban tenths, we note that, after the taking of tenths land for the hospital, educational, and church endowments and the Mount Cook barracks, there was no further sale or appropriation of urban tenths in the period to 1882. All that remained of the 110 acres originally set aside by the New Zealand Company in the town of Wellington was 36 acres 1 rood and 13 perches. (The one rood and 13 perches were part of section 543 in Pipitea Street; the rest was in Newtown.) The remaining reserves are shown in map 11.

### 13.2.8 Tribunal consideration of the Crown's appropriation of urban tenths

In considering whether the Crown acted in breach of Treaty principles in appropriating some 23 acres of urban tenths reserves for hospital, educational, and church purposes and in purchasing a further two acres of such reserves for military purposes, it is necessary to take into account a variety of factors:

- If Maori were to have a viable future in Wellington, they needed, in addition to an adequate rural land base, to be assured of adequate urban reserves to enable them to benefit from the economic opportunities which the developing town of Wellington provided.
- As a consequence of McCleverty's award and Grey's 1848 Crown grant to the New Zealand Company, Wellington Maori were left with rural reserves which were grossly inadequate both in quality and in location.
- Accordingly, it became even more important that as many as possible of the 110 Wellington urban tenths should continue to be held in trust for Wellington Maori. In

this way, they would share in the growing prosperity of the town, which in 1844 already had some 4000 Pakeha residents.

- The Crown was under an obligation to protect the interests of Wellington Maori in their urban tenths reserves by ensuring that such reserves continued to be held on their behalf.
- To ensure that the interests of Maori were protected, the Crown should have given consideration to appropriating the 23 Maori urban tenths only as a last resort and in the absence of any other urban land suitable for hospital, educational, and religious purposes. There is no evidence that there was no such suitable land among the 990 one-acre lots owned by the settlers or English speculators. Indeed, there is no evidence that the Crown even contemplated the acquisition of settler lots for such purposes. Nor did the Crown contemplate using part of the extensive town belt, which had already been taken from Maori without compensation (part of the town belt was subsequently used as the site of Wellington College, but this land was additional to the appropriated tenths reserves, which were retained by the school as an endowment).
- When the Crown was contemplating the appropriation of the 23 Maori urban tenths, and notwithstanding the availability of suitable land in non-Maori ownership, it should first have consulted fully with the beneficial owners and obtained their consent to the acquisition of the lands. Article 2 of the Treaty and the Treaty principle requiring full consultation and full consent of Maori in such circumstances demanded no less. In the unlikely event that Maori had agreed to the acquisition, the Crown was obliged to pay the full value of the land at the time of the purchase.

### 13.2.9 Tribunal findings of Treaty breaches

The Tribunal finds that:

- The Crown, in appropriating 23 valuable urban tenths reserves for hospital, educational, and religious purposes without any consultation with or the consent of the Maori beneficial owners of such lands, acted in breach of its Treaty duty to recognise and protect the rangatiratanga of the beneficial owners, and failed to meet its Treaty obligation to act reasonably towards them. As a consequence, the beneficial owners have been prejudicially affected by the loss of this valuable land.
- The compensation eventually paid by the Crown to the beneficial owners for the appropriation of their 23 urban tenths was manifestly inadequate. In paying only £4473, being somewhat less than a quarter of the land's 1874 market value and almost certainly significantly less than a quarter of its value in 1876, the Crown acted inconsistently with its Treaty duty to act reasonably and in good faith towards its Treaty partners. As a consequence, the beneficial owners have been prejudicially affected thereby.

- The Crown, in failing to compensate the beneficial owners for their loss of income from their 23 urban tenths for some 24 years, acted inconsistently with its Treaty duty to act reasonably and in good faith towards its Treaty partners. As a consequence, the beneficial owners have been prejudicially affected thereby.
- In 1848, the Crown, without any consultation with, or the consent of, the beneficial owners of town acres 89 and 90, being two tenths reserves in Mount Cook (beside what would later become the Buckle Street site of the National Museum), authorised the military forces to occupy those lots and to continue in such occupation, without paying any rent, for some 26 years, until eventually in 1874 it purchased the two sections from the beneficial owners. In so doing, the Crown acted in a manner inconsistent with its Treaty obligation under article 2 actively to protect Maori rangatiratanga, and the beneficial owners were prejudicially affected thereby.
- In purchasing rather than leasing the two Mount Cook tenths reserves from the beneficial owners, the Crown further failed actively to protect Maori rangatiratanga, and the beneficial owners were further prejudicially affected thereby.

## 13.3 Te Aro and Pipitea Pa

Te Aro and Pipitea were the two largest pa in the town of Wellington and were guaranteed to Maori by both Spain and McCleverty. If Maori were to have any chance of participating in and benefiting from the development of Wellington, it was essential that they retain these important sites in the heart of the city. But this did not happen. The fate of this land, and of the communities that once lived on it, therefore merits examination in some detail. What emerges very clearly is the failure of the Crown to protect the interests of the Te Aro and Pipitea communities or to assist them to remain in the town. On the contrary, it appears that officials wanted to see Maori removed from the town, and they encouraged the alienation of this land in order to bring that about.

### 13.3.1 Te Aro and Pipitea Pa land reserved by McCleverty

Te Aro Pa (or at least the portion of it reserved by McCleverty) was situated on three sections which had been selected by purchasers of land orders from the New Zealand Company.[74] Part of the pa had also been assigned by the company as the site of the Custom House. By contrast, Pipitea Pa was located mostly on tenths reserve land.[75] Both pa were situated on flat land with harbour frontages, and they were thus not only well suited for Maori occupation but also highly desirable properties from a Pakeha perspective. Along with other pa in Port

74. Document 18, pp 107–108
75. Ibid, p 191



Figure 6: View of Te Aro, Wellington, looking along Manners Street towards Mount Victoria with the Te Aro foreshore on the left, and the Wesleyan Chapel on the right, 1857. Te Aro Pa is clearly visible in the middle of the photograph. Photographer unknown. Reproduced courtesy Alexander Turnbull Library, Wellington, New Zealand (f-2961-½).

Nicholson, Te Aro and Pipitea were reserved for Maori in the 1844 deeds of release. Spain noted in his final report that the area around Te Aro Pa had become 'the mercantile end of the town, where the principal wharves and stores are erected'.[76] The exclusion of the prime Pipitea and Te Aro sites was no doubt a contributing factor in the New Zealand Company's rejection of FitzRoy's Crown grant. When McCleverty began his work, he found that the company was still strongly opposed to the reservation of Te Aro for Maori. He reported to

76. Spain's final report on Port Nicholson, 31 March 1845, BPP, vol 5, p 15

Governor Grey a conversation that he had had with William Wakefield, from which he understood that:

> Colonel Wakefield would not advise the acceptance of a grant unless the Natives at Te Aro are either obliged, or their acquiescence purchased, to relinquish their pa at the head of the bay, which occupies the site of the intended Customhouse, and two town sections purchased by settlers.[77]

Grey noted that, although Te Aro Pa was 'situated in one of the most valuable portions of the Town of Wellington', the pa's many inhabitants would 'naturally feel the greatest reluctance to quit a place which they have inhabited for years, which is well suited to their wants, and with the value of which they are well acquainted'.[78] Despite the New Zealand Company's opposition, both Te Aro and Pipitea Pa were guaranteed to Maori by McCleverty.

The Te Aro Pa reserve was located around the intersection of Courtenay Place and Manners Street (near present-day Te Aro Park) and ran down to what was then the shore of Lambton Harbour (now Wakefield Street).[79] The Pipitea Pa land reserved by McCleverty lay in Thorndon between Moore, Moturoa, and Davis Streets and Thorndon Quay (when that was still at the harbour's edge).[80] There was still strong Pakeha opposition to the presence of these pa in the town. One settler wrote to a newspaper to complain about the guarantee of pa sites, commenting that, 'although these filthy kennels may not endanger the health by their noxious vapours or materially obstruct the promenaders, there is a probability of being devoured by dogs . . . numbers can testify to the annoyance received on passing the pa's at both Pipitea and Te Aro'.[81]

The New Zealand Company was equally unhappy with McCleverty's decision to recognise the right of Te Aro Maori to their pa, which they had never sold. In 1849, company secretary T C Harington wrote to Earl Grey asking that the Te Aro sections be placed 'in possession of the parties by whom they were selected'. He proposed that the inhabitants of the pa might be induced to 'remove to a less crowded spot' by granting them tenths reserve land, and even suggested that, if necessary, the company was prepared to give up some of its own private estate and pay money in order to effect the removal of Maori from Te Aro.[82] Earl Grey instructed Governor Grey to cooperate with the company to enable it to obtain possession of the pa site 'upon reasonable and just conditions', and Lieutenant-Governor Eyre wrote

77. McCleverty to Governor Grey, 17 February 1847, Turton, *Epitome*, s D, p 8 (doc A26)
78. Governor Grey to Earl Grey, 9 April 1847, Turton, *Epitome*, s A3, p 173 (doc A26)
79. See maps in doc N3(e), p 876; *Nga Waahi Taonga o Te Whanganui a Tara: Maori Sites Inventory*, Wellington City Council, site M67 (in doc M1(a))
80. See maps in doc A9(f), and doc N3(e), p 845
81. *Wellington Independent*, 9 December 1848, quoted in Pyatt (doc A18), p 37
82. Harington to Earl Grey, 29 October 1849, BPP, vol 6, [1136], p 240; see also Harington to Fox, 26 October 1849, CO208 (doc C1(c), pp 367–369)

that the local government was prepared to afford such cooperation.[83] Despite these instructions, however, Maori were allowed to retain the pa site, and the settler claimants were compensated for not gaining possession of these sections.[84] The award of Te Aro Pa was thus a rare instance in which the McCleverty arrangements resulted in Maori retaining land that had been allocated to settlers.

Native Secretary H T Kemp's report in 1850 provides a picture of the state of these two pa a few years after they were reserved by McCleverty. He described Te Aro Pa as 'equally divided between two sub-divisions of the Ngatiruanui and Taranaki Natives, who are also connected with the Ngatiawas'. Its population was 186. Kemp reported that the inhabitants of the pa had been encouraged to improve their living conditions but that he found their huts 'in a state of dilapidation, and the general state of the Natives, far from being healthy'. Pipitea Pa was smaller, with a population of 96, all of them 'Ngatiawa'. While there were 'several substantial weatherboarded houses' at Pipitea owned by Maori, these were mainly rented by Pakeha. The pa and huts were 'much out of repair', although some Pipitea Maori were collecting material to rebuild their huts and to construct a 'good substantial fence' around the pa.[85] Like the Maori population in Wellington generally, the population of the two pa suffered a dramatic decline in the 1850s and 1860s. By the mid-1850s, the Wesleyan district report for Wellington noted that at Te Aro 'A small remnant of a once considerable tribe occupy a few miserable huts not far from the Mission House'.[86] Commissioner Swainson mentioned in 1865 that Pipitea had been 'long unoccupied by the Natives – in fact there is only one resident on it'.[87] However, in 1869, the surgeon in charge of Wellington Hospital, Alexander Johnston, claimed that, when he had arrived in Wellington seven years before, there had been 'a good number' of Maori at Pipitea, although 'now there are not more than seven or eight, or occasionally a dozen'.[88]

Until it passed through the Native Land Court, all the land in the two pa reserves was held in common by the Maori owners, and, despite the marking out in 1851 of some land at Pipitea Pa for which the owners had requested Crown grants, no such grants were issued.[89] In 1865, Swainson wrote to the Native Minister, informing him that Maori were arranging private leases of small allotments in Te Aro and Pipitea Pa. Swainson maintained that 'Te Aro and Pipitea Pas are guaranteed to the respective tribes by Colonel McCleverty, not as under the

83. Earl Grey to Governor Grey, 9 November 1849, BPP, vol 6, p 240; Eyre to Domett, 15 July 1850, NM8/1850/858 (doc A40, p 227)

84. Quinn (doc 18), p 108

85. Kemp report on the Port Nicholson district, 1 January 1850, *New Munster Gazette*, 21 August 1850 (doc N3(c), pp 594–595)

86. Quoted in John Roberts, *The Wesleyan Maori Mission at Te Aro 1839–1877*, ca 1991, p 13 (doc E8, p 427)

87. Swainson to Native Minister, 2 May 1865, Turton, *Epitome*, s D, p 47 (doc A26)

88. Evidence of Alexander Johnston to the Religious, Charitable, and Educational Trusts Commission, 30 November 1869 (doc E8, p 359)

89. Domett to Kemp, 24 September 1851; Kemp to Domett, 14 October 1851, Turton, *Epitome*, s D, p 17 (doc A26)

general arrangement of an exchange for other lands', and he claimed that 'impartial men of both tribes consider that these pas are held by them under a sort of supervision by the Government – *ie*, that in cases of dispute the Government have a perfect right of interference'.[90] Given that Maori had never sold the land they occupied in the two pa reserves, it is difficult to understand Swainson's view that these lands were held under some sort of supervision by the Government.

### 13.3.2 Subdivision and sale of Te Aro and Pipitea Pa reserves

Between 1866 and 1868, the Te Aro and Pipitea Pa reserves were among the first McCleverty reserves to be surveyed into allotments which were Crown-granted to individuals or small groups under the Native Lands Act 1865.[91] Te Aro was surveyed into 28 lots and Pipitea into 23, and the usual restrictions on alienation were imposed on these lots.[92] Despite these restrictions, lots at both pa began to be sold from 1873 onwards. In the case of Te Aro, planned harbour reclamation works (discussed in chapter 18) were a contributing factor in these sales, and in the willingness of the Government to approve the removal of restrictions on alienation. Although the reclamation at Te Aro did not begin until 1886, this work had been planned since the early 1870s. In 1874, the Wellington City Council was granted 70 acres of the Te Aro foreshore and harbour upon trust for reclamation.[93] A number of Te Aro Pa lots extended down to the foreshore, and, since the first Te Aro Pa sections were sold in 1873 to the superintendent of Wellington, it seems reasonable to assume that this land was wanted for reasons relating to the reclamation.

The Wai 145 claimants have argued that a municipal slum-clearance programme also contributed to the destruction of Te Aro Pa. According to their statement of claim, 'The Crown helped remove Te Aro pa from central Wellington by declaring it a slum dwelling and laying a road through the middle of it'.[94] This claim is elaborated on in their closing submissions, which identify the road in question as Taranaki Street and refer to a slum-clearance programme begun by the Wellington mayor in 1874.[95] It seems that the Wellington City Council decided in 1875 to extend Taranaki Street through the pa to the sea.[96] However, the Tribunal has received no evidence about the involvement of the Crown in this process. Nor has any evidence been presented to us about the impact that extending Taranaki Street had on the

90. Swainson to Native Minister, 2 May 1865, Turton, *Epitome*, s D, pp 46–47 (doc A26)
91. Document 18, pp 109–110, 192; C Heaphy, 'Report on the Native Reserves in the Province of Wellington', 5 May 1871, AJHR, 1871, F-4 (doc A24, p 50)
92. For lot divisions and the people they were assigned to, see document A9(f) for Pipitea and document N3(e), p 876 for Te Aro.
93. Robert A McLean, 'Te Whanganui-a-Tara Foreshores Reclamations Report', report commissioned by the Waitangi Tribunal, November 1997 (doc 19), pp 172, 189
94. Claim 1.2(d), para 13.17
95. Document 04, p 322
96. Roberts, *The Wesleyan Maori Mission at Te Aro 1839–1877*, p 18 (doc E8, p 430)

inhabitants of the pa, or about whether Maori were consulted or compensated. The Tribunal is, therefore, not in a position to decide on the merits of this particular claim. As for the allegation that Te Aro Pa was removed as part of a municipal slum-clearance programme, if this claim is traced back to its origin, it turns out that the source relied upon in fact refers to a slum-clearance programme in the Te Aro *district* of Wellington and that it was promoted by a mayor who held office from 1927 to 1931, by which time the pa was long gone.[97]

Nevertheless, the perception that both Te Aro Pa and the wider Te Aro district which surrounded it were a blight on the city may have contributed to the pa's demise. From the earliest days of the Port Nicholson settlement, settlers objected strongly to the communal lifestyle of the pa on the grounds of morality, health, safety, and aesthetics.[98] In addition, by the 1860s the Te Aro Flat area where Te Aro Pa was located had become a notoriously overcrowded slum, although it was not until the 1930s that a concerted attempt was made to remedy the overcrowding and other slum conditions.[99] While there is no evidence that Te Aro Pa was 'removed' as part of any slum clearance, the belief that the pa constituted a slum within a slum no doubt made the authorities more willing to consent to the alienation of this land. There is very clear evidence that Commissioner Heaphy, for one, wished to see both Te Aro Pa and Pipitea Pa removed from Wellington city. Heaphy took a very favourable view of proposals to alienate McCleverty reserve land in Te Aro and Pipitea Pa, seeing them as an exception to the usual rule that reserve land required for Maori should be preserved for Maori.[100] Describing Te Aro Pa as 'a nest of immorality', Heaphy argued that for 'moral & sanitary reasons' it was desirable for the sake of Maori and Pakeha alike that Maori should leave the town and that the pa land should pass into Pakeha hands. Without giving any specific reasons, Heaphy supported the sale by Maori of a section at Pipitea Pa simply on the ground that it was 'desirable to get the natives out of the town', noting that they had cultivation land in the Hutt Valley, although 'not much'.[101]

Given Heaphy's willingness to approve the alienation of Te Aro and Pipitea Pa land, it is not surprising that many pa sections passed out of Maori ownership while he was commissioner. Nine Te Aro Pa lots were sold to the superintendent of Wellington in 1873 and 1874 and then conveyed to the Crown later in 1874.[102] While this land may originally have been

97. Document 04, p 322 refers to doc 14, p 266, which in turn refers to Alan Mulgan, *The City of the Strait: Wellington and its Province. A Centennial History*, Wellington, Reed, 1939, p 207

98. Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland, Auckland University Press/Oxford University Press, 1983 (originally published 1974), p 56; Gavin McLean, *Wellington: The First Years of European Settlement 1840–1850*, Auckland, Penguin Books, 2000, pp 81–82; enclosures with letter from T C Harington to Earl Grey, 29 October 1849, BPP, vol 6, [1136], pp 241–242

99. Gael Ferguson, *Building the New Zealand Dream*, Palmerston North, Dunmore Press, 1994, p 20; Malcolm McKinnon (ed), *New Zealand Historical Atlas: Ko Papatuanuku e Takoto Nei*, Auckland, Bateman, 1997, plate 74

100. Heaphy, memorandum, 11 December 1877, MA13/22, NA (doc N3(e), p 831)

101. Heaphy memoranda, 11 December 1877, 7 October 1878, 29 March 1879, 27 February 1880, 30 December 1879, MA13/22, MA13/23, NA (doc N3(e), pp 831, 836, 844, 872, 877); Heaphy, 'Report of the Commissioner of Native Reserves', 31 May 1876, AJHR, 1876, G-3 (doc A24, p 97)

102. Turton, *Deeds*, pp 111–115, 117–118, 124–126, 415 (doc A27)

bought for reclamation purposes, it presumably formed part of the 14 sections of the Te Aro Pa reserve which were offered for sale in 1875.[103] Thus, by 1875 half the Te Aro Pa sections were no longer in Maori ownership, and more were sold in 1876 and subsequent years.[104] A number of Pipitea Pa lots were likewise sold to private buyers in the period 1873 to 1875, again with Heaphy's approval.[105]

Various lots in both pa reserves were leased to Pakeha, often with Heaphy's assistance and generally for terms of 21 years.[106] Notwithstanding that there was clearly a demand for such leases from Maori, Heaphy encouraged the sale of pa lots. Had he not entertained so strong an antipathy to the continuing ownership by Maori of Te Aro and Pipitea Pa land, Heaphy might well have induced those Maori who expressed a wish to sell to retain their land and lease it for up to 21 years. In this way, many more Maori were likely to have retained ownership of increasingly valuable land in the heart of Wellington. When Heaphy conducted a royal commission into the Wellington tenths reserves and the McCleverty reserves in 1878–79, it appeared from evidence that the Te Aro Maori, who included several old and infirm people, had not much land to cultivate. As a consequence, on Heaphy's recommendation £96 was distributed in equal sums to 17 heads of such families.[107]

It is not known when Te Aro and Pipitea Pa passed entirely out of Maori ownership. The 1881 census showed 28 Maori still living at Te Aro and nine at Pipitea, but these were clearly communities in a state of terminal decline, and it seems unlikely that they lasted very long into the 1890s.[108]

In concluding this section, we note that the approval by the Crown of the sale of so much of the Te Aro and Pipitea Pa land has to be seen in the broader context of the Crown's failure to retain cultivatable land for the Maori of both pa within a convenient distance of these pa settlements, such as the Newtown tenths reserves which Mantell had agreed to make available for cultivation by Te Aro Maori (discussed in chapter 12). The fact that the Crown, through Heaphy as reserves commissioner and agent of the Crown, so readily facilitated the sale of much of the Te Aro and Pipitea Pa land instead of ensuring that, wherever possible, Maori retained ownership of their interest in the pa land by leasing rather than selling, resulted in both Te Aro Pa and Pipitea Pa passing entirely out of Maori ownership. The need for Maori to retain ownership was accentuated by the inadequacy of the land provided by McCleverty for Te Aro Maori in particular.

103. Roberts, *The Wesleyan Maori Mission at Te Aro 1839–1877*, p 18 (doc E8, p 430)
104. Charles Heaphy, 'Report of Commissioner of Native Reserves', 7 July 1877, AJHR, 1877, G-3 (doc A24, p 112)
105. Document 18, p 192
106. Charles Heaphy, 'Report of Commissioner of Native Reserves', 7 July 1877, AJHR, 1877, G-3 (doc A24, p 112)
107. Charles Heaphy, 'Report of the Commissioner of Native Reserves', 1 July 1879, AJHR, 1879, G-7 (doc A24, p 128)
108. 'Census of the Maori Population, 1881', AJHR, 1881, G-3, p 26

It remains to consider whether, in so readily facilitating the sale of the Te Aro and Pipitea Pa reserves, the Crown acted in breach of the Treaty. In so doing, we have regard to the following:

- McCleverty, against the wishes of the New Zealand Company, reserved these pa for Maori who had never sold them. In 1847, many Maori still lived at Pipitea and Te Aro, and in reserving the pa McCleverty recognised the right of Maori to retain ownership of their homes. This was particularly important, because various of their valuable near-by cultivations were assigned to the settlers.
- Both the Te Aro and the Pipitea sites were on very valuable harbour-front land in the developing commercial and administrative centre of Wellington.
- Heaphy's advice that it was desirable to get Maori out of the town, which was accepted and acted upon by other Crown officials, failed to recognise the need to ensure that Maori should continue to participate in the growth and development of Wellington and the economic benefits associated with that development.
- In all the circumstances, the Crown's policy of facilitating the sale by Maori of their land holdings in the two pa rather than encouraging the leasing of such land was contrary to the best interests of Maori.

### 13.3.3 Tribunal finding of Treaty breaches

The Tribunal finds that the Crown, in adopting the policy that it was desirable to remove Maori from the town of Wellington, and as a consequence of facilitating the sale of their land in Te Aro and Pipitea Pa, acted in breach of its Treaty duty actively to protect the best interests of Maori in their land, and in so doing failed to meet its obligation to act reasonably towards its Treaty partners, who, as a consequence, have been prejudicially affected by the loss of their valuable land.

## 13.4 Further Sales of Urban Reserves

Finally, in respect to the urban reserves, we note that by 1882 eight of the 45 original tenths assigned to Maori by McCleverty had been sold. Although the McCleverty-assigned urban reserves were supposed to compensate Maori for giving up their cultivations on settler-selected sections, these reserves were soon being targeted for lease or sale, even before this was allowed under the Native Lands Act 1865. As we noted in chapter 12, Maori who had been awarded reserves by McCleverty were not obliged to place them under the administration of the reserves commissioner, though some chose to do so. However, from 1865 they were obliged to go to the Native Land Court for a certificate of title under the Native Lands

Act before they could legally lease or sell their reserved land. Despite this requirement, a few McCleverty-assigned tenths were Crown-granted to individuals before the Act came into force and thus before ownership was determined by the Native Land Court. This happened with the seven town acres in Willis and Abel Smith Streets (sections 40, 42, 44, 46, 109, 111, and 113), which were granted to one person, Ropiha Moturoa, on 17 October 1865, before the Native Lands Act received the Governor's assent on 30 October 1865. Moturoa sold the sections on 3 January 1866 for £1000.[109] We have insufficient information to make a finding on the matter and have not been asked to do so by the Wai 145 claimants.

The only other McCleverty-assigned urban tenth to be sold before 1882 was section 659. This, with the adjoining section 660, was on the site of Pakuao Pa (at the junction of Tinakori Road and Lambton Quay). Both sections were assigned to Ngati Tama in McCleverty's Kaiwharawhara deed. In 1867, the two sections passed through the Native Land Court, which awarded the title of section 659 to seven owners and that of section 660 to six owners. Section 659 was leased and subsequently sold to the lessee in 1872 for £250. A licensed interpreter acting for the owners, T E Young, said that they had wanted to sell the land for a long time because of the small rent, which had to be divided between the seven owners; that there had been no illegal consideration in the transaction; and that the owners had sufficient land elsewhere. This explanation appears to have been accepted by the Government, which approved the sale.[110] Section 660 was sold in about 1885.

Finally, in this section, we note the sale of some of the McCleverty-assigned reserves taken from the town belt. These included a 52-acre reserve awarded to the people of Kumutoto, and parts of the 80-acre Orangikaupapa/Tinakore block awarded to the people of Pipitea. We discuss each in turn.

In October 1852, Governor Grey bought the 52-acre Kumutoto reserve for £160 and granted it to the Wesleyan Mission for a school. (The reserve had been a cultivation area for the people of Kumutoto Pa.) The school was never built, and in 1865 the church sold the block to the provincial government for £50 per acre, which was about 16 times the amount paid to Maori 13 years before.[111] In replying to criticisms of this transaction by claimant counsel, Crown counsel said that 'It has not been established that the price paid [by Grey] . . . was inadequate'.[112] He went on to argue that 'The higher price received by the Wesleyan Church in 1865 may well be explicable by the increase in values over the intervening years and factors such as the shifting of the capital to Wellington'.[113] We consider it highly likely that the price paid by Grey was inadequate, since the land, which was right on the edge of the town and which today makes up most of Wellington's Botanical Gardens, was surely valuable. It is possible that the Kumutoto Maori accepted a low price because they expected the church

109. Document 18, pp 198–200
110. Ibid, p 185
111. Ibid, pp 101–103
112. Document 04, p 302
113. Document 01, p 34

to build a school on the land. But, though the church fenced the site, it did not build the school or otherwise improve the land. We are surprised that Crown counsel should justify the church's gain from the rising capital values of the land, since he denied that Wellington Maori should be allowed similar increases in value when they were finally paid in the 1870s for land taken for hospital, educational, and religious endowments. But, in the absence of any firm evidence of the reserve's value in 1852, we are unable to make any Treaty finding on this transaction.

The Orangikaupapa/Tinakore block was taken from town belt land bordering the Botanical Gardens and extending into what is now the suburb of Northland. Te Matehou of Pipitea had cultivations on the land when it was assigned to them by McCleverty, but by 1863 they had ceased to cultivate the land and had leased it to a Pakeha. In 1873, it was subdivided into 14 lots. These were leased and, from 1876, gradually sold, usually after being further subdivided.[114] There was no comment by claimant or Crown counsel on the sale of this Orangikaupapa land, and so we make no finding. As to the town belt, we have discussed the Crown's title to it in chapter 6.

## 13.5 The Sale of Rural Reserves

Although most of the rural reserves were leased in the period covered in this chapter, a number of them were sold, usually to the lessees. Three categories of rural reserves were involved: the remaining unassigned New Zealand Company tenths; company tenths that were assigned by McCleverty; and reserves taken by McCleverty from the unsurveyed land beyond the area acquired by the company under the deeds of release.

By 1873, according to schedule D to the Native Reserves Act 1873, the rural tenths had been reduced to some 676 acres at Ohiro, Makara, Ohariu, and Mangaroa (Upper Hutt), plus 300 acres at Pakuratahi (near Kaitoke), which were not original tenths.[115] Some 3162 acres of rural tenths had been assigned to Maori as part of McCleverty's awards, and the passing of the Native Lands Act 1865 meant that, once its ownership had been determined by the Native Land Court, the land could be sold by its owners. More than 400 acres of the McCleverty-assigned rural tenths had been sold by 1882. The reserves allocated by McCleverty in the unsurveyed districts also began to be subdivided and alienated in this period. Although Heaphy tried to ensure that those Maori still resident in Wellington retained sufficient land for their needs, he was generally content to approve the sale of McCleverty reserve land where that land was of poor quality or where the owners had returned to Taranaki.

As we observed in chapter 11, much of the land assigned by McCleverty was remote and of poor quality. The same was true of some of the unassigned rural tenths, such as Lowry

114. Document 18, pp 202–205
115. The history of these Pakuratahi reserves is discussed in chapter 12, fn 73.

Bay sections 1 and 4, which were sold in 1864–65 and were described by surveyor Fitzgerald as 'principally situated in a swamp'.[116] The rural reserves were particularly ill-suited to the method of shifting cultivation practised by Maori at the time. Much of this land was suitable only for pastoral farming, which for the most part Wellington Maori lacked the financial resources to engage in. Partly because they lacked adequate land in the Wellington district, but also because of other factors discussed in chapter 11, many Maori left Wellington and returned to their ancestral homeland in Taranaki. Thus, by the time the rural reserves began to be sold, few Maori were living on them.

We record that, although Wai 145 claimant counsel noted that the Native Reserves Act 1856 gave the reserves commissioners the authority to alienate tenths reserves, the claimants have not complained over the use of that power so far as rural tenths were concerned.[117] Crown counsel noted that the commissioner needed the Governor's assent for the sale or exchange of reserve land or for the granting of leases of more than 21 years, and he added that 'consent to sales was not readily given'.[118] This statement is referenced to a discussion in the Crown's closing submissions which relates to consents given by just two of the commissioners, Heaphy and Mackay, and refers only to sales of McCleverty-assigned reserves.[119] We have discussed Heaphy's approach to the sales of Te Aro and Pipitea Pa land at section 13.3.2, and, so far as rural reserves were concerned, Crown counsel submitted that 'Heaphy's concern was to protect the cultivation lands of resident Maori'.[120] Where Maori had left the district, often to return to Taranaki, Heaphy usually approved their requests to sell Wellington reserves. We agree that this was appropriate. Given the absence of any Treaty claim in respect of the rural tenths or other rural interests of Maori, no finding by us is called for.

116. For more on the sale of these Lowry Bay sections, and their replacement by reserves in Palmerston North, see section 15.9 below.
117. Document O4, pp 326–327
118. Document Q1, p 41
119. Document P3, pp 46–51
120. Ibid, p 47

CHAPTER 14

# THE STATUS OF THE PUBLIC TRUSTEE, NATIVE TRUSTEE, AND MAORI TRUSTEE

## 14.1 Introduction

The Wai 145 claimants in their fourth amended statement of claim make a number of claims concerning alleged acts or omissions of, first, the Public Trustee (the trustee of Maori reserved lands from 1882 to 1920) and, secondly, the Native Trustee (whose name was changed to Maori Trustee by Parliament in 1947). The Native or Maori Trustee has been the trustee of Maori reserved land since 1920.

The issue of whether or not the Maori Trustee and his predecessors can be said to act 'by or on behalf of' the Crown in terms of section 6 of the Treaty of Waitangi Act 1975 was raised by Crown counsel during our proceedings. In June 1997, the Tribunal reserved its decision until all the evidence of the various parties was heard and the hearing completed.[1]

It is convenient to consider the question raised by Crown counsel in relation to the Public Trustee and the Native or Maori Trustee at this stage. In so doing, we are conscious that this Tribunal has no power to make binding determinations of the law. As the Tribunal in the *Whanganui River Report* said, that is a task for the courts. However, as that Tribunal also stated, there is a distinction between making a binding determination of the law and the interpretation of the law for the purposes of the Treaty of Waitangi Act. To consider whether a law is consistent with the principles of the Treaty of Waitangi, the Tribunal must consider what that law is.[2] Likewise, to consider whether, as in this case, certain corporations sole acting as trustees are 'acting by or on behalf of the Crown' in terms of section 6 of the Treaty of Waitangi Act, it is necessary for us to have regard to the relevant case law and statutes.

## 14.2 Crown's Primary Submission

Crown counsel submitted that the acts, omissions, policies, practices, and proposed policies and practices of the Public Trustee, Native Trustee, and Maori Trustee ('the trustees') that are complained of are not acts, omissions, policies, practices, or proposed policies and practices

1. Paper 2.125, p 3
2. Waitangi Tribunal, *The Whanganui River Report* (Wellington: GP Publications, 1999), p 307

undertaken 'by or on behalf of the Crown'. The trustees, counsel claimed, are entities distinct and independent from the Crown. Accordingly, the trustees do not act 'by or on behalf of the Crown' for the purposes of section 6(1) of the Treaty of Waitangi Act 1975.[3]

The Crown accepted that:

> legislation under which the Maori Trustee operated is a proper matter for inquiry by the Tribunal. The Crown further agrees that a proper investigation of the claims of the Wellington Tenths claimants requires consideration of the effect of this legislation, and this may involve some examination of the activities of the Maori Trustee. However, in the Crown's submission, the Tribunal has no jurisdiction to find that the Maori Trustee has acted inconsistently with Treaty principles.[4]

In closing submissions, Crown counsel reiterated the Crown's position that the Tribunal has no jurisdiction to find that the trustees have acted inconsistently with the principles of the Treaty, for the reason that their actions are not actions 'by or on behalf of the Crown'. In addition, the Crown stressed as a key point in its submission that the 'Maori Trustee' (which term we understood was intended to include the Public and Native Trustees) 'has been established by statute to perform his functions not on behalf of the Crown, but on behalf of the beneficial owners of Maori land'. Accordingly, the Crown's powers in relation to the functions of the various trustees do not constitute them as the Crown's agents, because of the large degree of independence which the trustees maintain.[5]

## 14.3 The Treaty of Waitangi Act 1975

Section 6 of the Treaty of Waitangi Act 1975 sets out the jurisdiction of the Waitangi Tribunal. Section 6(1) provides:

> **6. Jurisdiction of Tribunal to consider claims**—(1) Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected—
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> (a) By any ordinance of the General Legislative Council of New Zealand, or any ordinance of the Provincial Legislative Council of New Munster, or any provincial ordinance, or any Act (whether or not still in force), passed at any time on or after the 6th day of February 1840; or

3. Document G7, p 2
4. Ibid, p 3. We understand that Crown counsel intended to include the Public Trustee with the Maori Trustee in the period 1882 to 1920.
5. Document P4, pp 36–37

(b) By any regulations, order, proclamation, notice, or other statutory instrument made, issued, or given at any time on or after the 6th day of February 1840 under any ordinance or Act referred to in paragraph (a) of this subsection; or

(c) By any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown; or

(d) By any act done or omitted at any time on or after the 6th day of February 1840, or proposed to be done or omitted, by or on behalf of the Crown,—

and that the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission, was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section.

It follows that any claim made to the Tribunal must be based on one or more of the matters set out in section 6(1)(a) to (d) and that matter must be said to be inconsistent with the principles of the Treaty, resulting in prejudice to the claimant Maori or group of Maori.

Section 6(1)(a) relates to any legislation passed by Parliament or its legislative predecessors. Section 6(1)(b) relates to any subsidiary or delegated legislation authorised by the Governor-General in Council or his predecessors. These two clauses confer on the Tribunal the function of examining whether or not any statute or subsidiary legislation is or was consistent with the principles of the Treaty. The Crown therefore rightly accepts that allegations relating to the legislation under which the trustees operated can be tested by the Tribunal for consistency with Treaty principles. Such allegations are clearly within the Tribunal's jurisdiction and are a proper matter for inquiry.

Crown counsel noted that section 6(1)(c) and (d) relates to policies and practices adopted, and acts done or omitted, 'by or on behalf of' the Crown. The Act does not define the term 'the Crown', which also appears elsewhere in section 6. Under section 6(3), the Tribunal may recommend to the Crown that action be taken to remedy a well-founded claim. Section 6(5)(b) assists to clarify the definition of 'the Crown', referring to the Minister of Maori Affairs and 'such other Ministers of the Crown as . . . have an interest' in a particular claim. Counsel referred to a decision in the Waitangi Tribunal's Chatham Islands inquiry where the Tribunal was of the view that 'as a whole the term "the Crown" is used throughout the section in the one sense as referring to the executive or government'. Counsel submitted that this is the correct interpretation of 'the Crown'.[6]

6. Document G7, p 4, quoting Wai 64 ROI, paper 2.67, p 15

## 14.4 Claimant Counsel's Primary Submissions

In addition to submitting that certain native reserves legislation was inconsistent with the principles of the Treaty, counsel for the Wellington Tenths Trust submitted that the Tribunal could inquire into acts and omissions of the trustees in terms of one or more of three 'scenarios':

- *Scenario 1: Crown agent*—Under section 6(1)(c) and (d) of the Treaty of Waitangi Act 1975, certain acts and omissions of the trustees, as detailed in the evidence of Terence Green, were done 'by or on behalf of the Crown' and were inconsistent with Treaty principles.[7]
- *Scenario 2: Crown's responsibility*—Under section 6(1)(a) and (b), even if the acts or omissions of the trustees were not 'by or on behalf of the Crown', the Crown is still responsible for those acts or omissions because it: passed the statutes and regulations which established the trustees; by legislation, vested Maori reserves in the trustees for their management; promulgated regulations concerning the conduct of the trustees; appointed and dismissed persons to those positions; and structured, resourced, and managed the offices of the trustees.
- *Scenario 3: historical relevance*—Under section 6(1)(c), the acts or omissions of the trustees are 'historically relevant' (in the words of Justice Heron in *Te Runanga o Wharekauri Rekohu Inc v Waitangi Tribunal*) to the policies and practices adopted by the Crown in relation to the land rights of Maori generally, to the extent that the Crown failed in its duty under the Treaty to provide Maori with the full, exclusive, and undisturbed possession of their lands, estates, forests, fisheries, and other properties, and to provide them with protection.[8]

Mr Green, counsel for the Wellington Tenths Trust, challenged the Crown's contention that the trustees were not the Crown or agents acting on its behalf. While conceding that the trustees' status as corporations sole gives them a legal personality distinct from the Crown, he submitted that this status was not determinative of their position as agents of the Crown. He relied on references both in the trustees' legislation and in other statutes which made reference to the trustees as being 'instruments of the Crown'.

In addition, Mr Green submitted that the legal tests formulated by the courts for determining whether a body is an agent of the Crown lead to the conclusion that the former and present trustees were and are agents of the Crown.[9] Before considering Mr Green's submissions as to the three 'scenarios' referred to above, it is first necessary to resolve whether, as a matter of law, the Public Trustee, the Native Trustee, and the Maori Trustee were, in the exercise of their statutory powers as trustees, acting by or on behalf of the Crown in terms of section 6

7. The evidence of Terence Green referred to is document G1.

8. Document G8, pp 5–6; *Te Runanga o Wharekauri Rekohu Inc v Waitangi Tribunal*, unreported, 12 May 1994, Heron J, High Court Wellington, CP118/94, p 13 (doc G8(a), s 10)

9. Document G8, p 7

of the Treaty of Waitangi Act 1975. Mr Green's three 'scenarios' are considered later in the light of our finding on the question of law (see s14.14).

## 14.5 Tests for Crown Agency

Under the Native Reserves Act 1882, certain native reserves, including the Wellington tenths and some McCleverty-assigned reserves, were vested in the Public Trustee. Before examining this and subsequent Acts, it is first necessary to consider the submissions of counsel for the Wellington Tenths Trust and Crown counsel on various tests or criteria for assessing whether or not the trustees were acting by or on behalf of the Crown. These submissions fall under a variety of heads, and we consider each in turn.

Mr Green submitted that, where the legislation establishing an entity does not specify whether that entity will be an agent of the Crown, the courts have, over time, laid down two tests to determine the question: 'the functions test' and 'the control test'. He suggested that the latter test had largely replaced the former in the twentieth century. Counsel referred us in this connection to various passages from Professor Peter Hogg's treatise *Liability of the Crown*.[10]

Hogg notes that, in the middle of the nineteenth century, the test developed by the courts to determine whether a public corporation was an agent of the Crown was a 'functions' test:

> The question was whether the functions of the public corporation properly belonged within the 'province of government'. If they did, then the corporation was agent of the Crown. On this basis, bodies or officers performing traditional governmental functions, such as the administration of the courts or the police, were accorded Crown immunity from rates or taxes on land. It did not matter that the bodies or officials were independent of the Crown and therefore could not be regarded as Crown servants (or agents): if their functions were within the province of government, they were said to be *in consimili casu* (in a like case) with Crown servants (or agents) and were entitled to Crown immunities.[11]

We note that the function of acting as a trustee was not a 'traditional governmental function' in Britain. The appointment of the Public Trustee to assume responsibility for Maori reserves in New Zealand occurred in 1882, only 30 years after representative government began in 1852. And, as the parliamentary debates to which we later refer indicate, the Public Trustee was appointed with a view to insulating his function from the Government.

By the end of the nineteenth century, Hogg notes that the emphasis had changed from classifying the functions of a public body to examining the relationship between the body and

10. Peter W Hogg, *Liability of the Crown in Australia, New Zealand and the United Kingdom*, 2nd ed (Toronto: Law Book Company, 1989), pp 247–252 (doc G8(a), s 26)

11. Ibid, p 249

the Crown: 'If that relationship is one of control by a minister, then the controlled body is an agent of the Crown.'[12]

Mr Green referred us to a number of cases in which he submitted that the 'control test' has been applied. In *Fox v Government of Newfoundland*, the Privy Council held that certain boards of education constituted under Newfoundland Education Acts were not mere agents of the Government but had a discretionary power, independent of the Government, in expending certain bank balances standing to the credit of the various boards.[13]

In the case of *Tamlin v Hannaford*, the question in issue was whether the British Transport Commission was a servant or agent of the Crown in relation to a claim by the commission for Crown privilege or immunity from the impact of the Rent Restriction Acts. The British railways were nationalised under the Transport Act 1947 and became the responsibility of a statutory corporation, the British Transport Commission. Lord Justice Denning (who delivered the judgment of the court) noted that the commission had authority to own property, carry on business, and borrow and lend money, so long as it kept within the bounds set by Parliament. It raised its capital not by issuing shares but by borrowing. All its borrowing was guaranteed by the British Treasury, and any loss it could not repay would fall on the Consolidated Fund.

Justice Denning stated that, under the Transport Act, the Minister of Transport had been given powers over the commission:

> which are as great as those possessed by a man who holds all the shares in a private company, subject, however, as such a man is not, to a duty to account to Parliament for his stewardship. It is the Minister who appoints the directors – the members of the Commission – and fixes their remuneration. They must give him any information he wants; and, lest they should not prove amenable to his suggestions as to the policy they should adopt, he is given power to give them directions of a general nature, in matters which appear to him to affect the national interest, as to which he is the sole judge, and they are then bound to obey. These are great powers but still we cannot regard the corporation as being his agent, any more than a company is the agent of the shareholders, or even of a sole shareholder. In the eye of the law, the corporation is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown.[14]

Justice Denning went on to hold that:

> The only fact in this case which can be said to make the British Transport Commission a servant or agent of the Crown is the control over it which is exercised by the Minister of Transport; but there is ample authority both in this Court and in the House of Lords for

12. Hogg, p 249
13. *Fox v Government of Newfoundland* [1898] AC 667 (doc G8(a), s 14)
14. *Tamlin v Hannaford* [1950] 1 KB 18, 23–24 (doc G8(a), s 17)

saying that such control as he exercises is insufficient for the purpose. (See *Cannon Brewery Co Ld v Central Control Board (Liquor Tra ffic)*.)[15]

Mr Green also referred us to some recent Canadian cases. The first was *Westeel-Rosco Ltd v Board of Governors of South Saskatchewan Hospital Centre*, in which the aforesaid hospital board was held by the Supreme Court of Canada not to be a Crown agent. Justice Ritchie delivered the judgment of the court, which held that 'Whether or not a particular body is an agent of the Crown depends upon the nature and degree of control which the Crown exercises over it.' However, immediately after that statement is the following passage:

> This is made plain in a paragraph in the reasons for judgment of Mr Justice Laidlaw, speaking on behalf of the Court of Appeal for Ontario in *R v Ontario Labour Relations Board, Ex p Ontario Food Terminal Board*, at p 534, where he said:
>
> > It is not possible for me to formulate a comprehensive and accurate test applicable in all cases to determine with certainty whether or not an entity is a Crown agent. The answer to that question depends in part upon the nature of the functions performed and for whose benefit the service is rendered. It depends in part upon the nature and extent of the powers entrusted to it. *It depends mainly upon the nature and degree of control exercisable or retained by the Crown*. [Emphasis added by Justice Ritchie.][16]

We note that, in the *Ontario Labour Relations Board* case cited by Justice Ritchie, the Ontario Court of Appeal recognised that, while the test depended mainly upon the nature and degree of control exercisable, it also rested in part upon the nature of the functions performed and for whose benefit the service was rendered.[17] In short, it was a mix of the so-called 'function' and 'control' tests.

Mr Green also referred us to the Canadian Supreme Court decision in *Northern Pipeline Agency v John Perehinec*. This was a case where the Northern Pipeline Agency sought (successfully) to strike out a wrongful dismissal action in a provincial court on the ground that the agency was an agent of the Crown and that, accordingly, any action against the Crown should be brought in the Federal Court.

The Canadian Supreme Court, which dealt in considerable detail with the question of whether the Northern Pipeline Agency was an agent of the Crown, commenced its consideration of the question by stating that:

> Whether a statutory entity is an agent of the Crown, for the purpose of attracting the Crown immunity doctrine, is a question governed by the extent and degree of control exercised over that entity by the Crown, through its Ministers, or other elements in the

15. Ibid, p 25 (s 17)

16. *Westeel-Rosco Ltd v Board of Governors of South Saskatchewan Hospital Centre* [1977] 2 SCR 238, 249–250 (doc G8(a), s 19)

17. *R v Ontario Labour Relations Board, Ex p Ontario Food Terminal Board* [1963] 2 OR 91 (doc G8(a), s 20)

executive branch of government, including the Governor in Council. In *Metropolitan Meat Industry Board v Sheedy*, [1927] AC 899, Viscount Haldane considered the extent of the control by government, or conversely the uncontrolled discretionary power in the board, in determining whether the acts of the board in question constituted those of an agent of the Crown. In concluding that the board there in question was not an agent of the Crown His Lordship stated, at p 905:

> They are a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguished from theirs. That they were incorporated does not matter. It is also true that the Governor appoints their members and can veto certain of their actions. But these provisions, even when taken together, do not outweigh the fact that the Act of 1915 confers on the appellant Board wide powers which are given to it to be exercised at its own discretion and without consulting the direct representatives of the Crown.[18]

The court noted the relevant provisions of the Act which established the Northern Pipeline Agency:

> In the *Northern Pipeline Act, supra*, the Agency was established to carry out and give effect to an agreement which had been previously entered into by this country and the United States relating to the establishment of gas transmission pipeline facilities in the federal territories and the Province of Alberta. To this end the Agency, pursuant to s 3, was given a statutory mandate to 'facilitate the efficient and expeditious planning and construction of the pipeline', and in doing so 'to carry out . . . federal responsibilities in relation to the pipeline' . . .
>
> The Agency, by s 4 of its statute, was described as 'an Agency of the Government of Canada called the Northern Pipeline Agency over which the Minister shall preside'. The Agency was made subject to the management and direction of the Minister . . .
>
> Applying the principle of control . . . to the statutory provisions establishing the appellant, it would appear that the appellant is indeed an agent of the Crown, at least in the discharge of its primary function of attending to the design, construction and installation of the pipeline.[19]

Given that the purpose of the Northern Pipeline Act was to give effect to an international agreement of national importance, and the explicit provision that this was to be carried out by an agency of the Government of Canada especially constituted for the purpose and presided over by a Minister of the Crown and associated provisions, it is readily evident why the Supreme Court concurred in the conclusions reached in the two courts below. The decision

18. *Northern Pipeline Agency v John Perehinec* [1983] 2 SCR 513, 517–518 (doc G8(a), s 21)
19. Ibid, pp 520–521 (doc G8(a), s 21)

is significant in that the court found the agency to be an agent of the Crown, 'at least in the discharge of its *primary function* of attending to the design, construction and installation of the pipeline' (emphasis added). This leaves open the possibility that in some other respects the Northern Pipeline Agency may not have been acting on behalf of the Crown.

Mr Green also referred us to the New Zealand case of *Waitakere City Council v Housing Corporation of New Zealand*, where Master Gambrill in the High Court decided that the Housing Corporation was not an agent of the Crown and was therefore liable to pay local body rates given its commercial function and lack of direct Crown control. The decision is of interest in that the corporation was authorised to exercise certain powers under the Housing Act 1955. Section 39 of that Act specifically provided that, in respect of its functions under the Act, the corporation 'shall be deemed to be and always to have been the agent of the Crown, and shall be entitled accordingly to all the privileges which the Crown enjoys'. Master Gambrill recognised that, in exercising functions under the Housing Act, the Housing Corporation was clearly an agent of the Crown. But, in exercising its functions under the Housing Corporation Act 1974, it was not a Crown agent.[20]

Finally, we refer to *Proprietors of Taharoa c v Maori Trustee*. In that case, Acting Chief Justice Barker was called on to decide whether the sale of Crown shares in the Maori Development Corporation Limited (which were held by the Maori Trustee) to a Maori incorporation could be stopped by a third party (the Maori Congress), which sought to be joined in the proceeding, claiming that the sale of the shares was a breach of the Treaty of Waitangi and should be reviewed by the Waitangi Tribunal. As Mr Green pointed out, the court considered the dispute a simple one between the purchaser (the proprietors of Taharoa) and the vendor (the Maori Trustee), and it was not willing to give the third party leave to interfere with the sale.[21]

Mr Green noted that the acting chief justice held that the Waitangi Tribunal would have jurisdiction on the issue only if 'the Maori Trustee is the Crown'. Counsel submitted that:

> the issue of whether the Waitangi Tribunal had jurisdiction to enquire into the actions of the Maori Trustee acting '*by or on behalf of the Crown*' (section 6(1)(c) and (d) of the Treaty of Waitangi Act 1975) as opposed to whether '*the Maori Trustee is the Crown*' (which clearly it is not) was not argued before the Court and not considered by Barker ACJ [who was hearing the matter on short notice].[22]

The Tribunal accepts the validity of this submission of counsel. However, the following passages in Acting Chief Justice Barker's judgment, the second part of which was alluded to by Mr Green, are of relevance. In the first passage, the acting chief justice stated that:

20. *Waitakere City Council v Housing Corporation of New Zealand* [1992] 3 NZLR 591 (doc G8(a), s 23)
21. Document G8, pp 8–9
22. Ibid, p 9

14.5

The defendant is a corporation sole set up under the Maori Trustee Act 1953. Under s 4 of that Act, as effected by an amendment in 1991, the Maori Trustee is normally the person holding office as the Chief Executive of the Ministry of Maori Development. The roles of the Maori Trustee are extensive under the Act. They include general trustee duties. In this respect, the role of the Maori Trustee is similar to that of the Public Trustee.

Of particular relevance to Maori claims, is the ability of the Maori Trustee to act on behalf of persons with interests in Maori land and to collect the proceeds from leases on behalf of various beneficiaries, some of whom have only small interests in any given piece of land. Like the Public Trustee, the Maori Trustee has a common fund whereby investments can be pooled, but the beneficiaries in the common fund are nevertheless ascertainable; under the statute they receive interest earned from the common fund. In addition, the Maori Trustee is able to accept funds for investment on behalf of Maori and Maori corporations. Again, he is bound *under normal Trustee law* in respect of this money.

There is also a 'general purposes fund' said by Mr Gardiner, the current holder of the office of Maori Trustee, to be the equivalent of the Maori Trustee's equity. The funds are derived from profits and commissions from the Maori Trustee's activities. The Crown is entitled to be paid the costs of running the office out of this particular fund. The shares in question form part of this general purpose fund; there is therefore no defined beneficiary. [Emphasis added.][23]

These passages are of particular significance in the emphasis given to certain similarities between the roles of the Public Trustee and the Maori Trustee, the application of normal trustee law to both trustees, and the Crown's entitlement to reimbursement of office costs. Further reference is made by the acting chief justice to the applicability of principles of trustee law in the following passage:

Counsel for the applicant points out that, whereas prior to the 1991 amendment the Maori Trustee was a public servant not necessarily regarded as an arm of the Government, the situation is changed by the 1991 amendment which makes the Chief Executive of the Ministry of Maori Development the Maori Trustee.

One may argue about the wisdom of combining the two roles of chief executive of a Ministry of the Crown with that of a statutory trustee. However, Parliament presumably has had sufficient confidence in the person to be appointed to hold these dual roles with propriety. There is nothing in the Act and nothing in the evidence which indicates that in acting as Maori Trustee, the chief executive of the Ministry of Maori Development is bound to act on Government directive. Numerous principles of trustee law apply to him; if therefore he were to act in accordance with a Government directive not found in any statute to the detriment of any beneficiary, then the normal consequences of breach of trust would apply.[24]

23. *Proprietors of Taharoa c v Maori Trustee* (1993) 7 PRNZ 236, 237–238 (doc G8(a), s 11)
24. Ibid, p 238 (s 11)

Mr Green submitted that there is plenty of evidence to establish that the Maori Trustee is bound to act on Government directions, and that such evidence is before this Tribunal.[25] We will consider these matters later. Mr Green made no reference to the learned judge's opinion about the applicability of trustee law to the Public Trustee and Maori Trustee.

We have found the following passages in Professor Hogg's discussion of the 'control test' helpful, derived as they are from the English and Canadian decisions we have discussed. Hogg explains that:

> The control test stipulates that the question whether a public corporation is an agent of the Crown depends upon 'the nature and degree of control which the Crown exercises over it'. If the corporation is controlled by a minister (or cabinet) in much the same way as a government department is controlled, then the corporation is an agent of the Crown. If, on the other hand, the corporation is largely free of ministerial control, then it is not an agent of the Crown.[26]

We note later that Hogg recognises that a public corporation may be a Crown agent at common law in the exercise of some functions but not others.

After noting that, in the cases of *Fox v Government of Newfoundland* and *Metropolitan Meat Industry Board v Sheedy* (to which Mr Green also referred us), the right to exercise discretionary powers was considered critical in holding that the respective boards were not agents of the Crown, Hogg states that:

> The *Sheedy* case demonstrates that a public corporation need not be wholly free from ministerial control in order to be held not to be a Crown agent. It is not possible to specify precisely what degree of control is required to make a public corporation an agent of the Crown. Between the extremes of full control and no control lies a continuum in which the courts have ranged without clear rules, often simply repeating that it is the 'nature and degree of control' that has to be assessed. As Dickson J has said: 'the greater the control, the more likely it is that the person will be recognized as a Crown agent'. However, the tendency of the decisions is to require a high degree of control; in other words, the tendency of the decisions is against the finding of Crown-agent status. The reason, without doubt, is a justified reluctance on the part of the courts to extend the special privileges of the Crown any further than necessary. . . .
>
> The result is that the status of Crown agent (at common law) will only be extended to public bodies that are fairly closely controlled by the executive. Any substantial measure of independent discretion will suffice to deny the status of Crown agent to a public body that is subject to some degree of direct control.

25. Document G8, p 9
26. Hogg, pp 250–251 (doc G8(a), s 26)

> For the purpose of the control test, control means de jure control, not de facto control. It is the degree of control that the minister is legally entitled to exercise that is relevant, not the degree of control that is in fact exercised. The question is therefore resolved by an examination of the corporation's empowering statute, and does not involve an assessment of the actual relationship between the corporation and the government.[27]

Hogg notes in a footnote that:

> a public corporation may be a Crown agent at common law in the exercise of one function (because the corporation is subject to control in the exercise of that function) and not be a Crown agent in the exercise of another function (because the corporation is not subject to control in the exercise of that function). This possibility has often been recognized, eg, in *Townsville Hospitals Bd v City of Townsville* (1982) 149 CLR 282, 288 (giving further Australian references); *Northern Pipeline Agency v Perehinic* [1983] 2 SCR 513, 520–521. This possibility also exists in the case of a public corporation that is designated by statute to be a Crown agent.[28]

Crown counsel referred us to the following passage from Paul Lordon QC in his book *Crown Law*, which states that, if the status of an entity and whether it is the Crown is unclear, three criteria can be examined:

> 1. the nature of the functions that the entity performs, and for whose benefit it performs these functions;
> 2. the nature and the extent of the powers entrusted to the entity;
> 3. *above all*, the nature and degree of control of the Crown or government over the entity.
>
> The most important test to determine whether it should be treated as a part of the Crown or not is the so-called 'control' test: a Crown component will be treated as a part of the Crown if it may be said to be 'controlled' by the Crown. [Emphasis in original.][29]

After concluding his submissions on the foregoing cases, Mr Green submitted that the vast majority of the cases in which the courts have had to determine whether or not an entity is an agent of the Crown concern a claim for Crown privileges or immunity from a tax or liability of some sort. Mr Green argued that the courts have shown a clear trend away from holding that entities affiliated closely with the Crown are Crown agents, and therefore subject to Crown immunity or privileges, but that this has been for reasons of public policy (equal treatment). As a consequence, counsel submitted that these cases on Crown immunity have 'skewed the pitch', and the level of Crown or ministerial control required to establish that an entity is an agent of the Crown has been set too high.[30] However, this Tribunal

27. Hogg, pp 251–252 (s 26)
28. Ibid, p 252, fn 15 (s 26)
29. Paul Lordon, *Crown Law* (Toronto: Butterworths, 1991), p 44 (doc G7(a), p 74)
30. Document G8, pp 20–21

can respond only by stating that it must take and apply the law as it finds it. Only the courts can entertain counsel's submission.

This being so, it would be inappropriate for the Tribunal to accede to Mr Green's submission that, in determining whether it has jurisdiction to inquire into the actions of the Public Trustee or Maori Trustee as an agent of the Crown, in the context of a grievance by Maori under the Treaty of Waitangi, the level of ministerial control need not be placed too high.[31] Our duty is to examine the relevant statutes to ascertain the degree of control, if any, that a Minister is legally entitled to exercise over the respective trustees. In doing so, we will adopt Hogg's conclusion that the cases show a tendency to require a high degree of control, with the result that the status of Crown agent will be extended only to public bodies that are fairly closely controlled by the Executive. Any substantial measure of independent discretion will suffice to deny the status of Crown agent to a public body that is subject to some degree of control. We will also bear in mind that a public corporation may be a Crown agent in the exercise of one function but not be a Crown agent in the exercise of another function or functions. This may be of particular relevance in the case of the Native or Maori Trustee.

## 14.6 Application of Crown Agency Tests for the Public Trustee and the Native or Maori Trustee

In determining whether or not the Public Trustee and the Native or Maori Trustee respectively were acting on behalf of the Crown in terms of section 6 of the Treaty of Waitangi Act 1975, we are required, for the purpose of the 'control test', to have regard to *de jure* control, not de facto control. This means that it is the degree of control that Ministers of the Crown are legally entitled to exercise over the respective trustees, not the control that they in fact exercise, that is relevant.

In chapter 12, we have considered the Crown's management of the Wellington tenths reserves and the McCleverty-assigned reserves following a brief period of management of the tenths reserves by the New Zealand Company. It is not disputed by the Crown that the Crown administration of these reserves prior to 1882 fell within the scope of section 6 of the Treaty of Waitangi Act.[32]

It is apparent that, in the formative years of the colony, when no public corporate trustee body existed in New Zealand and policy in relation to Maori was being developed, the burden of administering Maori reserves fell on the Crown by default. No other suitable body existed. However, in 1872 the Public Trustee was established as a body corporate to meet an obvious need. The opportunity was taken just 10 years later to transfer to the Public Trustee, as a corporate body with perpetual succession and a specialist trustee function, the

31. Ibid, p 21
32. Document P4, p 36

responsibility for administering the various Maori reserves. This was effected by the Native Reserves Act 1882.

Before discussing this legislation, it is first necessary to note the relevant provisions of the Public Trust Office Act 1872 in the period 1882 to 1920, during which time the Public Trustee had responsibility for administering the Wellington tenths reserves and some of the McCleverty-assigned reserves on behalf of the beneficial Maori owners.

## 14.7 The Public Trust Office Act 1872

The preamble to the Public Trust Office Act 1872 stated that it was 'expedient to make provision for the custody and management of certain property held in trust' in New Zealand. The Act established the Public Trust Office, which was to be administered by the Public Trustee (s 3). The trustee was constituted a corporation sole for the purpose of the Act, with perpetual succession and a seal of office to be used by the trustee only (s 9). The trustee and the staff of the office were to be appointed by the Governor and their salaries were to be fixed by Parliament (ss 3, 10, 11). The Governor was authorised to make regulations for a variety of matters, including the conduct of the business of the office; the fixing of scales of charges; and the keeping and auditing of accounts and related matters, such as the bank and securities in which moneys were to be kept or invested (s 13).

A board was to be established, consisting of the Colonial Treasurer, the Government annuities commissioner, the Attorney-General, the commissioners of audit, and the Public Trustee, of whom three were to be a quorum (s 18). If any doubt arose in the administration of the Act or relevant regulations or Orders in Council, or as to the powers or duties of the Public Trustee, he was bound to act on the determination of the board, with the advice of the Attorney-General but not otherwise (s 14). In short, he was to act as the Attorney-General, the principal law officer of the Crown, advised in such circumstances. The Attorney-General would be concerned to ensure that the trustee acted in conformity with the law governing the exercise of his fiduciary duties and obligations to those whose property he held on trust.

The Governor, by Order in Council, could place in the Public Trust Office any property held in trust for the benefit of private persons or public bodies or communities by the Crown or the Governor. Any such property was to vest in the Public Trustee, subject to the trusts attaching to it (s 15). Private property could be placed on trust in the office, as could securities of friendly and other societies. Any trust deed or will conveying or devising property to the trustee was to be referred by him to the board, which was to decide whether the deed or will would be accepted (ss 17, 18). The trustee was not to invest money in any securities, or to dispose of securities, without board authority (s 26).

The trustee was subject to the control of the Supreme Court. Any board member or any person having an interest in any property being administered by the trustee could petition the court in respect of any grievance relating to the conduct of the trustee. After hearing the trustee, the court could make such order, in relation to his conduct in the matter complained of, as it thought fit (s 28).

The trustee was required to keep separate and detailed accounts in respect of each separate property and all moneys invested on account of each property (s 38). Any deficiency in the office's expenses account was to be met out of the Consolidated Fund and repaid as soon as sufficient funds were available (s 40). The audit commissioners were required each year to send a copy of the audited accounts for each property in the office to the person or persons who had placed the property there or the person or persons beneficially entitled therein as the commissioners thought appropriate (s 41). This ensured accountability by the trustee to those whose property he held in trust.

Section 43 made it clear that any persons who suffered loss in respect of property through the act or default of the trustee or his staff were to have the same remedies at law for the recovery of such loss from the trustee as they would have had against a private trustee or other person concerned in the management of such property. We note that this provision, in substantially the same form, was carried forward in section 54 of the Public Trust Office Consolidation Act 1894, in section 61 of the Public Trust Office Act 1908, and section 136 of the Public Trust Office Act 1957.

The 1872 Act was repealed and substantially re-enacted by the 1894 consolidation Act. Section 61 of that Act provided that the Trustee Act 1883, which dealt with the powers of the Supreme Court in relation to trustees and a range of matters relating to trusts and trustees applied, where applicable, to the Public Trustee, except to the extent that his powers under his own Act were inconsistent with those of the Trustee Act.

The Public Trustee was obliged to conform to certain provisions of a prudential nature consistent with the duties of a trustee in the exercise of his powers and responsibilities. It is clear that the primary obligation of the trustee was, at all times, to the beneficiaries whose property he held on trust. If he failed to measure up to his fiduciary obligations, he was amenable to the control of the Supreme Court at the suit of an aggrieved beneficiary.

## 14.8 The Native Reserves Act 1882

The Native Reserves Act 1882 vested in the Public Trustee certain Maori reserves referred to in section 3.[33] These reserves included the Wellington tenths reserves and some of the

33. The Act is reproduced in document A21 at pages 40 to 46.

McCleverty-assigned reserves. The Acts in force relating to the Public Trustee were incorporated with the 1882 Act, so far as applicable, as were those regulating or relating to the practice and procedure of the Native Land Court (s 7).

All lands and personal estate vested in the Governor or any commissioner or public officer under any previous Act relating to native reserves were deemed to be placed in the Public Trust Office and were vested in the Public Trustee, subject to the trusts attached to them (s 8).

The Governor in Council could make regulations under section 13 of the Public Trust Office Act 1872 for the administration of native reserves under the 1882 Act and for fixing the charges to be paid for managing them. Salaries of all officers appointed for the administration of the 1882 Act were to be met by appropriation by Parliament (s 9).

All previous contracts made by the Governor or any commissioner or delegate were deemed to have been made with the Public Trustee and were to be carried out by him (s 10). The trustee was to furnish annual accounts of each reserve under his management to the Minister for Native Affairs, with a copy to be laid before Parliament (s 12). (This is the only reference to a Minister of the Crown in the Act.)

The trustee could (with the sanction of the board constituted under the Public Trust Office Act 1872, together with two Maori appointed by the Governor) lease any portion of reserves vested in him or under his control for specified purposes only, provided this would not be inconsistent with any trust relating to the reserve (s 15). The specified purposes were:

- agricultural and mining purposes, for which the term could not exceed 30 years; and
- building purposes, for which the term could not exceed 63 years, with renewable terms not exceeding 21 years each, subject to a reassessment of the ground rent at each such renewal.

The trustee was authorised to apply to the Native Land Court with the consent of the owners of any native reserve over which the native title had not been extinguished, to bring the reserve under the 1882 Act for management purposes. If the court so ordered, such land was to vest in the trustee, subject to such trusts as might have been proposed by him or the owners (s 20).

Restrictions on alienation or other limitations or conditions relating to any reserve vested in the trustee or held by any Maori could be removed by the Native Land Court on application by the trustee or the Maori owners respectively. Before making any such order, the court had to be satisfied that a final reservation had been made which was amply sufficient for the future wants and maintenance of the tribe, hapu, or persons to whom the reserve wholly or in part belonged (ss 22, 23).

Section 27 authorised the Governor to appoint a native reserves commissioner, who, subject to the direction of the trustee, could conduct all or any of the routine business relating to the administration of reserves vested in the trustee or under his control.

It is apparent that the responsibility for the administration of the reserves vested in the trustee, or in his control, lay with the trustee. He was not subject to the control of a Minister

of the Crown in the exercise of his responsibilities as a trustee. He was empowered to delegate, subject to his discretion, the conduct of routine business to a native reserves commissioner. Not surprisingly, the trustee was required to comply with certain prudential provisions designed to ensure compliance with accounting and related requirements. However, these did not make him an agent of the Crown. They were there principally for the benefit of the Maori beneficiaries whose land he held in trust.

While the trustee required the sanction of the Public Trust Board and two Maori appointees to lease reserves, he remained solely responsible for the reserves' administration, subject to the terms of any trusts on which they were held. The trustee was accountable to the Supreme Court, not the Government, for any breach of the trusts on which he held the Maori reserves. In certain important matters, such as the removal of restrictions on the alienation of reserves or the bringing of Maori land over which the native title had not been extinguished under the operation of the 1882 Act, the trustee could apply to the Native Land Court, in the latter case with the consent of the owners. Here, the control was exercised by the Native Land Court.

Mr Green for the Wellington Tenths Trust submitted that, under the 'functions test', the Public Trustee was the Crown's agent.[34] It is difficult to reconcile this suggestion with comments made by Native Minister John Bryce during the second reading of the Native Reserves Bill. In rejecting a suggestion that the reserves should be the responsibility of the waste lands boards, Bryce clearly indicated that he thought it desirable that the management of the Maori reserves should not be subject to the control of a Minister. He saw as an objection to this proposal that:

> the management of the reserves would not be removed from a Minister of the Crown who has a seat in this House; and I think it is desirable to so remove it, because there is no doubt that pressure of a kind difficult to resist might occasionally be put upon that Minister. If the management [of the reserves] is merely transferred from the Native Minister to the Minister of Lands, I do not see that there is any particular merit in the change.[35]

A similar point was made by the Honourable Frederick Whitaker in moving the second reading of the Bill in the Legislative Council, when he stated that the object of the Bill was 'to take the reserves out of the control of the Government'.[36] It appears that the principal reason for vesting the reserves in the Public Trustee was because he was perceived as being free from ministerial control or influence in exercising his duties as trustee of the Maori reserves. This strongly suggests that the Crown recognised that the role or function of the trustee was not seen as being a traditional Government function.

34. Document G8, p 25
35. 22 August 1882, NZPD, 1882, p 512 (doc A20, p 128)
36. 29 August 1882, NZPD, 1882, p 636 (doc A20, p 130)

Various amendments were made to the Native Reserves Act during the period in which the reserves were under the control of the Public Trustee.[37] Additional powers were conferred on the trustee, but responsibility remained firmly in his hands, subject to the jurisdiction of the Native Land Court in some instances.

In divorcing the Public Trustee from governmental control, or influence by the Crown, in the exercising of his responsibilities as trustee of the Maori reserves, the Crown would have known that the trustee was accountable to the Supreme Court. Any Maori having a beneficial interest in reserves administered by the trustee who considered that the trustee was not acting in conformity with his fiduciary duties was entitled to seek relief in the Supreme Court. This right did not depend upon any express statutory provision but derived from the inherent jurisdiction of the court, as conferred by the ordinance for establishing a Supreme Court enacted by the Legislative Council on 13 January 1844. However, as noted in our earlier discussion, section 43 of the Public Trust Office Act 1872 gave beneficiaries and others suffering loss through the acts or default of the Public Trustee the same remedies as were available against private trustees. That provision has been re-enacted in all subsequent Public Trust Office Acts.

The Tribunal, for the reasons we have advanced, is satisfied that, throughout the period 1882 to 1920, the Public Trustee in exercising his functions as trustee of Maori reserves under the Native Reserves Act 1882 was not acting by or on behalf of the Crown for the purposes of section 6(1) of the Treaty of Waitangi Act 1975.

## 14.9 The Native Trustee Act 1920

The Native Trustee Act 1920 established the Native Trust Office.[38] Section 3 provided, 'There is hereby established an office to be called the Native Trust Office, which shall be charged with the administration of this Act, *and shall form part of such Department of State as may from time to time be lawfully determined in that behalf* ' (emphasis added). (In 1921 the Act was amended, and the emphasised words were replaced with the words 'and shall be under the control of the Native Minister'.)

Section 4 provided for the appointment of the Native Trustee and Deputy Native Trustee, who were to be officers of the Public Service. The Native Trustee was constituted a corporation sole with perpetual succession and a seal of office (s 6). The trustee was empowered to enter into contracts with similar formalities as those required of private persons (s 8).

Staff of the Native Trust Office were to be appointed as public servants under the Public Service Act 1912 (s 9). A Native Trust Office Board was constituted and consisted of the Native Minister, a Maori member of the Executive Council, the Native Trustee, the

37. These amendments are discussed in chapters 15 and 16 below.
38. The Act is reproduced in document A21 at pages 148 to 156.

Under-Secretaries of Native Affairs and Lands, and one other appointee of the Governor-General (s10).

All native reserves vested in the Public Trustee were vested under section 13 in the Native Trustee, who was to hold them:

> for the same estate, upon the same trusts, with the same functions, powers, and duties, and with the same liabilities and engagements, as in the case of the Public Trustee immediately prior to the coming into operation of this Act.

As we have noted, as the trustee for Maori reserves, the Public Trustee was accountable to the Supreme Court, at the suit of any Maori having a beneficial interest in reserves under his administration, that he was not acting in conformity with his fiduciary duties. In addition, beneficiaries and others suffering loss through acts or default of the Public Trustee were entitled to the same remedies against him as were available against private trustees. These duties and liabilities are among those placed on the Native Trustee by section 13.

A Native Trustee's account, to be kept at the same bank as the Public Account of New Zealand, was established to be operated on by the Native Trustee or his deputy (s16). Any deficiency in the account was to be met out of the Consolidated Fund either absolutely or by way of advance only (s17). All moneys in the Native Trustee's account were to be held by the Native Trustee in accordance with the trusts affecting them (s20).

Under section 21, all moneys in the Native Trustee's account were to be invested by the Native Trust Office board in any of a prescribed list of securities, including the common fund of the Public Trust Office. This is the only provision in the Act vesting a power in the board. Its other powers, largely of a machinery kind, were left to be prescribed by regulations to be made under section 25.

The Native Trustee was empowered, with the approval of the Governor-General in Council, to accept and hold in trust for Maori any land transferred to him by its owners (s24). Once the land was vested in the Native Trustee, the trustee would be subject to the fiduciary duties and obligations imposed on him by trustee law.

Regulations were issued under the Native Trustee Act 1920. They dealt with routine matters such as the procedures of the board, the fixing of charges by the trustee, the keeping of accounts, the custody of money, and related matters. Virtually all, if not all, can be characterised as being of a prudential nature and are consistent with the prudent exercise by the trustee of his fiduciary duties to his beneficiaries. None are inconsistent with the trustee's normal rights or duties as a trustee or prevent him exercising such rights or duties. On the contrary, they may be said to enhance his ability to do so and were no doubt intended to achieve this end.

Mr Green for the Wellington Tenths Trust submitted that, with the passing of the Native Trustee Act 1920, 'the Crown's controlling grip on Maori reserves and property increased

significantly'.[39] However, he failed to demonstrate in what manner the Crown had a 'controlling grip on Maori reserves' under the Native Reserves Act of 1882 from that year to 1920, or how that grip 'increased' after the passing of the 1920 Act. The Tribunal considers that no such 'controlling grip' existed. Counsel referred to the 1921 amendment, which he said made it clear that the Native Trustee was responsible to the Native Minister.[40] The amendment in question placed the Native Trust Office under the control of the Minister. It did not, however, place the Native Trustee, a distinct legal body corporate, under ministerial control in the exercise of his fiduciary duties to his beneficiaries and all others whose money or property were under his control. The corporation sole to be known as the Native Trustee was created to take over the functions, powers, and duties of the Public Trustee (see section 13 of the 1920 Act, discussed above).

Mr Green invoked a provision in the Rating Act 1925 as evidence that the Government was imbedding the Maori Trustee as an agent of its Maori land policy.[41] We assume that the section of the Rating Act relied on was section 109. This section empowered the Native Land Court to vest in the Native Trustee Maori land which was subject to a charging order for unpaid rates. Such vesting, which was subject to the consent of the Native Minister, was to be for the purpose of selling the land in order to pay the charge. The trustee was given a discretion to sell the whole or part of the land or to raise money by a mortgage for the purpose of liquidating the charge. We note that the land was vested in the trustee not by the Minister but by the Native Land Court, with the Minister's consent. There is no element of control by the Minister over the trustee in the exercise by the trustee of his discretionary powers. He was in no sense an agent of the Minister. No Crown money was involved, nor was the trustee subject to the control of the Native Land Court.

The Native Trustee Act 1920 was repealed by the Native Trustee Act 1930. It is convenient to consider at this point whether the trustee was acting under the 1920 Act 'by or on behalf of the Crown' in terms of section 6(1) of the Treaty of Waitangi Act 1975.

In determining this question, it is necessary to assess the degree of control exercised by the Native Minister over the Native Trustee in the execution of his duties as trustee. In our opinion, the trustee was established as a corporation sole with perpetual succession to perform his functions, not on behalf of the Crown but, as with the Public Trustee before him, on behalf of the beneficial owners of Maori land. We accept the submission of Crown counsel to this effect.[42] If the Native Trustee was to fulfil his fiduciary obligations to the beneficiaries under trusts administered by him, he had to do so with a large degree of independence. He was responsible not to the Minister but to his beneficiaries, who had the right to resort to the courts if they had a grievance against him.

39. Document G8, p 28
40. Ibid, pp 28–29 (quoting G V Butterworth and S M Butterworth, *The Maori Trustee* (Wellington: Maori Trustee, 1991), p 32)
41. Document G8, p 29 (quoting Butterworth and Butterworth, p 32)
42. Document G7, pp 13, 18

While the regulations made under the Native Trustee Act 1920 were quite detailed, they were designed to ensure that the trustee was able to meet his fiduciary obligations to the Maori beneficiaries in a prudent and accountable manner. In our opinion, there is nothing in the Act or the regulations which gave the Minister any right to exercise control over how the trustee exercised his discretion as trustee or met his fiduciary obligations. We are unable to find that, in performing his trustee duties, the Native Trustee was acting by or on behalf of the Crown. On the contrary, we consider that he was acting on behalf of the beneficiaries of the trusts for which he was responsible. In doing so, he was not under the control of a Minister of the Crown.

### 14.10 The Native Trustee Act 1930

The Native Trustee Act 1930 substantially re-enacted the provisions of the Native Trustee Act 1920.[43] Those establishing the Native Trust Office, appointing public servants as the Native Trustee and the trustee's deputy, constituting the Native Trustee as a corporation sole with perpetual succession, appointing staff as officers of the Public Service, and establishing the Native Trust Office board were all re-enacted, as was the power to make regulations.

Also re-enacted were the provisions for the transfer of native reserves from the Public Trustee to the Native Trustee, with the stipulation that such reserves would continue to be so vested 'for the same estate, upon the same trusts and with the same functions, powers, and duties and with the same liabilities and engagements as in the case of the Public Trustee, save as the same may be expressly altered by this Act' (s 27).

However, one important new power was given to the Native Trustee by section 25 of the 1930 Act. The Native Minister was empowered, as was the Native Land Court on the application of the Minister, to declare that the control and management of specified Maori land should be vested in the trustee for the benefit of the beneficial owners. The trustee was empowered to occupy the whole or parts of such land as a farm and to carry on any farming business for the benefit of the beneficial owners. A range of incidental powers was also conferred on the trustee.

In 1932, the Native Land Amendment Act amended section 3 of the Native Trust Act 1930 to provide that the Native Trust Office was to 'form' part of the Native Department.[44] A second change made by the 1932 Act was to substitute for the Native Trust Office board a new board, called the Native Land Settlement Board, comprising the Native Minister (as chairman), the under-secretaries of the Native and Lands Departments, the Valuer-General, the financial adviser to the Government, the Director-General of Agriculture, and up to two other members. Among its functions were the power to exercise control over the investment

43. The 1930 Act is reproduced in document A21 at pages 169 to 195.
44. The Act is reproduced in document A21 at pages 204 to 205.

of all moneys available for investment in the Native Trustee's account and the expenditure on all farming operations undertaken by the Native Minister under section 522 of the Native Land Act 1931 or by the trustee, among others.[45] The change appears in part to be a consequence of the new duties laid on the trustee under section 25, which was new to the 1930 Act.

In 1934, as a result of Government concern over the operation of various schemes established under the Native Land Act 1931, a commission of inquiry chaired by Justice David Smith was appointed to inquire into the administration of those departments concerned with the operation of the schemes. After a lengthy inquiry, the commission reported on 20 October 1934. Its report extended over more than 160 pages. We refer to two passages which relate to the farming activities of the trustee, as authorised by section 25 of the 1930 Act.

Part 4 of the report dealt with the Native Trustee's schemes for Maori land development and farming assistance.[46] The commission, after stating that the Native Trustee was a body corporate established under the Native Trustee Act 1920, said:

> Until 1929 his powers of investment were those of an ordinary trustee. By legislation passed in 1929 and 1930 the Native Trustee was enabled to become a farmer on his own account on a large scale, and to subject directly the safety of all moneys under his control to the vicissitudes of the prices for primary products. This matter is of great importance, as the moneys under his control comprise both his Common Fund and special investments.[47]

In part 13 of its report, the commission dealt with the trustee's administration. The commission heard evidence of complaints from certain beneficiaries in the west coast settlement reserves and from some other beneficiaries of the trustee. We cite a passage from the commission's conclusions:

> In our opinion, there is need for a trustee who will act as a safe investment trustee for the Natives. We think that the Native Trustee should be limited to the functions of such a trustee and should not be permitted to act as a farmer, except in so far as he is a mortgagee in possession, or is otherwise protecting a security upon which he has advanced moneys subject to the safeguards proper to a trustee board of investment. We think that the schemes for the development of Native lands and for granting farming assistance to Natives should be carried on by the State and by the Maori Land Boards (whose funds are not guaranteed by the State) and should not be undertaken by the Native Trustee; and we make recommendation accordingly.[48]

It is apparent that the commission considered that it was not legitimate or appropriate for the Native Trustee to be involved in schemes for Maori land development and in providing

45. 'Report of the Commission on Native Affairs', 20 October 1934, AJHR, 1934, G-11, p 28
46. Ibid, pp 27–31
47. Ibid, p 27
48. Ibid, p 147

farming assistance to Maori. In recommending that these activities should instead be carried on by 'the State', the commission appears to differentiate the trustee from the State.

We have no reason to believe that these farming activities took place on any Wellington tenths reserves or McCleverty reserves with which we are concerned. It is not necessary therefore for the Tribunal to determine whether or not the Native Trustee, in carrying on the farming activities in question, was acting by or on behalf of the Crown. Given the view of the commission that these were essentially State activities, it is at least arguable that the trustee was, in respect of such activities, acting on behalf of the Crown. However, even if this was the case, it does not follow that, in respect of his normal duties as a trustee for Maori reserves, the trustee was acting by or on behalf of the Crown. As cited earlier, the case law clearly establishes that a body corporate may be said to be acting on behalf of the Crown in respect of one activity but not in respect of the remainder. Accordingly, it may be that, in carrying on the farming activities required of him by section 25 of the 1930 Act, the trustee was not engaging in the duties of an ordinary trustee but, rather, implementing a Government policy considered to be in the wider interest of the Maori people. If this was the case, then it would appear that, in respect of his section 25 activities (but no others), he may well have been acting on behalf of the Crown in terms of section 6 of the Treaty of Waitangi Act 1975.

After commenting on the Native Trustee Act 1930, Mr Green submitted that:

> What little of the Native Trustee's independence existed in 1930 was completely removed under s15 of the 1932 Native Land Amendment Act in which the Native Trust Office and the Native Department were formally amalgamated, with the offices of the Under Secretary of Native Affairs and the Native Trustee to be held jointly.[49]

It is correct that, under section 15 of the 1932 Act, the Native Trust Office was to 'form part of the Native Department', but section 15 did not provide that the positions of the undersecretary and Native Trustee were to be held jointly. However, the same person was in fact appointed to both offices in 1933.[50] This in no way means that the two quite separate and distinct offices – the one being a body corporate with perpetual succession and the other a departmental head – became one body. They remained then, as they do today, separate and distinct positions. (We discuss this matter further when examining the Maori Trustee Act 1953.)

We do not accept Mr Green's submission that the Native Trustee had little independence under the Native Trustee Act 1930. The 1930 Act was in almost all material respects the same as, or very similar to, the 1920 Act, which it repealed. Under the 1930 Act, the trustee continued to function independently of the Minister in the performance of his duties, and remained accountable to the Supreme Court.

49. Document G8, p 30
50. Butterworth and Butterworth, p 35

We have discussed the only significant new provision (s 25), which vested in the Native Trustee Maori land for farming purposes. The 1934 commission of inquiry made it clear that this was incompatible with the trustee's normal functions. This single anomalous provision does not, in our opinion, vitiate the independent role of the trustee under the 1930 Act. The Tribunal considers that the Native Trustee (who became the 'Maori Trustee' in 1947) was not acting by or behalf of the Crown in the performance of his other trustee duties and responsibilities.

## 14.11 The Maori Trustee Act 1953

The Maori Trustee Act 1953 replaced the Native Trustee Act 1930 and its amendments.[51] To ensure compatibility with the Maori Affairs Act 1953, section 2 provided that, unless the context required otherwise, terms and expressions defined in the Maori Affairs Act 1953 were to have the same meanings when used in the Maori Trustee Act.

Under section 3, the Maori Trust Office was continued as an office of the Public Service, and all officers of the Department of Maori Affairs (now Te Puni Kokiri, or the Ministry of Maori Development) were to be officers of the Maori Trust Office. The persons holding office as Maori Trustee and Deputy Maori Trustee were continued in office (s 4(2)). This provision was repealed and substituted by section 9 of the Ministry of Maori Development Act 1991 as follows:

> The chief executive of the Ministry of Maori Development may from time to time, with the prior consent of the State Services Commissioner, confer on an officer of the Ministry of Maori Development the office of Maori Trustee or of Deputy Maori Trustee. The conferring of either such office pursuant to this subsection shall not be deemed to be an appointment for the purposes of the State Sector Act 1988.
>
> In the absence of any such conferment of office,—
>
> The chief executive of the Ministry of Maori Development shall be the Maori Trustee:
>
> The next most senior officer of the Ministry of Maori Development shall be the Deputy Maori Trustee.

Crown counsel submitted, with reference to this section, that, while the Maori Trustee is appointed by the Crown, 'this is in no way determinative of its status as a corporation sole independent and distinct from the Crown'. Counsel noted that, in a similar way, members of the judiciary are appointed by the Crown but are not regarded as the Crown or its agents.[52] Crown counsel referred us to a passage from an article by Professor C E F Rickett:

51. The Act is reproduced in document A21 at pages 257 to 272.
52. Document G7, pp 15–16

> There is prima facie no reason in law why the same person may not exercise two functions. This means that it does not automatically follow that because person X holds both positions A and B, that X's exercise of the functions under position B in some way depends upon his exercise of the functions under position A. Thus, where the General Manager himself or herself is also the Maori Trustee, by virtue of there not having been an effective conferral of the office of Maori Trustee on some other officer of the Iwi Transition Agency, his or her position and hence functions under either office are *clearly separate*, and must be maintained and exercised as being separate. The special functions of the Maori Trustee, as set out in the MTA [Maori Trustee Act], relate to ownership and management of Maori lands, funds, and trusts. These are very different from the functions of the General manager of the Iwi Transition Agency which are essentially the active pursuit of the functions and purposes laid down in the MARA [Maori Affairs Restructuring Act 1989] . . . Furthermore, there is nothing in either of the relevant Acts (MTA or MARA) which indicates an accountability of the Maori Trustee to the General Manager, and which could perhaps be used to justify the functions of the Maori Trustee becoming, as it were, subject to general policy considerations, etc, relevant to the General Managership of the Iwi Transition Agency. *Neither would general trustee law allow any such compromising of the Maori Trustee's role*. [Emphasis in last sentence added.][53]

We recall that in *Proprietors of Taharoa C v Maori Trustee*, previously discussed, Acting Chief Justice Barker considered the 1991 amendment to section 4 and found that there was nothing in the Act and nothing in the evidence which indicated that, in acting as Maori Trustee, the chief executive of the Ministry of Maori Development was bound to act on a Government directive. The judge ruled that numerous principles of trustee law applied to the trustee and that, if he were to act in accordance with a Government directive not found in any statute to the detriment of any beneficiary, then the normal consequences of breach of trust would apply.

With respect, we endorse this statement by the learned judge. As a matter of law, it is clear that the two offices are distinct, as are their functions, and that the Maori Trustee is required to act in conformity with trustee law. It appears to this Tribunal, however, that legitimate concern could be held as a result of the appearance or perception of one person fulfilling the two quite distinct roles, which might, on occasion, be thought to be in conflict one with another. We consider this issue further at section 15.5.

Counsel for the Wellington Tenths Trust submitted that the Maori Trustee Act 1953, like the 1920 and 1930 Acts, is full of sections which, he claimed, 'exhibit the control of the Maori Trustee by the Crown'. He first cited section 4(2), as substituted, which we have been discussing. As the passages cited from Acting Chief Justice Barker and Professor Rickett make plain,

53. C E F Rickett, 'The Legal Accountability of the Maori Trustee', *New Zealand Law Journal*, November 1991, p 420 (doc G7(a), p 81). Note: for 'general manager', read 'chief executive', and for 'Iwi Transition Agency', read 'Ministry of Maori Development'.

there is a clear distinction between the two offices and each is required to be exercised independently of the other.

Mr Green next referred to the early part of the Act, which deals with the administration of estates. He noted that the beginning of the Act deals with the administration of estates generally and the management of those estates, and submitted that, in his role as trust manager simpliciter, it is probably not the case that the Maori Trustee is the agent of the Crown. Mr Green said that, in applying the control test to the Maori Trustee, one has to look at the question of what the trustee is controlling. Counsel agreed with a member of the Tribunal that it would be necessary to look at the trustee's function. He submitted that in cases like this (in the Maori Trustee Act 1953), where there are various functions which are separate and discrete, it may well be appropriate to apply a functions test as part of the process precursoring the control test, as Master Gambrill did in *Waitakere City Council v Housing Corporation of New Zealand* (see s14.5).[54]

It appears that Mr Green was suggesting that the trustee duties to which he referred were in some way different in kind from other duties of the Maori Trustee in relation to Maori reserves which the trustee exercised on behalf of Maori beneficiaries. We find any such distinction untenable. The trustee's duty in all such cases is to act on behalf of the beneficiaries of the trusts he is required to administer. It is to them, and ultimately to the court, that he is accountable for the proper exercise of his fiduciary duties. On the other hand, we accept that the farming duties imposed on the Native Trustee under section 25 of the 1930 Act might very well be an example of a separate and discrete function. This function arose from the grave economic circumstances of the Great Depression in the early 1930s. By any measure, it was an exceptional provision intended to cope with exceptional circumstances.

In further submissions, Mr Green referred to section 17 (which provides that the trustee's bank account is to be kept at banks approved by the Minister of Finance); sections 18 to 23 (which set out how the trustee is to keep his accounts); section 24A (which concerns temporary advances to the trustee with the approval of the Minister); and section 26 (which provides for the rate of interest payable on moneys in the common fund of the trustee to be fixed by Order in Council, if not otherwise provided for by regulations). Section 27 was said by counsel to show a strong link to the Crown. This section provides that, if there are insufficient funds to meet lawful claims on the common fund, the Minister of Finance is to pay into the fund sufficient sums to meet the deficiency. If, at a later time, there is sufficient money in the fund to meet all outstanding claims, the Minister of Finance may require repayment in whole or in part of any money so paid into the fund. We do see this not as controlling the Maori Trustee so much as ensuring the integrity of the common fund. Like many other provisions of the Act and its forerunners, those cited by Mr Green and other provisions are of a prudential nature. They are intended to assist the trustee to meet his statutory and common

54. *Waitakere City Council v Housing Corporation of New Zealand* [1992] 3 NZLR 591

law obligations and duties to the beneficiaries of the trusts administered by him. They are essentially enabling rather than controlling.

Counsel did not refer to a further set of sections which enabled the trustee to provide housing for officers of the Department of Maori Affairs (s37); to apply money for the purposes of property vested in him (s38); to acquire land on behalf of Maori (s39); and to acquire land to provide sites for Maori dwellings (s40). In each of these cases, the trustee required the consent of the Maori Land Board. However, this requirement was subsequently repealed, allowing the trustee to exercise the powers conferred on him under these sections without any such prior approval. This constitutes a removal of control.

The Tribunal is unable to detect any significant increase in ministerial control over the Maori Trustee under the Maori Trustee Act 1953 compared with that under the earlier Public Trustee and Native Trustee statutes. Such limited controls as exist are largely, if not wholly, intended to enable the trustee better to meet the fiduciary obligations to the beneficiaries and the trusts for which he is responsible. Those obligations adhere to the office of Maori Trustee, a corporation sole with perpetual succession. If, at any given time, the office is filled by the same person who occupies the position of chief executive of the Ministry of Maori Affairs or some other office, the trustee must perform his duties independently of and uninfluenced by any other office held by that officer. Before stating our final conclusions on the question of whether the Maori Trustee, in the execution of his trustee duties under the Maori Trustee Act 1953, is acting by or on behalf of the Crown, we must note one further set of submissions advanced by Crown counsel and counsel for the Wellington Tenths Trust.

## 14.12 The Public Trustee and the Native or Maori Trustee in Other Legislation

Crown counsel referred us to other legislation which supported the Crown submission that the Public Trustee and Native or Maori Trustee were not acting by or on behalf of the Crown. Mr Green likewise referred us to legislation which he claimed supported the contrary contention.[55]

Section 2 of the Stamp and Cheque Duties Act 1971 states:

> 'Public authority', in relation to any deed or bill of exchange, means the Public Trustee, the Maori Trustee, or any other corporation sole or corporate body that is an instrument of the Executive Government of New Zealand or its dependencies, in so far as the deed or bill of exchange relates to any money or other property held by the public authority *on behalf of the Crown; but for the purposes of this definition the Common Funds of the Public Trust Office and the Maori Trust Office are not money or property held on behalf of the Crown*. [Emphasis added by Crown counsel.]

55. Document G7, pp 13–15; doc G8, pp 32–34

14.12

Crown counsel noted that there are two important provisos in this section; first, that the Public Trustee and Maori Trustee are part of the Executive with respect to property held on behalf of the Crown and, second, that the common funds of the Public Trust Office and the Maori Trust Office are not money or property held on behalf of the Crown. Crown counsel submitted that this provision must be read in the context of the Stamp and Cheque Duties Act, and contended that the intention of including the Maori Trustee appears to have been to exempt him from certain duties. Counsel argued that it appears to have been the policy of the Act that such transactions involving the Maori or Public Trustee should share the same exemption from duty as transactions involving the various limbs of government. The apparent association of the Maori Trustee with the Crown, counsel submitted:

> can therefore be construed as being limited to the narrow administrative purposes of the Stamp Act and the Income Tax Act. In other words, the intention of the legislation is merely to include the Maori Trustee in certain categories of exemption for administrative convenience rather than fundamentally to affect its status as corporation sole.[56]

We agree that this provision is clearly for a limited purpose and is not determinative of the status of the trustees in question.

Crown counsel referred to the Ombudsmen Act 1975, which provides that ombudsmen may investigate actions taken by the organisations listed in the first schedule to the Act. In this schedule, the Maori Trust Office and the Public Trust Office are listed in part I, which is entitled 'Government Departments'. The Maori Trustee (but not the Public Trustee) is listed in part II, which is entitled 'Organisations Other than Local Organisations'. Counsel submitted that the listing of the Maori Trust Office in part I was consistent with the apparent status of that office as part of Te Puni Kokiri, whereas the Maori Trustee is listed in part II. We agree with counsel's submission that the organisations listed in part II are generally not regarded as 'the Crown'.[57] The omission of any reference in either schedule to the Public Trustee is, we believe, significant as indicating that this trustee is not the Crown or acting on its behalf.

Crown counsel next referred to the Official Information Act 1982. The definition of 'official information' in section 2 expressly excludes:

> any information held by the Public Trustee or the Maori Trustee—
>
> (i) In his capacity as a trustee within the meaning of the Trustee Act 1956; or
>
> (ii) In any other fiduciary capacity.

Section 22(6) of the Act provides that nothing in that section authorises or permits the Public Trust Office or the Maori Trust Office to make available any information which is contained in a document to which section 22(1) relates but which relates to the making of

56. Document G7, p 14
57. Ibid, pp 14–15

decisions or recommendations by the Public Trustee or the Maori Trustee in the capacities referred to in section 2(1) cited above. Also excluded is information relating to the affairs of any estate, or of any person concerned in such an estate, under administration in the Public Trust or Maori Trust Offices (s 52(2)). We agree with Crown counsel that the exclusion of information held by the Maori Trustee 'is consistent with his constitution as a corporation sole, independent and distinct from the Government'.[58] The same applies equally to the Public Trustee.

Crown counsel also referred to the Public Finance Act 1989. Section 2 defines 'department' as meaning:

> any department or instrument of the Government, or any branch or division thereof; but does not include a body corporate or other legal entity that has the power to contract, or an Office of Parliament, or the Public Trust Office, or the Export Guarantee Office.

Under this definition, both the Public Trustee and the Maori Trustee are excluded, each being a body corporate having the power to contract. In addition, the Public Trust Office is excluded.

Mr Green for the Wellington Tenths Trust also referred to a number of statutes in which reference is made to the Public Trustee or the Maori Trustee (or both). He referred first to section 98 of the Te Ture Whenua Maori Act 1993. Section 98(1) provides for public money to be paid into a Maori Land Court special aid fund to be held by the chief registrar of that court. The court may make orders for the payment out of this fund of the reasonable legal costs or expenses of any person heard or represented in any proceedings before the court. In addition, the court may make an order charging any property of the persons in whose favour the order is made with the whole or any part of the amount paid out of the fund. Mr Green cited section 98(7), which states that: 'Every charge created by an order of the Court under subsection (6) of this section shall be in favour of the Maori Trustee on behalf of the Crown.' In effect, the subsection requires the Maori Trustee to hold the charging order in trust for the Crown. In so doing, the trustee is exercising his function as a trustee and has the normal fiduciary obligations to the Crown as the body beneficially entitled to receive the whole or such part of the amount charged as is repaid. We are unable to see any distinction between this situation and one where the trustee holds a charging order on behalf of a private person.

Mr Green next referred to the definition in section 2 of the Crown Proceedings Act 1950, which defines a 'Government department' or 'department' as meaning 'the Public Trustee, the Maori Trustee, and every other Department or instrument of the Executive Government of New Zealand'. Both the Public Trustee and the Maori Trustee, as corporations sole, have the power to sue and the capacity to be sued.[59] It is significant that it was thought necessary

58. Ibid, p 15
59. *Halsbury's Laws of England*, 4th ed (London: Butterworths, 1998), vol 9(2), paras 1186, 1187, pp 671–672

to refer specifically only to the Public Trustee and the Maori Trustee in the context of a Government department or instrument of the Executive Government. It is likely this was done to remove doubts as to whether the Crown Proceedings Act was intended to apply to these trustees, who were already amenable to being sued as corporations sole.

Mr Green cited section 2 of the Securities Act 1978, which states that 'Government department' includes the Public Trustee and the Maori Trustee. This suggests that the term 'Government department' would not normally include these trustees. We note that in section 2 the term 'trustee corporation' means the Public Trustee or the Maori Trustee or any corporation authorised by any Act of Parliament to administer the estates of deceased persons and other trust estates. This strongly suggests that, in relation to their trustee responsibilities, the Public Trustee and Maori Trustee are linked with private trustee companies.

Mr Green also quoted a definition of 'public authority' from section 2 of the Immigration Act 1987 as including the Public Trustee and Maori Trustee, but we have been unable to find any such definition in this Act.

Next cited by Mr Green was section 3 of the Evidence Amendment Act 1952:

> 'Government' means the Government of New Zealand; and includes the Public Trustee, the Maori Trustee, and every other Department or instrument of the Executive Government of New Zealand.

We note that this definition is not in the Evidence Act 1908 itself and was inserted in the 1952 Act for the purposes only of the succeeding sections of that amendment, which relate to photographic copies of public records being admissible in evidence. As such, it has very limited scope.

Section 2 of the Copyright Act 1962 was also quoted by Mr Green. 'Government department' there included the Public Trustee and the Maori Trustee. However, that Act was repealed by the Copyright Act 1994. Section 2 of the 1994 Act expressly states that 'Government department', which it defines, does not include, inter alia, a body corporate or other legal entity that has the power to contract. This would exclude both the Public Trustee and the Maori Trustee. The Public Trust Office is also expressly excluded.

Finally, Mr Green referred to the definition of 'public authority' in section 2 of the Income Tax Act 1976 (now repealed). That definition was repeated in section OB1 of the Income Tax Act 1994 to include the Public Trustee and the Maori Trustee. However, the definition of 'trustee' in the same section includes in paragraph (a)(i) the Public Trustee and the Maori Trustee and, for the purposes of the Act, 'in relation to any trust, a reference in this Act to a trustee of that trust means that trustee only in the capacity as trustee of that trust'. It is apparent that the reference to the Public Trustee and Maori Trustee is to them in their respective capacity as corporations sole exercising their trustee functions, which of necessity must be exercised independently of the Crown.

### 14.13 Conclusion on the Status of the Trustees

We conclude our consideration of counsel's protracted submissions on the question of whether, as a matter of law, the corporations sole known as the Public Trustee, the Native Trustee, and the Maori Trustee were acting by or on behalf of the Crown in the performance of their respective duties as trustees of Maori reserve lands and other property held on behalf of their beneficiaries. Whether a function test or a control test or a combination of the two is applied where appropriate, we are of the opinion that the trustees have not, as a matter of law, been acting by or on behalf of the Crown in the performance of their statutory responsibilities as trustees. They have remained throughout subject to the jurisdiction of the Supreme Court (more recently the High Court) in the exercise of their duties and responsibilities to their beneficiaries.

If the function test is applied, it is clear that the trustees' function was not a 'traditional governmental function'. On the contrary, the nature of their trustee functions, which have been performed on behalf of their beneficiaries, with ultimate accountability to the courts, strongly indicates that they are not acting on behalf of the Crown.

If the control test is applied, we consider that the limited ministerial controls are largely, if not wholly, of a prudential nature intended to enable the respective trustees to better fulfil their fiduciary obligations to their beneficiaries. In short, they are acting on behalf of their beneficiaries, not the Crown. The Tribunal does not attach much weight to the circumstance that for some time the offices of the trustees have been staffed by public servants. Their function is to give the necessary assistance to the trustees for the time being in the performance of their statutory obligations. In doing so, they are subject to the control and direction of the trustees, whose staff they are.

At different times, the office of the Native or Maori Trustee has been held by the person holding office as the administrative head of the relevant Government department. It is clearly established that, where the departmental head also exercises the powers and duties of the Native or Maori Trustee, that departmental head must respect the fact that his position, and hence functions, under the two offices are clearly separate. That separation must be strictly observed. Any failure to do so could be in breach of general trustee law, and the normal consequences of a resulting breach of trust would apply.

Counsel for both the Crown and the Wellington Tenths Trust claimants invoked various statutory provisions referring to the Public, Native, or Maori Trustees. In all these instances, the references are there for the limited purpose of the particular statute in which they appear. To some extent, the instances cited by the Crown and claimant counsel respectively cancel each other out. We find none of these statutory references of sufficient weight or significance to cause us to abandon the well-established legal tests we have been required to consider in favour of a relative few references in unrelated statutes.

For these and the various reasons we have articulated during our consideration of the various statutes in force from 1882 on, we conclude that, as a matter of law, neither the Public

Trustee nor the Native or Maori Trustee has, in the performance of his respective duties and responsibilities as a trustee for Maori reserve lands, been acting by or on behalf of the Crown in terms of section 6(1) of the Treaty of Waitangi Act 1975.

### 14.14 Additional Submissions

At section 14.4, we set out three additional submissions made by Mr Green. We noted that we would defer their consideration pending our finding on the question of law as to the status of the various trustees in terms of section 6(1) of the Treaty of Waitangi Act 1975. These submissions set out three possible 'scenarios' under which the Tribunal could, in counsel's submission, inquire into the acts and omissions of the trustees.

In 'scenario 1', it was submitted that under section 6(1)(c) and (d) of the Treaty of Waitangi Act certain acts and omissions of the trustees as detailed in the evidence of claimant witness Terence Green were done 'by or on behalf of the Crown' and were inconsistent with Treaty principles. The effect of our finding on the status of the Public Trustee and the Native or Maori Trustee is that these trustees were not acting on behalf of the Crown. Accordingly, their 'acts or omissions' cannot be imputed to the Crown.

In 'scenario 2', counsel submits that, even if the acts or omissions of the trustees were not 'by or on behalf of the Crown', the Crown is still responsible for those acts or omissions because it passed the statutes and regulations which established the trustees. Pausing there, it is clear that the Tribunal has jurisdiction under section 6(1)(a) and (b) to consider whether Maori claimants have been prejudicially affected by any ordinance or Act, or any regulation or other statutory instrument, passed or made since 6 February 1840. Accordingly, the Tribunal has jurisdiction to consider whether any such legislative measures are contrary to Treaty principles. But, clearly, this does not extend to acts or omissions of the trustees acting under such legislation. The claimants' 'scenario 2' also extends to appointments and dismissals of trustees and the structure, resources, and management of the offices of the trustees. Whether any such matters might fall within the ambit of section 6 must be determined in the light of any specific claims relating to such matters.

In 'scenario 3', the claimants' submission under section 6(1)(c) invokes dicta of Justice Heron to argue that acts or omissions of the trustees are 'historically relevant' to the policies and practices adopted by the Crown in relation to the land rights of Maori generally. We note that the Crown does accept that the legislation under which the trustees operated is a proper matter for inquiry by the Tribunal. The Crown further agrees that a proper investigation of the Wai 145 claims requires a consideration of the effect of this legislation, and that this may involve some examination of the activities of the trustees. We consider the Crown's concession is appropriate, and we will have regard in our next chapter to any specific claims which fall under this head.

CHAPTER 15

# TRUSTEE ADMINISTRATION OF THE WELLINGTON TENTHS, 1882–1985

## 15.1 Introduction

In this chapter, we discuss aspects of the administration of the remaining Wellington tenths by the Public Trustee from 1882 to 1921, by the Native Trustee from 1921 to 1947, and by the Maori Trustee from 1947 until the reserves were transferred to the Wellington Tenths Trust board in 1985. However, in view of our findings in the previous chapter that the Public and Native or Maori Trustees were not agents of the Crown acting on its behalf, our comments on their administration are restricted. We concentrate mainly on the Maori Trustee, since his activities were the main focus of claims of Treaty breaches after 1882 in the Wai 145 fourth amended statement of claim.

We will also discuss claimants' grievances relating to the Native Reserves Act 1882, the Native Land Amendment Act 1932 (and later like provisions), and the 1967 legislative provision which enabled the Maori Trustee to sell reserved land to lessees. During the period under review, statutory provisions enabled the conversion of the Wellington tenths leases to leases in perpetuity. These leases are of considerable concern to the claimants. They ran through most of the period covered in this chapter, and continued almost to the present day. We think it preferable to treat them as a discrete topic in chapter 16.

We also discuss the alienation of several fragments of the urban tenths, a significant proportion of the remaining rural tenths, and the remaining McCleverty-assigned reserves.

The chapter concludes with a discussion of the land in Palmerston North which was reserved for Wellington Maori in exchange for two reserves at Lowry Bay.

## 15.2 The Native Reserves Act 1882

The principal provisions of the Native Reserves Act 1882, which placed the reserves under the control of the Public Trustee, are set out in section 14.8 and need not be repeated here. As we noted in section 12.3.1, the Native Reserves Act 1873 was never brought into operation, largely because of Pakeha concern that it gave too much control over reserves to Maori. The replacement legislation, when finally introduced into Parliament in 1882, was opposed by the

four Maori members in the House of Representatives. Their main objection was that Maori would have no say in the management of their reserves.[1]

In response to their representations, some amendments were made during the committee stages of the Bill. These included provision for two Maori representatives – who still constituted a minority – to be added to the Public Trust Office Board for the purpose of making decisions about Maori reserved land.[2]

### 15.2.1 Alleged Treaty breach

The Wai 145 claimants in their fourth amended statement of claim allege, as a Treaty breach, that the Crown failed to 'consult Maori owners before their lands were made subject to the Native Reserves Act 1882 which vested them in the Public Trustee and therefore denied them any say in the management of their reserves'.[3]

The change of administration from Crown commissioner to independent trustee in 1882 was unquestionably of great significance to the Maori beneficiaries of the reserves vested in the Public Trustee. There was clearly a duty on the Crown to consult with Maori before proceeding with these new administrative arrangements. The Crown has accepted that, 'to the extent that there existed a frustrated expectation of greater input [by Maori] into the management of the reserves, the Crown, in failing to provide for such input, may have breached the principles of the Treaty'.[4]

It is helpful to consider the claimants' grievances in the context of the Public Trustee's administration of the reserves. By providing for a native reserves commissioner to assist the Public Trustee, the Native Reserves Act 1882 allowed continuity from the previous administration and gave Maori some assurance that the inexperienced Public Trustee would not overlook their vital interests. Because of Charles Heaphy's failing health, Alexander Mackay, who had previously handled South Island reserves, was appointed commissioner of native reserves for the whole of New Zealand in June 1881. When the Native Reserves Act was passed in 1882, Mackay was appointed commissioner of native reserves under section 27 of the Act. On his appointment as a judge of the Native Land Court in 1884, Mackay ceased to be commissioner and was not replaced, but he continued to provide advice and assistance to the Public Trustee on the Wellington tenths until his retirement from the court in 1902.[5] However, the failure of the Public Trustee to replace Mackay suggests that the trustee did not regard his responsibilities in relation to Maori reserves and their beneficiaries as unduly onerous.

1. Document I11, pp 16–17; Ralph Johnson, *The Trust Administration of Maori Reserves, 1840–1913*, Waitangi Tribunal Rangahaua Whanui series, August 1997, pp 118–120
2. Document I11, p 14
3. Claim 1.2(d), para 14.4
4. Document P4, p 59
5. Document I11, pp 15–16; Johnson, p 111

Two Maori assistant commissioners who were on Mackay's staff in 1882 were dismissed in 1883 on the instruction of the Public Trustee and with the acquiescence of Mackay, who commented that their services had never been needed.[6] These were presumably the 'two Natives to be from time to time appointed by the Governor to hold office during pleasure', provided for in the Act, who were to sit together with the Public Trust Office board to approve the leasing of Maori reserves. Instead of involving Maori in the administration of the reserves, the Public Trustee relied on his own staff or on 'agents' who were otherwise in private employment. Agents were allowed to deduct a fee, originally 10 per cent, but later reduced to 5 per cent, of the rents.[7] For the remainder of the Public Trustee's administration to 1920, it appears that no Maori were actively involved in the administration of the reserves.

### 15.2.2 Tribunal finding of Treaty breach

The Tribunal finds that, in failing to consult with the Maori beneficiaries of the Wellington tenths reserves prior to the enactment of the Native Reserves Act 1882, and in further failing to make provision for the active involvement of Maori beneficiaries in the administration of their reserves, the Crown failed adequately to protect the rangatiratanga of the Maori beneficiaries in their land and to act reasonably towards them, and as a consequence the beneficiaries were prejudicially affected.

## 15.3 Public Trustee Administration

### 15.3.1 The determination of urban tenths reserves beneficiaries

The Native Reserves Act 1882 allowed the Public Trustee to apply to the Native Land Court for a determination of beneficiaries, but there was a long delay in implementing this provision in the case of the Wellington urban tenths. Heaphy had been engaged in an inquiry to determine who should be the beneficiaries of the reserves, but he died in 1881 before he could complete that inquiry and before he had been able to make lists of the urban tenths beneficiaries.

In 1888, the Public Trustee applied to the Native Land Court to determine who were the beneficial owners of the Wellington urban tenths. The case was heard by Judge Alexander Mackay (the former commissioner of native reserves), who explained that he investigated the matter 'in precisely the same manner as if it was a case of original investigation of land held under Native Tenure'. Accordingly, Mackay set out to determine who was in occupation around Te Whanganui a Tara at the time of the Port Nicholson 'purchase' in 1839. When the matter came before the court, the claimants were Ngati Haumia and Ngati Tupaia hapu of

6. Johnson, pp 123–124
7. Ibid, p 113–114

Taranaki and Ngati Ruanui; Te Matehou and Ngati Tawhirikura hapu of Te Atiawa; and Ngati Tama.[8] A claim was subsequently received on behalf of members of 'Ngatitu, Ngatironganui, Ngatirangitahi, [and] Ngatiruru', but Mackay rejected it on the ground that the hapu listed were not in occupation at 1839. Neither Ngati Mutunga nor Ngati Toa made a claim before the court in this case, and therefore their interests in the Wellington tenths were not considered, although Mackay remarked that Ngati Toa were the only other group 'who would have been justified in making a claim to the territory sold by the Ngatiawa in 1839'. Mackay concluded that 'the Port Nicholson block at the time it was sold to the Company was the property of the hapus of the Ngatiawa and Ngatitama then in occupation', and he proceeded to draw up the lists of beneficiaries on that basis.[9]

Mackay reported that, of the 316 claimants, 241 were found to be entitled, but of these 217 were dead, necessitating 'the ascertainment of the nearest of kin'.[10] Mackay's judgment has had long-lasting significance. His list of Te Atiawa, Ngati Tama, and (presumably, although this is unclear) Taranaki and Ngati Ruanui beneficiaries was the basis for all subsequent lists, including that of the Wellington Tenths Trust board when it was established in 1985. Mackay did not complete his list of 301 beneficiaries until 1895, and even then the Public Trustee did not begin to distribute payments to them because of a legal technicality which was dealt with by the Native Reserves Act Amendment Act 1896.[11]

In moving the committal of the Native Reserves Act Amendment Bill 1896, James Carroll described it as a 'machinery Bill', which, so far as the Wellington tenths were concerned, was needed because the Public Trustee had found that the powers vested in him 'were never clearly defined'.[12] In particular, doubts had arisen because the Native Reserves Act 1882 had not listed the Wellington tenths reserves that were to be transferred to the Public Trustee. Section 2 of the 1896 amendment confirmed that all the lands listed in the first schedule to the Act (which included the remaining Wellington tenths) were 'deemed to have been vested in the Public Trustee' since the coming into operation of the Act 1882. The schedule, which had been omitted from the 1882 Act, was a reprint of the schedule of tenths reserves in the Native Reserves Act 1873, apart from Makara 22 and 24, which were omitted.[13].

### 15.3.2 Distribution to beneficiaries

The 1896 amendment Act also attempted to settle doubts over the way in which the Public Trustee was to distribute rents to beneficiaries. Sections 3 and 4 authorised him to distribute

8. A Mackay, memorandum concerning sitting of Native Land Court in Wellington, 14 April 1888 (doc A39, p 109)
9. Judgment, 24 March 1888, Wellington Native Land Court minute book 2, fols 130–137 (doc H7(a), pp 403–410; typescript version in doc H8(a), pp 241–244)
10. A Mackay, memorandum concerning sitting of Native Land Court in Wellington, 14 April 1888 (doc A39, p 109)
11. Document I11, p 101; the beneficiaries' list is in doc A39, pp 74–85
12. 5 October 1896, NZPD, 1896, pp 436–437 (doc A20, p 229)
13. The schedule also mistakenly listed the two former urban tenths at Mount Cook (sections 89 and 90) which had been sold in 1874.

to beneficiaries three-quarters of the accumulated rentals and not more than half of the future rentals, and to spend the remainder for the 'physical, social, moral, and pecuniary benefit of the Natives individually or collectively interested therein, and the relief of such of them as are poor or distressed'.[14]

The Public Trustee was now free to distribute rents to beneficiaries according to this formula. Since he now had a list of beneficiaries for the urban tenths, he could pay out shares to those beneficiaries. In the case of the rural tenths, it had been customary to pay beneficiaries on the basis of Heaphy's lists from the 1870s, but these were by then out of date and, in any case, they had not been validated by a Native Land Court determination. When these sections came before the court, it usually validated Heaphy's lists, while also declaring necessary successions. The Ohiro sections, for instance, were simply awarded to owners whom Heaphy had identified in 1873. There was no contest for Mangaroa 132 and only one rival claim for the Makara reserves, which was dealt with easily in 1889. The beneficiaries of Ohariu 12 and the three Pakuratahi reserves were not decided until the 1920s, but even at that late date the court was prepared to accept Heaphy's lists of beneficiaries.[15]

We need not follow the Public Trustee's disbursements of reserves income through his complicated system of accounts, especially since claimant counsel has not made submissions on the matter. However, we note that the disbursement of rentals to beneficiaries was never easy, not least because of the difficulties in keeping records of addresses, deaths, and successions. Such difficulties may explain the fact that the Public Trustee usually accumulated more than the statutory minimum in his reserves funds. Beneficiaries might have suffered from not receiving their entitlement when due, but at least the money remained in the various reserves funds and was ultimately paid out. Since we have not been presented with any evidence that the Public Trustee failed to fulfil his fiduciary obligations to the Wellington tenths beneficiaries, we need make no further comment on this aspect of his administration.

### 15.3.3 The alienation of reserves

Although the Native Reserves Act 1882 transferred title to the tenths reserves to the Public Trustee and gave him authority to lease them, it gave him no authority to sell them. Prior to 1895, the beneficial owners themselves were sometimes able to sell tenths reserves following a determination of ownership by the Native Land Court, but the Native Reserves Act Amendment Act 1895 stated that beneficial owners were not to be entitled to dispose of land vested in the Public Trustee.[16] The trustee had no authority over the alienation of McCleverty reserves, which were subject to the alienation provisions of the Native Lands Acts. We briefly

14. The Native Reserves Act Amendment Act 1896 (doc A21, pp 99–104)
15. Document I11, p 100
16. Sections 2 and 3 of the Native Reserves Act Amendment Act 1895 (doc A21, p 96)

note the alienation of the different categories of reserves during the period of Public Trustee administration.

- *Urban tenths*—Only one urban tenth, town section 19, was alienated during the period of Public Trustee administration. Although section 19 was an original tenth, it was not included in the list of unassigned urban tenths in schedule D to the Native Reserves Act 1873. Nor was it assigned by McCleverty, though it was surrounded by McCleverty-assigned tenths and appears to have been regarded as one of them. It was included in a certificate of title with other McCleverty-assigned tenths at Polhill Gully but was granted solely to Wi Tako Ngatata and was sold in 1893.[17] Because section 19 was treated as a McCleverty reserve, the Public Trustee had no control over the sale.
- *Rural tenths*—From 1888, the beneficial ownership of the Wellington rural tenths was investigated by the Native Land Court. In a number of cases, the determination of ownership by the court was followed by the vesting of the reserves in the owners, perhaps on the mistaken assumption that they were McCleverty awards. As Pickens notes, such vesting led to alienation.[18] Makara 22 and 24 were vested in their owners in 1889. Makara 24 was then sold the following year, while Makara 22 was sold between 1895 and 1910.[19] Although the Native Reserves Act Amendment Act 1895 prevented the transfer to beneficial owners of reserves vested in the Public Trustee, special provision was made in the Maori Land Claims Adjustment and Laws Amendment Act 1907 for the transfer of the remainder of Ohariu 13 and all of Mangaroa 132 to the beneficial owners. Both sections were then sold by their owners in 1908.[20]

  By 1921, only three rural tenths reserves remained under Public Trustee administration: Ohiro 19 and 21, amounting to 175 acres, and Ohariu 12, of approximately 99 acres. However, the three Pakuratahi sections, sometimes regarded as tenths, also remained under Public Trustee administration. If we add these to the Ohiro and Ohariu tenths above, some 574 acres of the 977 acres of rural tenths taken over by the Public Trustee in 1882 remained in 1921.
- *McCleverty reserves*—Also during the Public Trustee's administration, the remaining McCleverty reserves, including former urban and rural tenths, continued to be alienated. However, although the trustee 'inherited' a few reserves that had been voluntarily put under the administration of the reserves commissioners, he had no control over the remaining McCleverty reserves. Once these had passed through the Native Land Court, they could be alienated according to the provisions of the Native Land Acts, subject to any restrictions on alienation in those Acts. Alienations of urban McCleverty reserves included most of the remaining fragments of Pipitea, Te Aro, and Kumutoto

17. Document 18, pp 118–119
18. Document 111, p 115
19. Ibid, pp 42–45; doc P4, p 52
20. Document 111, pp 56–57, 61; doc P4, p 53. More than half of Ohariu 13 had already been vested in Maori owners in the 1870s.

Pa. McCleverty-assigned urban tenths that were sold in the period included section 635, part of section 637, and section 660. Six of the 31 former urban tenths at Polhill Gully had been sold by 1889, and in 1891 further Polhill Gully reserve land was sold to a syndicate of businessmen, which then sold the land, at a considerable profit, to the Crown for a rifle range.[21] Parts of McCleverty reserves around the harbour edge at Kaiwharawhara, Ngauranga, and Lower Hutt were alienated in the period, sometimes for railway construction, and we discuss this in chapter 17. There was also further alienation of land in some of the more remote reserves at Ohariu, Makara, Korokoro, and Orongorongo, where land was usually sold to lessees.[22]

### 15.3.4 The transfer of the reserves to the Native Trustee

The transfer of the reserves from the Public Trustee to the Native Trustee was made under the Native Trustee Act 1920 as a consequence of a report by a commission of inquiry into the Public Trust Office in 1913. The report was generally positive about the Public Trustee's administration of Maori reserves, but it noted that the trustee and his staff believed that the office should be relieved of its responsibilities in this area, such responsibilities being seen as a burden on the office's over-stretched resources. It was also regarded as 'impolitic' to involve the trustee in any planned schemes for Maori betterment.[23] The commission recommended that 'in the administration of these reserves the Native point of view should be adequately represented' and that reserves revenue should be used to assist Maori to 'better themselves as agriculturists and otherwise'.[24]

The commission's recommendation for a separate Native Trust Office was accepted by the Government, but the enabling legislation was delayed by the First World War. The Native Trustee Act was finally passed in 1920 and, under section 13, the Public Trustee's responsibilities for the reserves passed to the Native Trustee. The first Native Trustee was appointed on 1 April 1921.[25]

## 15.4 The Administration of the Native and Maori Trustees

The relevant provisions of the Native Trustee Act 1920, which provided for the appointment of the Native Trustee as a corporation sole and established the Native Trust Office, are detailed in chapter 14.

21. Document 18, pp 117–118
22. Further details and references are in documents 18 and E12.
23. Johnson, pp 141–144
24. 'Public Trust Office Commission', AJHR, 1913, B-9A, p 18 (quoted in Johnson, p 144)
25. G V Butterworth and S M Butterworth, *The Maori Trustee* (Wellington: Maori Trustee, 1991), pp 28–29

The Native Trustee Act 1930, as we have noted in chapter 14, substantially re-enacted the provisions of the 1920 Act. As indicated, the provisions establishing the Native Trust Office, the appointment of public servants as Native Trustee and Deputy Native Trustee, and the constitution of the trustee as a corporation sole with perpetual succession were all re-enacted.

In chapter 14, we noted one important new power given to the Native Trustee by section 25 of the 1930 Act, whereby the control and management of specified land could be vested in the trustee for the benefit of the beneficial owners. We also recorded the view of a commission of inquiry that it was inappropriate for such powers to be vested in the trustee (see s14.10). However, it does not appear that the farming activities there in issue took place on any Wellington tenths reserves or McCleverty reserves with which we are concerned.

Part I of the Maori Purposes Act 1947 made provision in section 2 for the alteration of the term 'Native' to 'Maori' in any Act and related provisions or in any contract, deed, or other document. Section 5 provided that the Native Trustee Act 1930 might thereafter be cited as the Maori Trustee Act 1930 and that the Native Trust Office should be called the Maori Trust Office.

### 15.4.1 Accumulation of funds

The Wai 145 claimants allege in their fourth amended statement of claim that the Crown allowed moneys to accumulate in the North Island tenths benefit fund rather than distributing them to beneficial owners.[26] Under section 6 of the Native Trustee Amendment Act 1924, the Native Trustee was, 'from time to time' , to distribute up to three-quarters of the Wellington tenths' revenue to the beneficial owners, such distribution to be in proportion to their shares. The remainder of the tenths' revenue was to form a benefit fund to be applied 'towards the physical, social, moral, and pecuniary benefit' of the beneficiaries and their children. This provision, which was re-enacted as section 36 of the Native Trustee Act 1930, contemplated that funds could accumulate, and the Native Trustee was empowered to use the benefit fund to bring reserve land under the land transfer system and for other specified purposes. The 1934 commission of inquiry into native affairs noted that this section empowered the trustee to accumulate a very large residue, if he thought fit.[27] The commission further found that an accumulation of nearly £15,000 in the North Island 'tenths' seemed excessive. It recommended that an advisory committee be attached to the trustee for the purpose of administering the benefit funds.[28] It appears that, following the 1934 commission report, the trustee developed a policy on entitlement to money from the benefit fund.[29] Any acts or

26. Claim 1.2(d), para 15.6
27. 'Report of the Commission on Native Affairs', 20 October 1934, AJHR, 1934, G-11, p 154
28. Ibid, p 155
29. Document M2, p 126

omissions of the Native Trustee in the administration of the fund were those of the trustee and not of the Crown. Accordingly, we make no finding on this matter.

### 15.4.2 Administrative deficiencies

The Wai 145 claimants in their amended statement of claim say that the Crown failed to ensure that an adequate administrative system was put in place for responding to correspondence and for consulting with the beneficial owners, and that such failure constituted a breach of the Treaty.[30]

The short answer to this allegation is that the Native or Maori Trustee was acting not on behalf of the Crown but on behalf of the beneficiaries. For this reason, we propose to deal briefly with this grievance. Before commenting on the evidence, we should consider some general submissions made by Crown counsel concerning the methodology claimant witness Terence Green used to compile his written evidence on the twentieth-century administration of the Wellington tenths. In particular, Crown counsel submitted:

- that, under cross-examination, Mr Green stated that his methodology involved 'considering something in the order of 5000 pages of Maori Trust Office files and therein pulling out examples of what were considered to be detrimental pieces of administration by the Maori Trust Office in regard to the Wellington Tenths'; and
- that Mr Green further stated that his report 'never set out to analyse in any great detail the bureaucratic performance of the Maori Trust Office'; the primary aim was instead to illustrate 'the various inadequacies which were present in the Maori Trust Office's administration of the Wellington Tenths'.[31]

In addition, Crown counsel submitted that administration files 'inevitably highlight problematic administration rather than trouble-free administration'. In support, she cited from the Butterworths' work on the Maori Trustee.[32]

This observation is particularly relevant to the examples of delay evidenced by the correspondence. As the Butterworths note, 'successful or trouble-free activities leave little trace'. Mr Green provides some 16 case studies which he claims demonstrate institutionalised delays in the Maori Trust Office.[33] However, Crown counsel, relying on a detailed study of Mr Green's allegations by Crown historian Bob Hayes, submitted of the case studies that:

- in a number, there was no undue delay;
- in a number, there was a valid explanation for the delay which Mr Green overlooked;

30. Claim 1.2(d), para 15.7
31. Document P4, pp 60–61; transcript of cross-examination of Terence Green (doc P4(a), pp 12, 13)
32. Butterworth and Butterworth, p 97: the absence of records 'is unfortunately an all too common problem with the records of any administration: the successful or trouble-free activities leave little trace while the failures and difficulties take up more than their share of attention'.
33. Document G1, pp 50–69

- in others, it was not possible to reach an informed view on whether there was undue delay; and
- in a few, Mr Green does demonstrate delay.[34]

However, we would add that Mr Hayes states that over the decades there were numerous delays on the part of the office of the Maori Trustee, mostly in replying to correspondence and in many cases without an obvious reason. Mr Hayes cites a 1983 review of the trustee's administration of leases as noting that 'the most common cause of justifiable complaint would undoubtedly be the failure to acknowledge correspondence and the delays which often occur in replying to letters'.[35] While it appears that many of Mr Green's case studies of alleged delay are without foundation, it is evident that over the years there were significant delays on the part of the trustee in acknowledging and replying to correspondence. This must be viewed in the context of the thousands of leases, trusts, and estates administered by the trustee.[36]

Whether these delays were due to a lack of sufficient staff or to inadequate administrative procedures (or to some combination of both) or were caused by other reasons, the Tribunal is unable to say in the absence of comprehensive and reliable evidence. Mr Green acknowledged that, where there were delays in the adjustment of rentals, the rentals were backdated, but it is accepted that no interest was paid on the arrears of the new rental.[37] Again, we have no evidence of the likely sums involved.

Crown counsel accepted that Maori beneficiaries wished to be kept informed more frequently by the Maori Trustee of the situation regarding their reserved land, and she acknowledged that the trustee's failure to do that would have caused a certain amount of frustration.[38] The Tribunal, on the evidence before it, is unable to find that any administrative failures on the part of the Maori Trustee complained of by the Wai 145 claimants are attributable to the Crown.

## 15.5 Alleged End of Independence of the Native or Maori Trustee

In 1932, the Native Land Amendment Act was passed. Section 15 provided that the Native Trust Office was to 'form part of the Native Department'. The Wai 145 claimants allege in their fourth amended statement of claim that this 1932 amendment amalgamated 'the

34. Document P4, pp 65–66
35. A N F Harris, 'Review of Lease Administration in the Maori Trustee Office', Maori Trustee, October 1983, p 6 (quoted in doc M2, p 77)
36. 'In 1965, there were 2040 estates and trusts, 6631 leases and 2500 other matters administered by the Maori Trustee [AJHR (1965) 9-9]. By 1978, this number had reduced to 1053 estates and trusts, 3548 leases and 646 other matters [AJHR (1978) E-13].': doc P4, p 67.
37. Document G1, para 5.38, p 66
38. Document P4, p 68

Office of the Native Trustee with that of the Department of Native Affairs thereby ending the independence of the Native Trustee and the ability of the trustee to adequately protect the interests of the tangata whenua'.[39]

It should be noted that section 15 did not require that the positions of Under-Secretary of Native Affairs and Native Trustee be held jointly, but in 1933 the same person was in fact appointed to both offices.[40] As we observed in chapter 14, the two separate and distinct offices remained then, as they do today, separate and distinct bodies.

Crown counsel, while maintaining that there is no inherent conflict of interest in the dual role, conceded that a question could arise as to whether there could nevertheless be said to be a conflict in fact at various points in time.[41] We note that, while alleged acts or omissions of the Maori Trustees should not be attributed to the Crown, they could be relevant to the issue of whether the legislative provision in question resulted, in given circumstances, in a conflict of interest which prejudicially affected the Wai 145 claimants. Terence Green gave evidence in support of the claim that there was a conflict of interest by way of three case studies. We consider each of these in turn.

### 15.5.1 Failure to oppose freeholding legislation

Section 155 of the Maori Affairs Amendment Act 1967 enabled the Maori Trustee to sell Maori reserve land to the lessee of such land.[42] Terence Green considered that the Maori Trustee 'should have objected vociferously to this legislation, much as the NZMC [New Zealand Maori Council] did'.[43] He quoted from a passage in the 1975 report of the Commission of Inquiry into Maori Reserved Land (known as the 'Sheehan commission', after its chairman, Bartholomew Sheehan, a retired judge of the Maori Land Court). The passage states that the 1967 amendment to the legislation on freeholding:

> did not attract any comment from the Maori Trustee nor was he invited to submit his views. He was, however, consulted on some machinery matters. This same situation existed on the 1963 Palmerston North Petition to allow freeholding of Maori reserved lands.[44]

Mr Hayes gave detailed evidence both as to the passing of the 1963 legislation, which enabled the Palmerston North reserves to be freeholded, and on the background to the 1967 Act, which extended the power of the Maori Trustee to sell the freehold estate to lessees. We note first some salient aspects of the Palmerston North freeholding.

39. Claim 1.2(d), para 15.5; doc O5, pp 469–475
40. Butterworth and Butterworth, p 35
41. Document P4, pp 61–62
42. Section 155 of the Maori Affairs Amendment Act 1967 enacted this power in sections 9A and 9B of the Maori Reserved Land Act 1955. These provisions were repealed by section 9(a) of the Maori Purposes Act 1975.
43. Document G1, p 47
44. 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, p 25

In 1960 and again in 1962, Wellington Te Atiawa leader Ralph Love, with the support of a number of beneficial owners, petitioned Parliament for the right to sell the freehold of the Palmerston North reserves to the lessees, and Mr Hayes observes that he made a particularly persuasive case.[45] In the parliamentary debate on the 1963 freeholding legislation, the Minister of Maori Affairs stated that the Government regarded the Palmerston North reserves as a special case, the land being non-ancestral land, and that the measure was considered by the New Zealand Maori Council to be a 'domestic matter' which should be left to the determination of the reserve owners.[46] It appears that many of those owners did support the freeholding of the Palmerston North reserves. A significant number – probably a majority – of the beneficial owners of the Palmerston North reserves ultimately sought to sell their shares, although relatively few owners' shares were actually bought by lessees and, as we note later in this chapter, surprisingly little Palmerston North reserve land was sold.[47]

In 1964, a committee of inquiry was appointed to advise on (among other matters) whether restrictions on the powers of beneficial owners of lands subject to the Maori Reserved Land Act 1955 to alienate their interests should be relaxed or removed.[48] The Prichard–Waetford committee of inquiry reported in 1965 and recommended that the restrictions on alienating all categories of Maori land (including reserves) should be removed.[49] In March 1967, the New Zealand Maori Council presented the Minister with its considered views on the Prichard–Waetford report. Mr Hayes notes that 'Its proposals advanced the objectives of land retention and development. Notwithstanding these twin objectives, the Maori Council, without stating its reasons, approved the extension of the freeholding regime to the remaining reserves.' He observes that Terence Green was therefore incorrect in claiming that the Maori Council 'objected vociferously' to freeholding.[50]

The Maori Trustee was invited by the parliamentary select committee considering the 1967 Bill to respond to a submission from the West Coast Settlement Reserves Lessees' Association. This group objected to the minimum purchase price for the freehold of Maori reserve land being set at 10 per cent above special Government valuation, but the trustee stated in reply that, since the lessees were being given a right to freehold which they had previously not possessed, such a 10 per cent premium was justified. In response to another objection from the west coast lessees, the trustee argued for the retention of his discretion on whether or not to sell and for the right to refuse sales which were 'impracticable or inexpedient'.[51] Mr Hayes submits, we think with some justification, that the Maori Trustee's response went beyond 'some machinery matters' referred to by the Sheehan commission. We are also

45. Document M2, p 14
46. Ibid, pp 16–17, 19
47. Ibid, p 19; doc I10, pp 78–79; see also s 15.9.3 below
48. Document M2, p 24
49. Ibid, pp 27–28
50. Ibid, p 37
51. Maori Trustee to chairman, Maori Affairs Committee, 28 July 1967, LE1 1967/4/1, box 1326, National Archives (doc M2(a), vol 4, p 818)

disposed to accept Mr Hayes's suggestion that it is likely that the trustee agreed with the proposal to extend the freeholding of Maori reserve land, given the context of the era.[52] We would add that the trustee may well have been influenced by the then recent inquiry and recommendations of the Prichard–Waetford committee. As earlier discussed, in the exercise of his trustee functions, the Maori Trustee is not acting on behalf of the Crown in terms of section 6 of the Treaty of Waitangi Act 1975.

### 15.5.2 Alleged failure to press for more frequent rent review

Terence Green alleges that the Maori Trustee failed to press for more frequent (five-yearly) rent reviews in existing leases despite that power having been granted to leasing authorities under the Public Bodies Leases Act 1969.[53] We accept Crown counsel's response, based on Mr Hayes's evidence, that, in fact, the Maori Trustee did press for that power to be extended to Maori reserved land and that the Minister of Maori Affairs also wanted the provision extended to leases of Maori land.[54]

### 15.5.3 Alleged refusal to advise the beneficial owners' committee

Terence Green gave two examples which he claimed demonstrated the alleged conflict in the dual role when the Maori Trustee was called on to advise the beneficial owners of the tenths reserves. Mr Green argues that the trustee was able to advise the Government, yet he failed to advise 'those whose interests he was supposed to be representing'.[55]

Mr Green's first example was the alleged failure of the trustee to provide advice to the beneficial owners' committee, which had been set up to explore ways of maximising the revenue for the beneficial owners from the Wellington tenths reserves. Mr Green quotes a 1979 letter from the trustee to the Minister of Maori Affairs which explained that, although the trustee had promised support to the committee, 'it has been made clear . . . that they do the work then come back to the Maori Trustee with concrete arrangements'.[56]

Mr Hayes has pointed out that Mr Green failed to record that, at this time, the Maori Trustee was seeking to hand over the administration of the Wellington tenths to the beneficial owners. Following the release of the Sheehan commission's report, the tenths' beneficial owners formed an owners' committee with the aim of having a greater say in the managing of the reserves and of ultimately taking over their management. It is of interest that, as Mr Hayes explains, 'While the beneficial owners sought a tripartite trusteeship – the Maori Trustee and two nominated beneficial owners – the Maori Trustee preferred that the

52. Document M2, p 41
53. Document G1, pp 41–42
54. Document P4, p 63; doc M2, pp 67–69
55. Document G1, p 47
56. Maori Trustee to Minister of Maori Affairs, 18 July 1979, AAMK869/165c 6/47, fol 828 (quoted in doc G1, p 48)

beneficial owners assume full responsibility for the administration of the reserve'. It appears that an understanding was reached between the trustee and the owners' committee that the trustee's role would be that of a caretaker and be primarily limited to tasks such as collecting and distributing rent, while decisions of substance were to be made by the owners' committee.[57] The Tribunal is unable to find any conflict of interest if the trustee's letter is read in the light of the circumstances at the time.

Terence Green's second example concerns the planning designation of Athletic Park, Calvary Hospital, and Wellington South Intermediate School. The Minister of Maori Affairs had expressed the opinion that the planning designation of these three properties as 'special use areas' of Wellington tenths was unlikely to be changed, and this opinion had been endorsed by the Secretary of Maori Affairs. Mr Green is critical of this endorsement, but, again, he fails to place the correspondence in context.[58] The relevant background is discussed by Mr Hayes, and we do not propose to recount it here in any detail.[59] As Mr Hayes notes, the Maori Trustee requested a valuation of Athletic Park and the other properties on the basis of their underlying zoning. It appears that the Minister and the trustee considered that any change to the planning designation was unlikely, their opinion being consistent with the advice of the Valuation Department. It is worth noting that, in inviting the trustee to a general meeting of owners in June 1979, Dr Ngatata Love on behalf of the owners' committee recorded that both he and the committee had been very pleased with the support given to the committee by officers of the trustee's department.[60]

### 15.5.4 Tribunal conclusion on the Native or Maori Trustee's alleged loss of independence

The Tribunal considers that these studies do not, in fact, reveal a conflict of interest which was prejudicial to the interests of the beneficiaries. The Sheehan commission was of the opinion that, if the Legislature decided that the Maori Trustee should continue to administer the reserved land, the office of trustee should not be held by the person holding office as Secretary of Maori Affairs. The commission considered that the trustee could continue within the existing organisation but that he must be 'seen' by the beneficiaries as being completely independent.[61] Because the trustee has not, since 1989, had any responsibility for the administration of the Wellington tenths reserves, no comment is strictly called for from us. However, the Tribunal considers it appropriate to express its unqualified agreement with the Sheehan commission's view of the desirability of the trustee not only being independent but being seen to be so. This would best be achieved by the office of Maori Trustee being held by

57. Document M2, p 71
58. Document G1, pp 48–49
59. Document M2, pp 74–76
60. Ibid, p 76
61. 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, p 32

someone other than the chief executive officer of the Maori Affairs Department. We were informed by Crown counsel that this has in fact been the case since March 1998.[62]

## 15.6 Uneconomic Shares

The Wai 145 fourth amended statement of claim includes two related allegations of Treaty breaches by the Crown. They are:

- that the Crown alienated tangata whenua from their lands by way of the 'uneconomic interests' provisions of the Maori Reserved Land Act 1955; and
- that the Crown failed to consult with tangata whenua over the compulsory acquisition by the Maori Trustee of those shares deemed uneconomic by the 1955 Act.[63]

### 15.6.1 The legislative provisions

We first note the background to the legislative provisions relating to uneconomic shares.[64] Over the years, the fragmentation of shares in the tenths reserves and other Maori land resulted in very small sums being distributed to beneficial owners. To deal with the problem, the Crown introduced the concept of uneconomic shares and established in part xiii of the Maori Affairs Act 1953 a conversion fund within the Maori Trustee's account. The trustee was authorised to use these funds to purchase uneconomic interests in Maori land and on-sell such interests to other Maori. In 1953, the Minister of Maori Affairs directed as a matter of policy that the conversion scheme as laid down in the 1953 Act was not to apply to Maori reserves.

On 17 February 1955, the Maori Trustee wrote to the Minister of Maori Affairs, attaching, for his consideration, a proposal to extend the conversion scheme to reserve land.[65] The trustee expressed concern at the high proportion of uneconomic shares and the administrative cost of servicing those shares. Just over 80 per cent of the rental income from Maori reserves distributed every six months was less than 10 shillings per beneficiary, and the cost of distribution had been estimated in 1954 at 10 shillings per beneficiary.[66] The trustee advised the Minister:

62. Document p4, p 65
63. Claim 1.2(d), paras 15.2, 15.3
64. We have drawn on Mr Hayes's evidence: doc m2, pp 5–7.
65. Maori Trustee to Minister of Maori Affairs, 17 February 1955, ma6/0, aamk869/137c, National Archives (doc m2(a), vol 1, pp 94–98)
66. Maori Trustee to Minister of Maori Affairs, 17 February 1955, ma6/0, aamk869/137c, National Archives (doc m2(a), vol 1, p 96); memorandum of district solicitor, 3 September 1954, ma6/0, aamk869/137c, National Archives (doc m2(a), vol 1, p 108)

> It is clear that some remedial action will have to be taken even if only to lighten the burden of administration . . . The proposition made for your consideration is that the scheme of conversion could be applied, but with some modifications.[67]

The modification proposed was that 'the Maori Trustee, after recouping his capital outlay, would hold the income accruing to the "uneconomic" shares in trust for the benefit of their former owners or their community'.[68] On 23 February, the Minister of Maori Affairs approved the preparation of legislation and specifically noted that the proposed conversion 'should be dealt with by the Maori Trustee who in turn should make the money available for the benefit of the Maori people of the district in which such money is earned'.[69]

Responsibility for the introduction of the legislation and its contents lay with the Minister, not the Secretary of Maori Affairs or the Maori Trustee. Provision was made in part II of a new Maori Reserved Land Act 1955 for the compulsory acquisition by the trustee of uneconomic interests (those not exceeding £25 in value) in any reserved lands. However, the 1955 scheme differed from the 1953 provisions. The trustee was obliged to retain the shares he acquired, not to sell them to other Maori with rights in the reserves. He was to pay the income into a benefit fund and use it for the benefit of former owners and their descendants, irrespective of where they resided. There was no consultation with the tenths' beneficial owners before the enactment of the legislation, nor did the 1955 Act require that there be any prior consultation with owners of uneconomic interests before their acquisition by the trustee. Counsel for the Wai 145 claimants referred to the Sheehan commission's report, which noted that, as a result of the 1955 'uneconomic interests' provisions, the Maori Trustee had by 1974 become the largest shareholder in the Wellington tenths, holding some 19,190 shares out of 185,303 shares. The next largest shareholder held just 2669 shares.[70] When acquired, the trustee's shares were valued at $21,161.46. By 1974, they had grown in value to $268,389.73 despite the freeholding of two part-sections in 1974.[71]

In 1967, the provisions in the 1955 Act enabling the Maori Trustee to acquire the uneconomic interests of tenths beneficial owners were repealed and the further acquisition of uneconomic interests was also prohibited.[72] Finally, in 1987 legislation was passed for the return to owners of uneconomic shares previously acquired by the trustee.[73]

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67. Maori Trustee to Minister of Maori Affairs, 17 February 1955, MA6/0, AAMK869/137C, National Archives (doc M2(a), vol 1, p 96)
68. Document M2, p 6
69. Minister of Maori Affairs to Secretary, Maori Affairs Department, 23 February 1955, MA6/0, AAMK869/137C, National Archives (doc M2(a), vol 1, p 93)
70. 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, p 317
71. Document G1, p 43
72. Section 148A of the Maori Affairs Act 1953 (as inserted by section 121 of the Maori Affairs Amendment Act 1967)
73. See section 2 of the Maori Affairs Amendment Act 1987, which inserted a new part XIII into the Maori Affairs Act 1953. See also doc P4, pp 34–35.

Crown counsel agreed that 'there was no separate consultation process with owners aside from the usual mode of consultation of that era, ie Select Committee process'.[74] While it appears that Taranaki Maori made a submission on the 1955 Bill, we were not informed whether representatives of Wellington tenths beneficiaries did so, or indeed whether they were even aware of the provisions in the Bill. It is apparent that consultation with all tenths beneficial owners would have been very difficult. But, given the serious implications of the power of acquisition proposed to be given the Maori Trustee, a minimum requirement for consultation would have been the convening of meetings in Wellington and Palmerston North, and in one or more suitable locations in Taranaki, to explain to those who attended the nature and scope of the proposal, and to ascertain the reaction of the people. No such action or other appropriate action was taken.

Nor was there any provision in the legislation itself requiring the Maori Trustee to consult with those Maori beneficiaries whose shares were to be compulsorily acquired with a view to obtaining their consent. Article 2 of the Treaty of Waitangi guarantees to Maori their interest in their properties for so long as they wish to retain them. It is possible that some beneficial owners would not have objected to the purchase of their shares by the trustee. But to others, their share in their land, however small, would have been of great significance, the more so in view of their historical association with the land. Whether, as the claimants suggest, the Crown should have established a body corporate of owners to address the issue of uneconomic interests is debatable.[75] However, the leading rangatira associated with the Wellington tenths would have been well known to the Crown, and their cooperation could well have been sought in ascertaining the likely reaction of their people to the proposed legislation.

Crown counsel submitted that any prejudice arising from the compulsory acquisition of uneconomic shares was substantially remedied by the abolition of the Maori Trustee's powers of acquisition in 1967 and the return of such shares in 1987.[76] The Tribunal considers that the fact that the Crown found it necessary to repeal the trustee's powers of compulsory acquisition of owners' shares some 12 years after they were conferred and, ultimately, to provide for the return of the confiscated shares 20 years later is in itself testimony that the Crown came to accept that the confiscatory measures were unjustifiable.

### 15.6.2 Tribunal findings of Treaty breaches

The Tribunal finds that the Crown failed to ensure that the beneficial owners of the Wellington tenths or their appointed representatives were consulted prior to the enactment of legislative provisions for the compulsory acquisition of the uneconomic interests of such owners. This omission was in breach of the Crown's Treaty obligation to consult with Maori and to

74. Document P4, p 35
75. Claim 1.2(d), para 16.6; doc O5, p 589
76. Document P4, p 35

act reasonably towards them, and the beneficial owners have been prejudicially affected thereby.

The Tribunal further finds that the 1955 legislative provisions enabling the Maori Trustee to acquire shares from the beneficial owners of uneconomic interests in Wellington tenths land without first requiring the trustee to consult with and obtain the consent of such beneficial owners were in breach of article 2 of the Treaty, which guaranteed to Maori their rangatiratanga in and over their interests in land and their right to possess such interests for so long as they wished. As a consequence, the beneficial owners have been prejudicially affected thereby.

## 15.7 Legislative Provisions Permitting Freeholding of Tenths

The Wai 145 claimants allege in their fourth amended statement of claim that, in breach of the Treaty:

- in 1974, the Crown freeholded two sections without adequate consultation with the beneficial owners; and
- the Crown did not obtain the necessary shares from the beneficial owners in order to conduct the freeholding and instead used the Maori Trustee's shares accumulated under the 'uneconomic interest' provisions of the Maori Reserved Land Act 1955.[77]

We deal with each of these allegations in turn.

We have earlier considered an allegation by claimant witness Terence Green that the Maori Trustee failed to object to the passage of the legislation which empowered him to agree to the freeholding of Wellington tenths (see s15.5.1). In our discussion of this allegation against the trustee, we outlined the background to the passage of the 1963 legislation which permitted him to freehold Palmerston North reserves.[78] However, the Wai 145 claimants have made no objection to the passage of the 1963 and 1964 legislation or to any freeholding of the Palmerston North reserves by the Maori Trustee, no doubt because it was supported by the claimants at the time. It is clear that in so doing the claimants distinguished between the Palmerston North land, where they and their ancestors had never lived, and the Wellington tenths land.

The claimants' grievance about the lack of consultation relates to the provisions of section 155 of the Maori Affairs Amendment Act 1967, which added sections 9A and 9B to the Maori Reserved Land Act 1955. These 1967 provisions authorised the Maori Trustee to facilitate the freeholding of reserves, including Wellington tenths. In exercising these powers, the trustee was not acting for or on behalf of the Crown. The Crown had no power in relation to the freeholding of the Wellington tenths. But it did have responsibility for the legislation.

77. Claim 1.2(d), paras 15.8, 15.9; doc 05, pp 506–540
78. Section 20 of the Maori Purposes Act 1963 (as amended by section 16 of the Maori Purposes Act 1964)

We received lengthy submissions from claimant counsel Mr Green on the freeholding of two tenths sections by the Maori Trustee.[79] They concentrated on the details of two transactions which led to the alienation of two small Newtown properties, being parts of sections 989 (192 Rintoul Street) and 1082 (108 Russell Terrace). Mr Green also made submissions on the complexities of the relevant legislation. It appears plain that the Crown failed to ensure, prior to proceeding with the legislation, that the beneficial owners or their representatives were consulted on the proposal to extend to the Wellington tenths the Maori Trustee's power to freehold. Nor was there any legislative provision requiring the trustee to obtain the consent of the beneficiaries or a majority of them to the sale of tenths land. In fact, the trustee opted not to purchase the interest in tenths land from one or more of the beneficial owners in terms of section 9A of the Maori Reserved Land Act 1955. Instead, he chose to use his own shares, which had been acquired under the uneconomic interests provisions discussed earlier in section 15.6.

In legal argument, claimant counsel submitted that the Maori Trustee was not empowered by the provisions of section 9A of the Maori Reserved Land Act 1955 to use his own shares to alienate tenths land. Counsel next considered whether section 41E of the Maori Trustee Act 1953 (as inserted by section 128 of the Maori Affairs Amendment Act 1967) might give the trustee power to use his own shares. He submitted that nowhere is it apparent by virtue of either section 41E of the Maori Trustee Act 1953 or any other provision that the trustee had the power to use his shares to alienate Maori land. Claimant counsel concluded his legal submissions on the trustee's freeholding jurisdiction by stating that 'The absolute quagmire that is the Maori Reserved Land Act 1955 and the Maori Affairs Amendment Act 1967 is nothing short of incomprehensible'.[80]

Crown counsel submitted in reply that claimant counsel had misread section 41E(1) of the Maori Trustee Act. For reasons which she articulated, counsel submitted that this provision empowered the trustee to use his own shares (being an interest in reserved land vested in the trustee as an asset of the purchase fund) in a freeholding transaction, whether the purchaser was Maori or non-Maori.[81]

This Tribunal has no jurisdiction to make a binding decision on the complex provisions under discussion. That is a function of the regular courts, to which disaffected beneficial owners could have had resort in 1974. Nor is any useful purpose served by our rehearsing the lengthy factual evidence given by Terence Green for the claimants and Bob Hayes for the Crown relating to the Maori Trustee's actions. As we have earlier held, the trustee was not acting by or on behalf of the Crown but as Maori Trustee.

It is, however, instructive to refer to certain 1975 findings of the Sheehan commission. In considering the role of the Maori Trustee, the commission noted that there was a widespread

79. Document O5, pp 506–540, 544–555
80. Ibid, p 554
81. Document P4, pp 69–71

body of opinion among beneficial owners which considered that the administration by the trustee was too remote and impersonal. As a consequence, the commission considered that 'owners were inclined to level complaints at the Maori Trustee which were more appropriately complaints regarding the legislation'.[82]

In considering the area of reserved land freeholded since 1967, the commission stated that, according to the records of the Maori Trustee:

> no North Island sections have yet been freeholded but there are, however, two cases where freeholding action has commenced and is being proceeded with. No other sections will be freeholded until the outcome of the Commission of Inquiry is made known.[83]

However, it is apparent that the commission did receive advice that the two Wellington tenths sections referred to had been freeholded by the trustee. A table of reserved land freeholded since 1967 records the two sections as having an area of 30.89 perches in the aggregate.[84]

This table follows a statement by the commission that it understood that shares purchased by the trustee pursuant to the uneconomic share provisions of the Maori Reserved Land Act 1955 were used by him in the freeholding of land to lessees.[85] The commission made no suggestion that such purchases might have been illegal.

The table referred to shows the amounts by which the total of Maori reserved lands throughout New Zealand had been reduced since the passing of the Maori Affairs Amendment Act 1967. The area totals 17,987 acres, of which the two Wellington tenths sections comprise less than a quarter of an acre.[86] The commission stated that the reduction 'is largely a consequence of the provisions of that [1967] Act'.[87]

The commission summarised its conclusions by saying that 'the provisions allowing for the sale of the freehold to lessees must be repealed to ensure that further erosion of the corpus [of Maori reserved land] is prevented'. After referring to the economic importance of the reserved lands and the opportunity for training Maori in the art of administration, it said:

> Of greater importance, we feel that these lands are a means of preserving racial identity, of sustaining Maori mana and self respect, contributing towards a sense of community by uniting large numbers of Maori people in a continuing common enterprise, and enabling them to identify as an integral part of the New Zealand society and economy.[88]

82. 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, p 23
83. Ibid, p 316
84. Ibid, p 52
85. Ibid, p 51
86. Ibid, p 52
87. Ibid, p 51
88. Ibid, p 54

The commission recommended that the legislative provisions allowing the sale to lessees of the freehold of Maori reserved land be repealed.[89] As a consequence, they were abolished by section 9 of the Maori Purposes Act 1975.

### 15.7.1 Were the freeholding provisions in breach of Treaty principles?

We exclude from our discussion at this point the 1963–64 legislation which enacted the freeholding provisions in respect of the Palmerston North reserves. Counsel for the claimants submitted that the situation at Palmerston North was entirely different from that at Te Whanganui a Tara. We consider the claimants' grievances concerning the freeholding of Palmerston North reserves later in this chapter.

The 1967 freeholding legislation extended to all Maori reserved land throughout New Zealand.[90] The Sheehan commission's report states that some 17,987 acres of reserves had been freeholded by 1975, of which the two Wellington tenths properties so freeholded together comprised 30.89 perches (less than a quarter of an acre). This left the acreage of Wellington tenths largely intact. Our inquiry is limited to the Wellington tenths, and any finding as to alleged Treaty breaches can extend only to these reserves. Counsel for the Wai 145 claimants submitted that the legislation making possible the alienation of the Wellington tenths reserves should never have been passed. This was land to be held in trust, land that was to benefit the descendants of the 301 original beneficial owners as determined in 1888. Mr Green submitted that the Crown never had a mandate or a right to pass such legislation.[91]

The Prichard–Waetford committee in 1965 recommended that beneficial owners of reserved land should be permitted to alienate their interests by methods similar to those enacted for the Palmerston North reserves. In its report, the committee noted that, 'where we raised the question, the overwhelming answer was that there should be a power of sale by those owners who wish to sell'.[92] We are unaware, however, whether beneficial owners of Wellington tenths reserves were among those who so answered. The committee received a number of submissions calling for the establishment of local trusts to absorb uneconomic shares.[93]

The Sheehan commission reported in 1975 that the majority of the beneficial owners who appeared before them 'regarded with alarm' the consequences of the freeholding provisions of the 1967 legislation. The commission then stated:

89. Ibid, p 55
90. Sections 155 and 156 of the Maori Affairs Amendment Act 1967, which inserted sections 9A and 9B into the Maori Reserved Land Act 1955, and section 41E of the Maori Trustee Act 1953 (as inserted by section 128 of the Maori Affairs Amendment Act 1967)
91. Document O5, p 555
92. Prichard–Waetford report, pp 142–143 (quoted in doc M2, p 33)
93. Document M2, p 26

15.7.1

The Maori attitude to selling land is divided and contradictory in some respects. Most of the beneficial owners felt that they should have a right to sell their interest in land for what appeared to them to be good reasons but many of those felt that any sales should be within the group so as to preserve the corpus.

At the same time the majority realised that every sale of land to non-Maori lessens the area of Maori-owned land, weakens the economic position of the race as a whole, diminishes Maori mana, and tends to multiply the ranks of the landless Maori.

The Commission believes that these conflicting attitudes and desires can be reconciled and it is for this reason that we consider that any future administrative body that is set up should be empowered to buy up the shares of anxious sellers.[94]

The commission recommended that the beneficial owners of the land known as 'Wellington Tenths' should be constituted as a Maori incorporation under part IV of the Maori Affairs Amendment Act 1967, which would have had the effect of vesting the control of their lands in the beneficial owners.[95] In fact, the Wellington tenths beneficial owners chose in 1985 to have their interests controlled by a trust established pursuant to section 438 of the Maori Affairs Act 1953 (and its successor, the Te Ture Whenua Maori Act 1993).

In submissions to us on the question of whether the freeholding legislative regime was in breach of Treaty principles, Crown counsel suggested that the circumstances leading to the adoption of the freeholding provisions highlighted the inherent tension between the Crown's duty of active protection and the Maori rights of rangatiratanga.[96] We have difficulty with this approach. The 1967 freeholding provisions did not protect the beneficial owners from the Maori Trustee's selling of tenths without the owners' consent. Nor did they ensure that, if beneficiaries wished to sell their interest, other beneficiaries had the right to acquire such interest, thereby retaining rangatiratanga over the land. As the Sheehan commission noted, many beneficial owners felt that any sales should be within the group so as to preserve the corpus.[97]

Crown counsel submitted that there was consultation on the proposal to permit freeholding and cited the Prichard–Waetford committee proceedings by way of example.[98] Nevertheless, the beneficial owners were not consulted directly on the proposal, nor was there any consultation with their accredited representatives.

Finally, we note that, following the report of the Sheehan commission, which was critical of the freeholding provisions, the Crown acted promptly in repealing them. In short, the Crown accepted that they were not in the best interests of the Wellington tenths' beneficial owners. It is fortunate that while they were in force only two small sections totalling less then

94. 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, p 53
95. Ibid, pp 38–39
96. Document P4, pp 31–33
97. 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, p 53
98. Document P4, p 33

a quarter of an acre were sold to the lessees. This loss cannot be ignored, however, given the serious loss of urban and rural tenths in earlier years.

### 15.7.2 Tribunal findings of Treaty breaches

The Tribunal finds that:

- The Crown failed to ensure that the beneficial owners of the Wellington tenths or their appointed representatives were consulted prior to the enactment of the 1967 legislative provisions for the freeholding of reserve land. This omission was in breach of the Crown's Treaty obligation to consult with Maori and to act reasonably towards them, and the beneficial owners were prejudicially affected thereby.
- The 1967 legislative provisions enabling the Maori Trustee to freehold Wellington tenths land, without any requirement that the trustee first consult with and obtain the consent of beneficial owners or their representatives, were in breach of article 2 of the Treaty, which guaranteed to Maori their rangatiratanga in and over their interests in land and their right to possess such interests for so long as they wished. As a consequence, the beneficial owners were prejudicially affected thereby.
- The omission from the 1967 freeholding legislation of any provision enabling beneficial owners to have priority in acquiring the beneficial interest of any owner who wished to dispose of such interest, and thereby maintain the 'corpus' of the Wellington tenths land, was in breach of article 2 of the Treaty, which guaranteed to Maori their rangatiratanga in and over their interests in land and their right to possess such interests for so long as they wished. As a consequence, the beneficial owners were prejudicially affected thereby.

## 15.8 Alienation of Reserves by the Native or Maori Trustee

The Native Trustee Amendment Act 1924 allowed the Native Trustee, on being satisfied that a reserve or portion of a reserve could not be leased to the advantage of the beneficial owners, to sell such land with the written consent of the Native Minister and to pay the purchase money to the beneficial owners.[99] Although the 1924 Act gave the Native Trustee authority to alienate reserves in certain circumstances, he exercised this authority sparingly. The Maori Reserved Land Act 1955 contained a similar provision authorising the Maori Trustee to sell reserved land, with the consent of the Minister of Maori Affairs, but only in cases where reserved land could not be used profitably in the interests of the beneficiaries.[100] The Maori Trustee exercised this power in relation to one Wellington tenth reserve, Ohariu section 12.

99. Section 4 of the Native Trustee Amendment Act 1924 (doc A21, p 166)
100. Section 9(2) of the Maori Reserved Land Act 1955

The two small Newtown sections freeholded by the Maori Trustee in 1974 which we have discussed above were the only portions of the unassigned Wellington urban tenths that were alienated in 100 years; the fact that the remainder were preserved in trust ownership, for Maori beneficiaries, was no mean achievement. Since all the remaining urban tenths, except a tiny fragment at Pipitea, were outside the central business district of Wellington, there was probably little pressure from the lessees for them to be sold. Ironically, the perpetual leasehold titles, with their generous terms for renewal, gave the mainly residential lessees so much security that few of them wanted to gain the freehold, even in the years 1967 to 1975, when this was possible.

### 15.8.1 Rural tenths

For the sake of completeness, we discuss briefly the alienation of some remnants of rural tenths.

- *Pakuratahi sections 3, 4, and 7*—Though not originally New Zealand Company rural tenths, the three sections at Pakuratahi came to be treated as such. Until 1925, no reference was made to the Native Land Court to ascertain the beneficial owners. Pakuratahi sections 4 and 7 were the only rural tenths for which rents were never assigned to particular owners by Heaphy, and, when investigated by the Native Land Court, the beneficiaries were deemed to be the same as those determined for the urban tenths. These two reserves were let on perpetual leases and remained largely intact (apart from a few small public works takings).[101] Pakuratahi section 3 was awarded to three beneficial owners in 1925, and by 1972 succession had descended to two brothers, who had the land declared general land in 1973. Through a series of confused transactions, the land was eventually sold to the Ministry of Agriculture and Fisheries in July 1975.[102]
- *Ohariu section 12*—It was not until the 1920s that the Native Land Court was asked to declare the beneficial owners for Ohariu section 12, and then it simply accepted Heaphy's original list from the 1870s and those descended from them. Five beneficiaries were named by the court in 1927, but by the 1960s the number of beneficiaries had risen to 26. In 1964, the Maori Trustee sold the land for £900 under section 9(2) of the Maori Reserved Land Act 1955. The sum paid was substantially above a 1962 Government valuation of £645. It seems that the trustee had not consulted the Maori owners about the sale.[103]
- *Ohiro sections 19 and 21*—The beneficial owners of Ohiro sections 19 and 21 were determined by the Native Land Court in 1888. The court divided the two reserves into 17 subdivisions and declared these inalienable. However, as the Sheehan commission noted,

101. Document 111, pp 67, 70, 111
102. Ibid, pp 67, 70–72
103. Ibid, pp 57–60

the court made a new determination of ownership in 1902 and vested the reserves in 38 persons.[104] The reserves were then let on perpetual leases but remained intact and in Maori ownership until 1976, when some 93 acres were taken under the Public Works Act for a rubbish tip.[105]

Only 42 rural tenths reserves were set aside in the Port Nicholson block. As noted in section 8.8.1, 71 rural tenths of 100 acres each should have been allocated. One hundred and thirty-five years later, only 124 acres – scarcely more than one rural tenth - of those original rural tenths remained, and it was next door to a rubbish dump at Ohiro. Even if we add the remnants of the Pakuratahi reserves, which were not original tenths and had been reduced to 181 acres, Maori had retained the equivalent of three rural tenths.[106]

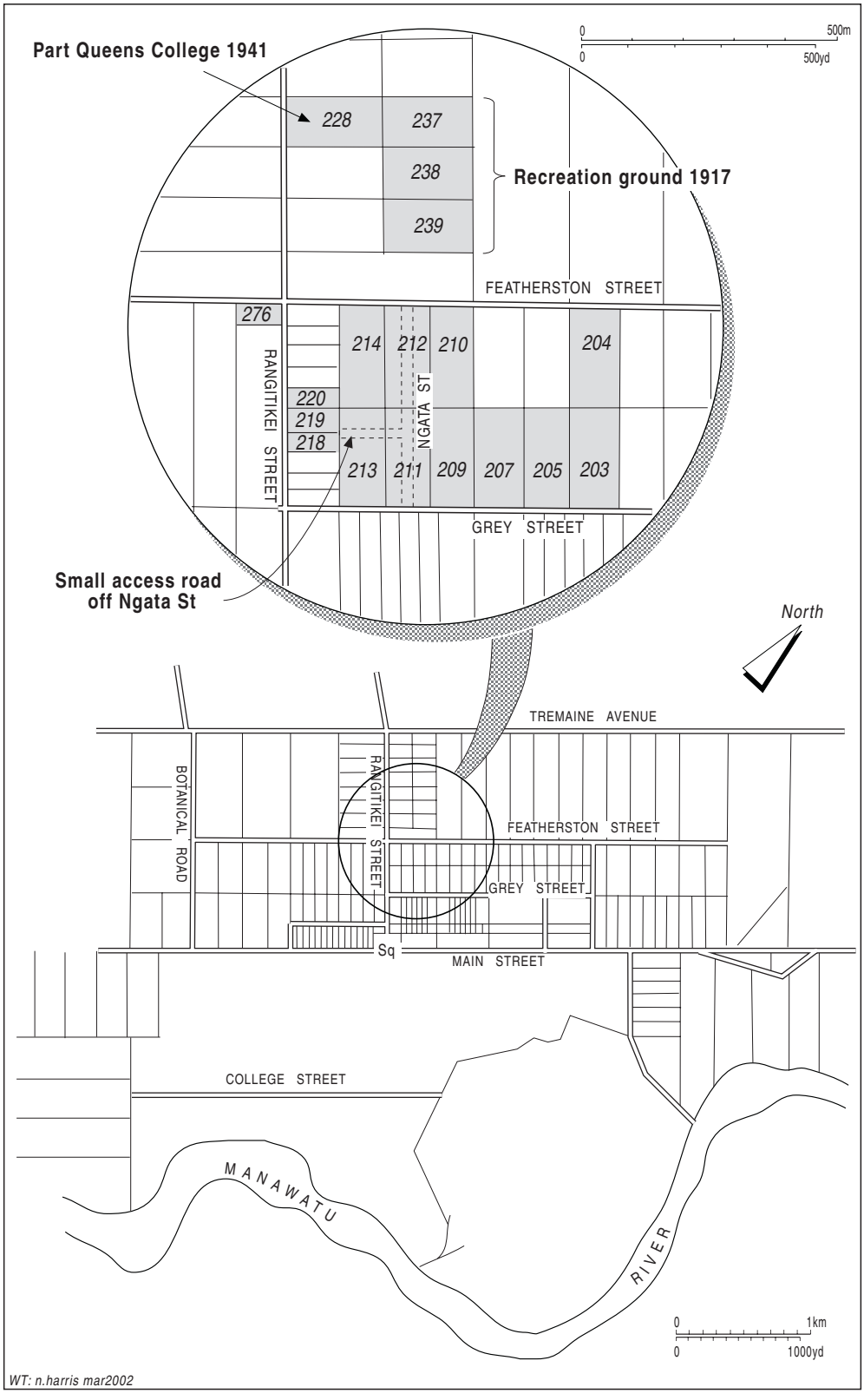
### 15.8.2 McCleverty reserves

Finally, we comment briefly on the remaining McCleverty-assigned reserves. In general, the Native or Maori Trustee had no involvement with the sale of McCleverty reserve land, although in some cases he sold the land on behalf of the owners. One or two fragments of former tenths had remained in urban Wellington, but the last, so far as we have been able to ascertain, was finally sold during the Maori Trustee's period of administration. This was a 15.8-perches fragment of section 487 (in downtown Woodward Street), originally granted to Wi Tako Ngatata in 1853 but finally sold on behalf of the owners by the Maori Trustee 100 years later, in 1953.[107]

Most of the remaining remnants of the rural tenths that McCleverty had assigned to Wellington Maori, along with the reserves in the town belt and more distant areas, also seem to have been sold. The most notable alienations were in Lower Hutt, where valuable market gardening land was sold or taken by the Crown. We discuss the most significant public takings in chapter 17.

The reports on the McCleverty reserves by researchers Stephen Quinn and Terence Green cannot account for the sale of every acre of the McCleverty-assigned reserves, and nor can we. To do so, it would be necessary to conduct an exhaustive search of titles, and even then we might not achieve finality, since some of the remnants of McCleverty reserves have been converted into general titles. Nevertheless, we can safely assume that little of the McCleverty reserve land remains in Maori ownership. Once the reserves were returned to Wellington Maori in customary ownership and became subject to the Native Land Acts, it was unlikely that they would remain reserves.

104. 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, pp 299–300
105. Document I11, pp 25–31
106. Ibid, p 116
107. Document I8, pp 100–101




Map 13: Palmerston North reserves

Apart from those reserves taken for public works purposes (discussed in chapter 17), there are no claims of Treaty breaches regarding the alienation of rural tenths or McCleverty-assigned reserves.

## 15.9 Palmerston North Reserves

Before recording the alienation of some Palmerston North reserves, it is necessary to recount how Wellington Maori came to be the beneficial owners of tenths reserves in land some 90 miles north of Te Whanganui a Tara, land which they had never occupied and with which they had no prior connection.

### 15.9.1 Origin of the Palmerston North reserves

In section 8.4.2, we noted that Wiremu Kingi objected to Spain, on behalf of Waiwhetu Maori, that the tenths reserves allotted by the New Zealand Company were unfit for use, being swampy or covered with water. Spain undertook that suitable alternative land would be provided but was unable to say precisely where. Following the signing of the 1844 Waiwhetu deed of release, Fitzgerald, the surveyor attached to Spain's commission, reported that the Lowry Bay tenths reserves (Lowry Bay sections 1 and 4) were 'principally situated in a swamp . . . The natives would never think of making use of such land'.[108]

It appears that on Governor Grey's arrival Waiwhetu Maori complained to him that they had been left with insufficient land. Whether or not Grey was aware of the earlier undertaking given by Spain is not known. However, Grey was sympathetic to the Waiwhetu situation and in 1846 purchased Hutt section 19 for Waiwhetu Maori. This section was described by Fitzgerald as one of the best in the Hutt (see s 10.4.1). It was included by McCleverty in his 1847 award to Waiwhetu, but he overlooked Lowry Bay sections 1 and 4. Waiwhetu Maori retained these sections in addition to the reserves allocated by McCleverty.[109]

The Crown took no further action in respect of the Lowry Bay sections for some 18 years. Section 1 was sold in May 1864 and section 4 a year later by direction from Governor Grey. The sale proceeds of £450 were paid into the native trust account administered by Swainson. It is not known whether Grey or Swainson consulted with Waiwhetu Maori before the sale of the two reserves. Researchers Ralph Johnson and Rachael Willan reported that no evidence could be located to establish whether Waiwhetu Maori had been consulted either about the alienation or about the possibility of replacing the two reserves with alternative sites.[110]

108. Fitzgerald, 'Report on the capabilities of the Native Reserves in this District for the Purposes of Cultivation by the Aborigines', NZC3/6, no 27, p 213, New Zealand Company archives (quoted in doc I10, p 12)
109. Document I10, p 14
110. Ibid, pp 16–17

### 15.9.2 Purchase of Palmerston North sections

In 1866–67, during Grey's tenure as governor, the Palmerston North reserve lands were bought to replace Lowry Bay 1 and 4, using funds from the native reserves accounts. The 18 sections, containing 71 acres 1 rood in total, were located about half a mile from what is now the Square in Palmerston North (see map 13).[111]

Researchers have been unable to find the reasons for Grey's decision to purchase lands at Palmerston North for Waiwhetu Maori.[112] Grey may have considered that suitable alternative land was not available in Port Nicholson and that Palmerston North urban lands would provide a beneficial return from leasing. There is no evidence before the Tribunal that the Waiwhetu people were consulted over, or agreed to, the purchase.

It was some years before the Palmerston North beneficial owners received any income from these reserves. Johnson and Willan report that, from 1867 to 1873, the Palmerston North lands were left seemingly unadministered. Waiwhetu Maori received no benefit until Heaphy took over and the reserves were first leased in 1874.[113] Waiwhetu Maori were assumed to be the beneficiaries of the Palmerston North reserves, but the beneficiary lists of Waiwhetu Maori drawn up first by Heaphy in 1875 and then by the Public Trustee in 1887 were the subject of contention for many decades.[114]

### 15.9.3 Alienation of Palmerston North reserves

The Palmerston North reserves were administered by the Public Trustee under the Native Reserves Act 1882, although there was no formal declaration of trust in relation to these reserves until 1887.[115] Responsibility was duly transferred to the Native Trustee in 1921. In 1937, to end any doubts about the status of the reserves, section 13 of the Native Purposes Act 1937 declared the lands to have been native reserves within the meaning of the Native Reserves Act 1882, and thus Maori land.[116]

In 1910, the Public Trustee reported that the 18 sections of Palmerston North reserves were all leased. To facilitate their further subdivision into building lots, the trustee obtained legislative authority to part with portions of the reserves for roads.[117] Between 1910 and 1913, he provided some eight acres for roading, which reduced the area from 71 acres 1 rood to 63 acres 29 perches.[118] This area was further reduced by a total of 20 acres 7 perches taken for public works in 1917 and 1941 (by the Palmerston North Borough Council for a recreation

111. 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, pp 262–263
112. Document 110, p 19
113. Ibid, p 20
114. Ibid, pp 23–30
115. Ibid, p 25
116. 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, p 264
117. Ibid, pp 265–266. Legislative authority was provided by section 3 of the Native Land Claims Adjustment Act 1910.
118. 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, p 267; doc 110, pp 51–52

ground and by the Crown for a technical high school site respectively). In addition, 3 acres 3 roods 3 perches were sold under the 1964 freeholding legislation, and a further 2 acres 1 rood 26.5 perches under the 1967 freeholding provisions. The net remaining area in 1975 was 36 acres 3 roods 33 perches.[119]

Section 20 of the Maori Purposes Act 1963 allowed the beneficial owners of the Palmerston North reserves to apply to the Maori Trustee to sell their shares to him. After buying these shares from the owners, the trustee could then sell his interest to the lessee. In 1964, further legislation permitted lessees to notify the Maori Trustee that they wished to purchase the freehold of their property. This applied only to lessees with perpetually renewable leases, which most of the Palmerston North leases were.[120] As noted earlier in this chapter, these legislative provisions were enacted following a petition in 1962 by Ralph Love on behalf of the beneficial owners of the Palmerston North reserves.

Johnson and Willan considered that there were many reasons why the Crown allowed Maori to sell their beneficial interests in the Palmerston North reserves. Briefly noted, they were as follows:

- the lessees wanted secure tenure;
- the owners received very little rent;
- the owners were passive recipients of rent;
- there was pressure from the owners;
- there was pressure from Palmerston North residents;
- there was the uneconomic shares problem; and
- Palmerston North was not the beneficial owners' traditional land.[121]

Johnson and Willan, after noting that only six acres were alienated by freeholding, suggested that, if in 1963 'the Government had considered vesting the reserve in an incorporation and allowing the incorporation to absorb uneconomic shares, owners may have favoured retaining their land'.[122] At best, this is speculative. The owners' petition presented to Parliament by Ralph Love in 1962 was signed by some 200 people. They wanted to have the option of selling their shares.[123] We are unaware that any proposal for vesting the reserves in an incorporated body was made by the petitioners or by anyone else on their behalf.

The Tribunal finds it surprising, given the considerable pressure from both the lessees and the beneficial owners to allow freeholding, that so little land was sold. It appears that most of the beneficiaries were content to accept the status quo, despite receiving little rent, as were most of the lessees, who had a secure tenure and were faced with rent revisions, albeit sometimes quite substantial, only once every 21 years. A report by a Government district valuer made in September 1974 showed that the reserved land was very close to the central business

119. 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, pp 267–269
120. Document I10, pp 74–77
121. Ibid, pp 91–94
122. Ibid, p 95
123. Ibid, p 73

area and contained some of the more-or-less fringe commercial part of the city, while the balance comprised residential properties. The redevelopment of parts of the residential area for office and other commercial uses was anticipated leading to a consequent increase in value. The valuer thought it most likely that the rest of the residential block would be redeveloped for flats as the older houses thereon became ready for demolition.[124]

The Sheehan commission recommended that the freeholding of reserve land should come to an end and that a body corporate of owners should administer the Palmerston North reserves. Freeholding was ended in 1975, and in 1979 the Palmerston North Reserves Trust was established by the Maori Land Court as an incorporation of owners to administer the Palmerston North reserves.[125]

## 15.10 Treaty Breach Claims in Relation to the Palmerston North Reserves

### 15.10.1 Sale of Lowry Bay sections 1 and 4

The Wai 145 claimants allege in their statement of claim that in 1864 the Crown sold Lowry Bay sections 1 and 4 without consultation with the tangata whenua to whom these sections had been Crown-granted, and that the Crown breached the Treaty by failing to treat tangata whenua as equal partners.[126] (We note that these sections had not in fact been Crown-granted to Waiwhetu or any other Maori.)

In submissions, claimant counsel stated that it was unclear whether there was any consultation with Waiwhetu Maori prior to such sales.[127] It is known that, following representations from the Waiwhetu people, Grey purchased and awarded them one of the best sections in the Hutt. Moreover, Wiremu Kingi had made it very clear to Spain that Lowry Bay sections 1 and 4 were of no use to them, a view shared by the Crown surveyor, Fitzgerald.

Given that Grey provided a valuable replacement, that Waiwhetu Maori had placed little or no value on the sections, and that it is unclear whether or not Waiwhetu Maori were consulted, we are unable to find that the Crown acted in breach of any Treaty principle.

### 15.10.2 Purchase of reserves at Palmerston North

The claimants next allege that in 1866–67 the Crown purchased sections in Palmerston North, outside the rohe of Te Whanangaui a Tara tangata whenua, to replace Lowry Bay sections 1 and 4.[128]

124. 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, p 275
125. Document 110, pp 2–3; doc 01, p 30
126. Claim 1.2(d), para 16.1
127. Document 05, p 565
128. Claim 1.2(d), para 16.2

Claimant counsel submitted that it is unclear exactly why Grey chose to purchase reserves in Palmerston North, so far from the traditional papakainga of Waiwhetu. Mr Green contended that, in terms of Maori customary law, the purchase of the reserves in a 'foreign' location was inappropriate for Waiwhetu Maori.[129] The Tribunal readily agrees that the purchase was inappropriate, and no doubt the anomalous intrusion of a reserve for the benefit of Maori who had no connection with the land would have been resented by those Maori within whose rohe the land was situated.

If Grey felt the need to make additional provision for Waiwhetu Maori, he should clearly have done so within their Te Whanganui a Tara rohe. Claimant counsel submits that, in purchasing for Waiwhetu Maori these sections in Palmerston North which were so far from their papakainga and had no significance for them, the Crown breached the Treaty by failing to protect the interests of Waiwhetu Maori and by failing to uphold their rangatiratanga.

While we are disposed to agree that the Crown failed to act reasonably in creating reserves in Palmerston North instead of in the Waiwhetu rohe, we are not satisfied that Waiwhetu Maori or the claimants were prejudiced thereby. As our review of the alienation of rural tenths has shown, virtually all were disposed of by Maori. By contrast, a significant number of urban tenths survived. While we accept that the creation of reserves for Waiwhetu Maori in Palmerston North was a serious slight to their rangatiratanga, we believe that the long-term benefit to the beneficial owners, particularly through capital appreciation, has been of value to them, and that value is likely to increase further. In all the circumstances, we consider it inappropriate to make any finding of a Treaty breach in terms of section 6 of the Treaty of Waitangi Act 1975.

### 15.10.3 Vacancy in the office of Wellington reserves commissioner

The claimants further allege that between 1867 and 1873 the Crown allowed the office of the Wellington reserves commissioner to be vacant, and that in so doing the Crown failed to protect the interest of the Waiwhetu people.[130]

Had a reserves commissioner been appointed earlier, it is possible that some Palmerston North sections might have been let before 1874, when the first lease of a Palmerston North reserve occurred. However, we are in no position to assume that this would have occurred, nor have we any evidence as to the likely rental income from any such letting. We are therefore unable to make finding of a Treaty breach in respect of this claim.

129. Document 05, p 566
130. Claim 1.2(d), para 16.3

### 15.10.4 Freeholding of Palmerston North reserve lands

We next note a claim that the Crown denied the beneficial owners involvement in the process of freeholding their lands.[131]

Claimant counsel submitted that the uneconomic interests held by beneficial owners and the existence of a substantial number of perpetual leases were two major influences which led owners to decide to sell their lands.[132] He also referred to other reasons noted by Johnson and Willan, to which we have earlier referred (see s15.9.3). In section 15.6.2, we have made findings of Treaty breaches in respect of the legislative provisions for the compulsory acquisition of uneconomic shares, and those findings apply equally to the Palmerston North reserves. The effect of perpetual leases is considered in our next chapter.

In support of his submission that the Crown breached the Treaty in denying the owners any involvement in the process of freeholding, we assume that claimant counsel was referring to Johnson's and Willan's suggestion that the Crown should have considered vesting the reserves in an incorporation and allowing the incorporation to absorb uneconomic shares, and that the owners may have favoured retaining their land. For the reasons given, the Tribunal considers that this can be no more than speculation (see s15.9.3).

In reply to this claim, Crown counsel submitted, first, that it was as a result of repeated requests from the beneficial owners that legislation was passed enabling freeholding and, secondly, that owners indicated whether or not they wished to sell their shares. Crown counsel also noted that there was no evidence of owners protesting about participating in the freeholding process.[133]

In all the circumstances, we are not satisfied that the Crown breached the Treaty as claimed.

### 15.10.5 Lack of a body corporate of owners

Another claim in relation to the Palmerston North reserves is that the Crown did not establish a body corporate of owners to address the issue of 'uneconomic interests', which body would have prevented Maori from losing further land.[134]

Willan and Johnson, whose work is cited by claimant counsel in support, did not go beyond suggesting that, had the Crown so acted, owners may have favoured retaining their land.[135] We are unable to find that the Crown breached the Treaty as claimed.

131. Claim 1.2(d), para 16.5
132. Document o5, p 576
133. Document p5, p 14
134. Claim 1.2(d), para 16.6
135. Document 110, p 95

## 15.11 The Compulsory Taking of Palmerston North Reserves

Finally, we consider the claim that the Crown compulsorily acquired 28 acres of the Palmerston North reserves between 1917 and 1942 without consulting the tangata whenua.[136] This claim refers to three specific takings: 15 acres 5.7 perches taken in 1917 by the Palmerston North Borough Council for a recreation ground; 5 acres 1.2 perches taken by the Crown in 1941 for a technical high school; and 8 acres 18.5 perches provided for roading between 1910 and 1913.[137]

### 15.11.1 Land taken for a recreation ground

In 1917, the Palmerston North Borough Council permanently acquired a total of 15 acres 5.7 perches of Palmerston North Maori reserve land for a recreation ground. The land acquired was all of sections 237, 238, and 239, and is now the North Street Park. Before compulsorily acquiring this land, the Palmerston North Borough Council leased it from the Public Trustee. In 1912, the trustee was given statutory authority to lease portions of the Palmerston North Maori reserve, not exceeding 11 acres, to the borough council. The lease was to be for three terms of 21 years, and the borough council was to plant the grounds.[138] It appears, although we have no evidence on the matter, that the borough council may have wished to have an even greater area than 11 acres for a recreation ground, or it may have preferred to acquire the ownership of the three sections of just over 15 acres rather than to lease a smaller area.

In 1917, the three sections were vested by proclamation in the borough council for a recreation ground. The Governor-General purported to do this under the powers vested in him by the Public Works Act 1908, the Public Works Amendment Act 1910, and the Municipal Corporations Act 1908.[139] It is not apparent where power is to be found in any of these Acts for Maori reserved land to be vested in a local authority for a recreation ground. However, in the absence of the question being raised by counsel for the parties, we make no finding on the legality or otherwise of the Crown's proclamation.

Crown counsel submitted that this was an acquisition by the Palmerston North Borough Council, not the Crown.[140] This submission overlooks the fact that the proclamation vesting the land in the borough council was made not by the council but by the Crown's representative. It was an act of the Crown. The submission also leaves open the question, assuming the proclamation to have been validly made, of whether the relevant legislation was consistent

136. Claim 1.2(d), para 16.4
137. Document O5, p 570
138. Document I10, pp 39–40. The leasing was authorised by section 41 of the Reserves and Other Lands Disposal and Public Bodies Empowering Act 1912.
139. *New Zealand Gazette*, 18 October 1917, p 3933
140. Document Q1, p 53

with or in breach of Treaty principles. We consider this question at sections 15.11.3 and 15.11.4.

### 15.11.2 Land taken for a technical high school

In 1941, the Crown took 5 acres 1.2 perches of Palmerston North Maori reserve land for a technical high school, this being all of section 228. This section backed on to the North Street Park and is now part of Queen Elizabeth College.[141]

In 1904, the Public Trustee considered the question of subdividing section 228 but decided that the demand for leasing the subdivided land would be insufficient to justify the expense. In 1922, the Native Trustee and the Palmerston North Borough Council planned to put a street through section 228 and divide it into 20 lots. The new sections were to be leased by the trustee. However, a lack of funds caused the project to be abandoned. In 1938, the board of governors of the Palmerston North high schools sought to lease section 228 for a technical high school. Nothing came of this, but in 1940 the Native Trustee was informally notified of the board's intentions to acquire the section.[142] It appears that the trustee agreed in principle to the acquisition, and, on 29 October 1941, the Crown compulsorily acquired the land under the Public Works Act 1928.[143]

### 15.11.3 Consideration of Treaty principles

We see no essential difference between the compulsory acquisition, under the Public Works Acts in force at the time, of the recreation ground and of the land for the technical high school. We consider that the Treaty principles which we discuss here are equally applicable to both takings.

The Tribunal in its *Turangi Township Report 1995* endorsed the earlier provisional view of the Tribunal in its *Ngai Tahu Ancillary Claims Report 1995* of the Treaty constraints which, given the clear and unequivocal terms of article 2 of the Treaty, should govern the exercise of statutory powers for the compulsory acquisition of Maori land.[144] The Turangi township Tribunal had the advantage of much fuller argument from counsel on the provisions of the Public Works Act 1928. The views there expressed apply equally to the 1908 and the 1910 legislative provisions. We consider that these propositions also apply equally to the present case.

The first proposition adopted by the Turangi township Tribunal was that:

141. Document 110, pp 42–43
142. Ibid, p 42
143. *New Zealand Gazette*, 27 November 1941, p 3752
144. Waitangi Tribunal, *The Ngai Tahu Ancillary Claims Report 1995* (Wellington: Brooker's Ltd, 1995), pp 10–11

> if the Crown wishes to acquire Maori land for a public work or purpose, it should first give the owners [adequate] notice and [by full consultation] seek to obtain their [informed] consent at an agreed price.[145]

Where land was proposed to be taken, section 18 of the Public Works Act 1908 required both the Crown, if it was taking the land for Government works, and local authorities, if they were taking it for local works, to prepare plans and give 40 days' notice to the owners or occupiers of, and any other person having an interest in, the land. However, this section was amended by section 4 of the Public Works Amendment Act 1909 to provide that no such notice was required to be given to Maori unless their title was registered under the Land Transfer Act 1908. Instead, it would be sufficient if a notice were published in the Maori-language *Gazette*. The same provisions were repeated in section 22 of the Public Works Act 1928.

We presume that, if any notice was given in the case of the taking of Palmerston North reserve land for the recreation ground and the technical high school, it would have been to the Public or Native Trustee. There is no evidence that any consultation took place with the Maori beneficial owners or that they gave their informed consent to the disposal of the land at an agreed price.

The second proposition endorsed by the Turangi township Tribunal was that:

> if the Maori owners are unwilling to agree, the power of compulsory acquisition for a public work or purpose should be exercised only in exceptional circumstances and as a last resort in the national interest.[146]

It could not be suggested that exceptional circumstances applied to the acquisition of the Palmerston North reserve land for a local recreation ground and a technical high school, nor that it was absolutely necessary in the national interest.

The third proposition was that:

> if the Crown does so seek to acquire the use of Maori land for a public work, it should do so by acquiring a lease, licence, or easement, as appropriate, on terms agreed upon with the Maori owners or, failing agreement, by appropriate arbitration. Should there be exceptional circumstances where the acquisition of the freehold by the Crown is considered to be essential, Maori should have the right to have that question determined by an appropriate person or body independent of the Crown.[147]

145. Waitangi Tribunal, *The Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995), p 360. The words in brackets were added by the Turangi Tribunal to the provisional view stated by the Ngai Tahu Tribunal.
146. Ibid, p 363
147. Ibid, p 365

We note that there was already an express statutory power enabling the Public Trustee to lease up to 11 acres of the reserve to the borough council for a recreation ground. If this area was inadequate, then either an attempt should have been made to have the trustee's power enlarged or alternative land should have been sought by the borough council. The land for the technical high school could likewise have been leased, and in fact this is what the board of governors initially applied to do. We endorse the Turangi township Tribunal's further requirement that 'The Crown should not seek to acquire Maori land without first ensuring that no other suitable land is available as an alternative'.[148]

We agree with the Turangi township Tribunal that the three requirements proposed by the Ngai Tahu Tribunal and the fourth requirement proposed by the Turangi Tribunal should be adhered to not only by the Crown but also by local authorities exercising statutory powers of compulsory land acquisition, to ensure compliance with Treaty principles.[149]

The researcher commissioned by the Tribunal could find no evidence of direct consultation by the Crown or the local authorities with the beneficial owners for either the recreation ground or the school site, nor did the Crown produce any such evidence.[150] Neither, it appears, did the Public or Native Trustee consult with or obtain the consent of the beneficial owners of the sections taken.

### 15.11.4 Tribunal findings of Treaty breaches

In relation to the proclamations made by the Crown under the provisions of the Public Works Act 1908 (and its amendments) and the Public Works Act 1928 compulsorily vesting part of the Palmerston North Maori reserve in the Palmerston North Borough Council as a recreation ground and compulsorily acquiring another Palmerston North reserve section for a technical high school, we find:

- that these proclamations were fundamentally inconsistent with the basic guarantee given in article 2 of the Treaty of Waitangi that Maori could keep their land until such time as they wished to sell it at a price agreed upon with the Crown or the local authority as appropriate, and that the beneficial owners of such land were prejudicially affected thereby; and
- that, in making these proclamations without first ensuring that there had been consultation with, and that consent had been obtained from, the Maori beneficial owners, the Crown acted in breach of its Treaty duty to recognise and protect the rangatiratanga of the beneficial owners. As a consequence, they have been prejudicially affected thereby.

148. Waitangi Tribunal, *The Turangi Township Report 1995*, p 365
149. Ibid, p 366
150. Document 110, pp 51, 56

### 15.11.5 Land provided for roading

In 1910, the Public Trustee considered subdividing certain of the Maori reserved land at Palmerston North. To do this, he required statutory authority. This was given by section 3 of the Native Land Claims Adjustment Act 1910, which provided that, 'For the purpose of enabling the Public Trustee to more profitably utilize Native reserves vested in him', the trustee was authorised to survey and subdivide Maori reserves under his control and to lay off roads with the consent of the local authority. Every such road then became a public road vested in the Crown. The rent from leasing the sections was to pay for the roads, and the Public Trust Office's common fund was to cover any shortfall. As rent accrued, the Public Trustee was to reimburse the common fund. Between 1910 and 1913, the trustee subdivided six sections into 102 sections.[151]

We agree with the submission of Crown counsel that the provision of roads would have increased the value of the remaining land and so been of direct benefit to the owners.[152] It is clear from the introductory words of section 3 quoted above that the statutory power to subdivide Maori reserves was provided to facilitate the more profitable use of such reserves.

An owner of land who wishes to subdivide that land into residential sections has an obligation to lay out roads to provide access to the sections, and this obligation has long existed in New Zealand. Once the roads are laid out to the satisfaction of the local authority, that authority will normally be responsible for their maintenance. We consider it misleading to refer to such lands as being 'taken' – they are an integral and essential part of the subdivisions. Accordingly, no question of compensation arises. Nor does the need to provide roads for access to sections give rise to any Treaty breach.

151. Ibid, pp 51–52
152. Document Q1, p 53

CHAPTER 16

# PERPETUAL LEASING OF RESERVES

## 16.1 Introduction

A major grievance of the Wai 145 claimants relates to the introduction of perpetually renewable leases for the Wellington tenths and Palmerston North reserves in 1895. The claimants' grievances concerning the perpetual leasing regime fall under two chronological heads: first, from the time the regime was imposed on these reserves in 1895 until 1997 and, secondly, the period since the enactment of the Maori Reserved Land Amendment Act 1997, which provides for the eventual phasing out of perpetual leases for Maori reserves. Thus, we deal first with the legislation in force prior to 1997 in sections 16.2 to 16.3 and then, in sections 16.4 to 16.6, we examine the situation after 1997.

## 16.2 The Perpetual Leasing Regime

As we noted in section 14.8, the Native Reserves Act 1882 provided for the leasing of reserves for agricultural and mining purposes for up to 30 years, and for building purposes for a maximum of 63 years by renewable terms of up to 21 years each, with a reassessment of rents after each term. Rural tenths suitable for agriculture could thus be leased on 30-year terms and urban tenths required for building for up to 63 years. By 1882, virtually all the rural and urban tenths were already leased under the provisions of earlier legislation, but the lessees could convert those leases to new ones under the 1882 Act once their existing terms had expired. This staggering of renewals was also to occur with subsequent amendments of the reserves legislation which altered the conditions of leases. It meant that at any one time reserves were held on a variety of leasehold conditions. We cannot follow these ramifications in detail, but we need to bear them in mind as we examine the most important change that was gradually imposed on the Wellington tenths and Palmerston North reserves: namely, the perpetual lease, sometimes called a Glasgow lease.[1]

1. As noted by Crown counsel (doc P4, p 7), the terms 'lease in perpetuity' and 'perpetual lease' are sometimes used interchangeably. However, 'lease in perpetuity' refers strictly to leases available for a term of 999 years, while 'perpetual lease' refers to a lease which contains a perpetual right of renewal. The terms 'perpetual lease' and 'perpetually renewable lease' are primarily used by the Tribunal. The term 'perpetual lease' is the form of lease prescribed by the Maori Reserved Land Act 1955.

### 16.2.1 Background to perpetual leasing

Much of the impetus for the conversion of leases of Maori reserved land to perpetual leases came from outside Wellington, most notably from lessees of South Island West Coast and Taranaki reserved land. Since these developments have already been examined in the Tribunal's *Ngai Tahu* and *Taranaki* reports, we need not examine them in detail here.[2]

Perpetual leases were first provided for in the Westland and Nelson Native Reserves Act 1887. In place of the 30-year and 63-year terms, a new standard term of 21 years for Westland and Nelson reserves was substituted by section 3. In all leases of these reserves, perpetual right of renewal was granted to the lessee by section 14, with the rent to be reviewed at the end of every 21-year term. The Tribunal in its *Ngai Tahu Report 1991* noted that 'Effectively the land was removed from the control, use, or occupancy of the Maori owners'.[3]

The Ngai Tahu Tribunal upheld a claim that the Crown failed to protect Ngai Tahu by passing legislation imposing perpetual leases without the consent of Ngai Tahu and without provision to protect them from economic loss.[4] As Crown historian Dr Donald Loveridge stated, 'After a thorough examination of these events, the Ngai Tahu Tribunal concluded that the perpetual lease provisions in the 1887 legislation "virtually came out of the blue", as far as the owners of the Westland reserves were concerned'.[5]

The West Coast Settlement Reserves Act 1892 empowered the Public Trustee, at his discretion, to grant perpetual leases of Taranaki reserves. A claimant witness, Neville Gilmore, noted that two public meetings, one with the Maori owners and one with the lessees, were held in Patea in January 1892. The Premier, John Ballance, asked Maori if they were agreeable to fresh leases being issued for the reserves. Ngarangi, speaking on behalf of the assembled owners, said that they opposed fresh leases being issued and requested the return of their land.[6] Dr Loveridge confirmed that, as with the perpetually renewable leasing provisions of the earlier Westland and Nelson Reserves Act 1887, it appeared that the provisions in the 1892 Act also 'virtually came out of the blue' as far as the Maori owners were concerned. He added that such tenures 'were not put to the owners as a possible alternative in January 1892, when Ballance met with them personally'. Dr Loveridge noted that it seems certain that perpetual leases would have been rejected by the owners.[7]

The Tribunal in its *Taranaki Report* noted that, by the terms of the Treaty, 'Maori were solemnly guaranteed not merely the ownership of their lands but the control and possession of them. Emphasis is given to this position when the English and Maori texts of article 2 are

2. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Booker and Friend Ltd, 1991), vol 3, ch 14; Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), pp 257–276
3. Waitangi Tribunal, *The Ngai Tahu Report 1991*, vol 3, p 746
4. Ibid, pp 753–754, 788–789
5. Document C2, pp 29–30 (quoting Waitangi Tribunal, *The Ngai Tahu Report 1991*, vol 3, p 776)
6. Document A11, pp 77–78
7. Document C2, p 58

read concurrently.' It expressed the preliminary opinion that, among other matters, the legislative provisions for perpetual leases were contrary to the Treaty's terms and principles.[8]

### 16.2.2 Perpetual leasing of Wellington tenths and Palmerston North reserves

The Native Reserves Act Amendment Act 1895 extended the leasing powers of the Public Trustee where land vested in him under the Native Reserves Act 1882 was subject to a lease for a term of more than 14 years, without any right of renewal or valuation for improvements. The trustee was authorised by sections 6 and 7 of the 1895 Act, at his discretion, to grant a new perpetually renewable lease of such land as from the date of the expiry of the existing lease. The term of the new lease was to be 21 years, and rent was set at 5 per cent of the value of the land, including improvements.

However, it appears that doubts arose as to whether the 1895 Act was intended to apply to the Wellington tenths, and a further Native Reserves Act Amendment Act was passed in 1896 to clarify the position. Section 2 provided that all the Wellington urban and rural tenths listed in a schedule to the Act were deemed to have been vested in the Public Trustee under section 8 of the Native Reserves Act 1882. However, no mention was made of the Palmerston North reserves.

It is not known how many of the Wellington tenths' leases were converted to perpetual leases before further amending legislation was passed in 1917, although it is known that Pakuratahi sections 4 and 7 were so converted in 1906.[9] It appears that the Public Trustee was not authorised under the 1895 and 1896 Acts to grant perpetual leases of urban reserves leased under the 1882 Act for building purposes. The perpetual leasing provisions of the 1895 Act applied only to land which was leased under the Native Reserves Act 1882 without any right of renewal. As noted above, land leased under the 1882 Act for building purposes was subject to renewable leases (albeit for a maximum of 63 years) and therefore did not come under the provisions of the 1895 Act. As a result, further legislation was needed to bring most of the urban tenths and Palmerston North reserves under the perpetual leasing regime. This was done by making the Public Trustee a leasing authority under the Public Bodies' Leases Act 1908, which allowed leasing authorities to lease land for terms of up to 21 years, with perpetual rights of renewal.[10]

The position of the Palmerston North reserves was clarified by the Native Land Claims Adjustment Act 1913. Section 18 deemed the Public Trustee to be a leasing authority under the Public Bodies' Leases Act 1908 in respect of the Palmerston North reserves containing 71 acres 1 rood which were vested in the Public Trustee.[11] The effect of this was to empower the

8. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, p 273
9. Document I11, p 69
10. Section 5 of the Public Bodies' Leases Act 1908 (doc A21, pp 131–132)
11. Document A21, p 144

Public Trustee to convert existing leases for Palmerston North reserves to perpetual leases. The basis of conversion was the payment by the lessee of the reversionary interest of the lesssor in the improvements.[12]

The Native Land Amendment and Native Land Claims Adjustment Act 1917 closed yet another possible gap in respect of the remaining 36 acres 1 rood 13 perches of Wellington urban tenths. Section 24 deemed the Public Trustee to be a leasing authority under the Public Bodies' Leases Act 1908 in respect of those tenths. Accordingly, the trustee was authorised to convert Wellington urban tenths to the same perpetual leasing regime. Rural tenths were not affected by this legislation, but these could already be leased on perpetual terms under the Native Reserves Act Amendment Act 1895. The urban tenths were gradually converted to perpetual leases as the term of each old lease expired. We have not been able to trace this process, but Native Trust Office official Roland Jellicoe reported in 1929 that all the Wellington tenths were leased for terms of 21 years, with perpetual right of renewal.[13]

A report by researcher Kieran Schmidt demonstrates that 'The effect of the long term leases sometimes meant a sharp rise in rentals when they were renewed at expiry'. Thus, the rents for some 37 North Island (Wellington) tenths leases which expired between 1914 and 1916 increased on renewal by 204 per cent.[14] As Schmidt notes, these sharp rises indicate the extent of the increase in land value during the 21-year lease term and imply that 'the overall return for Beneficial Owners was less for long term leases'.[15]

Land tax was also a burden on the tenths beneficiaries. Schmidt reports that under the Finance Act 1917 the land tax payable for the North Island tenths took up 53 per cent (£986) of the total rental (£1859). Land tax was based on valuations made every five to six years, and the tax increased accordingly while the rents stayed the same during the 21-year term. This burden was exacerbated by the fact that, no matter how small the beneficial owners' interests, they still had to pay tax on the whole block and the £500 exemption applied to them as a group. If the exemption had been allowed for each individual owner, Schmidt notes that very few would have had to pay tax, since few had individual interests worth more than £500. The Public Trustee drafted Bills to address this anomaly in 1906, 1908, and 1918, but they were not proceeded with owing to the strong opposition of the commissioner of taxes and treasury.[16] However, the Native Trustee was successful in promoting a limitation on land tax. The Land and Income Tax Amendment Act 1922 set a maximum level of 25 per cent, and further efforts by the Native Trustee saw the maximum level reduced to 10 per cent by 1927.[17]

12. 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, p 56
13. R L Jellicoe, 'Report on Native Reserves in Wellington and Nelson under the Control of the Native Trustee', 26 March 1929, AJHR, 1929, G-1, p 42 (doc A24, p 310)
14. The North Island tenths account did not include all of the remaining Wellington tenths: Ohariu 12 and 13, Pakuratahi 3, and Polhill Gully (Ohiro 19 and 21) had separate accounts.
15. Document G4, pp 168–169, fig 3.1c
16. Ibid, p 170
17. Ibid, p 178, fig 3.2c

It appears that rental income from the Maori reserves during the period 1921 to 1933 was constant until the Depression brought reductions. As at November 1932, the proportion of rental income to unimproved value was 3.28 per cent for the North Island tenths and 3.69 per cent for the Palmerston North reserves. These figures were below the 4 per cent for urban land specified in the legislation. Schmidt notes that Depression measures such as the National Expenditure Adjustment Act 1932 exacerbated the situation.[18] That Act required a 20 per cent reduction in the rents payable under contracts in force at the passing of the Act. The rents so reduced were not to be increased except by leave of a competent court (ss 31–32).[19] In the absence of any successful application to the court, the reduced rent would remain for up to 21 years, depending on when it was fixed prior to 1932.

The significant disadvantages to beneficial owners of Maori reserved land leased with a right of perpetual renewal are evident from the foregoing discussion.

### 16.2.3 The Maori Reserved Land Act 1955 and the Sheehan commission

The Sheehan commission on Maori reserved land discussed the perpetual leasing regime in some detail in its 1975 report. As the commission noted, the Maori Reserved Land Act 1955 was passed 'with the object of applying as far as possible the same general rules to all the reserved lands referred to in the Act'.[20] The lands falling within its ambit included the Wellington tenths and Palmerston North reserves administered under the Native Reserves Act 1882, and the Westland, Nelson, and Taranaki reserves (s 3).

Part III of the Act conferred wide leasing powers on the Maori Trustee, including the power to convert term leases to leases with a right of renewal in perpetuity. Rents for such leases of urban lands were fixed at 4 per cent of the unimproved value, as certified by the Valuer-General, and at 5 per cent for leases of rural lands.[21] Perpetual leases of Maori reserves under the Act were for terms of 21 years.

The commission summed up the position in 1975 of beneficial owners of reserves subject to the perpetual leasing regime as follows:

> The beneficial owners are not a contracting party and their role is a completely passive one. They are treated as children or persons under disability. They are not well informed upon the law or the facts concerning the lands in which they have an interest. They are not adequately consulted or indeed capable of being adequately consulted even when major changes in the law or the leases which affect their interests are contemplated. Even on occasions when they have expressed views in these matters their representations have not carried weight.

18. Ibid, p 177, fig 3.2b
19. These provisions remain in force.
20. 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, p 57
21. Sections 30–34 of the Maori Reserved Land Act 1955

. . . . .

> The equilibrium established by the tensions between Parliament and the lessees was finally expressed in the Maori Reserved Land Act 1955, but this equilibrium has in recent years been seriously disturbed by the concerns and demands of the beneficial owners who are no longer willing to play a passive part in the administration and control of these lands.
>
> The beneficial owners want to be fully informed and responsibly involved. They are concerned at what they regard as the inadequate income which these lands bring in. They want the right to sell their interests if they so decide that such is the correct thing for them to do. They feel that many aspects of these leases, especially as regards the perpetual right of renewal, the method of rent fixation, and the frequency of rent reviews, are contrary to their interests and these views have been expressed frequently and forcefully before the Commission.[22]

The commission considered that 'the aims of our forebears in granting perpetually renewable leases were entirely good' and that the intention had been to encourage lessees, particularly of rural lands, to improve Maori reserved land. But it considered that a terminating lease for a long term of years offered adequate security for the maximum development of urban lands, and said it had received convincing evidence on this point. The commission also considered that perpetual leases were by no means necessary to 'secure the maximal use and development of lands, even rural lands'.[23]

While the commission was aware of the need for the Maori lessors to 'escape from the restrictions and essential inequities which arise from the right of perpetual renewal provided for in the present lease', it could find no satisfactory way of escape. It would not recommend that contracts be 'arbitrarily altered by legislation'. This would be 'completely indefensible and would certainly involve the payment of very substantial compensation' to the lessees.[24] In view of this, the commission's various recommendations, while designed to ameliorate some of the adverse conditions of the statutory provisions governing the terms and conditions of perpetual leases, fell short of proposing that the right of perpetual renewal of such leases should be abolished.

## 16.3 Claimants' Grievances Concerning the Perpetual Leasing Regime

### 16.3.1 Imposition of the perpetual leasing regime

We discuss first the claim that, in breach of Treaty principles, legislation was passed rendering the tenths reserves subject to the perpetual leasing regime without prior consultation with the Maori beneficial owners. Two statutes we have discussed above – namely, the Native

22. 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, p 62
23. Ibid, pp 64–65
24. Ibid, p 68

Reserves Act Amendment Act 1896 and the Native Land Amendment and Native Land Claims Adjustment Act 1917 – are specifically referred to by the Wai 145 claimants.[25]

Claimant counsel submitted that Maori tenths beneficiaries were never consulted over the imposition of the perpetual leasing provisions and never gave them their approval.[26] He cited Dr Loveridge's evidence that he was not aware of any consultation with the beneficial owners of the Wellington tenths about the proposed legislation and had not seen any statement in any material that consultation took place before the new regime was imposed.[27]

Dr Loveridge notes that parliamentary discussion of the possible impact of the 1895 legislation 'on the Maori owners of the reserves affected was conspicuous by its absence'. When the Bill was before the House, Sir Robert Stout proposed that the clause enabling the Public Trustee to renew leases be modified to require 'the consent of the Native owners' before a new lease could be issued. Although this proposal was supported by all four Maori members, it was defeated by 29 votes to 28, after which the Bill was passed.[28]

Crown counsel noted that, with the exception of one remark by Premier Richard Seddon, there was no discussion of the possible impact of the 1895 legislation on the Maori owners.[29] Mr Green for the claimants responded that it seemed remarkable that this legislation, 'which was to have such a marked and detrimental effect on Maori, could be passed with little comment on its possible impact on Maori'.[30] We agree.

Crown counsel conceded that, as with the Westland and Nelson and west coast legislation, it was possible that the extension of the perpetual leasing power to the Wellington reserves 'virtually came out of the blue' as far as the owners of the reserves were concerned. However, counsel submitted that the Wellington reserves were unlike those in Taranaki and Westland, in that the Wellington reserves had, since the early 1840s, been intended to be endowment lands, not lands for Maori to live on. The apparent absence of meaningful consultation with Maori should be viewed in this light, according to Crown counsel.[31] In fact, we believe that no consultation, meaningful or other, took place with Maori in respect of the Wellington tenths and Palmerston North reserves. We accept Mr Green's response to the Crown that the introduction of the perpetual leases regime effected such a dramatic metamorphosis that consultation was imperative.[32]

We have discussed the provisions of the the Native Land Amendment and Native Land Claims Adjustment Act 1917 in section 16.2.2. This Act made no reference to the rural tenths, but it authorised the Public Trustee to convert the leases of the remaining 36 urban tenths reserves in Wellington to perpetual leases. Crown counsel noted that the 'Parliamentary

25. Claim 1.2(d), paras 14.5, 15.1; doc 04, pp 410–419; doc 05, pp 454–458
26. Document 04, p 417
27. Cross-examination of Don Loveridge, 3 November 1994 (see doc c7, p 230)
28. Document c2, p 72
29. Document p4, p 13
30. Document q11, p 81
31. Document p4, p 14
32. Document q11, p 81

debate is silent on the 1917 measure'.[33] As to consultation, the Crown conceded that there appears to be no evidence of consultation with Wellington Maori over the proposal to introduce perpetual leases under the 1895–96 and 1917 Acts. Accordingly, the Crown accepts that, in deciding to extend perpetually renewable leases to Wellington lands, there was a failure to consult meaningfully with the beneficial owners of the land.[34]

The Legislature passed four statutes in 1895, 1896, 1913, and 1917 to ensure that a perpetual leasing regime was imposed on the beneficial owners of the Wellington tenths and Palmerston North reserves without their consent. The Crown failed on each occasion to ensure that the beneficial owners or their representatives were consulted and that the effect of the legislation was explained to them. The need for this was, in our opinion, incontrovertible, because the practical effect of the leasing regime was to remove forever the possibility of the beneficial owners developing the land or, should they wish, disposing of it free of the encumbrance of a lease in perpetuity. In addition, as the Ngai Tahu Tribunal noted, there was no effective protection for the owners against economic loss.

### 16.3.2 Tribunal finding of Treaty breach

The Tribunal finds that the Crown, in failing to ensure that the beneficial owners of the Wellington tenths and Palmerston North reserves were consulted before the passage of legislation which imposed, without their consent, a perpetual leasing regime on their reserves, acted in breach of its Treaty duty to recognise and protect the rangatiratanga of those owners, and failed to meet its Treaty obligation to act reasonably towards them. As a consequence, the beneficial owners have been prejudicially affected by such failure.

### 16.3.3 Economic effects of perpetual leasing

We now consider the Wellington Tenths Trust's claim that the perpetually renewable leases limited the owners' opportunities to make a return on capital growth, thus limiting their ability to develop the land, and that such limitations were in breach of Treaty principles.[35]

Counsel for the claimants submitted that with the perpetual leasing regime the Wellington tenths' beneficial owners were doomed to be locked out of economic rentals in times of normal growth, and that only since the passing of the Maori Reserved Land Amendment Act 1997 has this been partially addressed. He stressed that, whatever advantage may have ensued as a result of the lessees obtaining security of tenure, this ignored 'the simple fact that this legislation for ever alienated these lands from Maori'.[36] The inevitable consequence of this mandatory exclusion of the beneficial owners from their land, counsel submitted, was

33. Document P4, p 16
34. Ibid, p 26
35. Claim 1.2(d), para 14.6
36. Document O4, p 435

that they were deprived of the opportunity to develop land management skills by assuming responsibility for their land.[37] He claimed that this constituted a deliberate and sustained violation of the Crown's duty both to guarantee and to protect rangatiratanga under article 2 of the Treaty.[38]

Crown counsel submitted that perpetual leasing was and is a reasonable investment form. She cited the Sheehan commission as observing that 'it is even doubtful if less secure tenure would have encouraged the development of rural lands at all'.[39] However, as Mr Green pointed out, the commission referred to 'virgin', not 'rural', lands in this quotation.[40] Mr Green noted that, far from suggesting that perpetual leases were appropriate for all rural lands, the commission went on to say that 'To secure the maximal use and development of lands, *even rural lands*, the security offered by the perpetual right of renewal *is by no means necessary*' (emphasis added by claimant counsel).[41] The commission also stated that there was no doubt that 'a terminating lease for a long term of years offers adequate security for the maximal development possible of urban lands'.[42]

Crown counsel also submitted that, for endowment lands, 'a low risk, long term form of investment is more appropriate than more active, higher risk investments' and that perpetual leases are relatively low risk, are less capital intensive, and require less revenue retention. She contended that the Wellington tenths were intended to be endowment lands, and that it was never intended that Maori would live on them.[43] However, Mr Green noted that Maori were originally encouraged to move to their reserves, although the tenths did later become trust lands to be leased for the benefit of Maori. He contested the view that perpetual leasing was a particularly sound form of investment for endowment lands, arguing that such leases 'alienated Maori from their land and attracted nothing more than peppercorn rentals, whilst the leaseholds became so valuable that they sold at freehold rates'.[44]

The Tribunal notes that, while perpetual leases might be a sound investment for charities, this would be so only if there were appropriate provisions for relatively frequent periodic rent reviews (say, every five years) to take account of inflation or other economic circumstances. In the case of Maori reserved land, the Legislature has very belatedly recognised that such leases are inappropriate.

Crown counsel sought to rely on what was seen as a factual distinction between the respective reserves considered in the Tribunal's *Ngai Tahu* and *Taranaki* reports.[45] Counsel noted in particular that the lands reserved to Ngai Tahu in the Arahura (West Coast) block fell into

37. Document O5, p 643
38. Document O4, p 438
39. Document P4, p 16. Both Crown counsel and Mr Green omitted the opening words of the sentence, which were 'In the rural lands'. We do not consider that this invalidates the point made by Mr Green.
40. Document Q11, p 82
41. 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, p 65
42. Ibid, p 64
43. Document P4, pp 17–18
44. Document Q11, p 83
45. Document P4, pp 23–26

two categories. Some 6724 acres were reserved for individual allotments (schedule A lands) and 3500 acres were reserved for religious, social, and moral purposes (schedule B lands). The schedule A lands were intended for the owners to live on, while schedule B lands were to be leased, with the rental income to be used for the benefit of Maori. All of the schedule B lands were brought under the New Zealand Native Reserves Act 1856, as were 3498 acres of the 6724 acres of schedule A lands.[46]

Included in these schedule A lands brought under the 1856 Act was the 500-acre Mawhera 31 block. Although this land had been reserved for individual allotments for Maori to live on, the area soon developed as the commercial part of the town of Greymouth. Evidence was given to the Ngai Tahu Tribunal that Maori saw the economic advantage that would accrue following any Pakeha settlement there. By the mid-1860s, the reserve had acquired considerable commercial value, and merchants leased parts of the reserve directly from the Maori owners. By July 1865, 4000 feet of the Mawhera River frontage was occupied, 37 per cent of it leased from Ngai Tahu.[47] This reserve was administered by the Public Trustee from 1882, and in 1887 the Mawhera Greymouth town leases became subject to the perpetual leases regime. Much of the central business district of Greymouth is built on Maori reserved land.[48] The Tribunal sees no significant distinction between the Mawhera reserve perpetual leases, which the Ngai Tahu Tribunal found to be contrary to Treaty principles, and the perpetual leasing of the Wellington tenths reserves.[49]

Notwithstanding Crown counsel's defence of the imposition of the perpetual leasing regime, the Crown very fairly accepts that perpetual leases under the terms prescribed by the Maori Reserved Land Act 1955 have been less advantageous to the lessor than other ground leases structured on an open market basis would have been. It attributed this to the combination of prescribed terms and the rampant effect of inflation during the 1980s and 1990s. Crown counsel noted that the Crown has accepted that, over time, the provisions of the Maori Reserved Land Act disadvantaged Maori owners in that their ability to receive a fair return on their assets was constrained.[50]

The Tribunal would observe that the disadvantages of the perpetual leasing regime were not confined to the high inflation of the 1980s and early 1990s. Inflation occurred earlier than 1980. We have noted above other adverse economic effects from 1914 on of various legislative measures. We accept the finding of the Sheehan commission, noted at section 16.2.3, that the perpetual leases were by no means necessary to 'secure the maximal use and development of lands, even rural lands'.[51]

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46. Waitangi Tribunal, *The Ngai Tahu Report 1991*, vol 3, p 736
47. Ibid, pp 733–734
48. Te Puni Kokiri, *A Guide to the Maori Reserved Land Amendment Act 1997*, (Wellington: Te Puni Kokiri, 1997) (doc N3(g), p 1247)
49. Waitangi Tribunal, *The Ngai Tahu Report 1991*, vol 3, pp 788–789
50. Document P4, p 19
51. 'Report of Commission of Inquiry into Maori Reserved Land', 1975, AJHR, 1975, H-3, p 65

### 16.3.4 Tribunal finding of Treaty breach

The Tribunal finds that the various legislative provisions imposing a perpetual leasing regime on the Wellington tenths and Palmerston North reserves were contrary to the principles of the Treaty which require the Crown to recognise and protect the rangatiratanga of Wellington tenths and Palmerston North reserves beneficial owners in their land. As a consequence, the beneficial owners have been prejudicially affected by such legislation, which prevented any rise in the fixed rents to reflect increases in land values during the 21-year currency of the leases and had the effect of permanently alienating Maori from their land, thereby depriving them of the opportunity to derive adequate benefit from the land and to develop land management skills.

### 16.3.5 Fixed-percentage rental formula

The Wai 145 claimants also claim that the Crown acted contrary to Treaty principles in establishing a fixed-percentage rental system which led to an erosion of the rent generated as a proportion of the land value over the term of the 21-year perpetual leases.[52]

Section 34 of the Maori Reserved Land Act 1955 instituted a fixed-percentage formula setting the rental of urban land at 4 per cent and of rural land at 5 per cent of the unimproved value of such land, as assessed by a Government valuation. Crown counsel noted, from the evidence of Crown historian Bob Hayes, various reasons advanced by the Maori Trustee in support of a fixed-percentage formula, which included:

- a desire to eliminate inconsistent outcomes in setting rent under the then existing regimes;
- a concern that arbiters tended to favour the tenant in arriving at a 'fair rent'; and
- the preference of the 1948 Myers commission on the west coast settlement reserves for a fixed-percentage formula.[53]

In submissions on whether the adoption of the fixed-percentage formula for rent setting was a breach of Treaty principles, Crown counsel stated that:

- aside from the opportunity to comment on the draft Bill, there is no evidence of separate consultation with the Wellington tenths' beneficial owners occurring whereas, in today's environment, such consultation would undoubtedly have taken place;
- with hindsight, it may be apparent that such a formula is risky, given the unpredictable nature of the market, but in the 1950s the fixed-percentage formula did not seem inherently risky, and the prescribed rentals were consistent with market rates; and
- the Sheehan commission in 1975 considered that a fixed-percentage formula might be appropriate for certain classes of land. However, as counsel for both the claimants and

52. Claim 1.2(d), para 15.4; doc O5, pp 466–469
53. Document M2, pp 7–12; doc P4, pp 27–28

the Crown noted, the Sheehan commission went on to say that, if such a formula were to be used, it should be coupled with five-yearly rent reviews.[54]

The Crown acknowledges that the rent-fixing provisions of the Maori Reserved Land Act 1955 have over time disadvantaged Maori owners in that their ability to receive a fair return on their assets was constrained.[55]

It is apparent that the problem with a fixed-percentage formula for the rent payable throughout a period as lengthy as 21 years is that it gives no assurance that the lessor will receive a fair return on the land throughout the term of the lease. Nor is there any way in which the lessor can recoup the loss of a fair return when the lease falls due for renewal. The longer the period a fixed rent remains in force, the greater any loss will be to the lessor. In the more volatile conditions which have obtained from time to time since Maori reserves became subject to the perpetual lease regime, Maori have been adversely affected by their inability to have rents reviewed on a timely basis.[56] We agree with the Sheehan commission that five-yearly rent reviews would be essential to ensure that such a system did not disadvantage the lessor.

### 16.3.6 Tribunal finding of Treaty breach

The Tribunal finds that the provisions of the Maori Reserved Land Act 1955 imposing in perpetually renewable leases for 21-year terms a uniform fixed-percentage formula for the rental of urban land of 4 per cent and of rural land of 5 per cent of the unimproved value of such land, without the consent of the beneficial owners of the Wellington tenths and Palmerston North reserves, was contrary to the principles of the Treaty requiring the Crown to recognise and protect the rangatiratanga of the beneficial owners in their land. As a consequence, they have been prejudicially affected by such legislation.

## 16.4 The Maori Reserved Land Amendment Act 1997

As we have seen, although the Sheehan commission made various recommendations designed to alleviate the adverse provisions of the perpetual leasing regime, it stopped short of recommending the phasing out of perpetual leases. No attempt was made by successive governments to grasp the nettle of rectifying the injustice inherent in the regime until the Ngai Tahu Tribunal reported in 1991. After a detailed consideration of the Greymouth and other West Coast perpetual leases, the Tribunal recommended that over two 21-year lease periods

54. Document P4, p 29
55. Ibid
56. See, for example, the increase in annual rental from $800 to $7400 on the renewal of the lease to Calvary Hospital in 1975: 'Report of Commission of Inquiry into Maori Reserved Land', 1975, AJHR, 1975, H-3, p 318.

the perpetual leases should be converted to term leases. It also recommended that there should be an immediate change to the rents from a fixed-percentage rental basis to one of a freely negotiated rental and to the rental review period from 21 years to a period of five years for commercial and rural land and seven years in respect of private residential land. Lastly, the Tribunal recommended that the lessees be reimbursed by the Crown for any loss as a result of the recommended legislative changes to the Maori Reserved Land Act 1955.[57]

In 1991, a ministerial review team was appointed in response to the *Ngai Tahu Report* and the 1975 Sheehan commission report. The review team's report was published in 1993 and was followed by a report from a reserved lands panel in January 1994. It in turn was followed in 1995 by a consultative working group of lessor and lessee representatives which was appointed to comment on the technical issues associated with the implementation of proposed legislative reforms. All these inquiries involved extensive consultations with owners, lessees, legal and valuation professionals, and the general public. Early in 1996, a Crown negotiator sought to gain the agreement of both lessees and landowners to legislative changes, but final agreement was not reached with the parties. Nevertheless, in 1996 the Government introduced into Parliament the Maori Reserved Land Amendment Bill.[58] It was passed on 10 December 1997 and came into force on 1 January 1998.

The Act provided for a move to market rentals of Maori reserved land.[59] After a three-year delay, market rentals were to be phased in over four years, beginning in 2001. Then, rents were to be reviewed every seven years, unless the parties negotiated an alternative agreement. Lessees retained a perpetual right of renewal during their lifetimes and could transfer this to spouses or children. Owners had a first right of refusal at market prices should a lessee wish to sell a lease; and lessees had such a right if owners wished to sell their land. The owners were to be given some $29 million compensation, which comprised $21 million for the delay in the move to market rents and right-of-first-refusal provisions; $2 million for increased transaction costs; and a $6 million lease purchase fund (ss 13, 25, 27). The compensation was to be exempt from income tax and goods and services tax. Meanwhile, the lessees were to receive some $37 million, mainly as compensation for the move to market rentals.

There was an important promise in schedule 5 to the Act whereby the then Government promised to address the issue of past losses to Maori arising from the fact that they had not been receiving fair market rents for their land. Though schedule 5 was not binding on another Government, we note that the Labour Opposition supported the 1997 Bill during its passage through Parliament. In September 2001, the Government announced that a negotiator had been appointed to begin discussions with the owners of Maori reserved land about addressing the issue of past rental losses.[60] In May 2002, the Government announced that

57. Waitangi Tribunal, *The Ngai Tahu Report 1991*, vol 3, p 793

58. Document P4, pp 78–79

59. For a plain language guide to the 1997 Act, see Te Puni Kokiri, *A Guide to the Maori Reserved Land Amendment Act 1997* (doc N3(g), pp 1244–1261).

60. *Press*, 22 September 2001

agreement had been reached with representatives of the owners of Maori reserved land to a one-off compensation payment for past rental losses. A total of $47.5 million is to be divided among the various organisations representing those owners, including the Wellington Tenths Trust and the Palmerston North Reserves Trust.

## 16.5 Claimant Grievances Concerning the Maori Reserved Land Amendment Act 1997

In their fourth amended statement of claim, the Wai 145 claimants make six separate allegations of Treaty breaches by the Crown in respect of the Maori Reserved Land Amendment Act 1997. In a brief submission, their counsel relied substantially on selected written submissions made by the Organisation of Maori Authorities in relation to the Bill.[61] This organisation is a body representing owners of Maori reserved land, including the Wellington Tenths Trust and the Palmerston North Reserves Trust.

### 16.5.1 Failure to provide for a termination point for perpetual leases

The claimants allege that 'The Crown compelled Maori to accept continuation of Reserved Land leases under a statutory regime without a termination point of 21 years from the next renewal date following enactment'.[62]

This breach is not further particularised or supported in the submissions of claimant counsel except for the statement that the 1997 Act, in effect, allows for these leases to run on for a period which may exceed 100 years.[63] As Crown counsel noted, it is not clear whether the subject of the complaint is the alleged 'compelling' of Maori to accept continuation of reserved land leases without a termination point or the fact that the Act does not provide for a termination point.[64] We assume the latter.

Crown counsel submitted that, in the absence of a termination point, it is anticipated that the right of first refusal (at market price) should a lessee wish to sell will achieve the same effect as a termination point. However, this right does not apply if an existing lessee sells or transfers the lease to a member of their immediate family (spouse, child, or children).[65] Crown counsel noted that a Te Puni Kokiri report to a parliamentary select committee on the Maori Reserved Land Amendment Bill stated that technically it is possible that owners might be prevented from obtaining access to their lands for over 100 years but that such a situation was likely to be an exceptional case. According to the report, 'It appears that most

61. Document 05, pp 651–655
62. Claim 1.2(d), para 14.7
63. Document 05, p 651
64. Document P4, p 89
65. Ibid, p 90

leases are placed for sale at least once every 21 years or so and this provides the opportunity for owners to purchase a lease'.[66]

### 16.5.2 Allegations of delay

The claimants state that the Crown delayed their Tribunal hearings, and the enactment of the Maori Reserved Land Amendment Act 1997, thereby causing them further loss and costs.[67]

As for the delays in Tribunal hearings, valid reasons existed, and the Tribunal is not satisfied that the Crown should be held responsible for them.[68]

Crown counsel responded to the claim that it delayed the enactment of the 1997 Act by accepting that Maori have for a number of years been receiving below-market rentals and that the issue of reserved land leases has taken a long time to resolve. However, the Crown pointed out that the issue was complex and required extensive consultation and negotiation.[69] Counsel elaborated on this response in her closing submissions.[70]

As Crown counsel noted, 22 years elapsed between the 1975 Sheehan report and the passage of the 1997 Act.[71] As discussed above, the Sheehan report stopped short of recommending that the perpetual leases should be abolished, and it appears that the Tribunal's *Ngai Tahu Report 1991* acted as a catalyst for action. The Tribunal report was followed by three further investigations or inquiries between 1991 and 1995 (see s16.4), all of which involved extensive consultation with owners, lessees, and others. Crown-sponsored negotiations between lessees and landowners about proposed legislative changes to the reserved land regime took place in 1996, and the Maori Reserved Land Amendment Bill was introduced into Parliament in August 1996. It was finally enacted on 10 December 1997.

It is apparent that the issues involved were both highly political and tremendously complex. The 1997 Act reflects these factors. While the delay was unfortunate, the Crown has recognised that Maori owners have been prejudiced by below-market rentals, and it has agreed to compensate the owners for their losses.

### 16.5.3 Crown and Crown-entity leases

The claimants' third grievance concerning the Maori Reserved Land Amendment Act 1997 is that the Crown treated itself as being of the same status as other leaseholders under the Act

66. Te Puni Kokiri report on the Maori Reserved Land Amendment Bill 1996 to the justice and law reform select committee, 30 September 1997 (doc N3(g), p 1206)
67. Claim 1.2(d), para 14.8
68. Document P4, p 80; see also the history of this inquiry, outlined in section 1.2 above.
69. Document Q1, p 45
70. Document P4, pp 77–81
71. Ibid, pp 77–79

in terms of the terminating provisions, thereby prejudicing the interests of Maori.[72] The claimants believe that the legislation should have provided for the immediate termination of the perpetual right of renewal and an immediate move to market rents in the case of leases held by the Crown or Crown entities.[73]

Crown counsel submitted that, although no such provision was made in the 1997 Act, in practice both these shifts have largely occurred voluntarily.[74] In 1993, the Reserved Lands Panel found that most Crown agencies with Maori reserved land leases had begun to negotiate new forms of leases.[75]

Crown counsel stated that, in respect of leases subject to the Wai 145 claim, there are no Crown or Crown entity leases in Palmerston North. In Wellington, the details of Crown or Crown entity leases are as follows:

> *South Wellington Intermediate School, 145 Rintoul Street, Wellington*. Lessee – Minister of Education. The terms of the lease include a perpetual right of renewal, rent of $91,000 per annum (paid since 21 April 1995), and five-yearly rent reviews.
> *11 Pipitea Street, Wellington*. Lessee – Her Majesty the Queen (since December 1996). The terms of the lease include a perpetual right of renewal, and rent of $26,000 per annum.[76]

(We note that the leasehold of the Pipitea Street property is being held by the Crown for possible future use in Treaty settlements.)

The Tribunal agrees with Crown counsel's submission that, in light of the foregoing, this claim has no relevance to the Palmerston North Reserves Trust and is of little practical relevance to the Wellington Tenths Trust. We refer to this further in section 16.6.

### 16.5.4 Failure to compensate Maori lessors for past losses

Another claimant grievance concerning the 1997 Act is the Crown's failure to compensate lessors for the loss of rents caused by the statutory imposition of 21-year rent reviews.[77]

Crown counsel acknowledged that the 1997 Act does not provide redress to Maori for past losses. She stated that, during its consideration of the issue in the 1990s, the Crown consistently maintained the position that the amendments to the Maori Reserved Land Act 1955 would not address the issue of past losses. Crown counsel stressed that the principal focus of the 1997 Act is on dealing with the future of the Maori reserved land leases. She added that, as schedule 5 to the 1997 Act states, past losses will be dealt with as part of the Government's

72. Claim 1.2(d), para 14.9
73. Document O5, pp 652–653
74. Document P4, p 91
75. Document B7, p 35
76. Document P4, pp 91–92
77. Claim 1.2(d), para 14.10

consideration of historical grievances of Maori.[78] As noted above, in May 2002 the Government announced an agreement to make a one-off compensation payment for past losses.

### 16.5.5 Alleged Crown obligations under schedule 5 to the 1997 Act

An additional claim relating to failure to compensate Maori for past losses is that the Crown has made no payments to Maori in recognition of the schedule 5 obligations in the Maori Reserved Land Amendment Act 1997.[79]

Schedule 5 provides that:

> The present Government recognises that Maori for a number of years have not been obtaining fair market rents for their land. This is an issue that has to be addressed by the present Government in the future. It is an issue that will be dealt with by the present Government as part of its consideration of historical grievances.

Schedule 5 was added to the Maori Reserved Land Amendment Act by supplementary order paper. All 120 members of Parliament voted in favour of it. It is not linked to any section of the Act itself but stands on its own.[80]

Crown counsel stated that the Crown accepts that it has a continuing obligation to meet the requirements of schedule 5.[81] However, she submitted that the schedule does not impose a legal obligation on the Crown to provide compensation for past losses. Counsel invoked section 19 of the 1997 Act in support.[82] We agree with this submission. However, Crown counsel next submitted:

> Nor in the Crown's submission does it impose a non-legal obligation to actually provide redress for past losses. Rather, there is an acknowledgment that the issue of past losses will be 'addressed' and 'dealt with' in the context of consideration of historical grievances. Thus, the most that is imposed is an undertaking to consider and address the issue in this context.[83]

Not surprisingly, claimant counsel reacted strongly to this submission, characterising it as a 'Crown betrayal' and urging that the Crown 'not be allowed to shelter behind semantics'.[84]

78. Document P4, p 84
79. Claim 1.2(d), para 14.11
80. Ibid
81. Ibid, p 88
82. Section 19 (as amended by the Maori Reserved Land Amendment Act 1998) provides:

> **19. Compensation not otherwise payable**—(1) Except as provided in sections 13 to 16 and in sections 3 and 4 of the Maori Reserved Land Amendment Act 1998, no compensation is payable to a lessor or lessee of a lease to which this Act applies by reason of the enactment of this Act.

83. Document P4, p 88
84. Document Q11, p 90

The Tribunal expects the Crown to act honourably and in good faith in addressing the claimants' past losses. We note that the compensation payment announced in May 2002 is intended to honour the commitment made in schedule 5.

### 16.5.6 Ability to respond to buy-back provisions in the Act

Finally, the claimants allege that the Crown has undermined the lessor buy-back provisions in the Maori Reserved Land Amendment Act 1997 by failing to make payments to Maori in recognition of the schedule 5 obligations in the Act.[85]

Claimant counsel submitted that, by failing to make any schedule 5 payments, 'the Crown has denied claimants the ability to respond to offer-back opportunities'.[86] In response, Crown counsel first noted that the Wellington Tenths Trust and the Palmerston North Reserves Trust did receive some recompense under the Act via the compensation (s 13), solatium (s 25), and purchase fund (s 28) payments, as shown in the table below.[87]

| | Compensation and solatium | Purchase fund | Total |
|---|---|---|---|
| Wellington Tenths Trust | $1,138,970.85 | $361,590.02 | $1,500,560.87 |
| Palmerston North Reserves Trust | $1,002,080.51 | $348,820.71 | $1,350,901.22 |

Crown counsel next noted that there is little information before this Tribunal on the current financial position of the Wellington Tenths Trust and none on the financial position of the Palmerston North Reserves Trust. She said that it was difficult to assess the ability of the trusts to respond to right-of-first-refusal opportunities without this information.

Crown counsel's third point was that the Wellington Tenths Trust has indicated that it intends to sell virtually all its reserved land properties.[88] Claimant counsel strongly criticised this hearsay evidence, which he said was without foundation.[89]

## 16.6 Treaty Compliance of the 1997 Act

Claimant counsel concluded his submissions on the six grievances by submitting that Treaty breach findings are justified.[90]

85. Claim 1.2(d), para 14.12
86. Document o5, p 655
87. Document p4, p 93
88. Ibid (referring to an article in the *Evening Post*, 8 January 1998) (doc p4(a), p 52)
89. Document q11, pp 90–91
90. Document o5, p 655

Crown counsel strongly urged the Tribunal not to reconsider the terms of the Maori Reserved Land Amendment Act 1997. She stressed that the 1997 Act was the outcome of lengthy consultations and negotiations. It was, she submitted, the result of 'a common plea for finality', citing in support the 1993 Reserved Lands Panel, which found through extensive consultation with owners and lessees that all parties sought finality in order to bring about certainty. Counsel further submitted that the Organisation of Maori Authorities (representing *inter alia* the Wellington Tenths Trust) also sought finality. The organisation's submission to the select committee on the Maori Reserved Land Amendment Bill 1996 expressed the hope that the select committee would be the last of countless commissions, committees, petition-bearers, courts, tribunals, administrators, and legislators to consider the issue. Crown counsel advised that the 1997 Act was supported by 112 of the 120 members of Parliament and urged that the time for finality (with the exception of the issue of redress for past losses) had arrived.[91]

We recognise the force of Crown counsel's submissions. We are, however, left with two main concerns. The first relates to the failure of the Crown to make provision for the immediate termination of perpetual leases held by the Crown and Crown entities. No reasons were given by Crown counsel for the Crown making provision for the abolition of the perpetual leasing regime for all Maori reserved lands but not for such perpetual leases held by the Crown. While we can appreciate that the Crown may wish to have reasonable assurance of tenure of the South Wellington Intermediate School site in Rintoul Street, we are unaware of any compelling reason why the school site or the property at 11 Pipitea Street needs to continue to be leased in perpetuity to the Crown.

Although we refrain from making any Treaty breach finding on this grievance of the claimants', we consider that the Crown should be prepared to negotiate the early surrender, on appropriate terms, of the perpetual leases held on these two Wellington Tenths Trust properties.

Our second concern relates to the past financial losses of, and other prejudice to, the claimants arising out of the perpetual leasing regime. In the first part of this chapter, the Tribunal has found that the Crown has acted in breach of its Treaty duty in three respects (see ss 16.3.2, 16.3.4, 16.3.6). If the Crown were to accept an obligation to compensate the claimants for all historical losses and other prejudice arising from such breaches and if it were to negotiate the early surrender, on appropriate terms, of the perpetual leases held by it, the Tribunal would see no need for further amendments to the Maori reserved land legislation.

We welcome the Crown's announcement that it is to compensate the Wellington Tenths Trust and Palmerston North Reserves Trust for past rental losses. We understand that the settlement relates only to such losses, and does not extend to other Treaty breaches arising from the perpetual leasing regime.

91. Document P4, p 94 (citing doc B7, p 3; doc I5, p 3)

CHAPTER 17

# THE TAKING OF MAORI RESERVED LAND FOR PUBLIC PURPOSES

## 17.1 Introduction

In earlier chapters, we have considered claims involving land, still in Maori customary ownership, which was taken by the Crown. Chapter 6 looked at the land taken by the Crown for public reserves (including the town belt) in the early 1840s. Chapter 10 dealt with the 'remainder lands' in the Port Nicholson block not allocated to the company settlers, retained as Maori reserves, or taken as public reserves: some 120,626 acres. This land was initially granted to the New Zealand Company, then, after the collapse of the company, went to the Crown. As we have indicated, we believe that this was Maori land taken without Maori consent, and without the payment of compensation. In chapter 13, we considered the taking of some 25 acres of urban tenths reserves for military, religious, educational, and hospital purposes. We have also discussed public works takings of Palmerston North reserve land in chapter 15.

In this chapter, we consider other claims by the Wai 145 claimants in respect of land that was taken by the Crown from tenths or McCleverty-assigned reserves for a variety of public purposes, including roads and railways, housing, and river protection. In the case of the taking of Waiwhetu Pa land for river protection, we heard claims brought by both the Wai 145 and the Wai 442 claimants.

## 17.2 Discussion of Public Works Takings in Previous Tribunal Reports

In discussing various takings of reserved land, we are conscious of previous Tribunal reports which have made some valuable findings on Treaty breaches relating to public works takings.[1] We have also had the benefit of Cathy Marr's 1997 Rangahaua Whanui report, *Public Works Takings of Maori Land, 1840–1981*.

1. Most notably the *Ngati Rangiteaorere Claim Report 1990* (Wellington: Brooker and Friend Ltd, 1990); *Mohaka River Report 1992* (Wellington: Brooker and Friend Ltd, 1992); *Te Maunga Railways Land Report* (Wellington: Brooker's Ltd, 1994); *Ngai Tahu Ancillary Claims Report 1995* (Wellington: Brooker's Ltd, 1995); and *Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995).

There was no specific provision in the Treaty, in either the English or the Maori text, for the compulsory taking by the Crown of Maori land for public purposes. The English text of article 2 of the Treaty confirmed and guaranteed to Maori 'the full exclusive and undisturbed possession of their Lands . . . so long as it is their wish and desire to retain the same in their possession'. Maori yielded to the Crown a sole right of pre-emption to purchase such land 'as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon'. The Maori text was similar to this, although 'possession' was rendered as 'tino rangatiratanga', which is more properly translated as full chieftainship, thus giving Maori control as well as possession of their land. There is nothing here that sanctioned the compulsory taking of Maori land by the Crown without Maori approval. However, the compulsory taking of Maori land for public purposes has usually been justified by the Crown as an exercise of sovereignty under article 1 of the Treaty.

In previous reports, the Tribunal has held that the Crown is required to balance its article 1 authority to exercise kawanatanga or government with its article 2 responsibility to recognise Maori rangatiratanga and to protect various properties, including land. The exercise of Crown authority to make laws for the peace, order, and security of New Zealand was subject to an undertaking to protect Maori interests.[2] Nor could the Crown evade its obligations to Maori under the Treaty by conferring authority on another body, such as a local council, harbour board, or river board.[3] Although the Tribunal has been aware of the possibility that, given the article 2 guarantees, *all* compulsory takings were breaches of the Treaty, it has admitted that *some* takings might be justified. It has usually had in mind 'last resort' takings, or those necessary for 'peace, security and good order'.[4] An example of the latter is the taking of land at Bastion Point, Auckland, for defence purposes. As the Tribunal noted in its 1987 *Orakei Report*:

> On the face of it the Crown's action in compulsorily taking this land appears to be in clear breach of Article 2 of the Treaty which requires the consent of the Maori proprietors to any disposition of land. At the same time the Preamble to the Treaty speaks of the anxiety of the Crown not only to protect the just rights and property of the Maori but also to secure peace and good order. It is arguable that the sovereign act of the Crown in taking land for defence purposes with a view to securing peace and good order is acting for the benefit of all citizens, Maori and European alike, and is not inconsistent with the principles of the Treaty.[5]

2. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed (Wellington: Waitangi Tribunal, Department of Justice, 1989), p 66
3. Ibid, p 73
4. Cathy Marr, *Public Works Takings of Maori Land, 1840–1981*, Waitangi Tribunal Rangahaua Whanui Series, 1997, pp 23–24
5. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington: Brooker and Friend Ltd, 1991), p 233

Although the Orakei Tribunal did not make a finding on this issue, it commented that, in any such acquisition of land today, the Crown might seek to lease rather than acquire ownership of the land.

The most recent and perhaps fullest discussion of the taking of Maori land for public purposes is in the Tribunal's *Turangi Township Report 1995*. This report reiterated the view expressed in the *Ngai Tahu Report 1991* that the cession of sovereignty to the Crown in article 1 of the Treaty was qualified by its guarantee of rangatiratanga to Maori in article 2. The Turangi township Tribunal did concede that the Crown could exercise its sovereign authority to override the 'fundamental rights guaranteed to Maori in article 2', but only in 'exceptional circumstances and as a last resort in the national interest'. These terms had been used previously in the *Ngai Tahu Ancillary Claims Report 1995*. However, they required definition. For instance, the Turangi Tribunal considered that 'reasons of convenience or economy' were 'insufficient' justification for overriding the article 2 rights of Maori. The Tribunal added that, having decided to take Maori land as a last resort in the national interest, the Crown was obliged to take the land in such a manner that Maori Treaty rights would be protected. Full consultation with Maori was necessary, and the Crown should not compulsorily acquire the freehold when a leasehold arrangement would be sufficient. The Turangi Tribunal then examined the Public Works Act 1928 and the Turangi Township Act 1964, by which the land under claim was taken, and concluded that those Acts deprived Maori owners of any protection of their Treaty rights.[6]

We note here two findings made by the Turangi Tribunal relating to those Acts. The first was a finding that:

> the claimants have been prejudicially affected by the provisions of the Public Works Act 1928 and the Turangi Township Act 1964, in that both Acts were and are fundamentally inconsistent with the basic guarantee given in article 2 of the Treaty of Waitangi that Maori could keep their land until such time as they wished to sell it at a price agreed with the Crown.[7]

The second finding was that:

> the claimants have been prejudicially affected by the omission of the Crown to make provision, when exercising its powers of compulsory acquisition under the Public Works Act 1928 and the Turangi Township Act 1964 over the claimants' land, for any such land no longer required for the public work for which it was taken to be returned to Maori ownership at the earliest possible opportunity and with the least cost and inconvenience to those Maori owners and that such omission was inconsistent with the Crown's Treaty obligation under article 2 actively to protect Maori rangatiratanga over their ancestral land.[8]

6. Waitangi Tribunal, *The Turangi Township Report 1995*, pp 284–288, 302
7. Ibid, p 302
8. Ibid, p 320

We now consider Crown takings of Maori reserved land for various public purposes within our inquiry district.

## 17.3 Roads and Railways

The claimants and the Crown (which provided a very useful summary table of public works takings of reserved land) have both been unable to supply us with full details of all the land taken from Wellington Maori reserves for roads and railways.[9] Some takings are reasonably well documented, with details of legal requirements, consultations, and compensation, but such details are lacking for most takings. We discuss here those takings raised by the Wai 145 claimants.

### 17.3.1 Roads

The original New Zealand Company survey plans provided for urban streets and roads linking the town of Wellington with the rural districts, including the Hutt Valley. The road which went around the western side of the harbour to the Hutt cut across the harbour access of several pa. As settlement proceeded, Maori reserved land was taken for further road works: for urban streets following the subdivision of town sections and for roads in the rural areas, which sometimes passed through Maori reserves. Some of these takings are set out in the table of public works takings prepared by Crown counsel. This table gives a good indication of the piecemeal nature of these takings and shows that Maori reserved land was still being taken for roading as late as 1986. However, we have very few details of these takings in the evidence before us.

Portions of tenths reserves 542 and 543 (on Mulgrave Street in Thorndon, near Pipitea Pa) were given to a settler called Moore, the owner of section 544, to compensate him for the loss of parts of his section when the area was resurveyed in the 1850s. The resurveying was a consequence of the setting apart of three new streets (Moore, Moturoa, and Davis). Wellington Maori were neither consulted about nor compensated for the land taken from their sections to compensate Moore.[10] However, this particular taking is not the subject of a claim by the Wai 145 claimants, presumably because the area of land taken appears not to have been large and perhaps because the creation of the new streets enhanced the value of Maori land through improved access.

There is also the complaint from the Wai 145 claimants that the Crown allowed Taranaki Street to be driven through Te Aro Pa.[11] We discussed this claim in chapter 13 and noted that there is insufficient evidence to make a finding on the matter (see s 13.3.2).

9. For the table of public works takings of reserved land, see the appendix to document Q2.
10. Document G2, p 30
11. Claim 1.2(d), para 13.17

The Wai 145 claimants have also complained about the taking of portions of rural reserves for roading. The Wai 145 fourth amended statement of claim refers specifically to the taking of parts of Hutt sections 1, 2, and 3, and Kinapora sections 7 and 8, for roading.[12] Claimant counsel makes the point that the acquisition of land for roads occurred in a piecemeal manner, and is therefore very difficult to trace. The specific takings referred to in the statement of claim are thus intended to be 'indicative of a much broader picture, exemplifying the continual manner in which land has been alienated from the Maori owners'.[13] However, we have very little evidence even in relation to these specific takings, and as a result we are unable to make findings on the matter.

### 17.3.2 Railways

The documentation of the taking of reserve land for railway works is also incomplete, owing partly to the loss of Public Works Department files. However, there is sufficient information to indicate a pattern. This suggests that compensation was usually paid, albeit sometimes belatedly and insufficiently. With several takings of reserved land in the Hutt Valley for the Wellington–Masterton railroad in the 1870s, compensation was not paid until after work on the railway commenced. The first instance concerns 11 acres of McCleverty-assigned reserves at Petone which were required for the railway line. Petone Maori asked for compensation of £150 an acre, but this price was not accepted by the Government. An angry group of Petone Maori met with Commissioner Heaphy, telling him that they wished the Government 'to purchase all their Reserves at the Hutt in consequence of alleged injury done by Railroad to their properties & fences'. Heaphy replied that his job was to preserve native reserves, not buy them, and that the railroad would increase the value of their reserve land.[14] The owners subsequently agreed to compensation of £55 per acre, although Heaphy admitted that 'Some difficulty was experienced in causing the Native owners to comprehend a measure of compulsory land surrender for purposes of public works'.[15] Another block of over six acres, needed for railway workshops, was purchased for £662 in 1876 (following what Heaphy described as 'very protracted' negotiations), and in this instance it was apparently not necessary to invoke compulsory purchase conditions under public works legislation.[16] By 1919, almost a quarter of the 107 acres of flat land in Hutt sections 1, 2, and 3 had been taken for railway purposes.[17]

Professor Alan Ward, in summing up the taking of McCleverty reserve land at Petone for railway purposes, notes that the railway probably provided employment and improved

12. Ibid, para 18.5
13. Document 05, p 630
14. Entry dated 28 November 1872, Heaphy's minute book, MA-MT6/14, NA (doc A36, p 30)
15. Charles Heaphy, 'Report of Commissioner of Native Reserves', 30 June 1873, AJHR, 1873, G-2 (doc A24, p 58)
16. Charles Heaphy, 'Report of Commissioner of Native Reserves', 7 July 1877, AJHR, 1877, G-3 (doc A24, p 111)
17. Document A44, p 45

transport for Maori; that land values (including the value of the remaining Maori reserve land in the area) rose with the advent of the railway; and that some prices paid to Maori were comparable with the prevailing values.[18] The Wai 145 claimants have alleged that 'The taking of Maori land by the Crown for railway purposes determined that the land would become a less valuable industrial locality rather than a prime residential zone'.[19] However, they have provided no evidence about the effects on land values of the construction of railways through Maori reserves.

The Crown's summary table of public works transactions lists a considerable number of takings of Maori reserve land for railway purposes, mainly in the Hutt Valley and continuing to as late as 1919.[20] The table provides details of the area taken, the compensation paid, and any consultation carried out, where these are known, but there is little or no information on many of the takings. We are therefore unable to comment on the adequacy of the arrangements. Other land for railway purposes was acquired through reclamation along the foreshore to the Hutt Valley. The railway was built alongside the Wellington–Hutt road and further distanced several pa, including Kaiwharawhara, Ngauranga, and Petone, from the foreshore. We discuss this under reclamations in chapter 18. Finally, in relation to the taking of reserved land for railway purposes, we note a reminder from Crown counsel that in 1993 the Wai 145 claimants accepted payment from the Crown in return for clearing for sale the railways properties in the Wellington region. Because of this, Crown counsel said, the Tribunal could make only limited findings on the offer-back of land taken for railway purposes.[21] In all the circumstances, we make no findings on the reserved land taken for railway purposes.

### 17.4 Housing

The compulsory acquisition of reserved land in Wellington for housing purposes has been the subject of several claims, but, for the reasons outlined below, this Tribunal is unable to make findings on these claims.

The first claim by the Wai 145 claimants relates to the compulsory acquisition of land from Kinapora section 8 for housing purposes in 1937.[22] The only source of information about this taking in the evidence before the Tribunal is the report of Philipa Biddulph, which merely

18. Document A44, pp 65, 71, 73–74
19. Claim 1.2(d), para 18.2. This claim is based on a comment by Professor Alan Ward in document A44: doc A44, pt B, p 71. However, Ward is referring specifically to the acquisition of land for railway workshops and yards. He does not generalise his comment to all acquisitions for railway purposes (indeed, he suggests that the railway may have increased the value of remaining Maori land), nor does he provide evidence of any adverse effect on Maori in this particular instance.
20. Document Q2, app
21. Ibid, p 19
22. Claim 1.2(d), para 18.7

notes, based on the *New Zealand Gazette* notification, that the land was taken.[23] In the absence of further information about this taking, we are unable to make a finding on the matter.

The Wai 145 statement of claim also lists the taking of Hutt sections 19 and 58 for housing purposes as Treaty breaches.[24] However, the taking of Hutt section 19 is also the subject of two separate claims, Wai 105 and Wai 660. These claims were severed from this inquiry by a Tribunal direction of 29 September 1998 because the claimants were attempting to negotiate directly with the Crown to settle their claims.[25] Owing to the severance, Crown counsel made no submissions on the taking of Hutt section 19.[26] Without having heard either the Wai 105 and Wai 660 claimants or the Crown, we are unable to report on the taking of this section.

The Wai 145 claimants are the only group with a claim relating specifically to the taking of Hutt section 58. However, Crown counsel made no submissions on this matter, apparently in the belief that it was also the subject of a claim by the Wai 105 and Wai 660 claimants.[27] In the absence of any submission from the Crown, we will make no findings and will restrict ourselves to providing a narrative of this taking, based on the evidence before us, and to making some provisional comments.

Hutt section 58 was a rural tenth reserve, 15 acres of which were assigned by McCleverty to Waiwhetu Maori. Waiwhetu's portion of Hutt section 58 was taken for public works in 1952 and 1963, but these takings have not been the subject of claims.[28] The bulk of the section, some 91 acres, was assigned by McCleverty to Petone Maori. All but two subdivisions of Petone's portion of Hutt section 58 remained in Maori ownership until the 1940s, although the owners were no longer living on this land. The section was evidently under consideration for housing from 1939, when the registrar of the Native Land Court wrote to the director of Housing Construction under the heading 'Land for Housing: Hutt District Native Land Taita and NaeNae'. The registrar suggested that the department take the land under the Public Works Act 1928, because it would be too difficult and expensive to obtain the agreement of all the owners.[29] In January 1941, the director of Housing Construction wrote to the Minister of Housing to recommend the compulsory acquisition of the Maori-owned land in Hutt section 58. He commented that:

> The majority of the land is occupied by market gardeners and other farmers, and as far as can be ascertained none of the registered proprietors lives on the property. One or two of the Natives have approached the Department to purchase their interests, but in my opinion

23. Document G2, p 19
24. Claim 1.2(d), para 18.8
25. Paper 2.200
26. Document Q2, p 23
27. Ibid
28. Document I8, p 139
29. Document G2, p 20

> the whole of the Native-owned Land should be acquired by Proclamation, as it would be a protracted, if not practically an impossible task, owing to the large number of owners involved and their widely divergent places of residence, to obtain all the necessary consents for the purchase of the land.[30]

At the same time, the director recommended that European-owned land on the section be acquired by negotiation.

In June 1941, a meeting of owners was held to obtain their opinions as to the proposed acquisition. Their views, as reported by the registrar of the Native Land Court, were mixed. Some were prepared to sell if the price was right, while others expressed an interest in living on the land (although they were not doing so at the time). The registrar thought that 'there would not be strong opposition to the proposal to take the land providing the price offered was adequate'.[31] In August 1942, the Government went ahead and compulsorily acquired almost 53 acres of Hutt section 58 under the Public Works Act 1928.[32] Compensation for the bulk of the land taken was assessed by the Native Land Court in November 1942. Valuations were provided by six valuers, two called on behalf of the Maori owners and four for the Crown. Each subdivision was valued separately, and the total compensation figure set by the court was £14,103 for just over 49 acres, or roughly £285 per acre.[33]

Wai 145 claimant counsel has alleged two specific Treaty breaches in relation to the taking of part of Hutt section 58 for housing purposes. The first is the lack of adequate negotiation or consultation with the Maori owners. The second is the calculation of compensation 'based on the subdivisions of the entire section, rather than the value of the section as a whole, resulting in the compensation being substantially less than it ought to have been'.[34]

The Tribunal observes that it is difficult on the basis of this evidence to accept that the compulsory taking of this land was not in breach of Treaty principles. However, in the absence of Crown submissions the Tribunal makes no findings on these claims. In the circumstances, we reserve the right of the claimants to apply further to the Tribunal.

### 17.5 River Protection – Waiwhetu Pa

The taking of the Waiwhetu Pa reserve for river protection purposes in 1928 is the subject of a claim by the Wai 145 claimants. Their grievance is that in 1928 all of the Waiwhetu Pa and reserve was taken by the Hutt River Board for river protection and reclamation purposes.[35]

30. Director of housing construction to Minister of Housing, 16 January 1941, MA29/7/1/1 (doc G2(a), p C5)
31. Registrar to under-secretary, Native Department, 10 June 1941, MA29/7/1/1 (doc G2(a), p C7)
32. *New Zealand Gazette*, 6 August 1942, p 1986 (doc G2(a), p C11)
33. Native Land Court, Wellington, minute book 34, pp 259–260 (doc G2(a), p C12)
34. Document O5, pp 633–634
35. Claim 1.2(d), para 17.10; doc O5, p 610

As noted below, not all of the Waiwhetu Pa land was so taken, the urupa being exempt. (It remains in Maori ownership today.) The pa reserve is also the subject of a separate claim (Wai 442) made on behalf of 'descendants of the owners of the original Waiwhetu Pa'. This claim was heard by the Tribunal in the course of its ninth hearing.[36] The Wai 442 claimants say that the Waiwhetu Pa lands were significant to their tipuna as kainga and wahi tapu; that, when it was no longer required for the purposes for which it was taken, the land was sold into private hands rather than being offered back to the original owners; and, further, that the taking of their land and the failure to offer these sections back to the owners or their descendants were in breach of the Treaty of Waitangi.[37]

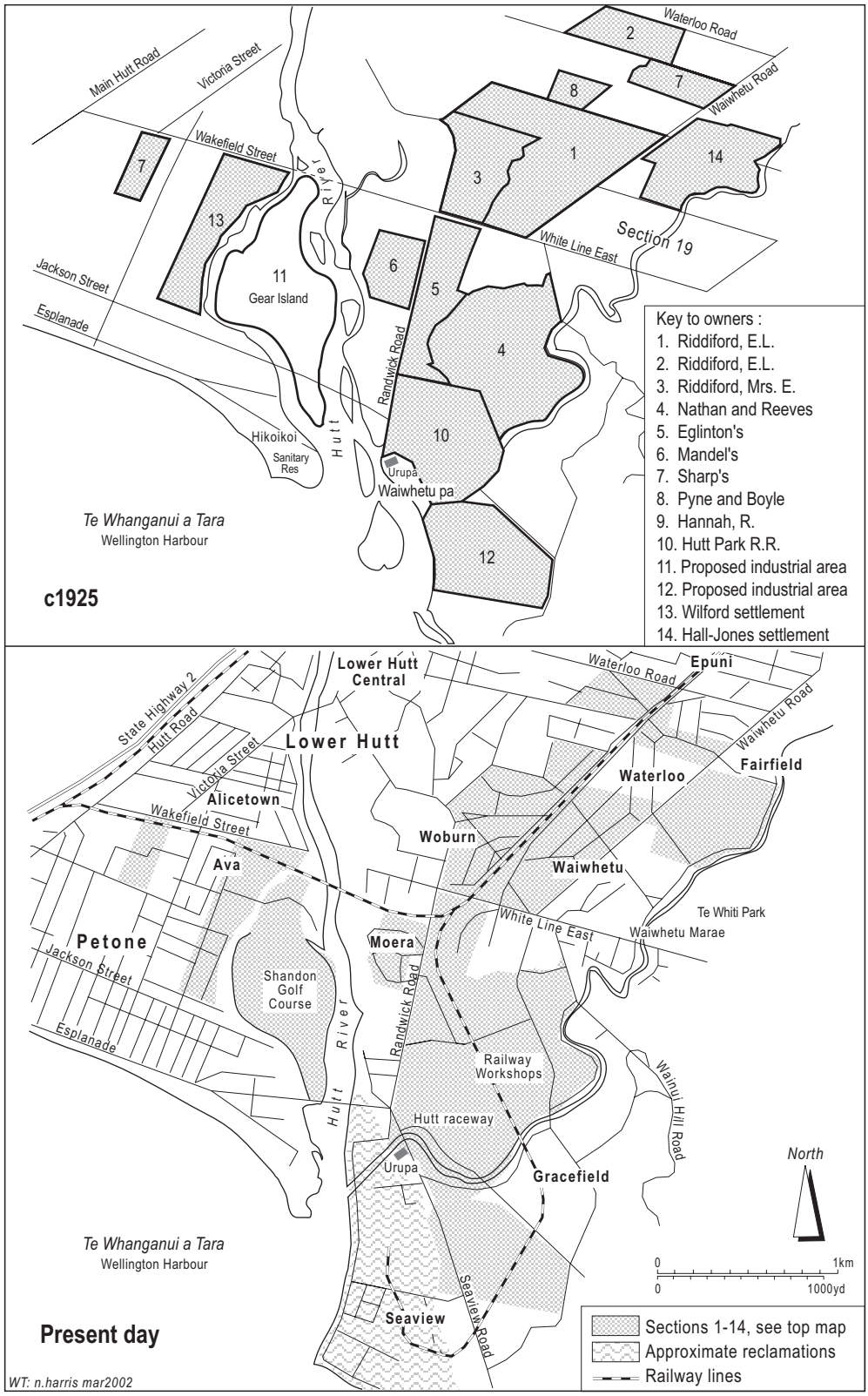
Tata Lawton, the author of the main report to the Tribunal on the taking of this land, describes Waiwhetu Pa as 'the last papakainga left in Maori ownership in the 1920s in the Lower Hutt region'.[38] It was one of the McCleverty awards; his deed of 30 August 1847 guaranteed the 'natives of Waiwetu' their pa, said to contain 3 acres 2 roods 39 perches.[39] However, when the ownership of the reserve was determined by the Native Land Court in 1908, the court found that the correct area for the pa reserve was 12 acres 1 rood 32 perches. At the request of the applicants, the court partitioned the reserve into four sections. Each of the three claimant groups before the court received a little over three acres, with the remainder – almost 2½ acres – set aside as an urupa under their joint ownership.[40] The land was later further subdivided, and sections 1B, 1C, and 1D were sold in 1927–28. By 1928, Maori were no longer living on the pa reserve. Many owners of the land were living on the nearby Hutt section 19, another McCleverty reserve, but they continued to use the shoreline of the pa land for fishing, eeling, and gathering shellfish, until pollution destroyed these food resources.[41]

### 17.5.1 Reclamation scheme

In 1922, the Hutt River Board developed a reclamation scheme to improve the channel of the Hutt River, including the estuary near the Waiwhetu Pa reserve, around the junction of the river and the Waiwhetu Stream. The scheme involved the reclamation of a large area of land from the sea, with a view to the future development of the Hutt district.[42] To this end, in 1922 the Hutt River Board entered into an agreement with the Wellington Harbour Board to obtain statutory authority for the reclamation of some 265 acres from Wellington Harbour. This authority was provided by the Hutt River Board Improvement and Reclamation Act

36. The ninth hearing was held at Te Tatau o te Po Marae in Lower Hutt on 15 and 16 December 1997. The Wai 442 claim was brought by Sir Ralph Love and 35 others on behalf of themselves and others of Te Atiawa and Taranaki iwi and descendants of the owners of the original Waiwhetu Pa.
37. Claim 1.9
38. Document 16, p 3
39. Turton's *Deeds* (doc A27), p 101
40. Document 16, pp 10–11
41. Ibid, pp 12–14; interview with Mohi Te One, doc 16(b)
42. Document 16, p 17

17.5.1




Map 14: Waiwhetu Pa and surrounding area before and after reclamation

1922. Map 14 shows the position of the urupa and the adjoining Waiwhetu Pa land on the Hutt River estuary at around 1925 and in relation to the subsequent reclamation. This reclamation commenced in 1936 and was undertaken by the Public Works Department and the Unemployment Board under an agreement with the Hutt River Board.[43]

In 1926, at the instigation of its engineer, the river board referred the question of Maori rights to reserves affected by the reclamation scheme to the board's solicitor for investigation and report.[44] It appears that the board wished to know who would own the reclaimed land fronting on the native reserve. In November, the board's solicitor responded, advising the board that the 'accrued land will belong to the native owners in proportion to their respective frontages, subject of course to the River Boards Statutory rights'.[45] Such rights were not spelt out by the solicitor.

In July 1927, the chairman of the river board reported to a board meeting that, because certain properties were being developed along the edge of the estuary, it would be advisable, in view of the proposed reclamation scheme, to acquire other properties with river frontages. Though the chairman did not specify who was developing properties, it seems likely, according to Lawton, that the board saw a need to acquire properties to avoid complications later.[46]

### 17.5.2 Taking of the Waiwhetu Pa land by the Hutt River Board

On 10 May 1928, the Hutt River Board published a notice in the *New Zealand Gazette* announcing that it intended to take land situated at Waiwhetu Pa, apart from the urupa, for river protection works. This land included two of the Waiwhetu Pa sections (1C and 1D) recently purchased by a Pakeha, who was mistakenly regarded as a Maori owner. No other land in the vicinity was included. Owners were given 40 days to lodge written objections. An objection was lodged by one of the owners, Teo Tipene, and another person on 28 June 1928, a few days outside the 40-day limitation. The board convened a public meeting on 6 July 1928 so that Tipene could voice his objections. Tipene said that he intended to build a house on his land at the pa, but, according to the board minutes of the meeting, he was persuaded that his section was too small for this. Tipene then said that he had no further objections to the board acquiring the land and would consider compensation at a later date. There is no record of any other consultation by the board with the Maori owners.[47]

Having taken care of the basic legal requirements, the board prepared a memorial for the Governor-General stating its need to take the land for river protection purposes under the Public Works Act 1908. On 14 August 1928, the Governor-General signed a proclamation taking the land and vesting it in the Hutt River Board as from 29 August.[48]

43. Document 16, pp 17–18; doc 19, pp 200–202, 204–207
44. Document 16, p 18
45. Hutt River Board minute book, 1924–29, pp 182–183 (quoted in doc 16, p 18)
46. Document 16, p 19
47. Ibid, pp 20–21
48. Ibid, pp 22–23. The notice was published in the *New Zealand Gazette* of 16 August 1928 at page 2464.

In January 1929, the Hutt River Board applied to the Native Land Court for an assessment of the compensation owed for the land taken for river protection works. The board offered to pay the Government valuation of £895 for the 7 acres 32 perches of Waiwhetu Pa land taken, plus up to £80 for outstanding rates, fees, and liens, and up to £150 for fencing the urupa, a total of £1125. The Maori owners objected that the Government valuation was too low, but the court accepted the board's offer as a fair level of compensation and issued an order to that effect. The court ordered that the compensation be paid to the Ikaroa District Maori Land Board for distribution to the owners after the deduction of a 2.5 per cent commission. Lawton could find no record of the payments having been made, but it seems safe to assume that they were.[49]

### 17.5.3 Failure to use the Waiwhetu Pa land for river protection works

Although the land had been taken under the Public Works Act 1908 for river protection works, the board did not use it for this purpose.[50] Following the Native Land Court's assessment of the compensation due, one of the Maori owners, Norah Jones, wrote to the Native Minister, Sir Apirana Ngata, questioning the legality of the initial taking and the amount of the compensation being offered. She said that although her land 'was taken ostensibly for protection purposes . . . I have good reason to believe that it will not be used for such purposes but that it will be subdivided for sale'. She added that Crown land adjacent to the pa blocks was valued at £1000 an acre, whereas the Maori land had been valued at only £100 an acre.[51] In fact, the land taken at Waiwhetu Pa had been valued at around £125 an acre. Ngata's under-secretary wrote a note on this letter:

> Hon Native Minister,
> This land was taken by the Hutt River Board, ostensibly for River protection purposes, but the whole of certain Sections were taken. I question if this can be legally done, but the only way of testing it is by action in the Supreme Court.[52]

Lawton suggests that the expense of going to court was too great for Mrs Jones, and the Native Department said that it could do no more. Compensation was within the jurisdiction of the Native Land Court rather than the Native Department, and, though the under-secretary of the latter department took the matter up with his counterpart in the Public Works Department, he was informed that the Hutt River Board had met its legal obligations. There, the matter rested. Lawton has pointed out that, whereas the Native Land Court had

49. Document 16, pp 23–24
50. Ibid, p 28
51. Norah Jones to Apirana Ngata, 9 February 1929, MA1/1929/210, NA (quoted in doc 16, p 26)
52. Note, 28 May 1929, MA1/1929/210, NA (quoted in doc 16, p 26)

jurisdiction over compensation for Maori land taken under the Public Works Act, compensation for general land taken under the Act was awarded by a compensation court run by experts and specialists in compensation law who were familiar with the latest developments in the area.[53] While it may be that the Waiwhetu Pa land was not fairly valued, as Mrs Jones claimed, we have insufficient evidence to make a finding on that matter.

In the meantime, further evidence of the river board's other intentions for the land was coming to light. Soon after the land was taken and much to the dismay of the urupa's owners, an industrial building was erected beside the urupa on one of the sections taken by the board.[54] In the early 1950s, the board began to negotiate with the Crown for the sale of Waiwhetu Pa sections covering a total of 6 acres 1 rood 17 perches, as well as 8 acres 1 rood 25 perches of Hutt section 11. The negotiations between the board and the land purchase officer for the Ministry of Works were soon concluded. The board agreed to accept an offer of £2250 an acre, with a total of £49,197 for the full 15.5 acres (including the portion of Hutt section 11). (That price was considerably more than the value put on the land by the Native Land Court in 1929.) Having reached agreement, the Crown took both parcels of land by proclamation in the *Gazette* of 12 June 1952, stating that it was for the better utilisation of the land pursuant to the Public Works Act 1928.[55] Another proclamation, published on 4 June 1953, declared that the Waiwhetu Pa land which was taken for Government work but not required for that work was to become Crown land by virtue of section 35 of the Public Works Act 1928. There was no definition of what was meant by 'better utilisation' of land, but a series of boundary changes between 1954 and 1960, which in some cases grouped Waiwhetu Pa land together with portions of reclaimed land, indicate that, as researcher Damian Stone suggests, the intention may have been to 'facilitate [the] efficient sub-division of the reclaimed lands'.[56]

### 17.5.4 Crown counsel's submissions

Crown counsel made the following points about the taking of the Waiwhetu Pa land:

- Waiwhetu Maori were not living on the land when it was taken, and therefore 'direct prejudicial effect on the Wai 442 claimants is likely to be minimal';
- the compensation paid 'does not appear to be inadequate', and the suggestion that adjoining Crown land was valued at £1000 per acre was unsubstantiated; and
- given that the land was taken by the Hutt River Board rather than the Crown, 'the ability of the Tribunal to make findings in relation to this acquisition may be limited'.[57]

53. Document 16, p 27; Marr, pp 140–142, 208
54. Document 16, p 25
55. Ibid, p 31
56. Document 16(a), pp 24–25
57. Document Q2, pp 21–22

### 17.5.5 Tribunal consideration of the compulsory taking of the Waiwhetu Pa land

The Wai 145 and Wai 442 claimants have a common interest in the taking of the Waiwhetu Pa land, and accordingly we draw on the evidence adduced on this topic in considering whether Treaty breaches have been established in respect of the taking and the subsequent failure to return the land when it was not used for the purpose for which it was taken.

The following events appear to be significant in relation to the compulsory taking of the Waiwhetu Pa land:

- Statutory authority to reclaim land in the vicinity of the Waiwhetu Pa was obtained by the Hutt River Board in 1922.
- In 1926, a legal opinion was obtained by the board as to the rights of Maori should any reclaimed land front on Maori reserves. In November 1926, the board's solicitor advised it that such reclaimed land would belong to the Maori owners in proportion to their respective frontages.
- Less than a year later, in July 1927, the river board's chairman informed the board that, in view of the proposed reclamation scheme, it would be advisable to acquire other properties with river frontages.
- In May 1928, the river board published a notice in the *New Zealand Gazette* announcing its intention to take the Waiwhetu Pa land, other than the urupa, for river protection works. No mention was made then or in the proclamation issued by the Crown in the name of the Governor-General of the proposed reclamation of lands adjoining those being taken from Waiwhetu Maori.
- In February 1929, Norah Jones wrote to the Native Minister, Sir Apirana Ngata, questioning the legality of the taking of the pa land. Ngata's under-secretary, in a note to the Minister, commented that the land was taken by the river board 'ostensibly for River protection purposes', but, because the whole of certain sections were taken, he questioned whether this could be legally done.
- There is evidence that, shortly after the pa land was compulsorily taken, an industrial building was erected beside the urupa on one of the sections taken from Maori.
- No river protection work was carried out, but the reclamation was duly proceeded with in 1936.

The Tribunal finds it difficult to escape the conclusion that the real reason that the river board compulsorily acquired the Waiwhetu Pa land was to prevent the Maori owners from becoming the owners of the reclaimed land which fronted on their pa land. It was not until 1928 that the board announced its intention to take the land for river protection works. All this was done ostensibly pursuant to powers vested in the board under the relevant provisions of the Public Works Act 1908 and the River Boards Act 1908 (which authorised river boards to take land under the Public Works Act).[58] Had the river board been concerned that

58. Sections 2, 18, 19, 22, 183 of the Public Works Act 1908 and like provisions in the Public Works Act 1928; sections 73, 74 of the River Boards Act 1908

the Maori Waiwhetu Pa land would have been in danger of being injuriously affected by any river protection works, section 2 of the River Boards Amendment Act 1910 provided that a river board could purchase or otherwise acquire such land, 'but not by compulsory taking'. That course was not followed. Moreover, it soon became apparent that the land was not in fact going to be used for river protection purposes.

The Hutt River Board was not an agent of the Crown or acting by or on behalf of the Crown. This, however, is not material to the question of whether the legislative provisions under which it purported to act, which were approved and promulgated by the Crown, were consistent with Treaty principles. The Waitangi Tribunal has found on various occasions that the Crown's duty of active protection of Maori property interests is not avoided by legislative or other delegation. If the Crown chooses to delegate, it must do so in terms that ensure that its Treaty duty of protection is fulfilled.[59] No such terms were contained in the River Boards Act 1908 or in the Public Works Act 1908, under which the land was declared taken by the Governor-General on 14 August 1928.[60]

We adopt the finding of the Turangi township Tribunal that, in the absence of 'exceptional circumstances and as a last resort in the national interest', the Crown was obliged to ensure that land was acquired from Maori in such a manner that Maori Treaty rights would be protected.[61] There were no such provisions in the Public Works Act 1928 or in the 1908 Act which it repealed. We consider the following statement by the Turangi Tribunal to be equally applicable to the relevant provisions of the Public Works Act 1908 and the River Boards Act 1908:

> they are not merely inconsistent with the terms of the Treaty and relevant Treaty principles; they are tantamount to a unilateral abrogation of article 2 . . . Far from actively protecting the Maori owners' right not to be deprived of their land without their consent and at an agreed price, they have been denied such protection by the powers vested in the Crown in [these Acts].[62]

We would add that, although the legislative provisions are clearly inconsistent with the Treaty duty of the Crown to ensure that the rangatiratanga rights of Maori to their land are actively protected, the Crown was also a party to the Hutt River Board's action in invoking the provisions of the 1908 Act. For no such taking could be legally effective until and unless the Crown, in the person of the King's representative, the Governor-General, formally declared that the necessary proclamation should take effect. This, he did.

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59. See, for example, Waitangi Tribunal, *The Whanganui River Report* (Wellington: GP Publications, 1999), pp 330, 332

60. The Public Works Act 1908 was in force at the time. It was repealed on 6 October 1928 by the Public Works Act 1928. The relevant 1908 provisions continued in force.

61. Waitangi Tribunal, *The Turangi Township Report 1995*, p 300

62. Ibid, p 302

The Tribunal is not satisfied that it was essential that the Waiwhetu Pa land should have been compulsorily acquired pursuant to the Public Works Act 1908 and the River Boards Act 1908. The pa land surrounding the urupa was clearly of considerable historical and cultural significance to the Waiwhetu Maori from whom it was summarily acquired.

### 17.5.6 Tribunal finding

The Tribunal finds that the Maori owners of the Waiwhetu Pa reserve land[63] were prejudicially affected by the taking of most of the reserve under the provisions of the Public Works Act 1908 and the River Boards Act 1908, in that both Acts were fundamentally inconsistent with the basic guarantee in article 2 of the Treaty that Maori could keep their land until such time as they wished to sell it at a price agreed with the Crown.

### 17.5.7 Failure to return the Waiwhetu Pa land

As noted earlier in section 17.5, the Wai 442 claimants alleged that the Waiwhetu Pa land should have been offered back to the original owners when it was no longer required for the purpose for which it was taken.

It appears to the Tribunal very doubtful that the land which was compulsorily taken was needed for river protection works. Had it been required for this purpose, it is highly unlikely that an industrial building would have been erected on it some six months after its taking. The Tribunal was advised that no river protection works involving the pa land were undertaken. In short, it appears that the river board could have offered back the land, or some part of it, to the former Maori owners. However, we accept Crown counsel's submission that the Tribunal received little in the way of documentary evidence as to what happened to the remainder of the pa site.[64] In the circumstances, given the lack of a sufficient evidential base, we are unable to make any finding on this aspect of the Wai 442 claim. The Wai 145 claimants made no such claim.

## 17.6 Other Offer-back Claims

The Wai 145 claimants allege that the Crown failed to offer back land when it was no longer needed for the purpose for which it was originally taken.[65] This breach is particularised in relation to the taking of Hutt Valley reserve land for public housing purposes, discussed

63. Represented in this inquiry by Wai 442 and Wai 145.
64. Document Q2, pp 22–23
65. Claim 1.2(d), para 18.13

above, but the Tribunal has been unable to make findings on these takings for the reasons outlined at section 17.4. Since the claimants have not referred to any other specific cases, the Tribunal is unable to make a finding on this general claim.

The Wai 145 statement of claim also states that the claimants have been unable to respond to offer-back opportunities under the Public Works Act 1981 because Crown policies have 'rendered tangata whenua impecunious'.[66] In closing submissions, Wai 145 claimant counsel said that it was a Treaty breach for the Crown to require claimants, who had been impoverished by Crown policies, to pay current market values when land taken for public works was offered back to Maori.[67] In response, Crown counsel made a number of points:

- there is limited information before the Tribunal about the financial position of the Wai 145 claimants;
- the Wellington Tenths Trust has proved itself able to respond to offer-back opportunities in some recent cases, such as those of the former defence land in Taranaki Street and the Buckle Street museum site;
- it is reasonable for Maori to whom land is being returned to pay something towards the value of improvements created by 'the capital and energies of the national community';
- in many cases, the owners were compensated at the time of the taking, so offering the land back at less than current market value could mean the owners would be compensated twice; and
- there are legislative provisions for the Crown to offer land back at less than current market value where it is reasonable to do so.

In conclusion, Crown counsel stated that there is insufficient evidence for the Tribunal to make a finding on the claim of inability to respond to offer-back opportunities.[68]

In all the circumstances, the Tribunal considers it inappropriate to make any finding.

## 17.7 Miscellaneous Takings

The Wai 145 fourth amended statement of claim also lists the following public works takings as Treaty breaches:

- 93 acres of Ohiro 19 and 21 taken in 1976 for a rubbish dump;
- 464 acres of Korokoro reserve taken in 1904 and 1911 for waterworks;
- 182 acres of Parangarahu block taken for lighthouse purposes between 1865 and 1939; and
- 25 acres of Parangarahu taken in 1964 for a sewer outfall.[69]

66. Ibid, para 18.14
67. Document O5, pp 637–638
68. Document Q2, pp 18–19
69. Claim 1.2(d), paras 18.6, 18.9, 18.10, 18.11, 18.12

17.7

Crown counsel's response to all these claims is that 'There is insufficient evidence on compensation, consultation, consideration of other sites, consideration of alternative forms of tenure, sufficiency of remaining lands, and benefits accruing from the public work to reach any findings on Treaty breach'.[70] The Tribunal agrees with Crown counsel. While the overall reduction of the area of reserved land left to Wellington Maori is regrettable, the Tribunal has insufficient evidence about these particular cases to make findings.

70. Document Q1, pp 61–63; doc Q2, pp 13–16, 23

CHAPTER 18

# WELLINGTON HARBOUR AND FORESHORE

## 18.1 Introduction

Te Whanganui a Tara and its foreshore (the area between the high- and low-water marks) were important resources for Wellington Maori. The harbour and harbour foreshore were abundant sources of food and were also very important for trade and transport. The sea and foreshore around the rest of the coast of the Port Nicholson block were also of great significance to Maori, but these are not discussed in this report because they are not the subject of claims against the Crown. We note that the Tribunal's jurisdiction in respect of commercial sea fisheries claims was removed as a result of the 1992 fisheries settlement, and we accordingly excluded all such fisheries from our consideration.

Wellington Harbour was also of great value to Pakeha, and indeed Wellington was chosen as a site of early European settlement because the harbour was ideally suited to shipping. Pakeha settlement brought great changes to the harbour, as from the 1850s onwards large areas around the shores of the harbour were reclaimed to create flat land, something which was in seriously short supply in Wellington. The pollution of the harbour also followed in the wake of settlement. This chapter surveys the history of these and other developments, and considers claims that actions or omissions of the Crown prejudiced Maori interests in Wellington Harbour and its foreshores.

## 18.2 Claims

The Tribunal has received some general claims, and some more specific ones, concerning the harbour, the foreshore, and related issues. The Wai 734 (Ngati Mutunga) and Wai 735 (Ngati Tama) claimants both say that their claim relates, among other matters, to 'harbours, seas and seashores, [and] fisheries' in the Te Whanganui a Tara area.[1] The Wai 623 (Muaupoko) claimants likewise claim rights to the foreshore, seabed, offshore islands, harbour, and fisheries within the inquiry district.[2] These claimant groups have not made any more specific claims in relation to these matters, however.

1. Claim 1.18, para 4.1; claim 1.19, para 4.1
2. Claim 1.17(b), paras 2.1, 3.1

The Wai 175 and Wai 543 (Rangitane) claimants have submitted an amendment to their statement of claim dealing specifically with harbour, foreshore, and fisheries issues. They say that Rangitane held rights to the harbour, foreshore, seabed, and fisheries at Te Whanganui a Tara 'from time to time in accordance with tikanga Maori', but that the ownership of these areas and resources was assumed by the Crown without the consent of Rangitane. The claimants further state that Rangitane never consented to reclamations at Te Whanganui a Tara. They allege that the Crown breached the Treaty by failing to recognise or protect Rangitane's interests in the harbour, foreshore, seabed, and fisheries and by failing to consult with Rangitane in relation to the management of these areas and resources. They also claim that the Crown failed to ensure the adequacy of customary fisheries stocks and allowed the pollution of the water at Te Whanganui a Tara. They call for the recognition of the rights of 'tangata whenua including Rangitane' in relation to the harbour, foreshore, and seabed at Te Whanganui a Tara. These rights, they say, include property rights, rights of management and control, and customary fishing rights.[3]

The Wai 207 (Ngati Toa Rangatira) claimants have also submitted an amendment to their statement of claim specifically addressing harbour, foreshore, and fisheries issues. They claim that:

- Ngati Toa, together with other iwi, owned and controlled the foreshore, seabed, fisheries, and other marine resources within the boundaries of the Port Nicholson deed, and exercised a role as kaitiaki in relation to these resources;
- Ngati Toa people 'frequented kainga and sites around the Wellington harbour both before and after 1840', using the marine resources of the harbour and the coasts, particularly at Ohariu, Island Bay, and Petone;
- the Crown assumed the ownership and control of the foreshores and seabed, and undertook reclamations in the Wellington area, without consulting Ngati Toa or considering their interests in these areas;
- the Crown sought to control and regulate fishing (including non-commercial fishing) without consulting Ngati Toa or considering their interests in these resources; and
- the Crown destroyed fisheries by reclamations and other means, and that Crown management practices and policies allowed the pollution of coastal and marine resources.[4]

Finally, the Wai 145 claimants have made a number of claims of Treaty breaches relating to the harbour and foreshore, which can be summarised as follows:

- the Crown authorised reclamations at Te Whanganui a Tara without consulting the tangata whenua;
- the Crown assumed the ownership of the foreshore, which the claimants assert belonged to them (along with the 'immediately adjacent sea') and was never formally alienated from them;

3. Claim 1.11(b); see also claim 1.11(a)
4. Claim 1.5(a), paras 13.2, 14.1; claim 1.5(b)

- the Crown reclaimed land, thus destroying fisheries, depriving tangata whenua of access to kai moana, and preventing tangata whenua from using the foreshore as a tauranga waka (a landing place for canoes);
- the Crown permitted the pollution and environmental degradation of the foreshore and harbour, thereby depleting kai moana resources and rendering much kai moana unfit for human consumption;
- the Crown failed to ensure that tangata whenua had an effective role in the conservation and environmental management of the harbour; and
- the Crown authorised sales and leases of reclaimed land without consulting the tangata whenua.[5]

## 18.3 Maori Use of the Harbour

Early Pakeha observers reported Maori catching an abundance of fish in Wellington Harbour, and the new settlers were themselves able to obtain huge catches (often with the assistance of Maori guides). There were also plenty of crayfish, shellfish, and water birds (particularly around the mouth of the Hutt River), and occasional whales (artist George Angas found Te Aro Maori collecting oil from a beached whale in 1845).[6] Maori displayed an intimate knowledge of the harbour and its fisheries. William Wakefield observed that Te Whanganui a Tara Maori were 'experienced in the seasons and times of day and weather in which to employ themselves in fishing', and in the 1840s Maori were employed as pilots due to their familiarity with the harbour entrance.[7] Maori quickly learned to take commercial advantage of their fishing skills, and in the early 1840s they had a near monopoly on the trade in fish.[8] In 1850, Native Secretary H Tacy Kemp found some settlements still earning income by selling fish or mutton shell (paua).[9]

The foreshore was very important to Te Whanganui a Tara Maori, not only as a source of kai moana but also as a tauranga waka. It was for this reason that all of the pa around the harbour had water frontage. As businessman G B Earp, who lived in Wellington for three years from 1839, told the House of Commons select committee on New Zealand:

> one great reason of the natives not being willing to give up the pahs was, that the water frontage of the other parts of the town had been selected and allotted out, and the natives

5. Claim 1.2(d), pp 47–51; doc 05, pp 595–596
6. Document 19, pp 96–98, 106, 188–189
7. William Wakefield, journal, 28 September 1839 (doc A29, p 395); doc 19, p 106
8. G B Earp, evidence to the House of Commons select committee on New Zealand, 13 June 1844, BPP, vol 2, pp 106–107
9. H Tacy Kemp, report on Port Nicholson district, 1 January 1850, *New Munster Gazette*, 21 August 1850 (doc N3(c), pp 593–596)

were afraid that if they gave up this pah, they should not have a landing-place to use for their canoes, which was necessary for them.[5]

Kemp found in 1850 that the Port Nicholson pa had between one and eight war canoes each, and at Petone there was even a 35-ton schooner.[6] As late as 1872, there were still more than 20 fishing canoes on Petone beach.[7]

As we have outlined in chapter 2, the Maori living around the harbour in 1840 were Te Atiawa, Ngati Tama, Taranaki, and Ngati Ruanui. These were the groups who were in a position to make use of the harbour and its resources at the time of Pakeha settlement and Crown intervention. Rangitane, Muaupoko, and the other Whatonga descent peoples were no longer living in the area and were thus unable to use the resources of the harbour. Ngati Mutunga had likewise departed the area.

Ngati Toa's claim to have 'frequented kainga and sites around the Wellington harbour both before and after 1840' and to have used the marine resources of the harbour cannot be sustained. In his first report to the Tribunal on Ngati Toa in the Wellington region, historian Richard Boast stated bluntly that there is no documentary evidence of Ngati Toa residences or cultivations around Wellington harbour, 'or of Ngati Toa using the harbour for fishing or navigation, although this may be qualified by oral evidence'.[8] In a later report, drawing on oral evidence, Boast gave some evidence of a few Ngati Toa individuals living in Wellington, including, it was said, two of Te Rauparaha's sons, who were there to transmit 'intelligence' to their father. However, Boast still acknowledged that he had found no evidence demonstrating 'a particular Ngati Toa interest in Wellington harbour or the Wellington South Coast'.[9] Oral evidence of Ngati Toa individuals fishing and gathering kai moana at the Hutt River mouth and at Island Bay in the twentieth century was presented to the Tribunal, but this does not constitute evidence of continuing customary rights in the area.[10] It is likely, as Boast suggested, that Ngati Toa fished and made use of marine resources at Ohariu and elsewhere on the western coast, but in the present chapter the Tribunal is concerned only with the use of Wellington harbour, since we have received no evidence or claims about actions or omissions of the Crown affecting the use of marine resources around the coast.

On the basis of the foregoing evidence, the Tribunal finds that those Maori having rights in Wellington Harbour in 1840 were confined to Te Atiawa, Ngati Tama, Taranaki, and Ngati Ruanui.

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5. G B Earp, evidence to the House of Commons select committee on New Zealand, 13 June 1844, BPP, vol 2, p 119
6. H Tacy Kemp, report on Port Nicholson district, 1 January 1850, *New Munster Gazette*, 21 August 1850 (doc N3(c), p 605)
7. Document I9, p 192
8. Document H8, p 167
9. Document K2, pp 13–14, 17
10. Document H20
11. Document P5, pp 29–30

## 18.4 Ownership of the Seabed and Foreshore, and Maori Interests in the Harbour

Several claimant groups maintain that the Crown's assumption of ownership of the seabed and foreshore within the inquiry district was in breach of the Treaty (see s 18.2). The Crown's position, as stated succinctly by Crown counsel in closing submissions, is that:

- 'Customary title to foreshore is extinguished where title to the adjoining land has been investigated by the Maori Land Court, sold, or otherwise alienated'; and
- 'Section 7 of the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 deems the Crown to have always been the owner of seabed."[16]

The legal issues relating to the ownership of the seabed and foreshore, and the question of whether those areas can be customary land within the meaning of those words in the Te Ture Whenua Maori Act 1993, were the subject of a High Court decision in June 2001.[17] This case (commonly referred to as the *Marlborough Sounds* case) has been appealed to the Court of Appeal. It would therefore be inappropriate for the Tribunal to comment on these legal issues.

The Tribunal does, however, consider that Te Whanganui a Tara Maori had an interest in the harbour, which the Crown was obliged under the Treaty to take account of. We concur with the view of the Manukau Tribunal that the Treaty promised Maori an interest in their harbours:

> That interest is certainly something more than that of a minority section of the general public, more than just a particular interest in particular fishing grounds, but less than that of exclusive ownership. It is in the nature of an interest in partnership the precise terms of which have yet to be worked out.[18]

Both Maori and non-Maori have an interest in the harbour, but the Maori interest is distinct and cannot be subsumed into that of the general public. The Crown is required to have regard to that Maori interest in terms of the Treaty principles discussed in chapter 4.

At the beginning of Pakeha settlement at Port Nicholson, Maori and Pakeha shared the harbour and its resources, and, as mentioned above, the new settlers benefited from Maori knowledge of the harbour. We have already discussed Maori use of the harbour, and it surely does not need to be demonstrated that Pakeha made extensive use of the harbour from 1839.[19] Indeed, it was because of the value to Pakeha of what was frequently described as its 'magnificent' harbour that Port Nicholson was chosen as the location for the New Zealand Company settlement in the first place. Had the Crown treated Maori as Treaty partners,

16. Document P5, pp 29–30
17. *Attorney-General & Ors v Maori Land Court* (2001) 4 NZ ConvC 193,399
18. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed (Wellington: Waitangi Tribunal, Department of Justice, 1989), p 70
19. For a history of Wellington Harbour, see David Johnson, *Wellington Harbour* (Wellington: Wellington Maritime Museum Trust, 1996). This history deals mainly with Pakeha use of the harbour.

there is no reason why Maori and non-Maori could not have continued to share in, and benefit together from, the use of the harbour. In this chapter, we will consider whether the Crown did, in fact, give appropriate effect to Maori interests in the harbour when decisions about the harbour were being made.

We must also consider the extent to which actions or omissions of the Crown prejudiced two other specific Maori interests. The first is the interest of Maori in the foreshore immediately adjoining their pa and reserve land around the harbour. Regardless of the more general issues of Maori ownership of the foreshore under consideration in the *Marlborough Sounds* case, Maori undoubtedly had an interest in what happened to the foreshore adjoining the land which remained in their possession, particularly those places where they actually lived. In addition, where reserve sections were surveyed down to the low-water mark, as the Te Aro Pa reserve was, Maori were clearly the owners of the foreshore, irrespective of questions of customary right. The second specific Maori interest which must be considered is the interest of Wellington Maori in their fisheries in the harbour. The English version of article 2 of the Treaty explicitly guaranteed to Maori 'the full exclusive and undisturbed possession of their . . . Fisheries . . . so long as it is their wish and desire to retain the same in their possession'. We must consider whether Maori ownership of their customary fisheries at Te Whanganui a Tara was in fact protected by the Crown, in accordance with this guarantee.

## 18.5 History of Wellington Harbour

The 1839 New Zealand Company deed of purchase for Port Nicholson stated that the company was to gain possession of the harbour and foreshore (since the coastal boundaries detailed in the deed were measured from the low-water mark).[20] A number of chiefs who gave evidence before Spain's commission said that they believed that they had received payment in 1839 only for anchorage rights or some kind of interest in the harbour.[21] Clearly, these chiefs saw themselves as having rights in the harbour, although it is unlikely that they believed that they were giving up their own rights by 'selling' rights to Pakeha. We have earlier found that the 1839 deed of purchase was invalid, and the 1844 deeds of release related only to land, as did Grey's 1848 Crown grant to the company.

As chapter 11 showed, all the pa sites around the harbour were assigned to Maori by McCleverty. All of these pa had water frontages, but all except Petone, Waiwhetu, and Te Aro were separated from the foreshore by a public road.[22] In town, only the sections at Te Aro (including the Te Aro Pa land reserved by McCleverty) were surveyed down to the low-water

20. Port Nicholson deed, 27 September 1839 (doc A29, pp 439–441)
21. Document 19, pp 94–95
22. Ibid, p 125

mark, thereby creating private ownership of the Te Aro foreshore (later confirmed when Crown grants were issued in the 1860s).[23]

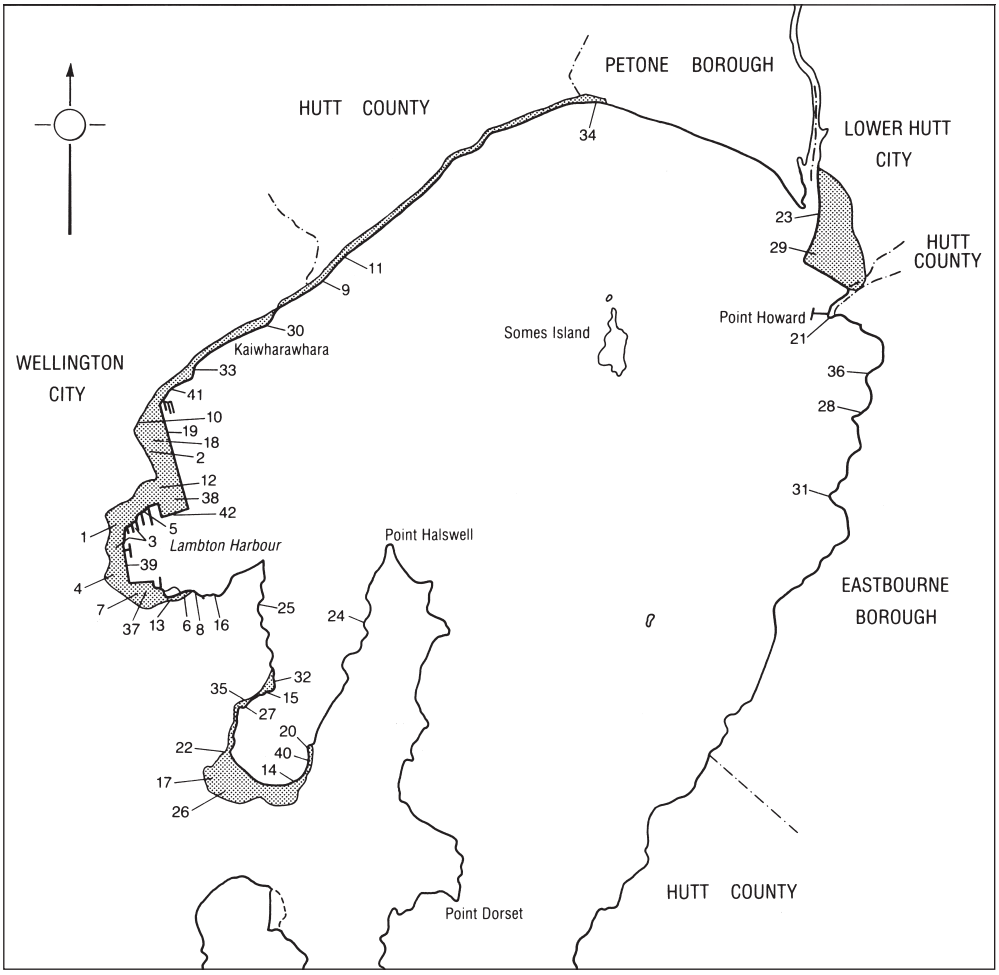
The shortage of flat land at Wellington presented a problem for the new settlement, and as early as 1841 Surveyor-General Felton Mathew suggested reclamation (that is, permanent infilling of the foreshore or seabed with earth, sand, or rock to create dry land) as a solution.[24] The first significant reclamation, which was at Lambton Harbour and was authorised by Governor Grey, was not undertaken until 1852.[25] Under section 2 of the Public Reserves Act 1854, the Governor was authorised to grant reclaimed land and land below the high-water mark to the superintendent of the province, or to other persons.[26] In 1855, 117 acres of land below the high-water mark were vested in the superintendent of Wellington province. The land granted ran from the 1852 reclamation at Willis Street along the length of Lambton and Thorndon Quays to Kaiwharawhara.[27]

### 18.5.1 The 1855 earthquake

Before the provincial government commenced reclamation, however, Wellington was struck by a massive earthquake in January 1855, and this had some important effects on the harbour. The earthquake caused significant uplift, but the land was tilted, with much greater elevation in the east than in the west: the uplift varied from about 0.6 metres at Lambton Harbour to 6.5 metres at Turakirae Head, the easternmost point along the coast of the Port Nicholson block.[28] It is not known how much land was elevated, although Edward Roberts of the Royal Engineers estimated at the time that 4600 square miles (11,900 $km^2$) was raised in the Wellington district between the west coast and the Rimutakas.[29] The uplift drained a number of low-lying, swampy areas in the Hutt River delta, at Lowry Bay, and at Te Aro, where an area covered by a stream and a lagoon (both known as Waitangi) had been reserved for a canal and shipping basin (the Basin Reserve). The Hutt River and Waiwhetu Stream, which had been navigable for some distance, were rendered much shallower and unsuitable for navigation. A strip of seabed was exposed all along the harbour, thus extending the shoreline and leaving more space for roads. The road between Wellington and the Hutt Valley, which had previously been barely above the high-tide level in places, was elevated above the waves which had endangered travellers. Shellfish beds were also exposed and fish left stranded. This was a temporary boon for Maori, who collected the exposed kai moana,

23. Ibid, p 103, 116
24. Ibid, pp 111–112
25. Ibid, pp 128–129
26. Ibid, pp 130–131
27. Ibid, pp 132–133
28. Ibid, p 43
29. Rodney Grapes, *Magnitude Eight Plus: New Zealand's Biggest Earthquake* (Wellington: Victoria University Press, 2000), pp 91–92

18.5.1




Map 15: Reclamations in Wellington Harbour, 1852–1982

**Summary of reclamations**

| Reclamation for | Area reclaimed (ha) | Percentage |
|---|---|---|
| Government and railway company | 206.17 | 58.0 |
| Wellington Harbour Board | 121.50 | 34.1 |
| Wellington City Council | 26.92 | 7.6 |
| Private owners | 1.12 | 0.3 |
| Total | 335.71 | 100.0 |

**The area of Wellington Harbour before these reclamations was 8900 hectares, thus 4 per cent has been reclaimed.**

**Location of reclamation**

| Locality | Government | WHB | WCC | Other | Total (ha) |
|---|---|---|---|---|---|
| Lambton Harbour | 68.19 | 67.41 | 19.53 | 0.28 | 155.41 |
| Kaiwharawhara to Petone | 58.45 | — | — | — | 58.45 |
| Hutt Estuary | 37.23 | 44.27 | — | — | 81.50 |
| Evans Bay | 41.36 | 6.98 | 7.39 | 0.84 | 56.57 |
| Point Howard–Eastbourne | 0.94 | 2.84 | — | — | 3.78 |
| Total (ha) | 206.17 | 121.50 | 26.92 | 1.12 | 355.71 |

Map and tables reproduced with permission from David McGill's *The Pioneers of Port Nicholson* (Wellington: AH and AW Reed, 1984).

**Wellington Harbour Board reclamations in Wellington Harbour up to 1982 (localities indicated by numbers on map)**

| No on map | Date | Area | Authority (first user) | Locality | Purpose |
|---|---|---|---|---|---|
| 1 | 1852 | 3187 | New Munster Govt | Lambton Harbour | City extension |
| 1 | 1857–67 | 84,554 | Provincial Govt | Lambton Harbour | City extension |
| 1 | 1859–65 | 2833 | Private owners | Lambton Harbour | City extension |
| 1 | 1857 | 10,927 | Crown | Lambton Harbour | Government buildings |
| 1 | 1876–93 | 195,944 | Prov and Gen Govt | Lambton Harbour | Railway, public buildings, etc |
| 2 | 1882–84 | 122,266 | Manawatu Railway Co | Lambton Harbour | Railway |
| 3 | 1882–86 | 5236 | WHB | Lambton Harbour | Harbour purposes |
| 4 | 1886–95 | 166,427 | WCC | Lambton Harbour | City extension Te Aro |
| 5 | 1893–1903 | 23,447 | WHB | Lambton Harbour | Harbour purposes |
| 6 | 1900 | 4047 | WCC | Oriental Bay | Te Aro public baths |
| 7 | 1901–14 | 76,764 | WHB | Lambton Harbour | Harbour and leasing purposes: Te Aro |
| 8 | 1902–25 | 17,200 | WCC | Oriental Bay | Street widening |
| 9 | 1904 | 105,952 | Crown | Kaiwhara–Petone | Hutt Road |
| 10 | 1904–13 | 56,049 | NZR | Thorndon–Kaiwhara | Hutt railway |
| 11 | 1904 | 305,260 | NZR | Kaiwhara–Petone | Hutt railway |
| 12 | 1904–16 | 140,021 | WHB | Waterloo Quay | Harbour and leasing purposes |
| 13 | 1906 | 4148 | WHB | Oriental Bay | Boat harbour |
| 14 | 1909 | 15,580 | WHB | Evans Bay | Aberdeen Quay |
| 15 | 1910 | 8372 | Wgtn Patent Slip Co Ltd | Evans Bay | Patent slip |
| 16 | 1911 | 582 | WCC | Oriental Bay | Bathing pavillion |
| 17 | 1912–37 | 73,855 | WCC | Evans Bay | Kilbirnie recreation reserve |
| 18 | 1918–21 | 230,671 | NZR | Aotea Quay | Railway: Thorndon |
| 19 | 1920–21 | 47,374 | WHB | Aotea Quay | Harbour purposes |
| 20 | 1928 | 7613 | WHB | Evans Bay | Burnham Wharf |
| 21 | 1935 | 683 | WHB | Point Howard | Point Howard Wharf |
| 22 | 1941–67 | 33,200 | WHB | Evans Bay | Boat harbour |
| 23 | 1940 | 372,311 | Crown | Hutt Estuary | Industrial |
| 24 | 1942 | 16,187 | Crown | Evans Bay | Naval depot: Shelly Bay |
| 25 | 1946 | 809 | WHB | Balaena Bay | wcc recreation reserve |
| 26 | 1953–60 | 364,200 | Crown | Evans Bay | Airport, etc |
| 27 | 1954 | 8100 | Crown | Evans Bay | Flying boat base |
| 28 | 1956–61 | 8100 | Crown | Lower Hutt–Eastbourne | Road widening |
| 29 | 1956–65 | 442,726 | WHB | Hutt Estuary | Industrial |
| 30 | 1961–66 | 105,200 | Crown | Kaiwhara–Ngauranga | Motorway |
| 31 | 1961 | 1265 | Crown | Sunshine Bay | Donated to Eastbourne BC |
| 32 | 1966–67 | 25,116 | Crown | Evans Bay | Fisheries research, etc |
| 41 | 1966–74 | 34,400 | NZR | Kaiwharawhara | Second RR ferry |
| 34 | 1966–70 | 12,000 | WHB | Korokoro | Harbour purposes |
| 35 | 1967 | 5666 | WHB | Evans Bay | Adjoining former flying boat base |
| 36 | 1967–74 | 12,394 | WHB | Lowry Bay | Boat harbour |
| 37 | 1967–69 | 32,700 | WHB | Lambton Harbour | Taranaki Street terminal |
| 38 | 1967–74 | 251,434 | WHB | Lambton Harbour | Thorndon dev |
| 39 | 1968–74 | 56,700 | WHB | Lambton Harbour | Harbour and street purposes |
| 40 | 1969 | 6880 | WHB | Evans Bay | Incinerator site |
| 33 | 1969–71 | 34,400 | WHB | Kaiwharawhara | Harbour purposes |
| 42 | 1972 | 1850 | WHB | Waterloo Quay | Harbour purposes |
| 6 | 1973 | 7100 | WCC | Ferguson Pool | Car parking |
| 21 | 1973–74 | 3364 | WHB | Point Howard | Seaview Wharf |
| 11 | 1978–79 | 12,000 | NZR | Ngauranga–Petone | Access, protection |
| | | 3,557,094 | | | |

but the uplift may have been responsible for virtually wiping out the population of rock oysters in Wellington Harbour.[30]

In closing submissions, Crown counsel made much of the effects of the 1855 earthquake. She appears to have been seeking to establish two points:

- that the earthquake separated harbourside pa from the foreshore even before large-scale reclamations began; and
- that the earthquake had an adverse effect on kai moana prior to any effect from reclamations or pollution.[31]

These points can be disposed of very briefly. First, while the earthquake did distance the pa around the harbour from the foreshore, it did not cut these pa off from the foreshore, nor did it cause the foreshore to disappear as reclamations did. Secondly, the earthquake certainly killed off a great quantity of kai moana in the short term and may even have almost eliminated some species from the harbour. Nevertheless, no one has suggested that the harbour was left devoid of kai moana following the earthquake or that shellfish beds would not have been re-established in time. The Tribunal must, therefore, still consider whether actions or omissions on the part of the Crown adversely affected the fisheries of Te Whanganui a Tara Maori, regardless of how those fisheries had been affected by the earthquake.

We will not consider in this report the question of the ownership of the land raised by the earthquake, since this is bound up with the questions of the ownership of the foreshore and seabed, which, as we have stated above, we consider it inappropriate for the Tribunal to comment on.

### 18.5.2 Reclamations

The reclamation of the land at Lambton Harbour granted in 1855 to the provincial government began in 1857, and for the next 20 years the provincial government undertook most of the reclamation within Wellington Harbour. However, a series of Acts passed in the 1860s effectively placed harbours under the control of the Governor, acting through a marine board. In the 1870s, the central government became more involved in reclamation, and, when the provinces were abolished in 1875, the foreshore reserve granted to the superintendent of Wellington in 1855 became vested in the Crown. The Public Works Department completed the major Lambton Harbour reclamation of 46 acres begun by the provincial government.[32] Another significant event in the early 1870s was the construction of the Wellington to Hutt railway, for which the Crown acquired a significant area of foreshore in 1872. With both a road and a railway now separating them from the foreshore, the remaining Maori at

30. Document I9, pp 135–136; Grapes, pp 91–103, 113; G R Stevens, *Rugged Landscape: The Geology of Central New Zealand, Including Wellington, Wairarapa, Manawatu and the Marlborough Sounds*, 2nd ed (Wellington: DSIR Publishing, 1990), pp 226–229

31. Document P5, pp 18–22

32. Document I9, ch 5



Figure 7: Te Aro, Wellington, 1883. The Catholic church Saint Mary of the Angels on Boulcott Street is in the foreground. This photograph shows both the original shoreline and the line of the Te Aro reclamation. Te Aro Pa can no longer be seen. Photographed by William Williams (1859–1948). Reproduced courtesy Alexander Turnbull Library, Wellington, New Zealand (E R Williams collection, G-25883-1/1, collection reference PAColl-0975).

Pipitea, Kaiwharawhara, Ngauranga, and Petone Pa had their access to the foreshore further curtailed, and much of the western harbour beach and foreshore was destroyed.[33]

The Harbours Act 1878 introduced a new system for regulating harbours and harbour reclamations. Under this Act, reclamations could be authorised either by a special Act or by an Order in Council. The Act also set out the powers and functions of harbour boards, and the Wellington Harbour Board was created under it in 1879. Most of the foreshore of Wellington Harbour was vested in the harbour board, although the areas excluded from this grant included Lambton Harbour and the shoreline between Kaiwharawhara and Petone (which was reserved for roading and railway purposes). The Wellington Harbour Board went on to undertake many reclamations, and by 1916 it had already been responsible for almost 43 acres of reclamations, mainly around Lambton Harbour.[34]

Another body which was authorised in the 1870s to undertake reclamations was the Wellington City Council, to which in 1874 the provincial government granted 70 acres of the Te Aro foreshore and harbour upon trust for reclamation. The Te Aro Reclamation Act 1879 authorised the city council to reclaim the entire 70 acres granted in 1874 and provided for the

33. Ibid, pp 145–146
34. Ibid, pp 156–171

compensation of those who might suffer loss or damage as a result of works carried out under the Act. The city council began reclamation work on the Te Aro foreshore in 1886, and by 1914 some 57 acres within the Te Aro grant area had been reclaimed by the council and the harbour board.[35]

It is beyond the scope of this report to provide a detailed history of the many reclamations carried out in Wellington Harbour by the Crown, the Wellington Harbour Board, and the Wellington City Council, but the extent of these reclamations is shown in map 15. Researcher Robert McClean has provided a detailed listing of the reclamations and the legislation under which they were carried out, and he summarised the spread of reclamations around the harbour as follows:

> Between 1852 and 1900, reclamation works were entirely focused on Lambton Harbour to provide land for the city, Government buildings, railway and harbour works. Between 1900 and 1940, reclamation schemes spread out to the Kaiwharawhara–Petone foreshore and around the coast to Evans Bay. After 1940 the Hutt Estuary and Evans/Lyall Bay became the key reclamation projects. By 1960 attention was turning again to Lambton Harbour and the need to revamp the wharves to cater for containerisation of trade and other developments such as the introduction of roll on/roll off ferries.[36]

By 1982, 355.71 hectares had been reclaimed within Wellington Harbour, or roughly 4 per cent of the original area of the harbour. Of this area, 58 per cent was reclaimed by the Government or the railway company, 34.1 per cent by the Wellington Harbour Board, 7.6 per cent by the Wellington City Council, and just 0.3 per cent by private owners.[37]

### 18.5.3 The 1980s and 1990s

From the 1970s, reclamation became subject to environmental impact assessments and a more stringent planning regime. In 1979, the Wellington Harbour maritime planning area was established and the Wellington Harbour Board was appointed as the Maritime Planning Authority under the Town and Country Planning Regulations 1978. The harbour board was given a grant of control of the foreshore and seabed within the maritime planning area in 1982. The harbour board established a planning committee to administer the area, and a maritime planning scheme for the harbour became operative in 1988.[38]

However, a major change to harbour administration took place as a result of a series of Acts in 1988–89 which abolished harbour boards and created new port companies to take

35. Document 19, pp 171–177
36. Ibid, p 217. For more detail on the reclamations, see chapters 5 to 7 and appendix C.
37. David McGill, *The Pioneers of Port Nicholson* (Wellington: AH and AW Reed, 1984), p 66
38. Document 19, pp 239–241, 283–288

over the boards' commercial activities. The Wellington Harbour Board was disestablished and its regulatory functions were transferred to the Department of Conservation and the Wellington Regional Council. The harbour board's commercial functions were transferred to the Port of Wellington Company, which inherited 72 hectares of reclaimed land from the harbour board. The remainder of the land and seabed which had been under the control of the harbour board was revested in the Crown under the Foreshore and Seabed Endowment and Revesting Act of 1991. The Resource Management Act was also passed in 1991, and, under that Act, reclamation is permitted only where it is allowed by a rule in a regional coastal plan or where a resource consent has been given for it.[39]

## 18.6 Claimant Grievances

The claims relating to the Wellington Harbour and foreshores were summarised at section 18.2. We have found that Ngati Toa, Ngati Mutunga, Rangitane, and Muaupoko did not have interests in the harbour from 1840, while the Ngati Tama claimants have not made specific claims in relation to the harbour. We therefore address only the claims of the Wellington Tenths Trust claimants, grouping them together according to their common themes, and make findings on them.

### 18.6.1 The Crown's assumption of ownership of the foreshore and seabed

The Crown's assumption of ownership over the foreshore and seabed has been challenged by the claimants.[40] For the reasons outlined at section 18.4, the Tribunal makes no finding on this claim in this report. However, following a final court decision being made in the *Marlborough Sounds* case, the Tribunal reserves the right of the claimants to apply for a further hearing on their claims relating to the ownership of the foreshore and seabed.

The Wai 145 claimants have also claimed as a Treaty breach the vesting of the foreshore and seabed in the superintendent of Wellington under the Public Reserves Act 1854.[41] If what is complained of here is the Crown's assumption that it owned the foreshore and seabed, then, as the Tribunal has just stated, it makes no finding on this matter in this report. If the grievance is not the original assumption of ownership but, rather, the transfer of ownership from the central to the provincial government, this does not in itself constitute a Treaty breach, because it is simply a transfer of ownership from one arm of government to another.

39. Ibid, pp 244–247, 290–314
40. Document 05, pp 595–596, 615, 617
41. Claim 1.2(d), paras 17.2, 17.3, 17.4



Figure 8: Stranded blackfish whales under the trestling for the first Te Aro reclamation (at the foot of Taranaki Street), circa 1882–83. Photographed by William Williams (1859–1948). Reproduced courtesy Alexander Turnbull Library, Wellington, New Zealand (E R Williams collection, G-25538-1/1).

### 18.6.2 Reclamations

The Wai 145 claimants have alleged that the Crown breached the Treaty by authorising reclamations without consulting Maori.[42]

None of the many pieces of legislation authorising reclamations made any provision for consultation with Maori, nor is there any evidence that Maori were, in practice, consulted about reclamation before the late 1980s. Maori were consulted in 1988 about a proposed reclamation to create a marina at Seaview, but this was probably the first time Maori had ever been consulted about a reclamation in Wellington Harbour.[43]

The claimants have also alleged that they were adversely affected by the destruction of foreshore and fisheries as a result of reclamation.[44] Counsel for the Wai 145 claimants stated that the destruction of Maori fishing, trading, and moorage sites on the foreshore as a result of reclamation 'forced the decision upon many Maori to leave the Wellington region'.[45] However, we note that the source relied upon for this statement in fact says that 'It seems *likely*

42. Claim 1.2(d), para 17.1; doc 05, p 607
43. Document 19, p 244
44. Claim 1.2(d), paras 17.5, 17.6, 17.9; doc 05, pp 613–616
45. Document 05, p 614

that the loss of these important resources and facilities *contributed* to the decline of Maori numbers in the Wellington region' (emphasis added).[46] Claimant counsel also claimed (citing McClean) that reclamation had three major effects on Wellington Maori: it destroyed their kai moana, tauranga waka, and wahi tapu; it deprived them of water frontage and access; and it alienated the foreshore, which was under Maori use and ownership, by bringing the high- and low-water marks together, thus making the foreshore disappear.[47]

Crown counsel argued that, by the time the major reclamations occurred, most of the occupants of the harbour pa had already left the area and that 'there is no correlation between dates of reclamation and the sale, abandonment or acquisition of nearby pa sites'.[48] It is therefore worth examining the evidence in relation to each of the pa sites around the harbour.

- The Te Aro Pa reserve created by McCleverty had full foreshore frontage, surveyed down to the low-water mark. The pa reserve was subdivided in the 1860s, and many lots were sold in the 1870s. Issues regarding the alienation of this Te Aro Pa land were discussed at section 13.3.2. It appears that the main way in which Te Aro Maori lost ownership of the foreshore was through the sale of the Te Aro Pa lots with harbour frontage. However, those few Maori who still owned harbourside lots at Te Aro in June 1874 lost their rights to the foreshore as a result of the Crown grant of 70 acres of foreshore and seabed to the Wellington City Council.[49] Crown counsel presented evidence which suggested that Te Aro Maori were compensated for the loss of their foreshore rights, although this evidence is by no means conclusive.[50] While the foreshore was acquired by the city council in 1874, reclamation at Te Aro did not commence until 1886. It is not known how many Maori remained at Te Aro by this time, but their numbers had been declining dramatically from the 1850s.
- Kumutoto Pa was separated from the foreshore by the construction of Lambton Quay, so it did not have foreshore frontage when it was reserved by McCleverty. The pa was already in decline when Kemp visited it in 1849, and Wi Tako Ngatata and his people were planning to relocate,[51] so there were probably no Maori living there by the time reclamation commenced in the area.
- Pipitea Pa was deprived of its foreshore frontage by the construction of Thorndon Quay, so the pa reserve created by McCleverty did not include the foreshore. The foreshore in front of Pipitea was part of the 117 acres Crown-granted to the provincial superintendent in 1855, but it was not until 1876 that reclamation reached Pipitea Point.

46. Document A44, p 88
47. Document O5, p 615
48. Document P5, pp 25–27
49. Document I9, p 189
50. Document P5, pp 24–25; minutes of Native Land Court hearing of the *Parumoana* case (doc P5(a), p 4)
51. H Tacy Kemp, report on Port Nicholson district, 1 January 1850 (doc N3(c), p 594)

Another reclamation between Kaiwharawhara and Pipitea Point was completed in 1883.[52] The census recorded a mere nine Maori still living at Pipitea in 1881, and much of the pa land had already been sold by then.[53]

- The Kaiwharawhara Pa land reserved by McCleverty extended only to the high-water mark. The 1855 earthquake distanced the pa reserve from the harbour, with the Crown claiming the land raised by the earthquake, and the construction of the Hutt Railway in the 1870s further cut off access to the foreshore. The Kaiwharawhara Pa reserve was sold in 1894, before reclamation work began along the western foreshore in 1904.[54]
- Ngauranga Pa likewise lost its foreshore access when the Hutt railway was built, and it was further distanced from the harbour by the reclamation which commenced in 1904.[55] Ngauranga is one instance where the reserve land was sold only after reclamation had taken place.[56] It is not clear whether Maori still lived at Ngauranga at the time that the reclamation took place, although already in the 1870s Ngauranga did not appear as a location in census returns.
- Petone Pa was located on Petone beach. McCleverty assigned Hutt sections 1, 2, and 3 (including the pa site) to Petone Maori, giving them an extensive harbour frontage. However, some of this land was compulsorily acquired by the Crown for the Wellington to Hutt railway, and the construction of this railway in the 1870s also cut off access to the foreshore. It is not clear from the evidence before the Tribunal whether reclamation ever took place near the Petone Pa site, but it seems likely that the foreshore in front of Petone Pa was reclaimed as part of the upgrading of the Wellington to Hutt rail link in 1904. It is not known whether the pa was still occupied at this time.[57]
- Waiwhetu Pa had a harbour frontage and remained in Maori ownership until the pa reserve was compulsorily acquired by the Hutt River Board under the Public Works Act 1908 in 1928, ostensibly for river protection works. This taking has been discussed in chapter 17. Reclamation at Waiwhetu, as part of the Hutt River estuary reclamation, did not commence until 1936, after the pa reserve had already been taken.[58]

In light of the above evidence, it appears that Crown counsel's submission on this point is substantially correct. By the time reclamation took place, Maori had, for the most part, moved away from their pa, often leaving the region altogether. Moreover, in almost all cases the bulk of the reserve land at the pa sites had already been sold before reclamation commenced, although Ngauranga is a notable exception. The claim that reclamation forced Maori to leave the Wellington region is therefore unsustainable.

52. Document 19, p 152, 179
53. 'Census of the Maori Population, 1881', AJHR, 1881, G-3, p 26
54. Document 19, p 191; doc 18, pp 183–184
55. Document 19, p 192
56. Document 18, pp 142–145
57. Document 19, pp 145–146, 179–181, 192–193. See also the discussion of the Petone reserves in document A44.
58. Document 19, pp 204–207

This is not to say, however, that those Maori who remained in Wellington were unaffected by reclamation. Reclamation destroyed marine habitats where Maori had collected kai moana, although many of these areas were probably quite polluted before reclamation began.[59] As a result, Maori lost, without any consultation or compensation, many of the fisheries guaranteed to them by the Treaty. The Crown has acknowledged that reclamation probably had an adverse effect on the kai moana of Te Whanganui a Tara but says that such adverse effects must be balanced against the benefits of settlement and reclamation, a point discussed below.[60]

Moreover, reclamation caused the foreshore to disappear. Regardless of the legal questions about the ownership of the foreshore, Maori had an interest in the foreshore which should have been acknowledged. The foreshore had great cultural and spiritual significance to Maori. It had played an important part in their lives as a source of food, a place for landing canoes, and a link between land and sea. There can be no more drastic action than to cause so valuable a part of the natural environment to cease to exist altogether, yet the destruction of the foreshore by reclamation at Te Whanganui a Tara took place without any consultation with the Maori who had been kaitiaki of that foreshore. The destruction of foreshore and fisheries by reclamation had an adverse effect on those Maori who were still living around the harbour when reclamation commenced, and we have little doubt that for some Maori the reclamation and its consequences would have been a contributing factor to their decision to leave Wellington.

Before making findings in regard to reclamations, however, we need to consider a number of points made by Crown counsel.

First, Crown counsel made the point that there is no evidence of protest by Wellington Maori about reclamation until the 1890s, some 40 years after large-scale reclamation began. Counsel submitted that the absence of protest before the 1890s suggested 'Maori agreement or at least ambivalence regarding reclamations', and she also pointed out that Wi Tako Ngatata voted in Parliament for the Te Aro Reclamation Bill. Furthermore, Crown counsel maintained, there has been little more modern protest by the Wai 145 claimants regarding reclamations.[61]

It is true that there is remarkably little evidence of Maori protest about reclamation. A series of petitions by Enoka Te Taitu and others in the 1890s complained, among other things, that as a result of the Government taking over the administration of the tenths, Maori had lost their canoe landing places, mud banks, shellfish beds, and other resources obtained from the sea. One of these petitions specifically mentioned the destruction of pipi beds and other food sources by reclamation.[62] This is the only example of protest about reclamation

59. Ibid, p 226
60. Document P5, p 17
61. Ibid, pp 22–24, 29
62. Document I9, pp 193–194

in Wellington found by Robert McClean. McClean also commented that the absence of a record of protest by Maori about their fishing rights at Wellington 'contrasts with a very extensive record of Maori protest at Porirua'.[63]

However, the absence of protest by Maori about reclamation does not absolve the Crown of its obligation under the Treaty to consult them. As in the case of the 'twenty years of silence' argument, discussed in chapter 13, the Crown has attempted to argue that Maori silence can be read as acceptance. The Tribunal is not persuaded by this line of argument. Wi Tako's apparent support for reclamation is more persuasive, since, as a rangatira of Wellington Te Atiawa, Wi Tako was a representative of his people. Nevertheless, his vote in Parliament does not constitute consultation with Wellington Maori.

Crown counsel also submitted that any adverse effects of reclamations have to be weighed against the benefits. Reclamation was part of the development of Wellington, development in which Maori were keen to participate and from which they benefited, counsel argued. She observed that there was an inherent contradiction in the Wai 145 claimants' argument on harbour development:

> On the one hand, they appear to agree that development of the city was necessary in order to bring value to the lands they retained, and to encourage trade and commerce. Yet, at the same time, the submissions on reclamation and pollution appear to suggest in places that these things should not have occurred at all.

Settlement and development inevitably have some environmental impact, she continued, but any damage caused must be balanced against the benefits. Finally, Crown counsel stated that the Crown has a right under article 1 of the Treaty to manage and exploit natural resources for the benefit of all. Therefore, 'the regulation of reclamation of land for roads and the development of Wellington's harbour is an area where the Crown's right of kawanatanga must prevail'. She acknowledged, however, that there may have been insufficient provision for consultation with Maori when the Crown was authorising and carrying out reclamations.[64]

There is some force to Crown counsel's argument on this point. Flat land was so scarce in Wellington that it is hard to see how industrial and maritime development could have taken place there without reclamation. As McClean observed, reclamation provided land for roads, railways, wharves, and the airport, thus facilitating communication and trade links both nationally and internationally. It also provided land for the private and State sectors. Reclaimed land, in McClean's view, enabled Wellington to grow and to gain wealth and power.[65]

It is part of the case of the Wai 145 claimants that they did not share in this wealth to anywhere near the extent that they should have. In particular, they lost most of the

63. Document 19, p 226
64. Document P5, pp 16–17, 34–35
65. Document 19, p 253

valuable urban tenths which would have allowed them to participate in and benefit from the development of the city. However, their grievance about the appropriation of urban tenths by the Crown (discussed in chapter 13) and the resulting loss of revenue implies a desire to benefit from the development which reclamation made possible. It does seem contradictory to claim that Maori should have been able to participate more fully in development but at the same time to claim that a key part of that development should never have taken place.

It is possible to resolve this apparent contradiction, however. Reclamation is not in itself a bad thing, nor is it necessarily inimical to the interests of Maori. Consultation with Maori and consideration of Maori values are the key to development which complies with Treaty principles. It is not sufficient to rely on Maori to object to or protest against development which adversely affects their interests: the Crown is required to consult with Maori before undertaking or authorising development which may affect significant Maori interests. Prior to the 1980s, there was no such consultation with Maori in relation to reclamations. Many of these reclamations were carried out by the Crown, and in all cases the Crown authorised this reclamation work by legislation or Orders in Council (or both). When authorising reclamation, the Crown failed to make provision for consultation with Maori.

As a result, there was no recognition of Maori interests in the foreshore, nor of Maori rights to their fisheries. Maori interests in the foreshore should have been recognised by, at the very least, consultation about proposed reclamations. Maori interests in their fisheries, the continued ownership of which was specifically guaranteed in article 2 of the Treaty, required a stronger form of recognition. Where reclamation had the effect of destroying shellfish beds, the Crown was obliged to obtain Maori consent and to compensate Maori for such destruction. The Crown's kawanatanga rights under article 1 of the Treaty do indeed give it the right to undertake public works for the benefit of the general community, but this does not allow the Crown simply to disregard the specific interests of Maori and their rights under article 2.

On the contrary, the Crown's kawanatanga Treaty rights under article 1 are not absolute; they are qualified by the obligation of the Crown to respect the rangatiratanga rights of Maori under article 2 of the Treaty. Article 2 guarantees to Maori the right to retain full authority over their lands, forests, fisheries, and other valuable possessions as long as they wish to retain them. Moreover, as we noted in chapter 4, the Ngai Tahu Tribunal (after citing a passage from Sir Ivor Richardson's judgment in the *New Zealand Maori Council* case) has stated that 'On matters which might impinge on a tribe's rangatiratanga consultation will be necessary. Environmental matters, especially as they may affect Maori access to traditional food resources – mahinga kai – also require consultation with the Maori people concerned.'[66]

66. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 2, p 245

The Tribunal was referred by claimant counsel to a discussion by Professor Alan Ward on the importance to Maori of foreshores.[67] Ward noted that possession of, and access to, foreshores was 'a jealously guarded right' among Maori for a variety of reasons, 'but especially because of their value as food resources'.[68] It is clear that, during the lengthy period when most of the reclamation took place around Wellington Harbour, Maori fisheries were steadily diminished as a result of Crown actions taken and legislation passed without the consent of Maori and without any compensation being paid by the Crown.

Had reclamation been undertaken in consultation with Wellington Maori, and had Maori been compensated for their losses (especially the loss of the fisheries), there is every reason to believe that it could have proceeded with the support of Maori, and to the mutual benefit of both Maori and Pakeha. When Te Atiawa kaumatua were for the first time consulted about the Seaview reclamation in 1988, they did not oppose it.[69] Under the Resource Management Act 1991, Maori values and the principles of the Treaty of Waitangi must be taken into account when considering whether proposed reclamations will have an adverse effect.[70] This goes some way towards ensuring that any future reclamation will be undertaken in consultation with Maori, and in compliance with the Treaty.

### 18.6.3 Tribunal finding of Treaty breaches

The Tribunal finds that:

- Maori have been prejudicially affected by the actions of the Crown and legislative provisions which authorised the reclamation of substantial parts of the foreshore of Wellington Harbour. Those Maori so affected were Te Atiawa, Ngati Tama, Taranaki, and Ngati Ruanui.
- The prejudice arose from the consequential destruction of the foreshore, which was of great cultural and spiritual significance to Maori. As a result, Maori progressively lost their rights of access to the foreshore, which served as a source of food, as a place for landing waka, and as a ready link between the land and the sea.
- In so destroying much of the foreshore, the Crown failed at any time prior to the 1980s to consult with Maori or to compensate them for the loss of their right of access to the foreshore and the loss of their customary fisheries. Such actions and omissions of the Crown and the legislative measures which authorised the destruction of foreshore were inconsistent with the Treaty obligation of the Crown under article 2 of the Treaty to consult with Maori before any such reclamation was undertaken and to compensate Maori for the loss of their rights in respect of that foreshore.

67. Document 05, p 595
68. Alan Ward, *National Overview*, 3 vols (Wellington: GP Publications, 1997), vol 1, p 89
69. Document 19, p 244
70. Ibid, p 247

- In assessing the degree of prejudice to Maori as a consequence of the foregoing, regard should be had to the beneficial effect of the various reclamations on the growth and prosperity of the city of Wellington. Regard should also be had to the fact that the ability of Wellington Maori to participate in such growth and prosperity was substantially reduced by the loss of many of their valuable urban tenths reserves.

### 18.6.4 Sale and lease of reclaimed land

The Wai 145 claimants have alleged that the Crown breached the Treaty by authorising sales and leases of reclaimed land without consulting Maori.[71]

The claimants have not explained how such sales and leases of reclaimed land breached the Treaty, so it is difficult for the Tribunal to respond to this generalised claim. The Tribunal has found at section 18.6.3 that the Crown acted inconsistently with its Treaty obligations by undertaking and authorising reclamation around the foreshore of Wellington Harbour without consulting Maori or paying them any compensation. We consider that no further Treaty breach has been established in relation to the failure to consult with Maori about the sale and lease of land once it had been reclaimed. However, we would add that, had the Crown been conscious of its Treaty duty, it would have been appropriate for it to have vested a portion of the reclaimed land in the affected Maori.

### 18.6.5 Pollution

The claimants have stated that the Crown failed to prevent the pollution of, and other environmental damage to, the harbour and foreshore and that this has resulted in the destruction of kai moana resources.[72]

As Crown counsel pointed out, 'There is little evidence on the Wai 145 Record in relation to pollution'.[73] The main report on the harbour by Robert McClean does include some evidence on the subject, but McClean noted that it was not the main focus of his report.[74] We start by summarising that evidence.

By the 1870s, Wellington Harbour was already becoming polluted, and sewage disposal was a serious problem. The completion of a sewerage outfall at Moa Point in 1898 reduced the discharging of sewage into the harbour, but by 1935 the sewerage reticulation system was overloaded, and construction began on a new comprehensive sewerage scheme for Wellington city. Similar problems were encountered in the Hutt Valley and led to the construction of a sewer outfall at Pencarrow Head. This was completed in 1962. The harbour was also

71. Claim 1.2(d), para 17.15
72. Ibid, paras 17.7, 17.8, 17.12, 17.13; doc 05, p 614
73. Document P5, p 35
74. Document 19, p 252

polluted by increasing quantities of industrial waste, mainly from the Hutt Valley, Kaiwharawhara, and Ngauranga, from the 1880s onwards.

In 1954, a Wellington City Council report highlighted major water pollution in Wellington Harbour, and a 1971 report for the Hutt Valley Drainage Board found that the Hutt Estuary and Waiwhetu Stream were grossly polluted by sewage and industrial waste. A comprehensive evaluation of the harbour's shellfish resources in 1982 concluded that most, if not all, of the shellfish in the harbour were likely to be contaminated at some time, so all shellfish should be considered unfit for human consumption. Reports in the 1990s indicated that the water quality in the harbour was gradually improving, but there are still few sites within the harbour which would be suitable for edible shellfish, and the Hutt River estuary remains highly polluted.[75]

It appears that Wellington Maori did not start protesting about the pollution of the harbour until the 1980s, when they began to complain about the discharge of untreated sewage at Moa Point. In 1986, the Wellington Maori Council lodged a claim to the Waitangi Tribunal about the situation at Moa Point, but the claim was withdrawn when the Wellington City Council decided to start treating the sewage.[76]

The Crown accepts that pollution has had an adverse effect on Wellington Harbour generally and on kai moana specifically, although it says that 'the extent of the adverse effect and its impact on Maori is unknown'.[77] Crown counsel argued that pollution was a by-product of development and, as in the case of reclamation, submitted that environmental damage must be balanced against the benefits of settlement and development. While accepting that 'most pollution is likely to have come from European sources', Crown counsel also suggested that Maori contributed to the pollution and participated in the industrial development of the city.[78]

The Tribunal agrees with Crown counsel that there is insufficient evidence to enable it to make definitive findings in relation to pollution. To assess the Crown's responsibility, it would be necessary not only to know more about the impact of pollution but also to know what action the Crown could realistically have taken to prevent or to reduce the pollution. It is clear that pollution has made kai moana in most of the harbour inedible, thus depriving Maori of the fisheries guaranteed by the Treaty. This would appear, on the face of it, to be a Treaty breach, if actions or omissions of the Crown could be shown to be responsible for the pollution. On the basis of the evidence available to us, however, the Tribunal is unable to say with confidence that the Crown was responsible.

75. Document I9, pp 217–224
76. Ibid, pp 226–228
77. Document Q1, pp 56–58
78. Document P5, pp 17–18

### 18.6.6 Lack of Maori input into decision-making on Wellington Harbour

The claimants have stated that the Crown breached the Treaty by failing to involve Maori in the management of the harbour and its resources.[79]

Until recently, there was quite simply no provision for Maori to be consulted about issues relating to the harbour and foreshores, let alone to be more directly involved in decision-making on these issues. The legislation affecting the harbour and foreshores, and authorising reclamations, made no mention of the need to consult with Maori and to protect their rights under the Treaty. Nor is there any evidence that Maori were, in practice, consulted about harbour issues prior to the 1980s. It was not until 1988 that the new Wellington Harbour maritime planning scheme mentioned the need to protect parts of the harbour which have special significance to Maori.[80] Since 1991, there has been provision under the Resource Management Act, together with associated coastal policy statements, for Maori input into resource management issues regarding the harbour and for the recognition of special Maori interests in the harbour.[81] Crown counsel also pointed out that other relevant legislation provides for the consideration of Treaty principles by decision-makers acting under that legislation.[82]

Crown counsel acknowledged that 'in the past there may have been insufficient provision for Maori input into conservation and management of the harbour', but she submitted that 'the current legislative framework provides for such input, and in doing so is consistent with Treaty principles'.[83] In reply, counsel for the Wai 145 claimants argued that the Crown should receive no special praise for ensuring that it meets its Treaty obligations in the future, and that this did not absolve the Crown of its obligation to provide redress for past Treaty breaches.[84]

The Tribunal acknowledges the provisions that exist in current legislation for recognising Maori interests in the harbour and foreshores, for consulting Maori, and for allowing Maori input into decision-making on resource management issues regarding the harbour. However, for almost 150 years Maori interests were not recognised, Maori were not consulted, and there was no provision for Maori input when important decisions were made about the harbour. In that time, the face of the harbour was changed radically in ways which affected Maori interests. We consider it deplorable that Maori were denied involvement in the resource management of Wellington Harbour while, as noted in the previous section, that harbour was being seriously polluted.

79. Claim 1.2(d), para 17.14
80. Document I9, p 241
81. Ibid, app E
82. Document P5, p 32
83. Ibid, p 35
84. Document Q11, p 94

### 18.6.7 Tribunal finding of Treaty breach

The Tribunal finds that the failure of the Crown to make legislative provision for the involvement of Wellington Maori in the management of Wellington Harbour and its resources until very recently is in breach of its Treaty obligation to protect the customary rights of Maori in the harbour and the foreshore and that the claimants have been prejudicially affected thereby.

### 18.6.8 The Resource Management Act 1991

While helpful, the Tribunal believes that the provisions of the Resource Management Act 1991 and associated policy statements are inadequate. The Tribunal's *Ngawha Geothermal Resource Report 1993* was critical of the Resource Management Act on the ground that it does not require persons exercising functions under the statute to act in conformity with Treaty principles but merely provides that Treaty principles must be taken into account.[85] This criticism was endorsed by the Tribunal in its 1993 *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* and its *Te Whanganui-a-Orotu Report 1995*.[86] In its 1999 *Whanganui River Report*, the Tribunal found the Resource Management Act to be 'inconsistent with the principles of the Treaty in that it omits any provision that ensures that all persons as identified in section 2 of the Act exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, are to do so in a way that is consistent with, and gives effect to, the Treaty of Waitangi'.[87] This finding is equally relevant to Wellington Harbour.

85. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993), pp 145–147, 154

86. Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: Brooker and Friend Ltd, 1993), pp 23, 34–35; Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995* (Wellington: Brooker's Ltd, 1995), pp 164–165

87. Waitangi Tribunal, *The Whanganui River Report* (Wellington: GP Publications, 1999), p 332

CHAPTER 19

# FINDINGS AND RECOMMENDATIONS

## 19.1 Introduction

In many of the preceding chapters, the Tribunal has made findings of Treaty of Waitangi breaches by the Crown. As we have seen, the claim in respect of the Port Nicholson block originated with the Wai 145 claim brought by the Wellington Tenths Trust and the Palmerston North Reserves Trust, representing the interests of the beneficiaries in those trusts. It was originally limited in scope. However, as evidence was adduced, it became apparent that the claimants' grievances extended beyond matters which were solely the concern of the Wai 145 claimants. As a consequence, claims brought on behalf of Ngati Toa, Ngati Tama, Ngati Rangatahi, Rangitane, Muaupoko, and Ngati Mutunga also became part of this inquiry.

In this chapter, we note some key Tribunal findings and also summarise the Crown's various breaches of the Treaty as found by the Tribunal. In doing so, we note the particular Maori group or groups affected by such breaches. This is followed by a discussion of how the question of appropriate remedies should be approached and the need in some cases for the question of representation to be settled by the parties.

## 19.2 Tribunal Findings on Events to 1840

The Tribunal has found that:

- At 1840, Maori groups with ahi ka rights within the Port Nicholson block (as extended in 1844 to the south-west coast) were Te Atiawa at Te Whanganui a Tara and parts of the south-west coast; Taranaki and Ngati Ruanui at Te Aro; Ngati Tama at Kaiwharawhara and environs and at parts of the south-west coast; and Ngati Toa at Heretaunga and parts of the south-west coast. These groups also had take raupatu over the remainder lands of the Port Nicholson block (see s 2.7; for the remainder lands, see ss 10.8.4–10.8.5).
- The 1839 Port Nicholson deed of purchase was invalid and conferred no rights under either English or Maori law on the New Zealand Company or those to whom the company subsequently purported to on-sell part of such land (s 3.8.5).

## 19.3 Summary of Tribunal Findings of Crown Treaty Breaches

### 19.3.1 The town belt and other public reserves

The Crown took most of the town belt land from Maori without obtaining their consent or carrying out any consultation and without making any payment (s 6.3.2). The Maori adversely affected were Te Atiawa, Taranaki, Ngati Ruanui, and Ngati Tama.

The Crown also took various reserves in Wellington for public purposes and assumed the ownership of Matiu (Somes Island) in 1841, again without obtaining the consent of Maori or carrying out any consultation and without making any payment (ss 6.3.4, 6.4.2). The Maori adversely affected were Te Atiawa, Taranaki, Ngati Ruanui, and Ngati Tama.

### 19.3.2 The switch from an inquiry to arbitration

By insisting that the price to be paid by the New Zealand Company to Maori for 67,000 acres in the Port Nicholson block should be based on the assessed value of the land at the time of the invalid 1839 deed of purchase of the block, the Crown failed to protect the Treaty rights of Maori to sell their land at a price freely agreed upon by them. The Maori adversely affected were Te Atiawa, Taranaki, Ngati Ruanui, Ngati Tama, and Ngati Toa, being the Maori having customary rights in the Port Nicholson block (s 7.6.3).

The Crown:

- failed adequately to consult with such Maori having customary interests in the Port Nicholson block before deciding to switch from proceeding with the Spain inquiry to implementing a form of arbitration;
- proceeded to implement the arbitration process without the informed consent of such Maori; and
- failed to ensure that a fair process, acceptable to Maori, would be followed by the arbitrator, in that the Crown reserved the right to impose conditions and settle compensation without the willing consent of Maori, as required by article 2 of the Treaty (s 7.7.4 ).

The Crown imposed on such Maori having customary interests in the Port Nicholson block an arbitration regime which was intended to complete the extinguishment of any claims to title by Maori without a determinative inquiry and finding into whether or not a valid sale had occurred and which lands, if any, Maori had knowingly and willingly wished to alienate and, further, imposed on Maori the burden of establishing a valid claim to their lands and thereby shifted the burden of proof to Maori. The Crown also failed to ensure that Maori freely agreed to such a regime (s 7.8.3).

In addition, the Crown prejudicially affected such Maori other than Ngati Toa by favouring the interests of the settlers over those of Maori by requiring Maori not to resume any of their lands built upon by settlers and by failing to prevent settlers from pulling down fences erected by Maori and from driving their cattle on Maori cultivations (s 7.8.3).

### 19.3.3 The 1844 deeds of release

The Treaty breaches relating to the 1844 deeds of release need to be considered in the light of the Tribunal finding that those deeds related only to the 71,900 acres of land specifically referred to in the schedule attached to each of the deeds and not to the remaining land included in the 1839 Port Nicholson deed of purchase, as extended in 1844 (s 8.3.10).

The Crown failed actively to protect Maori living in the Port Nicholson block who were parties to the deeds of release by:

- not ensuring that the protector of aborigines was at all times free to act independently of the Crown and was not subjected to pressure by Crown officials to facilitate the purchase of Maori land by the New Zealand Company (s 8.5.3);
- failing to ensure that Maori freely and knowingly signed the deeds of release and, in particular, that they understood the nature and scope of such deeds and were not placed under pressure to sign them (s 8.6.3);
- failing to ensure that Maori who were parties to the deeds of release were not threatened by Crown officials that, if they did not agree to accept the sum of money offered as compensation for signing the deeds, no higher offer would be made and the land would go to the European settlers without the consent of Maori (s 8.6.3); and
- failing to ensure that the rights of such Maori to their pa, burial grounds, and cultivations (reserved to them under the deeds of release) were adequately protected by being included in an approved surveyed plan and in any Crown grant made in respect of such lands (s 8.8.2).

In addition, the Crown failed actively to protect all Maori having customary rights in the Port Nicholson block at 1840 by failing to ensure the allocation by the New Zealand Company of the full number of rural tenths to which they were entitled; the shortfall in such provision amounting to some 3090 acres, making up 31 rural tenths (s 8.8.2).

### 19.3.4 Ngati Toa

The Crown failed adequately to recognise, investigate, or take into account the full scale and nature of Ngati Toa's interests in the Port Nicholson block area and failed adequately to compensate Ngati Toa for their loss of such interests or to ensure that they gained an equitable interest in the rural and urban tenths reserves. As a consequence, the Crown failed to act reasonably and in good faith and failed to protect the customary interests of Ngati Toa in and over the Port Nicholson block and, in particular, Heretaunga (s 9.7.3).

The Tribunal notes that the effect of this finding cannot result in Ngati Toa being included as beneficiaries in the Wellington tenths reserves, because the beneficiaries were determined by the Native Land Court in 1888. But it does entitle them to compensation for this exclusion from such reserves.

### 19.3.5 Ngati Rangatahi in Heretaunga

The Crown breached the Treaty principle of active protection of the article 2 rights of Ngati Rangatahi by:

- failing to recognise and protect Ngati Rangatahi's rights to their lands, cultivations, and other properties in the Hutt Valley which had been acquired pursuant to Maori custom;
- ordering their expulsion from the Hutt Valley in February 1846;
- allowing the destruction and pillaging of their property after they had agreed to vacate their lands in the Hutt Valley (which destruction included the burning of their pa by the military forces of the Crown);
- failing to award them compensation for the loss of their lands and valuable cultivations following their expulsion in 1846; and
- failing to reserve lands in the Hutt Valley for their future use and enjoyment (s 9.8.3).

### 19.3.6 Ngati Tama in Kaiwharawhara and Heretaunga

The Crown omitted to protect the rangatiratanga of Ngati Tama in Kaiwharawhara and Heretaunga by:

- failing to prevent them from being driven from their land and cultivations at Kaiwharawhara;
- failing to recognise their right to resort to the Hutt Valley to cultivate land for their sustenance and livelihood;
- failing to honour the provisions in the March 1844 Kaiwharawhara deed of release reserving to them all their cultivations and cleared land (ngakinga) for so long as they wished to retain the same; and
- requiring them in February 1846 to surrender their cultivations, houses, and other property in the Hutt Valley without any consultation or a freely negotiated agreement, and without paying adequate compensation for the loss resulting from their expulsion (s 9.9.2).

### 19.3.7 The McCleverty transactions

Those Maori involved in the so-called McCleverty exchanges were Te Atiawa, Taranaki, Ngati Ruanui, and Ngati Tama. The Crown failed to ensure that such Maori were given a free and unpressured choice as to whether they wished to relinquish their cultivations in favour of the settlers, and a free and unpressured choice as to any land they might receive in exchange. By such failure, the Crown failed to protect the rangatiratanga of Maori in and over their cultivations (s 10.6.4).

The land assigned to Maori by McCleverty, in exchange for the release by such Maori in the Port Nicholson district of their cultivations on land claimed by settlers, was not waste land belonging to the Crown, nor did it belong to the New Zealand Company. It was in part tenths reserves held in trust for Maori, and the remainder was town belt or unsurveyed land belonging to Maori having customary interests in the Port Nicholson block. As a result, Maori received no compensation for the release of their valuable cultivations to the Crown (s10.7.5).

As a consequence of the foregoing, the Crown failed to fulfil its Treaty obligation to protect the rangatiratanga of such Maori in and over their land by ensuring that their tenths reserves remained intact and that they received adequate compensation for the surrender of their valuable cultivations, which had been expressly reserved to them (s10.7.5). The change of tenure of the tenths reserves also facilitated their eventual alienation.

### 19.3.8 Grey's 1848 Crown grant

As at January 1848, when Grey issued his Crown grant to the New Zealand Company, Ngati Toa, Te Atiawa, Taranaki, Ngati Ruanui, and Ngati Tama had take raupatu rights over the remainder lands of some 120,626 acres in the Port Nicholson block.

Maori who had rights in this block had not, as the 1848 Crown grant claims, made a full and valid cession of all their rights to the land in the Port Nicholson district. In particular, such Maori had not relinquished their take raupatu rights over some 120,626 acres or thereabouts included in the grant to the New Zealand Company.

As a result, the Crown failed to act reasonably and in good faith towards its Treaty partners in disposing of the remainder lands without making any payment to or obtaining the consent of such Maori and, further, it failed actively to protect the Treaty rights of such Maori (s10.8.6).

### 19.3.9 Failure to reserve adequate land for Port Nicholson Maori

The Crown neglected to protect the rights of Maori living in the Port Nicholson district who were parties to the McCleverty deeds by failing to set aside reserves which left them with an adequate land base for their short- and long-term cultivation and resource-gathering needs and which made adequate provision for Maori to develop on an equal footing with Pakeha (particularly by taking up pastoralism or other farming and land-use activities) (s11.2.3).

### 19.3.10 The Crown's administration of tenths reserves, 1840–82

The Tribunal is satisfied that Maori having customary rights in the Port Nicholson block as at 1840 were intended to be the beneficial owners of the tenths reserves to be provided for

out of the land in the block acquired by the company. These reserves were to be held in trust for such Maori (s12.4.3).

The above finding on the status of the tenths reserves leads to a number of findings of Treaty breaches. The Crown failed in its Treaty duty actively to protect the interest of the beneficial owners of the Wellington tenths reserves in a number of respects. During the period 1840 to 1882, the Crown failed:

- to devise a satisfactory policy to administer the reserves in the best interests of the beneficiaries;
- to pass legislation defining the legal status of the reserves and providing for their effective administration;
- to provide for the effective administration of the reserves and the continuous supervision of the reserves commissioners;
- to consult with the beneficial owners and to involve their representatives in the reserves' administration;
- to ensure that payments were made only to persons entitled to them; and
- to ensure the prompt rental of reserves, the prompt payment of income to beneficial owners, and the prompt ascertainment of those entitled to be beneficiaries (s12.5.2).

### 19.3.11 The alienation of urban reserves, 1840–82

The Crown acted in breach of Treaty principles in the following respects:

- In appropriating 23 valuable tenths reserves for hospital, educational, and religious purposes without any consultation with or the consent of the Maori beneficial owners of such lands (s13.2.9).
- In eventually paying compensation for the appropriation of the above reserves which was manifestly inadequate (s13.2.9).
- In failing to compensate the beneficial owners for the loss of income from such reserves for some 24 years (s13.2.9).
- In authorising, without any consultation with or the consent of the beneficial owners, the occupation by military forces of town acres 89 and 90, being two tenths reserves in Mount Cook, and in allowing the military to continue occupying these reserves without paying any rent for some 26 years until they were formally purchased by the Crown in 1874. In purchasing rather than leasing these two reserves, the interests of the beneficial owners were further prejudiced (s13.2.9).
- In adopting the policy that it was desirable to remove Maori out of the town of Wellington and, as a consequence, facilitating the sale of their land in Te Aro and Pipitea Pa, thus failing to protect the interests of the owners of the pa reserves (s13.3.3).

### 19.3.12 Trustee administration of Wellington and Palmerston North reserves, 1882–1985

For the reasons given in chapter 14, the Tribunal has concluded that, as a matter of law, the Public, Native, and Maori Trustees were not, in the performance of their respective duties and responsibilities as trustees for Maori reserve lands, acting by or on behalf of the Crown in terms of section 6 of the Treaty of Waitangi Act 1975.

However, the Tribunal has found that the Crown, in promoting certain legislation, acted in breach of Treaty principles and, further, that some legislative provisions were also in breach of the Treaty. We record these as follows:

- In failing to consult with the Maori beneficiaries prior to the enactment of the Native Reserves Act 1882, and in further failing to make provision for the active involvement of Maori beneficiaries in the administration of their reserves, the Crown breached Treaty principles (s15.2.2).
- In failing to ensure that the beneficial owners of the Wellington tenths were consulted prior to the enactment of legislative provisions for the compulsory acquisition of the uneconomic interests of such owners, the Crown failed to fulfil its Treaty obligation to consult with Maori and to act reasonably towards them (s15.6.2).
- The 1955 legislative provisions enabling the Maori Trustee to acquire shares from the beneficial owners of uneconomic interests in Wellington tenths land, without any requirement that the trustee first consult with and obtain the consent of such beneficial owners, were in breach of article 2 of the Treaty (s15.6.2).
- The Crown breached its Treaty obligations to Maori by failing to ensure that the beneficial owners of the Wellington tenths were consulted prior to the enactment of the 1967 legislative provisions for the freeholding of reserve land (s15.7.2).
- The 1967 legislative provisions enabling the Maori Trustee to freehold Wellington tenths land, without any requirement that the trustee consult with and obtain the consent of the beneficial owners, were in breach of article 2 of the Treaty (s15.7.2).
- The omission from the 1967 freeholding legislation of any provision enabling beneficial owners to have priority in acquiring the beneficial interest of any owner who wished to dispose of such interest, and thereby maintain the 'corpus' of the Wellington tenths land, was in breach of article 2 of the Treaty (s15.7.2).
- The proclamations made by the Crown under the provisions of the Public Works Act 1908 (and its amendments) and the Public Works Act 1928 compulsorily vesting part of the Palmerston North Maori reserve in the Palmerston North Borough Council as a recreation ground and compulsorily acquiring another Palmerston North reserve section for a technical high school were in breach of Treaty principles in the following respects:
  - These proclamations were fundamentally inconsistent with the basic guarantee given in article 2 of the Treaty that Maori could keep their land until such time as they wished to sell it at a price agreed upon with the Crown or the local authority, as appropriate.

- The Crown had failed to ensure that there had been consultation with, and the consent obtained of, the Maori beneficial owners before the proclamations were made (s15.11.4).

### 19.3.13 Perpetual leasing of reserves

In relation to the perpetual leasing regime for Maori reserved land, the Tribunal has found that the Crown acted in breach of its Treaty duties to the beneficial owners of the Wellington tenths and Palmerston North reserves by:

- failing to ensure that the beneficial owners of the Wellington tenths and Palmerston North reserves were consulted before the passage of the legislation which imposed, without their consent, the perpetual leasing regime on their reserves (s16.3.2);
- enacting various legislative provisions imposing a perpetual leasing regime on Wellington tenths and Palmerston North reserves (s16.3.4); and
- imposing, under the Maori Reserved Land Act 1955, a fixed-percentage rental formula in perpetually renewable leases for 21-year terms without the consent of the beneficial owners of the Wellington tenths and Palmerston North reserves (s16.3.6).

The Tribunal has refrained from making any Treaty breach findings on the grievances of the Wai 145 claimants concerning certain aspects of the Maori Reserved Land Amendment Act 1997. However, we consider that the Crown should be prepared to negotiate the early surrender, on appropriate terms, of the perpetual leases held on the South Wellington Intermediate School site and the property at 11 Pipitea Street, Wellington (s16.6).

### 19.3.14 The taking of Waiwhetu Pa land for river protection purposes

The provisions of the Public Works Act 1908 and the River Boards Act 1908, under which most of the Waiwhetu Pa reserve was taken by the Hutt River Board, were in breach of Treaty guarantees that Maori could keep their land until such time as they wished to sell it at an agreed price. Those Maori affected were the owners of the Waiwhetu Pa reserve land, represented by the Wai 442 and Wai 145 claimants (s17.5.6).

### 19.3.15 Wellington Harbour and foreshore

The Tribunal has found that:

- Maori have been prejudicially affected by the actions of the Crown and legislative provisions which authorised the reclamation of substantial parts of the foreshore of Wellington Harbour. Those Maori so affected were Te Atiawa, Ngati Tama, Taranaki, and Ngati Ruanui (s18.6.3).

- The prejudice arose from the consequential destruction of the foreshore, which was of great cultural and spiritual significance to Maori. As a result, Maori progressively lost their right of access to the foreshore, which served as a source of food, as a place for landing waka, and as a ready link between the land and the sea (s18.6.3).
- In so destroying much of the foreshore, the Crown failed at any time prior to the 1980s to consult with Maori or to compensate them for the loss of their rights of access to the foreshore and the loss of their customary fisheries. Such actions and omissions of the Crown and the legislative measures which authorised the destruction of foreshore were inconsistent with the Treaty obligation of the Crown under article 2 to consult with Maori before any such reclamation was undertaken and to compensate Maori for the loss of their rights in respect of that foreshore (s18.6.3).
- The failure of the Crown to make legislative provision for the involvement of Wellington Maori in the management of the harbour and its resources until very recently is in breach of its Treaty obligation to protect their customary rights in the harbour and the foreshore (s18.6.7).

This Tribunal has also endorsed a finding of the Whanganui River Tribunal as being equally relevant to Wellington Harbour. In its 1999 *Whanganui River Report*, the Tribunal found the Resource Management Act 1991 to be:

> inconsistent with the principles of the Treaty in that it omits any provision that ensures that all persons as identified in section 2 of the Act exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, are to do so in a way that is consistent with, and gives effect to, the Treaty of Waitangi.

(See section 18.6.8.)

## 19.4 Claimants Entitled to Remedies

As noted above, in 1840 ahi ka customary rights were held in the Port Nicholson block by Te Atiawa at Te Whanganui a Tara and parts of the south-west coast; by Taranaki and Ngati Ruanui at Te Aro; by Ngati Tama at Kaiwharawhara and environs and at parts of the south-west coast; and by Ngati Toa at Heretaunga and parts of the south-west coast. Take raupatu customary rights were also held by these groups over the remainder lands of the Port Nicholson block, which we have found amounted to some 120,626 acres at the time of Grey's 1848 Crown grant to the New Zealand Company. Such lands were never sold by Maori.

The Tribunal has upheld various claims by the Wai 145 claimants brought on behalf of all beneficiaries of the Wellington Tenths Trust and Palmerston North Reserves Trust. However,

counsel for the trust has acknowledged that, as a result of Crown actions designed to alienate Maori from their lands and interests in such lands, the current beneficial owners' list does not reflect the total number of Maori who should benefit from any settlement of the Wai 145 claim. Accordingly, the Wellington Tenths Trust and the Palmerston North Reserves Trust recognise the need for '*all* who whakapapa to Maori in possession of Te Whanganui-a-Tara from the 1839–40 period to participate in and benefit from' any settlement with the Crown (emphasis in original).[1] For this reason, we were advised by Mr Green that a separate settlement trust has been developed:

> with a view to bringing all persons eligible through whakapapa to be a part of the trust. This includes persons who had their shares defined as 'uneconomic' and subsequently confiscated, those who were left out of succession, those who sold their shares as a result of coercion and/or lack of reasonable return and those whose tupuna were left off owners' lists last century, but who had an entitlement to the lands.[2]

We are unaware what progress has been made towards the establishment of the proposed settlement trust. However, it appears to go some way to meeting serious concerns represented to us by Ihakara Porutu Puketapu in claim Wai 562, which was brought on behalf of himself and of descendants of Te Matehou and Puketapu hapu of Te Atiawa iwi. Both these hapu and members of other hapu of Te Atiawa were present in the Port Nicholson block in 1840.

In his evidence in support of this claim, Mr Puketapu made it clear that he generally supported the claim brought by the Wellington Tenths Trust.[3] However, he was seriously concerned that the proceeds of any settlement with the Crown should not automatically be deposited in a 'general pool' of assets administered by the Wellington Tenths Trust for existing shareholders only, to the exclusion of all others who were present in the Port Nicholson block but whose descendants are not represented among the beneficiaries of the Wellington Tenths Trust. In support of this contention, Mr Puketapu referred, by way of example, to Duncan Moore's evidence to the Tribunal on the Wellington town belt.[4] Moore's evidence showed that only a relatively small proportion of individuals living at Te Aro and Pipitea Pa were included on McCleverty's deeds relating to those pa.[5]

Mr Puketapu strongly urged that, if there is to be a durable settlement, all assets received from the Crown for allocation to Te Atiawa should be for all those Te Atiawa who can whakapapa back to the original owners and occupiers and should not be confined to the present Te Atiawa shareholders in the tenths trust. While Mr Puketapu was naturally concerned with the inclusion of all such Te Atiawa in any settlement with the Crown, the same concern

1. Document 05, p 660
2. Ibid, pp 660–661
3. Document K5
4. Ibid, p 3
5. Document K3, pp 34–35

applies equally to all Taranaki, Ngati Ruanui, and Ngati Tama who can whakapapa back to the original owners and occupiers of the Port Nicholson block. The Tribunal shares this concern and believes that full consultation should take place between the four Maori groups involved to ensure that all are included in any settlement with the Crown. This would not occur if only existing beneficiaries were to benefit. The Tribunal considers that this issue should be resolved by the parties as a precondition to any settlement with the Crown.

Given our conclusion that the 1839 deed was invalid, we believe that it is the descendants of those Maori present in 1840 who should benefit from the settlement of Treaty claims relating to the tenths. It was in 1840, in clause 13 of the November agreement between the Crown and the New Zealand Company, that the Crown made clear that a tenth of all the land validly purchased by the company from Maori in the Port Nicholson block was to be set aside for the Maori vendors.

It was not until 1888 that the Native Land Court made a decision identifying those Maori who, in the court's opinion, were entitled to be beneficiaries of the Wellington tenths reserves. A significant number of the original tenths had been either alienated or vested in some only of the Maori as a result of the McCleverty 'exchanges'. It is not disputed by the Wellington Tenths Trust's proposed settlement trust that any tupuna who were left off the owners' lists had an entitlement to the land.

An important question arises as to whether, as appears to be contemplated in the draft trust deed, 'some specific parts of the settlement will belong firmly with the listed owners in the Wellington Tenths and Palmerston North Reserves'.[6] We understood that Mr Puketapu, speaking on behalf of those he represented from Te Atiawa, considered that all proceeds accruing from the settlement relating to Te Atiawa should be shared among all of the widened class of those who can whakapapa back to ancestors in the Port Nicholson block in and about 1840.

This matter has not been the subject of submissions to the Tribunal, and accordingly we can make no recommendation on the question at this stage. Our present view, which is given in case it is of assistance, is that, if a portion of any Crown settlement were to be reserved for current trust beneficiaries, it should not include compensation given for Treaty breaches affecting Te Atiawa, Taranaki, Ngati Ruanui, and Ngati Tama prior to 1888, when, for the first time, the Native Land Court decided who should be the beneficiaries of the trust.[7] However, this question is certainly arguable. It may be that the parties involved will recognise that some subsequent Treaty breaches can fairly be regarded as relating solely to existing trust beneficiaries. In the event that the parties are unable to reach agreement on this or related questions, leave is reserved for any of the parties affected to seek a recommendation from the Tribunal.

6. Peter Love, Wellington Tenths Trust, notice seeking registration of interest in Port Nicholson block claims, 6 March 1998 (doc 05(a), p 94)

7. The list of the specific beneficiaries was not completed until 1895.

The Tribunal has found that the Crown acted in breach of Treaty principles by excluding Ngati Toa from participating in the Wellington tenths reserved under the deeds of release. We consider that it would be inappropriate for us to suggest that an attempt should be made retrospectively to deem Ngati Toa to have been beneficiaries of the Wellington tenths. The Tribunal considers that the appropriate remedy is for the Crown to compensate Ngati Toa for their exclusion from the beneficial ownership of the tenths reserves in the Port Nicholson block.

In relation to the unsold remainder land of some 120,626 acres, we recommend that Ngati Toa, along with Te Atiawa, Ngati Tama, Taranaki, and Ngati Ruanui, should be compensated by the Crown. In speaking of those who have raupatu rights, Ngarongo Iwikatea Nicholson said that 'it is for that collective to reach consensus as to the extent each of them should be entitled and what the [share of any] entitlement is to be'. He stressed that, as a matter of tikanga, they should recognise one another's contribution.[8]

In making its findings in respect of each Treaty breach, the Tribunal has indicated in each case the particular Maori or group of Maori that has been prejudiced by such breach. Where we have referred to the beneficiaries or beneficial owners of Wellington tenths reserves, this is not to be taken as necessarily excluding those who are not beneficiaries in the existing Wellington Tenths Trust.

Claims were made by two groups of Ngati Tama. It will be for them to agree on who is to represent them in their negotiations with the Crown in respect of the various Treaty breaches which affected Ngati Tama along with Te Atiawa, Taranaki, and Ngati Ruanui. In only one instance is a Treaty breach found in respect of Ngati Tama alone. This concerns their being driven from Kaiwharawhara and their later expulsion from the Hutt Valley.

In this report, we have frequently made reference to Taranaki and Ngati Ruanui as groups which have customary interests in the Port Nicholson block and which suffered prejudice as a result of Treaty breaches by the Crown. We have done so because these two groups, which lived in and around Te Aro Pa, were clearly distinct and independent from other groups in the nineteenth century. However, descendants of these groups have not submitted separate Treaty claims relating to our inquiry area. This may well be because they are now so thoroughly intermingled with other iwi that they no longer have a distinct identity in Wellington. We note, for example, that Sir Ralph Love, who originally brought the Wai 145 claim to the Tribunal, was of Taranaki and Ngati Ruanui, as well as Te Atiawa, descent.[9] It may well be appropriate, therefore, for the Wellington Tenths Trust to represent all Taranaki and Ngati Ruanui interests in settlement negotiations (subject to our view, stated above, that the current beneficiaries of the tenths trust should not be the only ones to benefit from the settlement). This is, however, a matter for the descendants of those Taranaki and Ngati Ruanui present at Port Nicholson in 1840 to determine.

8. Document L14, p 25
9. Catherine Love, 'Makere Rangiatea Ralph Love', DNZB, vol 5, p 292

In his closing submissions, counsel for the Wai 145 claimants referred to the outcome of an urgent hearing granted by the Tribunal, on the application of the claimants, on 22 February 1996.[10] Detailed reasons for granting the request are set out in a Tribunal memorandum of 29 February 1996.[11] The hearing concerned a proposal by the purchasers of State-owned enterprise land adjoining and overlooking the Pipitea Marae atea (courtyard of the marae) immediately in front of the wharepuni (meeting house). This Tribunal considered that irreparable damage would be done to the Pipitea Marae should a proposed three-storey building proceed, the more so since the marae was included in a proposed Wellington City Council heritage list of Maori sites and was classified as being of 'outstanding' significance.

Shortly before the urgent hearing was concluded, the Tribunal was advised that the land, which had earlier been vested by the Crown in a State-owned enterprise and on-sold by that enterprise to a developer, had been repurchased by the Crown. In so advising the Tribunal, the Crown intimated that the price which it had had to pay the developer for the land (which price presumably included loss of profits on the development) or the land's current value, whichever was the greater, would be offset against the settlement of the Wai 145 claimants' Treaty claim.

While the Tribunal was not called on to make a finding on the merits of the claim, it heard sufficient evidence to convince it that, if the proposed development were allowed to proceed, it would gravely and irreparably damage the Pipitea Marae and its amenities. In the circumstances, the Tribunal believed that the cost of avoiding the potential damage resulting from the disposal of that section of land by the Crown should be met by the Crown rather than by the claimants.

Counsel for the Wai 145 claimants also expressed concern that the trust has been left by the Crown to carry substantial legal costs in connection with a proposal by the Crown to float the sale of nine departmental buildings in the heart of Wellington city. Four of the nine buildings were relatively close to Pipitea Marae. Each of those properties was memorialised under provisions of the Treaty of Waitangi (State Enterprises) Act 1988. The claimants feared, following a public warning by the Minister in Charge of Treaty of Waitangi Negotiations that he could not rule out seeking legislation to take away the existing powers of the Tribunal to make binding recommendations for the return of memorialised property under the Treaty of Waitangi (State Enterprises) Act 1988, that they would lose their statutory right to apply to the Tribunal for such a recommendation. The Tribunal found that, in so acting, the Crown was in breach of Treaty principles.[12] The claimants say that they were faced with high costs to protect their interests, and we recommend that the Crown should meet their reasonable legal costs in pursuing this matter.

10. Document 01, pp 3–4
11. Paper 2.84
12. Paper 2.185

The Wai 145 claimants alleged that the Crown had declined to accept an application to have the Tramways Building at 1–3 Thorndon Quay declared a wahi tapu site in terms of section 27D of the State-Owned Enterprises Act 1986.[13] They claimed that the Crown had declined the application. Crown counsel, however, advised that in fact the Crown was still considering the application and that a final decision had not been made.[14] As the matter has not been considered on its merits, the Tribunal makes no finding.

On 1 May 1991, the Wai 145 claimants applied to the Tribunal for orders and recommendations pursuant to the Treaty of Waitangi (State Enterprises) Act 1988.[15] Preliminary consideration only was given to the application by the Tribunal, and it was left in abeyance. Leave is reserved to the Wai 145 claimants to apply to the Tribunal for a determination of the application or any amendment thereof.

The Tribunal has concluded that, while Muaupoko and Rangitane each claim an early association with Te Whanganui a Tara, they could provide no evidence of occupation within the Port Nicholson block in or after 1840. We have concluded that they lost their lands by the raupatu of the incoming tribes before the advent of the Crown. It was not in the power of the Crown to restore rights lost in such a way (see s 2.5.4). However, as Professor Alan Ward says, the grouping which we have referred to as the 'Whatonga-descent peoples' (of which Rangitane and Muaupoko were part) has left 'hundreds of placenames on the landscape and a collective cultural memory of the human occupancy of the area since the time of Kupe'.[16] Such ancient associations with the Port Nicholson block remain forever.

Rangitane have requested the recognition of their ancient association with certain sacred sites in Port Nicholson, and the return of those sites. This possibility may in fact already be covered by the Wellington City Council's site inventory and the various protection mechanisms which this affords. Moreover, the Crown has made provision to protect such connections through its various protection mechanisms (the Historic Places Act 1993, the Resource Management Act 1991, the Conservation Act 1987, the Te Ture Whenua Maori Act 1993, and Te Puni Kokiri's process for protecting 'significant sites').[17] Whether or not this recognition is adequate is a matter for the Whatonga-descent peoples to pursue with the relevant local bodies and under the Crown's legislation. We note that, in the Wellington City Council's district plan, the council acknowledges that the area around Wellington Harbour was 'formerly the domain of earlier tribes' than Ngati Toa and Te Atiawa and that 'The tangata whenua have a duty to ensure that the wahi tapu of all the tribes who have lived in Wellington are

13. Document 01, pp 7–8; Minister for State-Owned Enterprises to Ngatata Love, 11 March 1999 (doc 01(a), pp 147–149)

14. Document Q2, pp 24–25

15. Paper 2.27

16. Document M1, p 103

17. Te Puni Kokiri, *Sites of Significance: A Step-by-Step Guide to Protecting Sites of Cultural, Spiritual and Historical Significance to Maori* (Wellington: Te Puni Kokiri, 1996); see also Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown* (Wellington: Office of Treaty Settlements, 1999), esp pp 37, 103–104, 118–119

given proper recognition'.[18] We consider that it is appropriate that the relevant local bodies, the Crown, and other iwi acknowledge the ancient history of the area by recognising in a meaningful and public way the centuries-long occupation of Te Whanganui a Tara and environs prior to 1840.

Apart from the few recommendations made in this chapter we consider that, given the relative complexity of the issues and the interrelationships of Maori groups affected by a number of our Treaty breach findings, the parties (having settled the question of their representation) should enter into negotiations with the Crown. We recommend accordingly.

In considering the nature and scope of the remedies appropriate, given the many serious Treaty breaches by the Crown, regard should be had to the loss by the various claimants of almost all their land in the Port Nicholson block.

Instead of conducting a full and fair inquiry into the so-called 1839 deed of purchase, the Crown resorted, without the consent of Maori, to a highly questionable and pressured 'arbitration' process. This and the subsequent McCleverty transactions led to the 1848 Crown grant to the New Zealand Company, which arbitrarily deprived Maori of some 120,000 acres of their land, without their consent and without payment. The town belt was likewise taken by the Crown without payment to Maori and without their consent. In addition, 23 acres of highly valuable tenths reserves situated in the central business and Government district of the town of Wellington were appropriated by the Crown without the consent of the Maori beneficial owners, without making any payment for some 24 years, and without paying compensation for the loss of income resulting from the arbitrary taking of the land. When a payment was finally made for the tenths appropriated by the Crown, it was almost certainly for less than a quarter of their then value.

The perpetual leasing regime imposed by the Crown on Wellington tenths and Palmerston North reserves without the consent of the beneficial owners, including the stipulation of fixed-percentage rents for 21-year terms, resulted, over time, in significant monetary loss to the beneficiaries of those reserves. Maori also suffered the destruction of the foreshore and of their kai moana through reclamation without their consent and without compensation. These and other Treaty breaches set out in this report combine to entitle the various claimants to substantial compensation. The Tribunal considers that a significant element of such compensation should be the return of Crown land in Wellington city and its environs.

Leave is granted to the parties to seek more specific recommendations if agreement cannot be reached. Reasonable costs should be met by the Crown in compensation for any past litigation costs incidental to the claims, legal and related costs in the claims upheld by the Tribunal, and legal costs in negotiating a settlement.

18. Wellington City Council, *Wellington City District Plan* (Wellington: Wellington City Council, 2000), 'Issues for Tangata Whenua', s 2.3.3, p 2/8

Dated at Wellington this 1st day of May 2003

G S Orr, presiding officer

J Clarke, member

M P K Sorrenson, member



APPENDIX I

## PORT NICHOLSON DEED OF PURCHASE

Know all men by these Presents that we the undersigned Chiefs of the Harbour and District of Wanga Nui Atera, commonly called Port Nicholson, in Cook's Straits in New Zealand do say and declare that We are the sole and only proprietors or owners of the Lands tenements Woods, Bays, Harbours, Rivers, Streams and Creeks within certain boundaries as shall be truly detailed in this Deed or Instrument. Be it therefore known unto all men that We the Chiefs whose names are signed to this Deed or Instrument, have this day sold and parted with all Right Title and Interest in all the said Lands Tenements, Woods, Bays, Harbours, Rivers, Streams and Creeks as shall be hereafter described unto William Wakefield Esquire in trust for the Governors, Directors and Shareholders of the New Zealand Land Company of London, their Heirs, Administrators and Assigns for ever, in Consideration of having received as a full and just payment for the same One hundred red blankets, one hundred and twenty muskets, two tierces of tobacco, forty eight iron pots, two cases of soap, fifteen fowling pieces, twenty one kegs of gunpowder, one cask of ball cartridges, one keg of lead slabs, one hundred cartouche boxes, one hundred tomahawks, forty pipe-tomahawks, one case of pipes, two dozen spades, fifty steel axes, twelve hundred fish hooks, twelve bullet moulds twelve dozen shirts, twenty jackets, twenty pairs of trowsers, sixty red night caps, three hundred yards of cotton duck, two hundred yards of calico, one hundred yards of check, twenty dozen pocket handkerchiefs, two dozen slates and two hundred pencils, ten dozen looking glasses, ten dozen pocket knives, ten dozen pairs of scissors, one dozen pairs of shoes, one dozen umbrellas, one dozen hats, two pounds of beads, one hundred yards of ribbon one gross of Jews' harps, one dozen razors, ten dozen dressing combs, six dozen hoes, two suits of superfine clothes, one dozen shaving boxes and brushes, twenty muskets, two dozen adzes and one dozen sticks of sealing wax, which we the aforesaid chiefs do hereby acknowledge to have been received by us from the aforesaid William Wakefield. And in order to prevent any dispute or misunderstanding and to guarantee more strongly unto the said William Wakefield, his executors and administrators in trust for the said Governors Directors, and Shareholders of the New Zealand Land Company of London, their Heirs, Administrators and Assigns for ever, true and undisputed possession of the said Lands, Tenements, Woods, Bays, Harbours, Rivers, Streams and Creeks, We the undersigned Chiefs for ourselves, our Heirs, Administrators and Assigns for ever, do hereby agree and bind ourselves individually and collectively to the Description following which constitutes the Boundaries of the said Lands, Tenements, Woods, Bays,

Consideration given

Harbours, Rivers Streams and Creeks now sold by us the Undersigned Chiefs to the said William Wakefield in trust for the said Governors Directors and Shareholders of the New Zealand Land Company of London, this twenty seventh day of September in the Year of our Lord One thousand eight hundred and thirty nine, that is to say:—The whole of the Bay, Harbour, and District of Wanga Nui Atera, commonly called Port Nicholson situate on the North Eastern side of Cook's Straits in New Zealand. The summit of the range of mountains known by the name of Turakirai from the point where the said range strikes the sea in Cook's Straits, outside the Eastern headland of the said Bay and Harbour of Wanga Nui Atera or Port Nicholson, along the summit of the said range called Turakirai at the distance of about twelve English miles, more or less, from the low water mark on the Eastern shore of the said Bay or Harbour of Wanga Nui Atera or Port Nicholson until the foot of the high range of mountains called Tararua, situate about forty English miles, more or less from the sandy beach at the North Eastern extremity of the said Bay or Harbour of Wanga Nui Atera or Part Nicholson, in the Eastern boundary of the said Lands, Tenements, Woods, Bays, Harbours, Rivers, Streams and creeks. From the point where the Eastern boundary strikes the foot of the aforesaid Tararua range of mountains along the foot of the said Tararua range until the point where the range of mountains called Rimarap strikes the foot of the said Tararua range, is the North Eastern boundary of the said Lands, Tenements, Woods, Bays, Bays, Harbours Rivers Streams and Creeks. From the said point where the Rimarap range of mountains strikes the foot of the Tararua Range, along the summit of the said Rimarap range of mountains, at a distance of about twelve English miles, more or less, from the low water mark on the Western shore of the said Bay or Harbour of Wanga Nui Atera or Port Nicholson until the point where the Rimarap range strikes the sea in Cook's Straits outside the Western headland of the said Bay of Wanga Nui Atera or Port Nicholson is the Western boundary of the said Lands Tenements, Woods, Bays, Harbours, Rivers, Streams and Creeks. From the said point where the Rimarap range of mountains strikes the sea in Cook's Straits in a direct line to the aforesaid point where the Turakirai range strikes the sea in the said Cook's Straits is the Southern boundary of the said Lands, Tenements, Woods, Bays, Harbours, Rivers, Streams and Creeks; Be it also known that the said Bay, Harbour and District of Wanga Nui Atera or Port Nicholson does include the island of Makaroa and the island of Matiu, which islands are both situate in the said Harbour of Wanga Nui Atera or Port Nicholson as well as all other Lands, Tenements, Woods, Bays, Harbours Rivers, Streams and Creeks situate within the aforesaid boundaries, and now sold by us the aforesaid Chiefs to the said William Wakefield in trust for the said Governors, Directors and Shareholders of the New Zealand Land Company of London, their Heirs, Administrators and Assigns for ever. And we do hereby acknowledge for ourselves, our Heirs, Administrators and Assigns for ever, to have this day received from the said William Wakefield full and just payment for the said Lands, Tenements, Woods Bays, Harbours, Rivers, Streams and Creeks situate within the aforesaid Boundaries of the said Bay, Harbour and District of Wanga Nui Atera or Port Nicholson in Cook's Straits in New Zealand. And he the said William Wakefield is

Boundaries

to have and to hold the Lands, Tenements, Woods, Bays, Harbours, Rivers, Streams and Creeks as aforesaid and all the above bargained premises, unto the said William Wakefield, his executors and administrators in trust for the said Governors Directors and Shareholders of the New Zealand Land Company of London, their Heirs, Administrators and Assigns, to and for their own proper use and uses and as and for their own proper Goods and Chattels, from henceforth and for ever. And we the said Chiefs as undersigned hereby for ourselves our Heirs, Administrators and Assigns for ever, do covenant, promise and agree to and with the said William Wakefield his executors and administrators in manner following, that is to say, That the said hereby bargained premises and every part thereof are and so for ever shall be, remain, and continue unto the said Governors, Directors and Shareholders of the New Zealand Land Company of London, their Heirs, Administrators, and Assigns, free and clear, and freely and clearly acquitted, discharged and exonerated of from and against all former and other gifts, Claims, Grants, Bargains, Sales, and Incumbrances whatsoever, and We the undersigned Chiefs do further promise and bind ourselves, our Families, Tribes, and Successors individually and collectively to assist defend and protect the said Governors, Directors, and Shareholders of the New Zealand Land Compnny of London, their Heirs, Administrators and Assigns for ever, in maintaining the quiet and undisputed possession of the aforesaid Lands, Tenements, Woods, Bays, Harbours, Rivers, Streams and Creeks sold by us to the said William Wakefield, in trust for the Governors Directors and Shareholders of the New Zealand Land Company of London their Heirs Administrators and assigns for ever as aforesaid. And the said William Wakefield on behalf of the said Governors, Directors, and Shareholders of the New Zealand Land Company of London, their Heirs, Administrators and Assigns for ever does hereby covenant, promise, and agree to and with the said Chiefs that a portion of the land ceded by them equal to a tenth part of the whole, will be reserved by the said Governors, Directors and Shareholders of the New Zealand Land Company of London their Heirs, Administrators and Assigns, and held in trust by them for the future benefit of the said Chiefs, their families and heirs for ever.

Tenth part to be allotted as Native reserves.

In Witness whereof the said Chiefs on the one part and the said William Wakefield on the other part, have hereunto put their hands and seals this twenty seventh day of September in the year of our Lord One thousand eight hundred and thirty nine.

Matangi x his mark. LS.
Epuni x his mark. LS.
Bouacawa x his mark. LS.
Rongatua x his mark. LS.
Kariwa x his mark. LS.
Kaihaia x his mark. LS.
Hawia x his mark. LS.
Tuarau x his mark. LS.

Etueko x his mark. LS.
Tingatoro x his mark. LS.
Tuati x his mark. LS.
Wakaradi x his mark. LS.
Emau x his mark. LS.
Atuawera x his mark. LS.
Ewareh x his mark. LS.
Warepori x his mark. LS.

W Wakefield

Witnesses—

Rich Barrett.

Tho Lowry Chief Mate.

Nayti.*

* 'Deed No 1: Port Nicholson Block (Original Purchase), Wellington District', 27 September 1839, H H Turton (comp), *Turton's Land Deeds of the North Island: Microfiche Edition* (Wellington: Alexander Turnbull Library, undated), pp 95–96

APPENDIX II

# RECORD OF INQUIRY

## RECORD OF HEARINGS

### The Tribunal

On 30 November 1990, the chairperson of the Waitangi Tribunal constituted a Tribunal to hear matters relating to claim Wai 145, which had been granted urgency. This Tribunal comprised William Wilson (presiding), Professor Gordon Orr, and Georgina Te Heuheu. Subsequently, by direction of 25 March 1991, the Right Reverend Manuhuia Bennett was added to the panel.

By a further direction of the chairperson on 3 August 1994, the Tribunal was reconstituted. Upon his request, William Wilson was removed owing to his unavailability (and was replaced as presiding officer by Professor Gordon Orr) and Professor Keith Sorrenson was added.

In a memorandum on 8 August 1996, the parties were advised that Mrs Te Heuheu would be unavailable for any further sittings of the Wellington tenths Tribunal, owing to her having been appointed a list candidate for the National Party in that year's general election. Mrs Te Heuheu was elected to Parliament and she subsequently resigned from the Tribunal, which left the Wellington tenths Tribunal with the minimum number of members required for a quorum

On 10 October 1997, the presiding officer issued a memorandum notifying the parties that Professor Sorrenson was to be out of the country during the first half of 1998. In order that the Tribunal could sit during the period that Professor Sorrenson was overseas, it was proposed that John Clarke be appointed to the panel. (Notwithstanding this appointment, the presentation of final submissions was to be deferred until Professor Sorrenson's return.) Counsel for the Crown and the Wellington Tenths Trust had no objections to Mr Clarke being added to the Tribunal, and the other claimant groups party to the inquiry were requested to make known their views on the matter by 31 October 1997.

On 6 November 1997, no objections to Mr Clarke's addition having been received, the chairperson issued a direction appointing him to the Tribunal.

As of November 1997, the Tribunal thus comprised Professor Gordon Orr (presiding), the Right Reverend Manuhuia Bennett, John Clarke, and Professor Keith Sorrenson. However, owing to Bishop Bennett being indisposed, the Tribunal was reconsitituted by direction of the chairperson on 18 June 1998 for the purpose of hearing and determining an application by the Wellington Tenths Trust concerning the proposed sale of Government Property Services Limited. The reconsitituted Tribunal comprised Professor Gordon Orr (presiding), John Clarke, and Areta Koopu, and the hearing took place on 26 and 29 June. The Tribunal's decision on the application was released on 27 July 1998.

The Tribunal's membership then reverted to that of November 1997, and it was with this membership that the Tribunal heard the closing submissions in the first quarter of 1999 and went on to start the writing of the report. However, Bishop Bennett passed away on 20 December 2001, before the report could be released.

Because the Waitangi Tribunal's governing statute, the Treaty of Waitangi Act 1975, did not specifically provide for the replacement of members and presiding officers in inquiries, the release of the Wellington tenths Tribunal's report had to await the passing of legislation that validated such replacements. In 2003, the Government passed this legislation, the Treaty of Waitangi Amendment Act 2003, which came into force on 10 April 2003. The report was released shortly thereafter.

appii

## The Counsel

During the course of the hearings, counsel appearing included Phillip Green for the Wai 145 claimants; Layne Harvey and Spencer Webster for the Wai 175 and Wai 543 claimants; Tom Bennion, Deborah Edmunds, Karl Upston-Hooper, and Claire Woolley for the Wai 207 claimants; Maui Solomon for the Wai 366 claimants; Rachel Steel and Carrie Wainwright for the Wai 377 and Wai 474 claimants; Tom Bennion for the Wai 734 and Wai 735 claimants; and Helen Aikman; Natalie Baird; Helen Carrad; Ellen France; Briar Gordon; Jennifer Lake; Andra Mobberley; and Fergus Sinclair for the Crown.

## The Hearings

### The first hearing

The first hearing was held at Te Tatau o Te Po Marae in Lower Hutt from 25 to 28 March 1991.

### The second hearing

The second hearing was held at Te Tatau o te Po Marae in Lower Hutt on 17 and 18 August 1994.

### The third hearing

The third hearing was held at Seabridge House in Wellington from 31 October to 4 November 1994.

### The fourth hearing

The fourth hearing was held at Te Tatau o te Po Marae in Lower Hutt and at Seabridge House in Wellington on 7 and 8 to 9 December 1994 respectively.

### The fifth hearing

The fifth hearing was held at Pipitea Marae in Wellington on 19 February 1996.

### The sixth hearing

The sixth hearing was held at Pipitea Marae in Wellington from 18 to 20 March 1996.

### The seventh hearing

The seventh hearing was held at Pipitea Marae in Wellington from 9 to 12 September 1996.

### The eighth hearing

The eighth hearing was held at Hongoeka Marae, Plimmerton and Te Herenga Waka Marae in Wellington from 7 to 11 July 1997

### The ninth hearing

The ninth hearing was held at Te Tatau o te Po Marae in Lower Hutt on 15 and 16 December 1997.

### The tenth hearing

The tenth hearing was held at the District Court in Wellington on 26 June 1998.

### The eleventh hearing

The eleventh hearing was held at Pipitea Marae in Wellington from 24 to 26 August 1998.

### The twelfth hearing

The twelfth hearing was held at Pipitea Marae in Wellington on 28 September 1998.

### The thirteenth hearing

The thirteenth hearing was held at the District Court in Wellington on 7 and 9 December 1998.

### The fourteenth hearing

The fourteenth hearing was held at the District Court in Wellington on 1 and 2 March 1999.

### The fifteenth hearing

The fifteenth hearing was held at Te Tatau o te Po Marae in Lower Hutt from 29 March to 1 April and on 6 and 7 April 1999.

### The sixteenth hearing

The sixteenth hearing was held at the District Court in Wellington from 5 to 7 and 13 May 1999.

## RECORD OF PROCEEDINGS

### 1. Claims

**1.1 Wai 105**

Claim severed from inquiry (see paper 2.200)

**1.2 Wai 145**
A claim by Makere Rangiatea Ralph Love and Ralph Heberley Ngatata Love on behalf of themselves and the beneficiaries of the Taranaki Maori Trust Board and Nga Iwi o Taranaki concerning the sacking of Parihaka, their loss of land and fishing rights, and the Crown's imposition of perpetual leases and failure to reserve a tenth of the Port Nicholson block for Maori, 23 December 1987
**(a)** Amended statement of claim, 18 July 1995
**(b)** Second amended statement of claim, 18 August 1995
**(c)** Third amended statement of claim, June 1996
**(d)** Fourth amended statement of claim, 7 April 1999

**1.3 Wai 175**
A claim by Piri Te Tau and others on behalf of themselves and descendants of the Tipuna Ngati Hamua Mokopuna of Rangitane and other descendant groups concerning the Crown's purchase of land in the south-west of the North Island, 29 October 1990
**(a)** First amended statement of claim, 11 July 1997
**(b)** Second amended statement of claim, 26 August 1998

**1.4 Wai 183**
Claim severed from Wai 145 inquiry (see paper 2.200)

**1.5 Wai 207**
A claim by Akuwhata Wineera and others of Ngati Toa on behalf of themselves and descendants of the iwi and hapu of Ngati Toa Rangatira concerning loss of tino rangatiratanga and loss of lands, waters, wahi tapu, and taonga in the south-west of the North Island and north of the South Island, undated
**(a)** Amended statement of claim, 27 June 1997
**(b)** Addition to the amended statement of claim, 12 September 1997

**1.6 Wai 366**
A claim by Roger Herbert on behalf of himself and Ngati Rangatahi concerning loss of land in the Hutt Valley, the expulsion of Ngati Rangatahi from the Hutt Valley, and the rejection of Ngati Rangatahi's land claims by the Spain commission, 14 July 1993
**(a)** Amended statement of claim, March 1998
**(b)** Amended statement of claim, March 1998
Covering letter from Wai 366 claimant to registrar naming Wayne Herbert as Wai 366 claimant, undated
Letter from Maui Solomon to Roger Herbert advising him that the amended statement of claim must be consented to by the original named claimant, 3 June 1999

**1.7 Wai 377**
A claim by Ngati Tama Te Kaeaea Trust on behalf of the descendants of Taringa Kuri concerning the forced sale of Kaiwharawhara and Hutt Valley lands, 2 August 1993
**(a)** Amended statement of claim, 19 July 1994
**(b)** Photocopy of section of Department of Lands and Survey 1:50,000 topographical map of Wellington (NZMS260, sheet R27, pt Q27), showing south-west Wellington region with 1840 Ngati Tama land boundary marked, undated
**(c)** Second amended statement of claim, 24 June 1997

**1.8 Wai 415**
A claim by Tata Parata, Brian Hemmingsen, and James Carroll concerning the Maori Purposes Act 1993, the Maori Affairs Restructuring Act 1989, and the proposed disposal of Kokiri Marae, 26 January 1994

**1.9 Wai 442**
A claim by Mark Te One and others concerning sections 1A, 2, 3, block XIV, Belmont survey district (the Waiwhetu Pa block), 7 May 1994

**1.10 Wai 474**
A claim by Michelle Marino on behalf of the beneficiaries of Ngati Tama and the descendants of Taringa Kuri concerning loss of land and cultivations at Kaiwharawhara, the lack of compensation awarded Ngati Tama by the Spain commission, and the expulsion of Ngati Tama from Heretaunga, 20 January 1995

**1.11 Wai 543**
A claim by Ruth Harris on behalf of herself and the descendants of the iwi and hapu of Rangitane ki Manawatu concerning the loss of land in the Wellington region, 25 July 1995
**(a)** First amended statement of claim, 11 July 1997
**(b)** Second amended statement of claim, 26 August 1998

**1.12 Wai 562**
A claim by Ihakara Puketapu on behalf of himself and the descendants of Te Matehou and Puketapu hapu of Te Atiawa concerning loss of Pipitea Pa lands and loss of control of lands, 14 November 1995

**1.13 Wai 571**
A claim by Ralph Heberley Ngatata Love concerning the loss of Pipitea Street land and the Crown's failure to consult over and pay compensation for the land, 23 February 1996

**1.14 Wai 660**
Claim severed from Wai 145 inquiry (see paper 2.200)

**1.15**
Entry vacated

**1.16 Wai 52**
A claim by Tamihana Tukapua on behalf of himself and Muaupoko concerning the Crown dealings in regard to Muaupoko lands, 5 December 1988
**(a)** Amendment to claim, undated
**(b)** Letter from Tamihana Tukapua to registrar confirming that claim 1.16 includes the land at the corner of Queen and Oxford Streets, Levin (lots 1, 2, and 3 and part lot 4 DP1006, CT420/38, proclamation 2748, Wellington Land Registry), 13 September 1989
Notice from New Zealand Post Limited to Muaupoko advising that it had applied to the Waitangi Tribunal for recommmendation that the land at the corner of Queen and Oxford Streets, Levin be no longer subject to resumption by the Crown, undated
**(c)** Letter from Tamihana Tukapua to registrar advising that claim 1.16 is amended to include Te Whanganui a Tara, 7 September 1992
**(d)** Amended statement of claim, 18 December 1997
**(e)** Amended statement of claim, 14 April 1999

**1.17 Wai 623**
A claim by John Hanita Paki, Mario Hori Te Pa, Peter Huria, and Ada Tatana on behalf of themselves, Muaupoko iwi, and Ngarue, Whano ki Rangi, Ngati Ao, and Pariri hapu concerning the Horowhenua Block Act 1865, Native Land Acts, and the loss of land in the Muaupoko rohe, 29 August 1996
**(a)** First amended statement of claim, 23 September 1996
**(b)** Second amended statement of claim, 23 December 1997

**1.18 Wai 734**
A claim by Toarangatira Pomare on behalf of himself, the whanau of Pomare Ngatata, and the descendants and successors of Ngati Mutunga concerning the loss of Ngati Mutunga lands in Te Whanganui a Tara and the Crown's failure to actively protect Ngati Mutunga, 24 August 1998

**1.19 Wai 735**
A claim by Te Puoho Katene and Te Taku Parai on behalf of themselves, their whanau, and the descendants and successors of Ngati Tama ki Te Whanganui a Tara concerning the loss of land and rights in Te Whanganui a Tara and the Crown's failure to actively protect Ngati Tama, 25 August 1998

## 2. Papers in Proceedings

**2.1** Paper removed from record pursuant to Tribunal direction of 29 September 1998 (see paper 2.200)

**2.2** Paper removed from record pursuant to Tribunal direction of 29 September 1998 (see paper 2.200)

**2.3** Paper removed from record pursuant to Tribunal direction of 29 September 1998 (see paper 2.200)

**2.4** Letter from chairman, Wellington Tenths and Palmerston North Reserved Lands Trust, to Tribunal concerning Pipitea Street properties, 3 July 1990

**2.5** Letter from chairman, Wellington Tenths and Palmerston North Reserved Lands Trust, to chairperson requesting urgency, undated

**2.6** Memorandum of chairperson summarising judicial conference of 22 June 1990, 26 June 1990

**2.7** Letter from Wai 145 claimant counsel to chairperson requesting urgent chambers hearing to appoint counsel and discuss research programme and hearing schedule, 18 October 1990

**2.8** Memorandum of chairperson concerning chambers hearing of 18 October 1990 and constituting Tribunal of William Wilson (presiding), Professor Gordon Orr, and Georgina Te Heuheu to hear claim Wai 145, 30 November 1990

**2.9** Letter from Wai 145 claimant counsel to registrar concerning research funding for Wai 145, 19 December 1990

**2.10** Application of claimants requesting hearing of part of Wai 145 relating to reserve land leased to the Crown and Crown agencies, 20 December 1990

**2.11** Memorandum from chairperson to registrar directing latter to register claim 1.3 as Wai 175, 25 January 1991

**2.12** Declaration that notice of registration of claim 1.3 given, 30 January 1991
Letter from registrar to chairman, Rangitane o Wairarapa, giving notice of registration of claim 1.3, 30 January 1991
Form letter from registrar to parties giving notice of registration of claim 1.3, 30 January 1991
List of parties sent notice of registration of claim 1.3, undated

**2.13** Memorandum of Tribunal to parties setting date of first hearing and subject-matter to be considered and directing claimants to file lists relating to Crown and other leases, 20 February 1991

**2.14** Notice of first hearing, 20 February 1991

**2.15** Paper removed from record pursuant to Tribunal direction of 29 September 1998 (see paper 2.200)

**2.16** Paper removed from record pursuant to Tribunal direction of 29 September 1998 (see paper 2.200)

**2.17** Declaration that notice of registration of claim 1.2, notice of paper 2.13, and notice of first hearing given, 22 February 1991
Form letter from registrar to parties giving notice of registration of claim 1.2, 22 February 1991
List of parties sent notice of registration of claim 1.2, notice of paper 2.13, and notice of first hearing, undated

**2.18** Form letter from registrar to parties giving notice of registration of claim 1.2 and notice of first hearing, 11 March 1991
List of parties sent notice of registration of claim 1.2 and notice of first hearing, undated

**2.19** Memorandum from Tribunal to parties concerning agenda of first hearing, 18 March 1991

**2.20** Letter from property manager, Government Property Services Limited, to registrar acknowledging first hearing and setting out position in regard to Pipitea Street properties, 18 March 1991

**2.21** Memorandum from chairperson to parties directing that Bishop Manuhuia Bennett be appointed to Tribunal hearing claim Wai 145, 25 March 1991

**2.22** Paper removed from record pursuant to Tribunal direction of 29 September 1998 (see paper 2.200)

**2.23** Memorandum from Tribunal to parties directing that Philip Green be appointed Wai 145 claimant counsel from 17 December 1990 to 28 March 1991, 17 April 1991

**2.24** Memorandum from Tribunal to parties concerning Crown's response to claimants' case, claimants' identification of Treaty breaches, and possibility of second hearing, 17 April 1991

**2.25** Memorandum of Crown counsel accepting that Maori Reserved Land Act 1955 disadvantages Maori landowners and proposing that hearing be adjourned for six months pending review of Act, 19 April 1991

**2.26** Memorandum of claimant counsel concerning alleged Crown Treaty breaches in respect of Russell Terrace and Pipitea Street properties, 30 April 1991

**2.27** Application of claimant counsel for orders and recommendations pursuant to Treaty of Waitangi (State Enterprises) Act 1988, 1 May 1991
Deed of purchase of Port Nicholson block, 27 September 1839
Map of Wellington district showing extent of Port Nicholson purchase, undated

**2.28** Letter from Crown counsel to registrar concerning paper 2.27 and advising of Crown's desire to be heard on that application, 6 May 1991

**2.29** Letter from claimant counsel to registrar concerning monetary loss to Wellington tenths beneficiaries in respect of Pipitea Street properties, 13 May 1991

**2.30** Memorandum from Tribunal to registrar directing latter to register claim 1.5 as Wai 207, 29 May 1991

**2.31** Notice of registration of claim 1.5 as Wai 207, 18 June 1991

**2.32** Direction of Tribunal extending appointment of claimant counsel, 24 June 1991

**2.33** Letter from chairman, Ngai Tahu Maori Trust Board, to chairperson stating interest of Ngai Tahu in Wai 207, 24 June 1991

**2.34** Memorandum of Crown counsel to Tribunal concerning ministerial inquiry into Maori reserved lands and covering letter from Crown counsel to registrar, 17 October 1991

**2.35** Direction of Tribunal extending appointment of claimant counsel, 21 January 1991

**2.36** Letter from chairman, justice committee, Te Runanga o Toa Rangatira Incorporated, to registrar requesting stay of proceedings in respect of Wai 145, 25 February 1992
**(a)** Direction of Tribunal releasing 'Exploratory Report on Early Crown Purchases Whanganui ki Porirua' by Jane Luiten, 16 April 1992

**2.37** Form letter from registrar to parties giving notice of judicial conference, 29 May 1992
List of parties sent notice of judicial conference, undated
**(a)** Direction of Tribunal instructing registrar to distribute report by Jim Rudolph, 16 December 1992

**2.38** Direction of Tribunal instructing registrar to distribute document A41, 20 December 1992

**2.39** Memorandum of claimant counsel to chairperson requesting urgent hearing and seeking recommendations that Crown take no steps to sell Pipitea Street properties, Petone Central School, or land at Fort Dorset, 2 April 1993

**2.40** Memorandum from Tribunal to registrar directing latter to register claim 1.6 as Wai 366, 6 August 1993

**2.41** Letter from registrar to Roger Herbert, giving notice of registration of claim 1.6, 9 August 1993
Form letter from registrar to parties giving notice of registration of claim 1.6, 9 August 1993
List of parties sent notice of registration of claim 1.6, August 1993

**2.42** Memorandum from Tribunal to registrar directing latter to register claim 1.7 as Wai 377, 2 September 1993

**2.43** Form letter from registrar to parties giving notice of registration of claim 1.7, 6 September 1993
List of parties sent notice of registration of claim 1.7, undated
**(a)** Direction of chairperson instructing registrar to distribute report by Victoria Fallas, 18 November 1993

**2.44** Memorandum from Tribunal to registrar directing latter to register claim 1.8 as Wai 415, 10 February 1994

**2.45** Direction of chairperson placing document A44 on the record, 10 March 1994

**2.46** Form letter from registrar to parties giving notice of registration of claim 1.8, 17 March 1994
List of parties sent notice of registration of claim 1.8, 17 March 1994

**2.47** Letter from Wai 377 claimant counsel to Landcorp concerning sale of Landcorp properties at Kaiwharawhara, 20 June 1994

**2.48** Statement of issues of Wellington Tenths Trust, 23 June 1994

**2.49** Memorandum of Tribunal recording decisions made at judicial conference of 29 June 1994 concerning resumption of hearing of claim, representation, withdrawal of William Wilson from Tribunal, hearing of claimant and Crown evidence, and any interests of section 438 trusts in claim Wai 145, 14 July 1994

**2.50** Declaration that notice of second hearing given, 22 July 1994
Form letter from registrar to Tribunal members giving notice of second hearing, 22 July 1994
Form letter from registrar to parties giving notice of second hearing, 22 July 1994

**2.51** Notice of second hearing, 22 July 1994

**2.52** Direction of chairperson appointing Professor Gordon Orr presiding officer of Tribunal hearing claim Wai 145 (replacing William Wilson) and adding Professor Keith Sorrenson, 3 August 1994

**2.53** Memorandum from Tribunal to registrar directing latter to register claim 1.9 as Wai 442, 18 November 1994

**2.54** Memorandum from Crown counsel to Tribunal concerning presentation of evidence by David Armstrong and Bruce Stirling, 19 October 1994

**2.55** Directions of Tribunal concerning document B7 and paper 2.54, 19 October 1994

**2.56** Notice of third hearing, 10 October 1994

**2.57** Letter from Crown counsel to Wai 145 claimant counsel concerning cross-examination of John Isles, 26 October 1994

**2.58** Submission of Te Runanganui o Taranaki Whanui ki te Upoko o te Ika a Maui supporting claim of Wellington Tenths Trust, concerning payment of compensation, and seeking opportunity to be heard on any Tribunal recommendations, 31 October 1994

**2.59** Notice of fourth hearing, 9 November 1994

**2.60** Form letter from registrar to parties giving notice of registration of claim 1.9, 21 November 1994
List of parties sent notice of registration of claim 1.9, 21 November 1994

**2.61** Memorandum from Tribunal to registrar directing latter to register claim 1.10 as Wai 474 and to ascertain whether urgency is sought and what research is needed, 27 February 1995

**2.62** Form letter from registrar to parties giving notice of registration of claim 1.10, 6 March 1995
List of parties sent notice of registration of claim 1.10, 6 March 1995

**2.63** Letter from Crown counsel to Tribunal concerning filing of joint memorandum of Crown and claimant counsel on transfer of leasehold interests in Pipitea Street properties, 8 June 1995

**2.64** Memorandum of Tribunal recording discussions at judicial conference of 6 June 1995 concerning overlapping claims, future hearings, claimant submissions, remedies, and an interim Tribunal report, 8 June 1995

**2.65** Memorandum from Wai 377 and Wai 474 claimant counsel to Tribunal concerning consolidation of claims Wai 377 and 474, representation and research issues, and being heard as part of Wai 145, 31 July 1995

**2.66** Memorandum of Tribunal recording discussions at judicial conference of 31 July 1995 concerning claims 1.2(a) and 1.11, readiness of overlapping claims, and future hearings, 1 August 1995

**2.67** Memorandum from Tribunal to registrar directing latter to register claim 1.11 as Wai 543 and noting that it should be heard with Wai 145, 31 August 1995

**2.68** Notice of Wai 543 claim, 13 September 1995
Form letter from registrar to parties giving notice of registration of claim 1.11, 13 September 1995
List of parties sent notice of registration of claim 1.11, 13 September 1995

**2.69** Directions of Tribunal aggregating claims Wai 105, 145, 175, 183, 207, 366, 377, 415, 442, 474, and 543 under Wai 145 and consolidating the records of inquiry, 6 October 1995

**2.70** Memorandum from Tribunal to registrar directing latter to register claim 1.12 as Wai 562 and to aggregate the record of inquiry of Wai 562 with that of Wai 145, 30 January 1996

**2.71** Form letter from registrar to parties giving notice of registration of claim 1.12, 30 January 1996
Letter from registrar to Ihakara Puketapu giving notice of registration of his claim, 30 January 1996
List of parties sent notice of registration of claim 1.12, January 1996

**2.72** Facsimile from Crown counsel to Tribunal concerning claimant evidence, timely filing of claimants' historical and expert evidence, hearing schedules, consolidation of overlapping claims, and claimant counsel, 10 January 1996

**2.73** Notice of fifth hearing, 2 February 1996

**2.74** Declaration that notice of fifth hearing given, 2 February 1996
Notice of fifth hearing, 2 February 1996
List of parties sent notice of fifth hearing, 2 February 1996

**2.75** Memorandum from Tribunal to Stephen Quinn directing him to attend fifth hearing and give evidence on behalf of Wellington Tenths Trust and to produce document E13, 2 February 1996

**2.76** Facsimile from Crown counsel to Tribunal concerning late filing of claimant evidence, 14 February 1996

**2.77** Memorandum of Tribunal recording discussions at judicial conference of 1 February 1996 concerning advance provision of claimant evidence for fifth hearing, provision of interim final submission of Wai 145 claimant counsel and further amended statement of claim for Wai 145, and sale of Pipitea Street land, 14 February 1996

**2.78** Application of Wai 145 claimant counsel for urgent hearing on resumption of Pipitea Street land (section 1, CT36C/251, Wellington registry), 20 February 1996

**2.79** Application of Wai 145 claimant counsel for resumption of Pipitea Street land (section 1, CT36C/251, Wellington registry), 20 February 1996

**2.80** Memorandum of Tribunal granting urgency for hearing of Wai 145 claimant counsel's application for resumption of Pipitea Street land (paper 2.79), 22 February 1996

**2.81** Application of Wai 145 claimant counsel for severance from claim Wai 145 of claim concerning application for resumption of Pipitea Street land, 23 February 1996

**2.82** Entry vacated

**2.83** Memorandum from Crown counsel to Tribunal concerning response to urgent hearing on claimants' application for resumption, 23 February 1996

**2.84** Memorandum of Tribunal recording reasons for granting an urgent hearing on claimants' application for resumption, 29 February 1996

**2.85** Memorandum from Crown counsel to Tribunal setting out Crown position on application for severance and statement of issues (papers 2.81, 2.82), 1 March 1996

**2.86** Memorandum from Tribunal to parties granting Wai 145 claimant counsel's application for severance (paper 2.81) and directing registrar to register resulting claim as Wai 571, 1 March 1996

**2.87** Memorandum from Crown counsel to Tribunal filing transcript of cross-examination of Morris Love and evidence of Fergus Sinclair, Ralph Winmill, and Graeme Aitken, 11 March 1996

**2.88** Memorandum of Tribunal recording discussions at judicial conference of 28 February 1996 concerning urgent hearing and filing of evidence for Wai 145, 12 March 1996
**(a)** Letter from Crown counsel to Tribunal requesting amendments to record of judicial conference of 28 February 1996 (paper 2.88), 26 March 1996

**2.89** Facsimile from Crown counsel to Tribunal concerning jurisdiction of Tribunal to issue mandatory orders for resumption, 13 March 1996

**2.90** Memorandum of Tribunal reserving ruling on jurisdiction of Tribunal to issue mandatory orders for resumption until after presentation and consideration of all evidence at urgent hearing, 14 March 1996

**2.91** Facsimile from Crown counsel to Tribunal requesting clarification of proposed process for ruling on jurisdiction of Tribunal to issue mandatory orders for resumption, 14 March 1996

**2.92** Memorandum of Crown counsel to Tribunal summarising 18 March 1996 oral submissions of Crown counsel on jurisdiction of Tribunal to issue mandatory orders for resumption, 19 March 1996

**2.93** Memorandum of Tribunal concerning procedure to determine whether claim Wai 571 is well founded, 20 March 1996

**2.94** Memorandum of Tribunal directing registrar to aggregate record of inquiry of Wai 571 with that of Wai 145, 1 May 1996

**2.95** Memorandum of Crown counsel to Tribunal concerning procedure in regard to overlapping claims in Wai 145 inquiry, 9 May 1996

**2.96** Memorandum of Tribunal recording discussions at judicial conference of 9 May 1996 concerning seventh hearing, Wai 145 claimant evidence for seventh hearing, interim final submission and second amended statement of claim of Wai 145 claimants, and overlapping claims, 13 May 1996

**2.97** Memorandum from Tribunal to registrar directing latter to register amendment to Wai 145 as claim 1.2(c), 4 July 1996

**2.98** Memorandum of Tribunal recording discussions at judicial conference of 7 August 1996 concerning interim final submission and third amended statement of claim of Wai 145 claimants, Wai 145 claimant evidence, seventh hearing, overlapping and non-overlapping claims grouped with Wai 145, and constitution of Tribunal, 8 August 1996

**2.99** Notice of seventh hearing, 13 August 1996
**(a)** Declaration that notice of seventh hearing given, 13 August 1996
List of parties sent notice of seventh hearing, 13 August 1996

**2.100** Memorandum from Crown counsel to Tribunal seeking clarification on proposed constitution of Tribunal, 16 August 1996

**2.101** Memorandum from Crown counsel to Tribunal challenging jurisdiction of Tribunal to inquire into acts or omissions of Maori or Native Trustee, 16 August 1996

**2.102** Memorandum from Crown counsel to Tribunal concerning failure of Wai 145 claimant counsel to file evidence, 27 August 1996

**2.103** Memorandum from chairperson to registrar noting filing of document G1 and directing that it be distributed to named parties, 28 August 1996

**2.104** Memorandum from chairperson to registrar noting filing of document G2 and directing that it be distributed to named parties, 28 August 1996

**2.105** Letter from Ihakara Puketapu to Tribunal granting consent for Tribunal to make recommendation that Crown's leasehold interests in land at 9, 13, and 15 Pipitea Street be no longer liable to resumption, 9 August 1996

**2.106** Letter from Wai 145 claimant counsel to Crown counsel concerning evidence of Dr Patricia Berwick, 5 September 1996

**2.107** Memorandum of Tribunal concerning filing and presentation of witness evidence in respect of eighth hearing, 15 November 1996

**2.108** Letter from Crown counsel to Wai 145 claimant counsel concerning filing of interim final submission by claimant counsel and advising that no statement of defence would be filed by Crown counsel, 21 October 1996

**2.109** Memorandum from chairperson to registrar noting filing of document H3 and directing that it be distributed to named parties, 17 February 1997

**2.110** Memorandum from chairperson to registrar noting filing of document H4 and directing that it be distributed to named parties, 17 February 1997

**2.111** Memorandum of Tribunal to parties concerning filing date for evidence to be presented at eighth hearing, 4 March 1997

**2.112** Paper removed from record pursuant to Tribunal direction of 29 September 1998 (see paper 2.200)
Memorandum from deputy chairperson to registrar directing latter to register claim 1.14 as Wai 660 and to aggregate record of inquiry of Wai 660 with that of Wai 145, 10 March 1997

**2.113** Paper removed from record pursuant to Tribunal direction of 29 September 1998 (see paper 2.200)

**2.114** Memorandum from Tribunal to registrar noting filing of document H5 and directing that it be distributed to named parties, 25 March 1997

**2.115** Paper removed from record pursuant to Tribunal direction of 29 September 1998 (see paper 2.200)

**2.116** Paper removed from record pursuant to Tribunal direction of 29 September 1998 (see paper 2.200)

**2.117** Memorandum from deputy chairperson to registrar noting filing of report by Duncan Moore and directing that it be distributed to named parties, 23 April 1997

**2.118** Memorandum from chairperson to registrar directing latter to make arrangements for continuation of hearings for claims Wai 84, 145, and 201, and for commencement of hearings for claim Wai 262, 1 May 1997

**2.119** Memorandum from Tribunal to parties requesting additional information on Port Nicholson purchase area, surplus lands, tenths reserves, reclamations and foreshore, and Palmerston North exchanges, and directing registrar to arrange judicial conference, 5 June 1997

**2.120** Memorandum from Tribunal to parties outlining agenda for 20 June 1997 judicial conference, 18 June 1997

**2.121** Notice of eighth hearing, 20 June 1997
Outline of schedule for eighth hearing, undated
**(a)** Declaration that notice of eighth hearing given, 20 June 1997
Notice of eighth hearing, 20 June 1997
List of parties sent notice of eighth hearing, 18 June 1997

**2.122** Memorandum from Tribunal to parties directing those with claims overlapping Wai 145 inquiry to file amended statements of claim, 20 June 1997

**2.123** Memorandum from chairperson to registrar noting filing of document H7 and directing that it be distributed to named parties, 19 June 1997

**2.124** Memorandum from chairperson to registrar noting filing of document H8 and directing that it be distributed to named parties, 23 June 1997

**2.125** Memorandum from Tribunal to parties recording discussions at judicial conference of 20 June 1997 concerning Port Nicholson purchase area, surplus lands, tenths reserves, reclamations and foreshore, Palmerston North exchanges, Maori Reserved Land Amendment Bill 1996, plan attached to Fitzroy's 1845 Crown grant, jurisdiction of Tribunal in respect of Maori Trustee, interim final submission of Wai 145 claimants, further research and evidence, evidence of Ngati Toa, and statements of claim of overlapping claimants, 25 June 1997

**2.126** Letter from Wai 474 claimant to registrar advising that amended statement of claim for Wai 377 incorporating Wai 474 will be filed and requesting that claim Wai 474 be set aside, 17 June 1997

**2.127** Memorandum from Tribunal to registrar directing latter to withdraw claim Wai 474 and to register Wai 377 amended statement of claim (claim 1.7(c)), 25 June 1997

**2.128** Declaration that notice of registration of amendment to claim Wai 377 given, 27 June 1997
Lists of parties sent notice of registration of amendment to claim Wai 377, 27 June 1997

**2.129** Memorandum from Tribunal to registrar directing latter to register Wai 207 amended statement of claim (claim 1.5(a)), 2 July 1997

**2.130** Declaration that notice of registration of amendment to claim Wai 207 given, 16 July 1997
Lists of parties sent notice of registration of amendment to claim Wai 377, 16 July 1997

**2.131** Memorandum from Wai 175 and 543 claimant counsel to Tribunal critiquing document H5 and requesting that it not be placed on the Wai 145 record of inquiry, 11 July 1997

**2.132** Memorandum from Wai 207 claimant counsel to Tribunal concerning commissioning of further research by the Tribunal, 17 July 1997

**2.133** Memorandum from Tribunal to parties advising of overlaps between claim Wai 145 and claims filed on behalf of Te Runanga ki Muaupoko (Wai 52, 108, 237, 310, 623, 624), advising of requests from Wai 207 claimant counsel concerning further commissioning of research by Tribunal, and directing registrar to inform Wai 207 claimant counsel of additional research being considered by Tribunal, 28 July 1997
**(a)** Memorandum from Wai 52 claimant counsel to Tribunal objecting to Wai 145 hearings and seeking their adjournment pending Tribunal inquiry into claim Wai 52, 7 July 1997

**2.134** 'Deed of Agreement between the Minister in Charge of Treaty of Waitangi Negotiations on Behalf of the Crown and Ralph Hebberley Ngatata Love on Behalf of Himself and on Behalf of the Beneficiaries of the Wellington Tenths Trust in Relation to Claim Wai 145', deed of agreement concerning the surrender of leasehold interests in 9, 13, and 15 Pipitea Street to the trust, the carrying out of maintenance work on the properties, and the paying of $70,000 to the trust for refurbishment of the properties, 28 May 1997

**2.135** Joint memorandum from the Office of Treaty Settlements and the Wellington Tenths Trust to Tribunal recording partial settlement of Wai 145 claim concerning properties at 9, 13, and 15 Pipitea Street (paper 2.134), 28 July 1997

**2.136** Memorandum from Te Runanga ki Muaupoko to Tribunal, 8 August 1997

**2.137** Memorandum from Tribunal to registrar directing latter to register amended statements of claim to Wai 543 and Wai 175 (claims 1.3(a), 1.11(a)), 22 August 1997

**2.138** Declaration that notice of registration of amendments to claims Wai 175 and Wai 543 given, 1 September 1997
Lists of parties sent notice of registration of amendments to claims Wai 175 and Wai 543, 1 September 1997

**2.139** Memorandum from Tribunal to parties detailing agenda for judicial conference of 17 September 1997, 5 September 1997

**2.140** Memorandum from Wai 175 and Wai 543 claimant counsel to Tribunal reiterating criticism of document H5 as detailed in paper 2.131 and requesting that further research be undertaken to fulfil terms of research commission 3.20, 16 September 1997

**2.141** Memorandum from Tribunal to parties recording discussions at judicial conference of 17 September 1997 concerning claims filed on behalf of Te Runanga ki Muaupoko (Wai 52, 623, 624), ninth hearing, ancillary claims (Wai 105, 183, 415, 442, 660), further research, schedule for remaininder of inquiry, and possible appointment of additional Maori member to Tribunal, 19 September 1997

**2.142** Memorandum from Tribunal to parties requesting details of sources of historical or other evidence not already considered in reports received by the Tribunal, 19 September 1997

**2.143** Letter from Wai 415 claimants to Tribunal requesting that claim Wai 415 be withdrawn without prejudice, 18 September 1997

**2.144** Memorandum from Tribunal to registrar directing latter to withdraw claim Wai 415, 26 September 1997

**2.145** Paper removed from record

**2.146** Paper removed from record pursuant to Tribunal direction of 29 September 1998 (see paper 2.200)

**2.147** Paper removed from record pursuant to Tribunal direction of 29 September 1998 (see paper 2.200)

**2.148** Memorandum from Tribunal to registrar directing latter to register claim 1.5(b), 26 September 1997

**2.149** Declaration that notice of registration of amendment to claim Wai 207 given, 29 September 1997
Lists of parties sent notice of registration of amendment to claim Wai 207, 29 September 1997

**2.150** Memorandum from Tribunal to parties requesting comment on proposal to appoint John Clarke to Wai 145 Tribunal to enable hearings to continue in absence of Professor Sorrenson and following resignation of Georgina Te Heuheu, 10 October 1997

**2.151** Memorandum from Wai 175 and Wai 543 claimant counsel to Tribunal in response to paper 2.142 listing sources of evidence relating to claims Wai 175 and 543, 17 October 1997

**2.152** Declaration that notice of ninth hearing given, 5 November 1997
List of parties sent notice of ninth hearing, undated
Notice of ninth hearing, 5 November 1997
**(a)** Dispatch of notice of ninth hearing, 5 November 1997

**2.153** Memorandum from Tribunal to registrar noting filing of document 16 and directing that it be distributed to named parties, 5 November 1997

**2.154** Memorandum from Tribunal to registrar noting filing of document 17 and directing that it be distributed to named parties, 6 November 1997

**2.155** Memorandum from Tribunal to parties advising of appointment of John Clarke to Wai 145 Tribunal, 6 November 1997

**2.156** Memorandum from Tribunal to registrar noting filing of document E13 and directing that it be distributed to named parties, 26 November 1997

**2.157** Memorandum from Tribunal to registrar noting filing of document 19 and directing that it be distributed to named parties, 26 November 1997

**2.158** Memorandum from Tribunal to registrar noting filing of document 110 and directing that it be distributed to named parties, 26 November 1997

**2.159** Memorandum from Tribunal to registrar noting filing of document 110 and directing that it be distributed to named parties, 26 November 1997

**2.160** Memorandum from Tribunal to registrar noting filing of document 111 and directing that it be distributed to named parties, 26 November 1997

**2.161** Memorandum from Tribunal to parties directing Wai 52, Wai 108, Wai 237, Wai 310, Wai 623, and Wai 624 claimants wishing to be heard in Wai 145 inquiry to file amended statements of claim by 19 December 1997, 5 December 1997

**2.162** Entry vacated

**2.163** Entry vacated

**2.164** Memorandum from Tribunal to registrar directing latter to register Wai 52 amended statement of claim (claim 1.16(d)) and to aggregate record of inquiry of Wai 52 with that of Wai 145, 22 January 1998

**2.165** Declaration that notice of registration of amendment to claim Wai 52 given, 26 January 1998
Lists of parties sent notice of registration of amendment to claim Wai 52, 23, 26 January 1998

**2.166** Memorandum from Tribunal to registrar directing latter to registerWai 623 amended statement of claim and to aggregate record of inquiry of Wai 623 with that of Wai 145, 22 January 1998

**2.167** Declaration that notice of registration of amendment to claim Wai 623 given, 27 January 1998
Lists of parties sent notice of registration of amendment to claim Wai 623, 26 January 1998

**2.168** Memorandum from Tribunal to parties concerning scheduling of, venues for, and agendas for eleventh, twelfth, and thirteenth hearings, 27 March 1998

**2.169** Letter from Wai 145 claimant counsel to Tribunal requesting urgent hearing on proposed sale of Government Property Services Limited, 11 May 1998

**2.170** Letter from Crown counsel to Wai 145 claimant counsel agreeing to urgent hearing but complaining about lack of notice, 13 May 1998
**(a)** Submission of Crown counsel opposing application of Wai 145 claimant counsel for urgent hearing on proposed sale of Government Property Services Limited, 14 May 1998

**2.171** Submission of Crown counsel concerning matters raised at urgent hearing of 19 May 1998, material filed by claimants on 19 May 1998, 18 May 1998 affidavit of Dr Ngatata Love, and *Tumu Te Heu Heu Tuwharetoa Maori Trust Board and Others v Attorney-General and Others* (unreported, 15 May 1998, Robertson J, High Court Rotorua, CP44/96), 20 May 1998

**2.172** Memorandum from Tribunal to registrar noting filing of document J6 and directing that it be distributed to named parties, 22 May 1998

**2.173** Memorandum from Tribunal to registrar noting filing of document J7 and directing that it be distributed to named parties, 22 May 1998

**2.174** Memorandum from Tribunal to registrar noting filing of document J8 and directing that it be distributed to named parties, 22 May 1998

**2.175** Letter from Wai 377 claimants to Tribunal supporting Wai 145 claimants' application for urgent hearing on, and expressing concern at, proposed sale of Government Property Services Limited, 27 May 1998

**2.176** Memorandum from Tribunal to parties granting Wai 145 claimants' application for urgent hearing on proposed sale of Government Property Services Limited, 3 June 1998

**2.177** Notice of urgent hearing on proposed sale of Government Property Services Limited, 4 June 1998
**(a)** Declaration that notice of urgent hearing on proposed sale of Government Property Services Limited given, 4 June 1998
Notice of urgent hearing on proposed sale of Government Property Services Limited, 4 June 1998
List of parties sent notice of urgent hearing on proposed sale of Government Property Services Limited, 4 June 1998

**2.178** Memorandum from Tribunal to parties concerning scheduling of urgent hearing on proposed sale of Government Property Services Limited and filing of evidence therefor, 4 June 1998

**2.179** Memorandum from Tribunal to parties advising of Manuhuia Bennett's illness and consequent unavailability for sittings and directing that Areta Koopu be appointed to Tribunal to enable urgent hearing on proposed sale of Government Property Services Limited to proceed, 18 June 1998

**2.180** Notice of urgent hearing on proposed sale of Government Property Services Limited, 18 June 1998
**(a)** Declaration that notice of urgent hearing on proposed sale of Government Property Services Limited given, 18 June 1998
Notice of urgent hearing on proposed sale of Government Property Services Limited, 18 June 1998
List of parties sent notice of urgent hearing on proposed sale of Government Property Services Limited, 18 June 1998

**2.181** Memorandum from Wai 145 claimant counsel to Tribunal outlining recommendations to be sought at urgent hearing on proposed share float of Government Property Services Limited, 25 June 1998

**2.182** Memorandum from Wai 145 claimant counsel to Tribunal listing documents likely to be referred to at urgent hearing, 25 June 1998

**2.183** Memorandum from Tribunal to registrar noting filing of document H3 and directing that it be distributed to named parties, 16 July 1998

**2.184** Memorandum from Tribunal to registrar noting filing of document K2 and directing that it be distributed to named parties, 16 July 1998

**2.185** Memorandum from Tribunal to parties declining Wai 145 claimant counsel's application for a stay of the proposed share float of Government Property Services Limited but recommending that Crown give undertaking that the Tribunal's power to make binding recommendations in respect of State-owned enterprise land would remain unchanged or that sufficient land to protect Wai 145 and related claimants be landbanked, 27 July 1998

**2.186** Memorandum from Tribunal to parties concerning reports commissioned as potential reference or source material for Professor Alan Ward's overview report on customary tenure (doc M1) and the presentation of that overview report, 28 July 1998

**2.187** Notice of eleventh hearing, Wellington, 3 August 1998
**(a)** Declaration that notice of eleventh hearing given, 3 August 1998
Notice of eleventh hearing, 3 August 1998
List of parties sent notice of eleventh hearing, undated

**2.188** Memorandum from deputy chairperson to registrar noting filing of document K3 and directing that it be distributed to named parties, 11 August 1998

**2.189** Memorandum from Crown counsel to Tribunal declining to follow Tribunal's recommendations of 27 July 1998 (paper 2.185), 25 August 1998
Minister in Charge of Treaty of Waitangi Negotiations, 'Statement on Waitangi Tribunal GPS Decision', undated

**2.190** Memorandum from Tribunal to parties recording discussions at judicial conference of 24 August 1998 concerning filing of evidence, placing documents from Wai 65 and Wai 461 records of documents on Wai 145 record of documents, scheduling of twelfth and thirteenth hearings and final submissions, and status of claim Wai 183, 26 August 1998

**2.191** Letter from Office of Treaty Settlements to Tribunal concerning nature of 31 May 1993 payment of $50,000 by the Crown–Congress Joint Working Party to Te Runanga o Rangitane, 21 January 1998

**2.192** Memorandum from Tribunal to parties concerning scheduling of twelfth and thirteenth hearings, 2 September 1998

**2.193** Notice of twelfth hearing, 3 September 1998
**(a)** Declaration that notice of twelfth hearing given, 3 September 1998
Notice of twelfth hearing, 3 September 1998
List of parties sent notice of twelfth hearing, 3 September 1998

**2.194** Memorandum from deputy chairperson to registrar directing latter to register claim 1.18 as Wai 734 and setting out deadlines for filing of evidence, 3 September 1998

**2.195** Declaration that notice of registration of claim 1.18 given, 4 September 1998
List of parties sent notice of registration of claim 1.18, 4 September 1998

**2.196** Memorandum from deputy chairperson to registrar directing latter to register claim 1.19 as Wai 735 and setting out deadline for filing of evidence, 3 September 1998

**2.197** Declaration that notice of registration of claim 1.19 given, 4 September 1998
List of parties sent notice of registration of claim 1.19, 4 September 1998

**2.198** Memorandum from Tribunal to registrar directing latter to register claims 1.3(b) and 1.11(b), 16 September 1998

**2.199** Declaration that notice of registration of claim 1.3(b) and 1.11(b) given, 24 September 1998
List of parties sent notice of registration of claim 1.3(b) and 1.11(b), 24 September 1998

**2.200** Memorandum from Tribunal to parties recording discussions at judicial conference of 28 September 1998 concerning evidence of Iwi Nicholson and Selwyn Katene, removal of sections of documents L2, L3, L4, L5 and L6, provision of information about Wai 734 and Wai 735 claimants, missing Wanganui Maori Land Court file, severing of claims Wai 105, Wai 183, and Wai 660 from Wai 145, appearance of Richard Bradley, final submissions, and Ngati Toa whakapapa evidence, 29 September 1998

**2.201** Memorandum from deputy chairperson to registrar noting filing of document M1 and directing that it be distributed to named parties, 6 November 1998

**2.202** Notice of thirteenth hearing, 11 November 1998
**(a)** Declaration that notice of thirteenth hearing given, 11 November 1998
Notice of thirteenth hearing, 11 November 1998
List of parties sent notice of thirteenth hearing, 11 November 1998

**2.203** Memorandum from Tribunal to parties recording discussions at judicial conference of 7 December 1998 concerning removal of sections of documents L2, L3, L4, L5 and L6, hearing of final submissions and provision of copies thereof, stenographic recording of thirteenth hearing and provision of transcripts thereof, and addition of documents M6 and M7 to Wai 145 record of documents, 10 December 1998

**2.204** Notice of fourteenth hearing, 3 February 1999
**(a)** Declaration that notice of fourteenth hearing given, 4 February 1999
Notice of fourteenth hearing, 3 February 1999
List of parties sent notice of fourteenth hearing, 4 February 1999

**2.205** Notice of fifteenth and sixteenth hearings, 4 February 1999
**(a)** Declaration that notice of fifteenth and sixteenth hearings given, 4 February 1999
Notice of fifteenth and sixteenth hearings, 4 February 1999
List of parties sent notice of fifteenth and sixteenth hearings, 4 February 1999
**(b)** Declaration that notice of registration of claim 1.2(d), filing dates for submissions, and scheduling of closing submissions of Crown counsel given, 7 May 1999

Form letter from registrar to parties giving notice of registration of claim 1.2(d), filing dates for submissions, and scheduling of closing submissions of Crown counsel, 7 May 1999
List of parties sent notice of registration of claim 1.2(d), filing dates for submissions, and scheduling of closing submissions of Crown counsel, 7 May 1999

**2.206** Memorandum from Wai 145 claimant counsel to Tribunal seeking to reserve right to respond to Crown documents filed after closing of Crown case, 5 March 1999

**2.207** Letter from Crown counsel to registrar concerning relevance of documents N1, N2, N3, N3(a)–(i), and N9 and possible need to make submissions thereon, 9 March 1999

**2.208** Memorandum from Tribunal to parties reserving leave to claimant counsel to respond to additional Crown documents, 16 March 1999

**2.209** Letter from Muaupoko Tribal Authority Incorporated to registrar confirming that it now represents Muaupoko iwi and requesting relevant papers, 4 March 1999

**2.210** Memorandum from Tribunal to registrar directing latter to register claim 1.16(e) and to amend register to show James Broughton as first named claimant (replacing the late Tamihana Tukapua), 22 April 1999

**2.211** Declaration that notice of registration of amendment to claim Wai 52 given, 29 April 1999
Lists of parties sent notice of registration of amendment to claim Wai 52, 29 April 1999

**2.212** Memorandum from Tribunal to registrar directing latter to register claim 1.2(d), 4 May 1999

**2.213** Declaration that notice of registration of amendment to claim Wai 145 given, 7 May 1999
Lists of parties sent notice of registration of amendment to claim Wai 145, 7 May 1999

**2.214** Memorandum from Tribunal to parties listing filing dates for remaining submissions of Crown and claimant counsel, 6 May 1999

**2.215** Memorandum from Wai 52 claimants to Tribunal requesting urgent hearing in respect of part of claim 1.16(e) relating to pollution of Ngai Tara/Muaupoko in regard to proposed discharge of treated sewage onto land and into Lake Horowhenua by the Horowhenua District Council, 26 April 1999

**2.216** Memorandum from deputy chairperson to Wai 52 claimants requesting further information in respect of request for urgency (paper 2.215), 10 May 1999

**2.217** Paper refiled as document Q3

**2.218** Paper refiled as document Q5

**2.219** Paper refiled as document Q6

**2.220** Paper refiled as document Q7

**2.221** Paper refiled as document Q8

**2.222** Paper refiled as document Q9

**2.223** Entry vacated

**2.224** Paper refiled as document Q10

**2.225** Paper refiled as document Q4

**2.226** Memorandum from Tribunal to registrar directing latter to register claim 1.6(b) and to add Wayne Herbert as second named claimant, 14 July 1999

**2.227** Declaration that notice of registration of amendment to claim Wai 366 given, 16 July 1999
Lists of parties sent notice of registration of amendment to claim Wai 366, 15 July 1999

### 3. Research Commissions

**3.1** Memorandum from Tribunal to Wai 145 claimants authorising them to commission Neville Gilmore and Duncan Moore to prepare a historical overview report, Catherine Love to prepare a social and economic report, and Charles Hohaia to assist in the preparation of those reports, 19 March 1991

**3.2** Letter from the director, Waitangi Tribunal Division, to Wai 145 claimant counsel setting out terms and conditions for funding of research outlined in commission 3.1, 19 March 1991

**3.3** Memorandum from Tribunal to Wai 145 claimants authorising their counsel to commission Duncan Moore Mark Te One, Neville Gilmore, and Professor Stuart Locke to prepare a report on the origin, location, and administration of the New Zealand Company reserves, land taken by the Crown for public works, Maori settlement of the Cook Strait area between 1846 and 1973, and the McCleverty awards, 21 June 1991

**3.4** Memorandum from Tribunal to Wai 145 claimants authorising their counsel to commission Duncan Moore Mark Te One, Neville Gilmore, and Professor Stuart Locke to prepare a report, 21 June 1991

**3.5** Memorandum from Tribunal to Wai 145 claimants authorising their counsel to commission Neville Gilmore to prepare a document bank of all significant material held at the Maori Land Court in Wanganui relating to Maori reserves within the boundaries of Wakefield's 1839 Wellington purchase, 26 August 1991

**3.6** Memorandum from Tribunal to Wai 145 claimant counsel and Professor Stuart Locke increasing amount payable for completion of report on valuation matters, 8 November 1991

**3.7** Memorandum from chairperson to Jane Luiten commissioning her to prepare a report on early Crown purchases in the Whanganui ki Porirua area, 15 December 1991

**3.8** Memorandum from Tribunal to Wai 52, 88, 108, 113, 182, 207, 237, 265 claimants notifying them of the completion of Jane Luiten's 'Exploratory Report on Early Crown Purchases Whanganui ki Porirua' and inviting their comment thereon and advising them of a proposed judicial conference to consider further research, 16 April 1992

**3.9** Memorandum from chairperson to Hepa Solomon authorising him to commission Graham and Susan Butterworth to prepare an exploratory report on the history of Ngati Toa in the Horowhenua region, 14 June 1992

**3.10** Memorandum from Tribunal to Penny Ehrhardt commissioning her to prepare a report on customary Maori tenure in the Wellington region from the mid-1700s to the beginning of European settlement in the region, 15 June 1992

**3.11** Memorandum from chairperson to Mark Te One commissioning him to prepare a report on Waiwhetu Pa land taken in 1928 under the Public Works Act 1908 for river protection purposes, 29 June 1995

**3.12** Memorandum from chairperson to Mark Te One authorising him to commission researchers Damain and Derek Stone and extending term of commission 3.11, 12 September 1995

**3.13** Memorandum from chairperson to Melanie Baker authorising her to commission a researcher to prepare a report on matters relating to the disposal of Kokiri Marae, 30 June 1995

**3.14** Memorandum from chairperson to Philipa Biddulph commissioning her to prepare reports on public works takings of reserve land in the Whanganui a Tara region and Wellington Town section 542 and to assist Terence Green with his research for commission 3.15, 28 June 1996

**3.15** Memorandum from chairperson to Terence Green commissioning him to prepare a report on the administration of the Wellington tenths by the Native or Maori Trustee between 1922 and the mid-1980s, 28 June 1996

**3.16** Memorandum from Tribunal to Joy Hippolite commissioning her to prepare a report on Ngati Rangatahi, their history, migration to and expulsion from the Hutt Valley, and their relationship with Ngati Toa and Governor Grey, 25 July 1996

**3.17** Memorandum from chairperson to Graham and Susan Butterworth extending term of commission 3.9, 2 August 1996
**(a)** Memorandum from chairperson to Graham and Susan Butterworth further extending term of commission 3.9, 15 January 1997

**3.18** Memorandum from chairperson to David Churton authorising him to commission Tony Walzl to prepare a report on matters of relevance to Ngati Tama's overlapping claim in respect of the Wellington tenths, 28 August 1996

**3.19** Memorandum from chairperson to Wai 207 claimant counsel authorising her to commission Richard Boast to prepare a report on on matters of relevance to Ngati Toa's overlapping claim in respect of the Wellington tenths, 28 August 1996

**3.20** Memorandum from chairperson to Heather Bauchop commissioning her to prepare a report on the interests of Rangitane in Te Whanganui a Tara and the relationship between Rangitane, other iwi, and the Crown during the settlement and administration of the region, 28 August 1996

**3.21** Memorandum from chairperson to Joy Hippolite extending term of commission 3.16, 17 September 1996

**3.22** Memorandum from chairperson to Wai 207 claimant counsel extending term of commission 3.19, 17 February 1997

**3.23** Memorandum from Tribunal to Stephen Quinn commissioning him to prepare a report on the McCleverty reserves, their history, size, location, and management, and the positions of the Crown and Wai 145 claimants on them, 4 March 1997

**3.24** Memorandum from Tribunal to Stephen Quinn amending commission 3.23, 27 March 1997

**3.25** Memorandum from Tribunal to Tony Walzl extending term of commission 3.18, 27 March 1997

**3.26** Memorandum from chairperson to Tata Lawton commissioning him to prepare a report on block 14, Belmont survey district (Waiwhetu Pa) and the Waiwhetu reserve, 21 May 1997

**3.27** Memorandum from Tribunal to Duncan Moore commissioning him to prepare a report on Crown grants and surveys of lands in the 1839 Port Nicholson purchase and the 'surplus lands', 20 August 1997

**3.28** Memorandum from Tribunal to Keith Pickens commissioning him to prepare a report on the Wellington tenths reserves between 1873 and 1896, 24 September 1997

**3.29** Memorandum from Tribunal to Ralph Johnson commissioning him to prepare a report on the Palmerston North reserves, 8 October 1997

**3.30** Memorandum from Tribunal to Rachael Willan commissioning her to prepare a report on the Palmerston North reserves, 8 October 1997

**3.31** Memorandum from Tribunal to Tata Lawton commissioning him to prepare a historical and statistical summary of the Wellington tenths, McCleverty, and Palmerston North reserves, 8 October 1997

**3.32** Memorandum from Tribunal to Robert McClean commissioning him to prepare a report on reclamations and the foreshore in Te Whanganui a Tara, 8 October 1997

**3.33** Memorandum from Tribunal to Wai 207 claimant counsel authorising him to commission Richard Boast to prepare a report on Ngati Toa's economic and other interests and Ngati Toa's relationship with the Wellington settlement and the Crown between 1840 and 1860, 8 October 1997

**3.34** Memorandum from Tribunal to Wai 207 claimant counsel authorising her to commission Richard Boast to prepare a report on Ngati Toa's economic and other interests and Ngati Toa's relationship with the Wellington settlement and the Crown between 1840 and 1860, 19 December 1997

**3.35** Memorandum from Tribunal to Tata Lawton commissioning him to prepare a database and report on customary occupation, tenure, and rights along the west and south coasts of Wellington within the area covered by the Port Nicholson deed (as extended in 1844), 11 February 1998

**3.36** Memorandum from Tribunal to Angela Ballara commissioning her to translate and annotate Maori text in Wellington Maori Land Court minute book 1H, 11 February 1998

**3.37** Memorandum from Tribunal to Steven Chrisp commissioning him to prepare an annotated bibliography of primary source materials in the Alexander Turnbull Library concerning the ancestral, customary, and historical interests of Rangitane within the area covered by the Port Nicholson deed (as extended in 1844), 11 February 1998

**3.38** Memorandum from Tribunal to Professor Alan Ward commissioning him to prepare a report on customary tenure within the area covered by the Port Nicholson deed (as extended in 1844) between the 1820s and the 1840s, 27 March 1998

**3.39** Memorandum from Tribunal to Steven Chrisp commissioning him to prepare an annotated bibliography of primary source materials in the Alexander Turnbull Library concerning Mauapoko, 27 March 1998

**3.40** Memorandum from Tribunal to Duncan Moore commissioning him to prepare a report on the Wellington town belt between 1839 and 1861, 15 July 1998

**3.41** Memorandum from Tribunal to Clementine Fraser commissioning her to assist Professor Alan Ward to complete commission 3.38, 5 August 1998

**3.42** Memorandum from Tribunal to Elizabeth Cox commissioning her to to assist Professor Alan Ward to complete commission 3.38, 5 August 1998

**3.43** Memorandum from Tribunal to Tata Lawton commissioning him to to assist Professor Alan Ward to complete commission 3.38, 5 August 1998

**3.44** Memorandum from Tribunal to Professor Alan Ward extending term of commission 3.38, 2 September 1998

**3.45** Memorandum from Tribunal to Tata Lawton extending term of commission 3.43, 9 September 1998

**3.46** Memorandum from Tribunal to Clementine Fraser extending term of commission 3.41, 9 September 1998

**3.47** Memorandum from Tribunal to Elizabeth Cox extending term of commission 3.42, 9 September 1998

### 4. Summation of Proceedings

There are no summations of proceedings.

### 5. Transcripts

**5.1** Crown Law Office transcript of Crown counsel's cross-examination of Morris Love at fifth hearing, undated

**5.2** Transcript of tape recording of 26 March 1991 site visit during first hearing, undated

**5.3** Covering letter from the Treaty issues team, Crown Law Office, to registrar, 1 April 1996
Transcript of statement of Crown counsel made on 20 March 1996 concerning landbanking of properties at 1–3 Pipitea Street and Wai 145 claimant counsel's cross examination of Myra Tia Tahiwi on 20 March 1996, undated

**5.4** Translation of tape recording of oral submission of Hamiora Raumati at Pipitea Marae at eleventh hearing, undated

**5.5** Verbatim Transcript Services transcript of thirteenth hearing, 7–9 December 1998

## RECORD OF DOCUMENTS

* Confidential
† Sections of document removed as per direction of Tribunal (paper 2.200)
‡ Held in Waitangi Tribunal library

### a Documents Received to End of First Hearing, 28 March 1991

**a1**
**(a)** Letter from property manager, Government Property Services Limited, to Parent Advocacy Council offering latter opportunity to lease 9 Pipitea Street, 17 January 1990
**(b)** Ralph Heberley Ngatata Love and Makere Rangiatea Ralph Love, 'Submission to Maori Affairs Select Committee: Wellington Tenths and Palmerston North Reserves', select committee submission, 5 June 1990
**(c)** Letter from property manager, Government Property Services Limited, to New Zealand Guardian Trust seeking consent to sublet 9 Pipitea Street to Parent Advocacy Council, 21 September 1990
**(d)** Letter from chairman, Wellington Tenths Trust, to manager, Government Property Services Limited, objecting to terms of proposed lease of 9 Pipitea Street to Parent Advocacy Council and requesting meeting to discuss lease terms of Pipitea Street properties, 11 October 1990
**(e)** Letter from Minister of Justice to Sir Ralph Love concerning renegotiation of leases for Pipitea Street and Rintoul Street properties, 2 August 1990

**a2** Assorted files from Guardian Trust, Maori Trust, Native Trustee, and Public Trustee concerning 9 Pipitea Street, various dates

**a3** Assorted files from New Zealand Guardian Trust Company Limited and the offices of the Maori Trustee, Native Trustee, and Public Trustee concerning 11 Pipitea Street, various dates

**A4** Assorted files from the New Zealand Guardian Trust Company Limited and the offices of the Maori Trustee, Native Trustee, and Public Trustee concerning 13 Pipitea Street, various dates

**A5** Assorted files from the New Zealand Guardian Trust Company Limited and the offices of the Maori Trustee, Native Trustee, and Public Trustee concerning 15 Pipitea Street, various dates

**A6** Assorted files from the New Zealand Guardian Trust Company Limited and the offices of the Maori Trustee, Native Trustee, and Public Trustee concerning 28–32 Russell Terrace, various dates

**A7**
**(a)** The New Zealand Native Reserves Act 1856
The New Zealand Native Reserves Amendment Act 1858
The Native Reserves Amendment Act 1862
The Native Reserves Act 1873
The Native Reserves Act 1882
The Native Reserves Act Amendment Act 1895
The Native Reserves Act Amendment Act 1896
**(b)** Statutes concerning native reserves, 1842–1917

**A8** Extracts from *New Zealand Parliamentary Debates*, 1856–96, concerning Native Reserves Acts 1856, 1858, 1862, 1873, 1882, 1895, 1896
'Native Reserves Bill', NZPD, 1856–58, pp 229–230, 233, 235, 237, 250, 261, 267, 313, 315; 'Native Reserves Amendment Bill', 29 July 1858, NZPD, 1858

**A9**
**(a)**‡ 'Plan of the Town of Wellington, Port Nicholson, New Zealand', 1:7920 map, S010408, undated
**(b)**‡ Wakefield, 'Map of the Country Sections in the Vicinity of Port Nicholson, New Zealand', S010456, 25 September 1918
**(c)**‡ 'City of Wellington', 1:792 map of east Thorndon, March 1985
**(d)**‡ 'The Hutt Valley, 1840–1940: Showing Historical Places', map traced from original drawing by Lance Hall, December 1840, undated
**(e)**‡ Two maps of Wellington region showing area of Port Nicholson purchase, undated
'Deed No 1: Port Nicholson Block (Original Purchase), Wellington District', 27 September 1839, H H Turton, *Maori Deeds of Land Purchases in the North Island of New Zealand*, vol 2, pp 95–96
**(f)**‡ 'Plan of Pipitea Pa, Wellington', 1:396 plan, WD3140, undated

**A10** Brief of evidence of Duncan Moore concerning boundaries of 1839 deed of purchase, undated
Amended brief of evidence of Duncan Moore concerning boundaries of 1839 deed of purchase, undated
**(a)** Supporting documents to document A10

**A11** Brief of evidence of Neville Gilmore concerning history of Wellington tenths, undated

**A12** Supporting documents to document A11, various dates

**A13** Opening submissions of claimant counsel, 25 March 1991

**A14** Itinerary for 26 March 1991 site visit, undated
Six Universal Business Directories maps of Wellington city and suburbs, showing stops for 26 March 1991 site visit, undated

**A15** Brief of evidence of Eruera Te Whiti Nia concerning Wellington wahi tapu, March 1991
**(a)*** Whakapapa of Eru Te Whiti Nia, undated

**A16** Brief of evidenceof Dr Ralph Heberley Ngatata Love, undated

**A17** Brief of evidence of Professor Stuart Locke, undated
**(a)** Copies of certificates of title, valuation documents, and photographs of 9 Pipitea Street
**(b)** Copies of certificates of title, valuation documents, and photographs of 11 Pipitea Street
**(c)** Copies of certificates of title, valuation documents, and photographs of 13 Pipitea Street
**(d)** Copies of certificates of title, valuation documents, and photographs of 15 Pipitea Street
**(e)** Copies of certificates of title, valuation documents, and photographs of 28–32 Russell Terrace

**A18** J Pyatt, 'The McCleverty Commission, 1846–47: An Early Attempt to Resolve the Difficulties Arising from Disputed Purchases of Maori Land', unpublished report, undated (registrar)

**A19** Letter from chairman, Wellington Tenths Trust, to manager, technical services, New Zealand Railways Corporation concerning disposal and memorialisation of excess railways lands, 12 April 1991

**A20** 'Wellington Tenths Parliamentary History', extracts from *New Zealand Parliamentary Debates* from 1856 to 1953 concerning Wellington tenths reserves and related legislation, undated

**A21** 'Wellington Tenths Legislative History', summary and reproductions of statutes from 1844 to 1979 concerning Wellington tenths reserves, undated

**A22** 'Wellington Tenths Legislative History: Original Bills', 2 vols, summary and reproductions of Bills from 1854 to 1953 concerning Wellington tenths reserves, undated, vol 1

**A23** Wellington Tenths Legislative History: Original Bills', 2 vols, summary and reproductions of Bills from 1854 to 1953 concerning Wellington tenths reserves, undated, vol 2

**A24** 'The Wellington Tenths: AJHR, 1858–1935', summary and reproductions of material from the *Appendix to the Journal of the House of Representatives* between 1858 and 1935 concerning Wellington tenths reserves, undated

**A25** 'Wellington Tenths: AJLC, 1858–1935', summary and reproductions of material from the *Appendix to the Journal of the Legislative Council* between 1858 and 1935 concerning Wellington tenths reserves, undated

**A26** 'Wellington Tenths: Turton's *Epitome*', extracts from H Hanson Turton, *An Epitome of Official Documents Relative to Native Affairs and Land Purchases in the North Island of New Zealand* (Wellington: Government Printer, 1883), concerning land purchases in Wellington province, undated

**A27** 'Wellington Tenths: Turton's Deeds', extracts from vol 2 of H Hanson Turton, *An Epitome of Official Documents Relative to Native Affairs and Land Purchases in the North Island of New Zealand* (Wellington: Government Printer, 1883), concerning land purchases in Wellington province, undated

**A28** *The Twelfth Report of the Directors of the New Zealand Company, Presented to an Adjourned Special Court of Proprietors, Held on the 26th April 1844* (London: Palmer and Clayton, 1844)

*Documents Appended to the Twelfth Report of the Directors of the New Zealand Company, April 26, 1844 (London: Palmer and Clayton, 1844), pp i–xlviii, 1A–223D*

**A29** *Documents Appended to the Twelfth Report of the Directors of the New Zealand Company, April 26, 1844* (London: Palmer and Clayton, 1844), pp 224D–23K

**A30** 'Wellington Tenths: Excerpts from *British Parliamentary Papers* Relative to the Tenths, 1840–1843', extracts from *British Parliamentary Papers* (1840–43) concerning Wellington tenths reserves, undated

**A31** 'Wellington Tenths: Excerpts from *British Parliamentary Papers* Relative to the Tenths, 1844 (Paper 556)', extracts from *British Parliamentary Papers* (1844) concerning Wellington tenths reserves, undated

**A32** 'Wellington Tenths: Excerpts from *British Parliamentary Papers* Relative to the Tenths, 1845–1846', extracts from *British Parliamentary Papers* (1845–46) concerning Wellington tenths reserves, undated

**A33** 'Wellington Tenths: Excerpts from *British Parliamentary Papers* Relative to the Tenths, 1847–1854', extracts from *British Parliamentary Papers* (1847–54) concerning Wellington tenths reserves, undated

**A34** Department of Maori Affairs, assorted files concerning Wellington native reserves, 1848–71

**A35** Department of Maori Affairs, assorted files concerning Wellington native reserves, 1868–81

**A36** Charles Heaphy, minute book, 1867–79

**A37** James Heberley, old land claim

**A38** Native Affairs Committee, minutes and papers concerning petition of Tamati Te Wera, various dates

**A39** Papers concerning Wellington native reserves, 1873–95

**A40** New Munster correspondence files concerning Wellington tenths, 1844–53

**A41** Penny Ehrhardt, 'Te Whanganui a Tara: Customary Tenure, 1750–1850', December 1992
**(a)** Supporting documents to document A41

**A42** 'Review into Leases under the Maori Reserved Land Act 1955', unpublished report, November 1991

**A43** 'A Framework for Negotiation Toi Tu Te Whenua Proposals for a Solution to Maori Reserved Land Issues', unpublished report, April 1993

**A44** Professor Alan Ward, Dr Robyn Anderson, Helen Walter, and Michael Harman, 'Wellington Lands for the Crown Congress Joint Working Party', unpublished report, undated
Alan Ward, 'Draft Report on the Legal and Administrative Regimes Affecting the Porirua and Petone Reserves', report commissioned by Crown–Congress Joint Working Party, pt B

## B Documents Received to End of Second Hearing, 18 August 1994

**B1** Opening address of Wai 145 claimant counsel, 17 August 1994

**B2** Brief of evidence of Professor Stuart Locke concerning lease histories, rentals, and valuations of, and returns on, 9, 13, 15 Pipitea Street and 145 Rintoul Street, 17 August 1994

**B3** Brief of evidence of John Isles concerning the impact of the Maori Reserved Land Act 1955 on the rentals paid for 9, 11, 13, and 15 Pipitea Street and 145 Rintoul Street, 17 August 1994

**B4** Duncan Moore, 'Composite Time-Line', chronology of events relating to settlement of Wellington from 1817 to 1863, undated

**B5** Brief of evidence of Dr Ngatata Love concerning history of Wai 145 claim, 17 August 1994

**B6** Letter from Minister of Justice to Minister of Education concerning renegotiation of the rental paid by the Wellington Education Board for 145 Rintoul Street, 9 December 1993

**B7** Reserved Lands Panel, 'Report of the 1993 Reserved Lands Panel', pre-publication copy, January 1994
**(a)** Letter from Crown Law Office to Tribunal concerning restrictions on release to Tribunal members of 'Report of the 1993 Reserved Lands Panel' (doc B7), 31 August 1994
**(b)** Letter from Crown Law Office to Tribunal lifting restrictions previously imposed on release to Tribunal members of 'Report of the 1993 Reserved Lands Panel' (doc B7), 19 October 1994

**B8** Verbatim Reporting Services Limited transcript of 17 August 1994 hearing (with index), undated
**(a)** Verbatim Reporting Services Limited transcript of 18 August 1994 hearing (with index), undated

## C Documents Received to End of Third Hearing, 4 November 1994

**C1** D A Armstrong and Bruce Stirling, 'A Summary History of the Wellington Tenths, 1839–1888, report commissioned by Crown Law Office, December 1992
**(a)** D A Armstrong and Bruce Stirling (comps), '1840–1844', vol 1 of 'Wellington Tenths – IA1: Internal Affairs Inwards Correspondence Files Relevant to Wellington Tenths', 2 vols, unpublished compilation of Internal Affairs files, undated
**(b)** D A Armstrong and Bruce Stirling (comps), '1845–1860', vol 2 of 'Wellington Tenths – IA1: Internal Affairs Inwards Correspondence Files Relevant to Wellington Tenths', 2 vols, unpublished compilation of Internal Affairs files, undated
**(c)** D A Armstrong and Bruce Stirling (comps), 'Excerpts Relevant to the Tenths from CO208', unpublished compilation of material from Colonial Office files (series CO208), undated
**(d)** Assorted files from National Archives Governor series (G19/1), various dates
**(e)** Assorted Colonial Secretary and Treasury files concerning Wellington Hospital reserves, 1854–57, varous dates
**(f)** Assorted Internal Affairs files concerning Wellington Hospital and College reserves, 1865–72
**(g)** Personal and official correspondence from George Clarke junior to George Clarke senior concerning Wellington tenths, 1842–44
**(h)** Assorted files from National Archives Governor series (G36/1 36/2: micro Z 002), various dates
Grey, outward letter books, November 1845 – December 1853
**(i)** Colonial Office files, various dates

**C2** Dr Donald M Loveridge, 'The Adoption of Perpetually-Renewable Leases for Maori Reserved Lands, 1887–1896', unpublished report, undated
**(a)** Supporting documents to document C2

**C3** Brief of evidence of Arthur Stewart concerning investment potential of perpetually renewable leases, 25 October 1994

**C4** Opening submissions of Crown counsel, undated
**(a)** Letter from Crown Law Office to registrar enclosing documents referred to in opening submissions of Crown counsel, 21 November 1994
'Report of Royal Commission Appointed to Inquire Into and Report Upon the Operation of the Law Relating to the Assessment of Rentals under Leases of the West Coast Settlement Reserves', AJHR, 1948, G-1
'Maori Reserved Land Bill', 1 September 1955, NZPD, 1955, pp 2171–2173
'Maori Reserved Land Bill', 12 October 1955, NZPD, 1955, pp 2946–2953
'Maori Reserved Land Bill', 13 October 1955, NZPD, 1955, p 3025
'Third Readings', 19 October 1955, NZPD, 1955, p 3140
Extracts from *Journal of the House of Representatives, Appendix to the Journal of the House of Representatives* and *Journal of the Legislative Council*concerning petitions relating to the West Coast Settlement Reserves Bill 1892 and the Native Reserves Amendment Act 1895, 1891–95

**C5** *Badger v Whangarei Refinery Expansion Commission of Inquiry* [1985] 2 NZLR 688

**C6** Memorandum from Crown counsel to Tribunal concerning the employment status of the researchers who compiled documents C1 and C1(a)–(i), undated

**C7** Verbatim Reporting Services Limited, 'Wai 145 Wellington Tenths: Full Transcript of Hearing Held on 1 November 1994, 2 November 1994, 3 November 1994', transcript commissioned by Crown Law Office, undated

## D Documents Received to End of Fourth Hearing, 9 December 1994

**D1** Closing submissions of Wai 145 claimant counsel, 7 December 1994
**(a)** Facsimile from Minister of Justice to Wai 145 claimant counsel concerning proposal that Crown purchase 9, 13, and 15 Pipitea Street and transfer them to Wellington Tenths Trust, 6 December 1994
**(b)** Ralph Heberley Ngatata Love and Makere Rangiatea Ralph Love, 'Submission to Maori Affairs Select Committee: Wellington Tenths and Palmerston North Reserves', select committee submission, 5 June 1990

**D2** Summary of closing submissions of Crown counsel, 8 December 1994
**(a)** Supporting documents for closing submissions of Crown counsel, various dates
**(b)** Memorandum from Crown counsel toTribunal concerning relevance of historical evidence, 8 December 1994
**(c)** Letter from Crown counsel to Tribunal enclosing table showing calculated internal rates of return for 9, 13, and 15 Pipitea Street, 8 December 1994
**(d)** Memorandum from Crown counsel to Tribunal concerning consideration paid for purchase of Wellington tenths land between 1839 and 1847, jurisdiction of Tribunal to determine questions of law, and appointment of commissioners under West Coast Settlements Reserve Act 1892, 7 April 1995

**D3** Submissions of Wai 145 claimant counsel responding to closing submissions of Crown counsel, 9 December 1994

## E Documents Received to End of Fifth Hearing, 19 February 1996

**E1** Te Puni Kokiri, *Toitu te Mana Toitu te Whenua: Maori Reserved Lands Government Policy Decisions, 1994* (Wellington: Te Puni Kokiri, 1995)

**E2** Covering letter from Crown counsel to Tribunal enclosing joint memorandum from Crown and Wai 145 claimant counsel, 10 July 1995
Joint memorandum from Crown and Wai 145 claimant counsel to Tribunal concerning proposed transfer of leasehold interests in 9, 13, and 15 Pipitea Street, 10 July 1995

**E3** Duncan Moore, 'The Origins of the Crown's Demesne at Port Nicholson, 1839–1846', 3 vols, report commissioned by Massey University, August 1995, vol 1

**(a)** Selection of pages for oral presentation, 20 February 1996

**E4** Duncan Moore, 'The Origins of the Crown's Demesne at Port Nicholson, 1839–1846', 3 vols, report commissioned by Massey University, August 1995, vol 2

**E5** Duncan Moore, 'The Origins of the Crown's Demesne at Port Nicholson, 1839–1846', 3 vols, report commissioned by Massey University, August 1995, vol 3
**(a)** Six A4 maps, undated

**E6** Duncan Moore (comp), 'Supporting Documents to the Paper Presented by Duncan Moore Entitled: "The Origins of the Crown's Demesne at Port Nicholson, 1839–1846"', 3 vols, report commissioned by Massey University, August 1995, vol 1

**E7** Duncan Moore (comp), 'Supporting Documents to the Paper Presented by Duncan Moore Entitled: "The Origins of the Crown's Demesne at Port Nicholson, 1839–1846"', 3 vols, report commissioned by Massey University, August 1995, vol 2

**E8** Duncan Moore (comp), 'Supporting Documents to the Paper Presented by Duncan Moore Entitled: "The Origins of the Crown's Demesne at Port Nicholson, 1839–1846"', 3 vols, report commissioned by Massey University, August 1995, vol 3

**E9** Dr Patricia E Berwick, 'Land and Land Ownership in the Wellington Tenths and Taranaki: The Gap between Tangata Whenua and Crown Concepts in the 1840s', report commissioned by Wellington Tenths Trust, 4 February 1996
**(a)** Dr Patricia E Berwick (comp), 'Appendices to "Land and Land Ownership in the Wellington Tenths and Taranaki: The Gap between Tangata Whenua and Crown Concepts in the 1840s"', 2 vols, unpublished report, 13 February 1996, vol 1
**(b)** Dr Patricia E Berwick (comp), 'Appendices to "Land and Land Ownership in the Wellington Tenths and Taranaki: The Gap between Tangata Whenua and Crown Concepts in the 1840s"', 2 vols, unpublished report, 13 February 1996, vol 2
**(c)** Memorandum from Wai 145 claimant counsel to Tribunal making emendations and amendments to footnotes in documents E9 and E10, 19 February 1996

**E10** Dr Patricia E Berwick, 'The Trusteeship and Administration of the Tangata Whenua Reserve Lands of Whanganui-a-Tara', report commissioned by Wellington Tenths Trust, 15 August 1995
**(a)** Dr Patricia E Berwick (comp), 'Appendices to "The Trusteeship and Administration of the Tangata Whenua Reserve Lands of Whanganui-a-Tara"', 2 vols, report commissioned by Wellington Tenths Trust, 12 February 1996, vol 1
**(b)** Dr Patricia E Berwick (comp), 'Appendices to "The Trusteeship and Administration of the Tangata Whenua Reserve Lands of Whanganui-a-Tara"', 2 vols, report commissioned by Wellington Tenths Trust, 12 February 1996, vol 2

**E11** Philipa Biddulph, 'Appendix B to Report on The Wellington Tenths Trust – Reclamations and Foreshores in Whanganui-a-Tara', report commissioned by Wellington Tenths Trust, 29 January 1996

**E12** Terence Green, "Appendix A to Report on The Wellington Tenths Trust – The McCleverty Awards, 1847', report commissioned by Wellington Tenths Trust, 29 January 1996

**E13** Stephen Quinn, 'Report on The Wellington Tenths Reserve Lands', draft of report commissioned by Wellington Tenths Trust, 29 January 1995
**(a)** Stephen Quinn, 'Supporting Documents and Amended Footnotes to "Report on The Wellington Tenths Reserve Lands"', report commissioned by Wellington Tenths Trust, 29 January 1995

**E14** Notice to Wellington City Council of High Court application for judicial review by Wellington Tenths Trust under Judicature Amendment Act 1972, 22 December 1995

**E15** High Court statement of claim of Wellington Tenths Trust opposing granting of resource consents by Wellington City Council for construction of residential dwelling units on Pipitea Street land (section 1, CT36C/251, Wellington registry), December 1995

**E16** Application for interim relief in the matter of application for judicial review by Wellington Tenths Trust under Judicature Amendment Act 1972, 22 December 1995

**E17** Affidavit of William Cooper supporting Wellington Tenths Trust applications for judicial review of, and interim relief for, granting of resource consents by Wellington City Council, 20 December 1995

**E18** Affidavit of Morris Love supporting Wellington Tenths Trust applications for judicial review of, and interim relief for, granting of resource consents by Wellington City Council, 20 December 1995

**E19** Affidavit of Ralph Heberley Ngatata Love supporting Wellington Tenths Trust applications for judicial review of, and interim relief for, granting of resource consents by Wellington City Council, 19 December 1995

**E20** Undertaking by chairman, Wellington Tenths Trust, that trust would abide by any High Court order relating to damages in respect of trust's applications for judicial review of, and interim relief for, granting of resource consents by Wellington City Council, 20 December 1995

**E21** Memorandum to presiding judge summarising Wellington Tenths Trust applications for judicial review of, and interim relief for, granting of resource consents by Wellington City Council and seeking service of documents on landowner and land developer, 9 February 1996

**E22** Notice of ex-parte application by Wellington Tenths Trust for directions as to service, 9 February 1996

**E23** Affidavit of Morris Love supporting ex-parte application by Wellington Tenths Trust for directions as to service, 8 February 1996

**E24** Opening submissions of Wai 145 claimant counsel, 19 February 1996

**E25** Submissions of Peter Love, 19 February 1996
**(a)** Letter from Peter Love to Minister of Maori Affairs, 19 November 1995
**(b)** Letter from Peter Love to chairman, Maori affairs select committee, concerning proposed Maori Reserved Land Act and perpetual lease provisions, 19 November 1995
**(c)** Letter from Peter Love to member of Parliament for Northern Maori, 19 November 1995
**(d)** Letter from private secretary for Minister of Maori Affairs to Peter Love acknowledging receipt of letter of 19 November 1995, 7 December 1995
**(e)** Letter from Peter Love to chairman, Wakatu Incorporation, acknowledging provision of information concerning proposed Maori Reserved Land Act, 19 November 1995
**(f)** Notice from chairman, Wakatu Incorporation, to shareholders concerning proposed changes to perpetual leases regime and form letter of protest for shareholders to send to members of Parliament, November 1995

**E26** Letter from Wai 145 claimant counsel to Treaty of Waitangi Policy Unit approving purchase of 9, 13, and 15 Pipitea Street and proposing purchase of two further properties adjacent to Pipitea Marae, 2 March 1995

**E27** Facsimile from counsel for Wellington City Council to Matthew McClelland, Kensington Swan, concerning resource and building consents, 1 February 1996

**E28** Letter from chief executive, Te Puni Kokiri, to Crown Law Office advising that no approved draft of Maori Reserved Land Amendment Bill had been produced by Te Puni Kokiri officials, 16 February 1996
Letter from chief executive, Te Puni Kokiri, to Crown Law Office concerning release of material on Maori Reserved Land Amendment Bill and opportunities for landowner participation in reform process, 19 February 1996

**E29** Facsimile from Minister of Maori Affairs to Crown Law Office confirming willingness to release draft copy of Maori Reserved Land Amendment Bill to lessors, lessees, and Wellington Tenths Trust, 20 February 1996

**E30** Document renumbered paper 2.78

**E31** Document renumbered paper 2.79

**E32** Letter from Ihakara Puketapu to Tribunal supporting Wellington Tenths Trust's applications for urgency and resumption of Pipitea Street land, 20 February 1996

**E33** Submission of Crown counsel concerning Wellington Tenths Trust's application for urgency, 21 February 1996
**(a)** Map of Pipitea Pa, undated

**E34** Crown memorandum attaching three letters, 21 February 1996

**e35** Extracts, various dates

**e36** Extracts, various dates

**e37** Deed of Port Nicholson block, 27 September 1839

## f Documents Received to End of Sixth Hearing, 20 March 1996

**f1** Stephen Quinn, 'An Historical Background Paper to Section 1–3 Pipitea Street, Thorndon' report commissioned by Wellington Tenths Trust, 8 December 1995

**f2** Brief of evidence of Neville Gilmore, 28 February 1996
**(a)** Aerial photograph of Thorndon showing original course of Pipitea Stream, the pre-settlement pa boundary, and McCleverty's pa boundary, undated
**(b)** Aerial photograph of Thorndon showing original course of Pipitea Stream, the pre-settlement pa boundary, McCleverty's pa boundary, and core of pa area as at 1840, undated

**f3** Brief of evidence of Bruce Farquhar, 28 February 1996
**(a)** Letter from Minister in Charge of Treaty of Waitangi Negotiations to counsel for Wellington Tenths Trust declining proposal that Government purchase land at 1–3 Pipitea Street and transfer it to trust, 29 January 1996
**(b)** Letter from counsel for Wellington Tenths Trust to Minister in Charge of Treaty of Waitangi Negotiations requesting urgent meeting between Crown, developers of 1–3 Pipitea Street,and trust, 1 February 1996
**(c)** Letter from Minister in Charge of Treaty of Waitangi Negotiations to counsel for Wellington Tenths Trust declining latter's request for urgent meeting between Crown, developers of 1–3 Pipitea Street,and trust, 4 March 1996

**f4** Brief of evidence of Fergus Sinclair, March 1996

**f5** Brief of evidence of Graeme Aitken concerning application for resumption of land at 1–3 Pipitea Street, 11 March 1996

**f6** Brief of evidence of Ralph Winmill concerning application for resumption of land at 1–3 Pipitea Street, undated
**(a)** Department of Survey and Land Information 32 cm × 51.5 cm map of Thorndon from Hobson Street south to Mulgrave Street with overlays, undated

**f7‡** Felton Mathew, 'Plan of the City of Wellington, Port Nicholson, the First & Principal Settlement of the New Zealand Company', 1:10,560 map, 1841
**(a)** Enlargement of central section of document f7, undated
**(b)** Felton Mathew, 'Plan of the City of Wellington, Port Nicholson, the First & Principal Settlement of the New Zealand Company', 1:10,560 map, 1841

**f8** Opening address of Wai 145 claimant counsel for resumption order in respect of 1–3 Pipitea Street, 18 March 1996

**f9** *Wellington. Thorndon. Pipitea Pa. 1891*, sketch, 1891

**f10** G Leslie Adkin, *The Great Harbour of Tara: Traditional Maori Place-names and Sites of Wellington Harbour and Environs (A Revision)* (Christchurch: Whitcombe and Tombs Ltd, 1959), pp ii–iii, 120–123

## g Documents Received to End of Seventh Hearing, 12 September 1996

**g1** Terence Green, 'Twentieth Century Administration of the Wellington Tenths', report commissioned by Waitangi Tribunal, August 1996
**(a)** Supporting documents to document g1, 2 vols, various dates, vol 1
**(b)** Supporting documents to document g1, 2 vols, various dates, vol 2
**(c)** Terence Green, 'A Summary of the Report: Twentieth Century Administration of the Wellington Tenths', report commissioned by Waitangi Tribunal, August 1996
**g2** Philipa Biddulph, 'Public Works Takings, History of Town Section 542 and Unsurveyed Land in the Whanganui-a-Tara Region', report commissioned by Waitangi Tribunal, August 1996
**(a)** Supporting documents to document g2, various dates

**g3** Neville Gilmore, 'The Myth of the Overlords: Tenure in Whanganui-a-Tara, 1819–1947', unpublished report, undated

**G4** Kieran Schmidt and Fiona Small, 'The Maori Trustee, 1913–1953', draft of report commissioned by Crown Forestry Rental Trust, May 1996

**G5** Brief of evidence of Taumanu Teone concerning buying back of Waiwhetu land taken by proclamation, 10 September 1996

**G6** Brief of evidence of Rangitihi Tahuparae concerning history of Te Tuturu Mana Whenua mai te Kahui Maunga ki te Panepane o Ikaroa, undated

**G7** Summary of submissions of Crown counsel on jurisdiction of Tribunal to inquire into actions of Maori Trustee, September 1996
**(a)** Supporting documents to document G7, various dates

**G8** Submissions of Wai 145 claimant counsel on jurisdiction of Tribunal to inquire into actions of Maori Trustee, 11 September 1996
**(a)** Supporting documents to document G8, various dates

**G9** Summary of oral submissions of Crown counsel in response to document G8, 17 September 1996

### H Documents Received to End of Eighth Hearing, 11 July 1997

**H1** Application by Wai 145 claimant counsel to Governor-General seeking Crown resumption of land at 1–3 Thorndon Quay, 13 September 1996
**(a)** Brief of evidence of Neville Gilmore concerning Pipitea Pa site as at 1840, undated
**(b)** Brief of evidence of Mark Te One concerning history of land at 1–3 Thorndon Quay, 4 October 1996

**H2** Document removed from record pursuant to Tribunal direction of 29 September 1998 (paper 2.200)

**H3** Tata Parata, 'Kokiri Marae Inc', report commissioned by Waitangi Tribunal, December 1995

**H4** Joy Hippolite, 'Ngati Rangatahi', report commissioned by Wai 366 claimants, January 1997
**(a)** Joy Hippolite, 'Presentation Summary of Ngati Rangatahi', report commissioned by Wai 366 claimants, July 1997

**H5** Heather Bauchop, 'Ngati Ira and Rangitane in Te Whanganui-a-Tara to 1865', report commissioned by Waitangi Tribunal, January 1997

**H6** Duncan Moore, 'The Crown's Surplus in the New Zealand Company's Purchases', report commissioned by Waitangi Tribunal, April 1997

**H7** Tony Walzl, 'Ngati Tama in Wellington (1820–1920)', report commissioned by Waitangi Tribunal, May 1997
**(a)** Tony Walzl (comp), 'Supporting Papers to "Ngati Tama in Wellington (1820–1920)"', report commissioned by Waitangi Tribunal, May 1997
**(b)** Tony Walzl, 'Presentation Summary of "Ngati Tama in Wellington (1820–1920)"', report commissioned by Waitangi Tribunal, May 1997

**H8** Richard Boast, 'Ngati Toa in the Wellington Region: A Report to the Waitangi Tribunal', 2 vols, report commissioned by Waitangi Tribunal, June 1997, vol 1
**(a)** Richard Boast, 'Ngati Toa in the Wellington Region: A Report to the Waitangi Tribunal', 2 vols, report commissioned by Waitangi Tribunal, June 1997, vol 2
**(b)** Table of heke (migration) to Wellington region, undated

**H9** Te Puni Kokiri, *The Maori Reserved Land Amendment Bill 1996* (Wellington: Te Puni Kokiri, 1996)

**H10** RG Calvert, RW Davison, Dr TP Boyd, *Report of the Independent Review Committee to the Minister of Maori Affairs* (Wellington: Te Puni Kokiri, 1996)

**H11** The Maori Reserved Land Amendment Bill 1996 (218–1)

**H12** MHD Manawaiti, 'Report on Ngati Rangatahi Land Research', report commissioned by Ngati Rangatahi Whanauanga, undated

**H13** Opening submissions of Wai 207 claimant counsel, undated
**(a)** 'Booklet of Maps', compilation of maps of Wellington region, various dates

**H14** Brief of evidence of Ken Arthur concerning mana of Te Rauparaha through raupatu whenua, undated

**H15** Brief of evidence of Te Puoho Katene concerning Ngati Poneke, Ngati Toa, and Maori input to Wellington City Council, undated
**(a)** Wellington City Council, 'Issues for Tangata Whenua', ch 2 of *Proposed District Plan for Wellington City* (Wellington: Wellington City Council, 1994)

**H16** Brief of evidence of Selwyn Katene concerning Wellington Tenths Trust and tangata whenuatanga, undated

**H17** Brief of evidence of Makere Reneti concerning personal links to Wellington area, undated
**(a)** Susanne Butler, 'The Mystery of the Headstone', article from unidentified newspaper, undated

**H18** Brief of evidence of Ariana Rene, concerning personal memories of Wellington, undated

**H19** Brief of evidence of Tiratu Williams concerning Ngati Toa links with Taranaki Maori, undated
**(a)** Hongoeka Marae, *Te Whakatuwheratanga o te Heke-Mai-Raro* (Wellington: Hongoeka Marae, 1997)

**H20** Brief of evidence of Ruhi Solomon concerning personal memories of Ngati Toa in Wellington, undated

**H21** Brief of evidence of Taku Parai concerning appearance of Parai whanau on registry of Wellington Tenths Trust, undated

**H22** Brief of evidence of Milly Solomon concerning family history, undated

**H23** Brief of evidence of Matiu Te Rei concerning tangata whenua status of Ngati Toa in Wellington and Hutt Valley, undated

**H24** Brief of evidence of Richard Boast concerning findings in his report 'Ngati Toa in the Wellington Region: A Report to the Waitangi Tribunal' (docs H8, H8(a)), undated

**H25** Department of Lands and Survey, 'The Hutt Valley, 1848', map (LS153/5), undated (from Ian Wards, *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand, 1832–1852* (Wellington: Historical Publications Branch, Department of Internal Affairs, 1968) p 222)

**H26** Ian Wards, 'The Pacification of the Wellington District', ch 7 of *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand, 1832–1852* (Wellington: Historical Publications Branch, Department of Internal Affairs, 1968)

**H27** Opening submissions of Wai 366 claimant counsel, 9 July 1997

**H28** Brief of evidence of Te Wahapa Wairangi Te Tau Kotuku, undated
**(a)** Whakapapa of Te Rauparaha, undated

**H29** Brief of evidence of Wayne Herbert, undated

**H30** Brief of evidence of Roger Puhia Herbert, undated

**H31** Brief of evidence of Ria Herbert, undated

**H32** Brief of evidence of Robert Waretini Tukorehu Herbert, undated
**(a)** Constitution of Ngati Rangatahi Whanaunga, undated

**H33** Brief of evidence of Robert Ropiha Herbert, undated

**H34** Brief of evidence of David Churton, undated

**H35** Brief of evidence of Michelle Marino, undated

**H36*** Brief of evidence of Huia Kirk, undated

**H37** Brief of evidence of Horace Churton, undated

**H38** Brief of evidence of Mere Tamihana, undated

**H39** Synopsis of closing submissions of Wai 377 claimant counsel, undated

**H40** Opening submissions of Wai 543 claimant counsel, 11 July 1997

**H41** Brief of evidence of James Rimene, undated
**(a)** 'Hikoi by Rangitaane to Whanganui A Tara', booklet, undated

**H42** Brief of evidence of Tamati Tuhiwai, undated

**H43** Brief of evidence of Manahi Paewai, undated

**H44** Brief of evidence of Richard Bradley, undated

**H45** Brief of evidence of Ruth Harris, undated
**(a)** 'Te Rohe o Rangitane: Waahi Tapu Sites in Te Whanganui A Tara', map, undated
**(b)** 'Te Rohe o Rangitane', map, undated
**(c)** 'Te Rohe o Rangitaane: Te Whanganui a Tara', map, undated

## 1 Documents Received to End of Ninth Hearing, 16 December 1997

**11** New Zealand Guardian Trust Company Limited, *Guardian Trust Annual Report of the Wellington Tenths Trust, 1995/1996* (Wellington: New Zealand Guardian Trust Company Limited, [1996])

**12** Dr Robyn Anderson and Keith Pickens, *Wellington District: Port Nicholson, Hutt Valley, Porirua, Rangitikei, and Manawatu*, Waitangi Tribunal Rangahaua Whanui Series, 1996

**13**
**(a)**‡ 'Map of the Country Sections in the Vicinity of Port Nicholson (10456) as Amended by Duncan Moore to Show: Company Sections Known to Contain Ngakinga 1845; Company Selected Reserves Assigned 1847; Company Selected Reserves Not Assigned in 1847; Various Lands Assigned to Maori in 1847; Exterior Boundary of the 1844 Releases; Exterior Boundary of the 1845 Land Commissioner's Award, 1846 FitzRoy Grant, 1848 Grey Grant', map, undated
**(b)**‡ 'Plan of the Town of Wellington, Port Nicholson (1040B), New Zealand as amended by Duncan Moore to Show: Company Sections Known to Contain Ngakinga 1845; Company Selected Reserves Assigned 1847; Company Selected Reserves Not Assigned in 1847; Various Lands Assigned to Maori in 1847', map, undated
**(c)**‡ 'Plan of the Town of Wellington, Port Nicholson, the First and Principal Settlement of the New Zealand Company', map, 14 August 1840
**(d)**‡ 'Plan Shewing the Boundaries of the Port Nicholson Purchase', map, 7 October 1844
**(e)**‡ 'Sketch of the Country Sections in the Vicinity of Port Nicholson', map, 4 January 1843
**(f)**‡ Maori Land Information Office, 'Index map of Native Reserves, District of Wellington', map, undated

**14** Duncan Moore, 'The Crown Could Not Grant What the Crown Did Not Possess', unpublished report, March 1992

**15** Submission of Organisation of Maori Authorities on behalf of owners of Maori reserved land to justice and law reform select committee on Maori Reserved Land Amendment Bill 1996, undated
**(a)** Supplementary submission of Organisation of Maori Authorities on behalf of owners of Maori reserved land to justice and law reform select committee on Maori Reserved Land Amendment Bill 1996, undated

**16** Tata Lawton, 'The Taking of Waiwhetu Pa for River Protection Purposes under the Public Works Act, 1908', report commissioned by Waitangi Tribunal for claim Wai 442, August 1997
**(a)** Damian Stone, 'Waiwhetu Pa, Seaview, Petone', report commissioned by Waitangi Tribunal for claim Wai 442, [1996]
**(b)** Richard Te One, 'Report on Waiwhetu Pa, Seaview, Petone: Interviews with Mohi Karena Te One and Heni Tipene Nukutaia, 1st and 2nd July 1997', unpublished report, [1997]
**(c)** Tata Lawton, 'The Taking of Waiwhetu Pa for River Protection Purposes under the Public Works Act, 1908', summary report prepared for presentation to Waitangi Tribunal hearing claim Wai 442, December 1997

**17** Duncan Moore, 'Questions Regarding the Port Nicholson Purchase: Surplus Lands, Purchase Consideration, and Title to Maori Reserves', report commissioned by Waitangi Tribunal, [1997]

**18** Stephen Quinn, 'Report on the McCleverty Arrangements and McCleverty Reserves', report commissioned by Waitangi Tribunal, November 1997
**(a)** Stephen Quinn, 'Report on the McCleverty Arrangements and McCleverty Reserves: Summary of Evidence', summary report prepared for presentation to Waitangi Tribunal, November 1997
**(b)** Letter from Stephen Quinn to Waitangi Tribunal concerning area of Maori cultivations at Ohariu given in document 18, 20 March 1998

**19** Robert McClean, 'Te Whanganui-a-Tara Foreshores Reclamations Report', 3 vols, report commissioned by Waitangi Tribunal, November 1997, vols 1, 2

**(a)** Robert McClean, 'Te Whanganui-a-Tara Foreshores Reclamations Report', 3 vols, report commissioned by Waitangi Tribunal, November 1997, vol 3
**(b)** Robert McClean, 'Te Whanganui-a-Tara Foreshores Reclamations Report', summary report prepared for presentation to Waitangi Tribunal, December 1997

**I10** Ralph Johnson and Rachael Willan, 'The Sale and Administration of Waiwhetu Reserves at Lowry Bay and Palmerston North', report commissioned by Waitangi Tribunal, November 1997
**(a)** Ralph Johnson, 'The Sale and Administration of Waiwhetu Reserves at Lowry Bay and Palmerston North', summary report prepared for presentation to Waitangi Tribunal, undated
**(b)** Rachael Willan, 'The Sale and Administration of Waiwhetu Reserves at Lowry Bay and Palmerston North', summary report prepared for presentation to Waitangi Tribunal, undated
**(c)** Supporting documents to documents I10(a), (b), various dates

**I11** Keith Pickens, 'The Wellington Tenths, 1873–1896', report commissioned by Waitangi Tribunal, November 1997
**(a)** Keith Pickens, 'The Wellington Tenths, 1873–1896', summary report prepared for presentation to Waitangi Tribunal, December 1997

**I12** 'Port Nicholson Purchase Showing the Boundaries of the Port Nicholson Purchase', map, 7 October 1844

## J Documents Received to End of Tenth Hearing, 26 June 1998

**J1** Brief of evidence of Prudence Densem concerning Crown policy on landbanking of Wellington properties, 14 May 1998

**J2** Brief of evidence of Alexander Wilson concerning proposed sale of Government Property Services Limited, 14 May 1998

**J3** Submission of Wai 145 claimant counsel responding to submission of Crown counsel opposing former's application for urgent hearing on sale of Government Property Services Limited, 18 May 1998

**J4** Brief of evidence of Ralph Heberley Ngatata Love concerning proposed sale of Government Property Services Limited, 18 May 1998

**J5** *Te Heu Heu v Attorney-General and Others* unreported, 15 May 1998, Robertson J, High Court Rotorua, CP44/96

**J6** Angela Ballara (trans), 'Translation of Maori Verbatim Evidence, Wellington Native Land Court Minute Book 1H', translation commissioned by Waitangi Tribunal, April 1998

**J7** Steven Chrisp, 'Sources for Muaupoko History in the Port Nicholson Deed District: Sources Held in the Alexander Turnbull Library', report commissioned by Waitangi Tribunal for claim Wai 52, May 1998

**J8** Steven Chrisp, 'Sources for Rangitane History in the Port Nicholson Deed District: Sources Held in the Alexander Turnbull Library', report commissioned by Waitangi Tribunal, April 1998

**J9** Brief of evidence of Professor Ralph Heberley Ngatata Love, undated

**J10** 'Treaty Settlements: Annual Policy Overview', paper to Cabinet Committee on Treaty of Waitangi Issues, TOW(97)40, 30 September 1997

**J11** Submission of Wai 145 claimant counsel concerning proposed sale of Government Property Services Limited, 26 June 1998
**(a)** Duncan Moore, 'The Origins of the Crown's Demesne at Port Nicholson, 1839–1846', 3 vols, report commissioned by Massey University, August 1995, vol 1, pp 13, 69, 111, 114–115
**(b)** Duncan Moore, 'The Origins of the Crown's Demesne at Port Nicholson, 1839–1846', 3 vols, report commissioned by Massey University, August 1995, vol 3, pp 370–371, 374, 449
**(c)** Stephen Quinn, 'Report on the McCleverty Arrangements and McCleverty Reserves', report commissioned by Waitangi Tribunal, November 1997, pp 57, 66–67, 98, 100, 191–195
**(d)** Robert McClean, 'Te Whanganui-a-Tara Foreshores Reclamations Report', 3 vols, report commissioned by Waitangi Tribunal, November 1997, vol 1, pp 104, 112–113, 120, 124–125, 145–146, 153, 178, 188–189, 190, 225

**J12** Document listing contents of submissions made on behalf of Wai 145 claimants, undated

**J13** Document summarising contents of briefs of evidence of Prudence Densem, Alexander Wilson, and Professor Ngatata Love (docs J1, J2, J4), undated

**J14** Submissions of Wai 207 claimant counsel, 26 June 1998
**(a)** Waitangi Tribunal, *Report on Kaimaumau Lands* (Wellington: Waitangi Tribunal, 1991)
**(b)** *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671, 671–677 (CA)

**J15** Submissions of Crown counsel concerning proposed sale of Government Property Services Limited, 26 June 1998

## K Documents Received to End of Eleventh Hearing, 26 August 1998

**K1** Tata Lawton, 'Customary Occupation, Tenure and Rights along the West and South Coasts of Wellington, within the Boundaries of the Port Nicholson Deed, as Extended in 1844', report commissioned by Waitangi Tribunal, April 1998
**(a)** Noel Harris, 'Locality Map Showing Some Placenames on the West and South Coasts of Wellington, map, July 1997

**K2** Richard Boast, 'Ngati Toa and the Colonial State: A Report to the Waitangi Tribunal', report commissioned by Waitangi Tribunal, June 1998
**(a)** Supporting documents to document K2
**(b)** Brief of evidence of Richard Boast, undated

**K3** Duncan Moore, 'The Wellington Town Belt, 1839–1861', report commissioned by Waitangi Tribunal, August 1998
**(a)** Supporting documents to document K3
**(b)** Duncan Moore, 'The Wellington Town Belt, 1839–1861', summary report prepared for presentation to Waitangi Tribunal, August 1998

**K4** Closing submissions of Wai 623 claimant counsel, 11 August 1998

**K5** Submissions of Wai 562 claimant, 18 August 1998

**K6** Brief of evidence of Ngarongo Nicholson concerning Ngati Toa history, undated

**K7** Brief of evidence of Te Puoho Katene concerning Ngati Tama and Wellington, undated

**K8** Brief of evidence of Hinewairoro Solomon concerning Ngati Tama and Wellington, undated

**K9** Brief of evidence of Te Taku Parai concerning Ngati Tama and Wellington, undated

**K10** Brief of evidence of Ruth Harris concerning Rangitaane and Wellington, 26 August 1998

**K11*** Transcript of evidence of Hohepa Tukapua, undated

**K12** Brief of evidence of Toarangatira Pomare concerning Ngati Mutunga, Pomare Ngatata, and Wellington, 26 August 1998

## L Documents Received to End of Twelfth Hearing, 28 September 1998

**L1** Richard Boast, 'Ngati Mutunga in the Wellington Region: A Report to the Waitangi Tribunal', unpublished report, September 1998

**L2†** Brief of evidence of Tony Walzl concerning evidence relating to Ngati Mutunga o Wharekauri presented to Waitangi Tribunal inquiry into Chatham Islands (Wai 64) by Dr Michael King, undated

**L3†** Brief of evidence of Hirini Mead concerning traditional concepts, undated

**L4†** Brief of evidence of Maui Pomare concerning Ngati Mutunga history and their migration to Chatham Islands, undated

**L5†** Richard Boast, 'Ngati Mutunga and the Chatham Islands: A Report to the Waitangi Tribunal', unpublished report, March 1995

**L6†** Tony Walzl, 'Chatham Islands Maori Tribal History to 1870', unpublished report, undated

**L7** Brief of evidence of Ihakara Puketapu concerning Ngati Mutunga customary rights to, and rangatiratanga over, Te Whanganui a Tara, undated

**L8** Untitled document on 'Holy Trinity: Anglican Parish of Stratford' letterhead by Tiki Raumati concerning Te Urinui, undated

**l9** Brief of evidence of Selwyn Katene concerning Ngati Toa Rangatira, Ngati Tama, Ngati Mutunga, and Te Atiawa rights to Te Whanganui a Tara, undated

**l10** *Te Waka He Ika o te Arawa v Treaty of Waitangi Fisheries Commission* unreported, 4 August 1998, Paterson J, High Court Wellington, CP395/93

**l11** Submissions of Wai 735 claimant counsel, 28 September 1998

**l12** Untitled table showing whakapapa of Ngati Toa, Ngati Mutunga, and Ngati Tama, 28 September 1998

**l13** Submissions of Wai 734 claimant counsel, 28 September 1998

**l14** Brief of evidence of Ngarongo Nicholson oncerning Maori traditions and customs, especially those of Ngati Toa and Ngati Raukawa, 15 September 1998
**(a)** Page 27 of an unidentified handwritten document written in Maori with accompanying typed transcription and English translation, undated
**(b)** 'Relationships between the Descendants of Torangatira and Rangatahi', table of whakapapa, undated

**l15** Brief of evidence of Richard Bradley concerning Rangitaane customary ownership of Te Whanganui a Tara, 1998

## m Documents Received to End of Thirteenth Hearing, 9 December 1998

**m1** Professor Alan Ward, 'Maori Customary Interests in the Port Nicholson District, 1820s to 1840s: An Overview', unpublished report, October 1998
**(a)** Supporting documents to document m1
**(b)** Summary of document m1

**m2** Bob Hayes, 'Administration of the Wellington Tenths by the Maori Trustee', unpublished report, November 1998
**(a)** Supporting documents to document m2, 6 vols
**(b)** Summary of document m2

**m3** Bob Hayes, 'The Valley of the Hutt, 1839–1846', unpublished report, November 1998
**(a)** Supporting documents to document m3, 4 vols
**(b)** Summary of document m3

**m4** 'Historical Claims under the Treaty of Waitangi', *Journal of Pacific History*, vol 28, no 2, 1993

**m5** Opening submissions of Crown counsel, 8 December 1998

**m6‡** Angela Ballara, 'The Origins of Ngati Kahungunu', PhD thesis, Victoria University of Wellington, 1991

**m7‡** Ann Parsonson, 'He Whenua te Utu: The Payment Will Be Land', PhD thesis, University of Canterbury, 1978

## n Documents Received to End of Fourteenth Hearing, 2 March 1999

**n1** Assorted documents concerning the Royal Commission on Wellington Native Reserves, various dates
Letter from T W Lewis to Charles Heaphy concerning latter's inquiry into Wellington tenths claims, 17 May 1878
Notice concerning Heaphy's inquiry into Wellington tenths claims, 1 July 1878, *Supplement to the New Zealand Gazette*, no 64, 27 June 1878, pp 949–950
'Report of the Commissioner of Native Reserves (From 1st July, 1878, to 30th June 1879)', 1 July 1879, AJHR, 1879, G-7, p 1
Assorted correspondence and minutes of the Royal Commission on Wellington Native Reserves, various dates (MA W2218, box 31)
Assorted correspondence and minutes of the Royal Commission on Wellington Native Reserves, various dates (MA W2218, box 8)

**n2** Minutes and transcripts of evidence to Royal Commission on Wellington Native Reserves, various dates

**n3**
**(a)** Crown document bank, 8 vols, vol 1
**(b)** Crown document bank, 8 vols, vol 2
**(c)** Crown document bank, 8 vols, vol 3
**(d)** Crown document bank, 8 vols, vol 4
**(e)** Crown document bank, 8 vols, vol 5
**(f)** Crown document bank, 8 vols, vol 6
**(g)** Crown document bank, 8 vols, vol 7
**(h)** Crown document bank, 8 vols, vol 8

**n4** Closing submissions of Wai 735 claimant counsel, 1 March 1999

**n5** Closing submissions of Wai 734 claimant counsel, 1 March 1999

**n6** Closing submissions of Wai 366 claimant counsel, 1 March 1999
**(a)** Letter from Professor Frederic Brookfield to chief judge, Maori Land Court, enclosing legal opinion on aspects of raupatu, 26 January 1996
Professor Frederic Brookfield, 'Opinion for the Waitangi Tribunal on Legal Aspects of the Raupatu (Particularly in Taranaki and the Bay of Plenty)', legal opinion commissioned by Waitangi Tribunal, [1996]

**n7** Outline of closing submissions of Wai 175 and Wai 543 claimant counsel, 2 March 1999

**n8** Closing submissions of Wai 207 claimant counsel, 2 March 1999
**(a)** Noel Harris, 'The Exterior Boundaries of the Port Nicholson Purchase, 1839–48', map, November 1997
'The Limits of the Port Nicholson Arbitration', map, undated
'Map of the County Sections in the Vicinity of Port Nicholson, New Zealand', map, undated
Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), fig 4

**n9** New Zealand Company, *The Eighteenth Report of the Directors of the New Zealand Company, Presented to the Annual General Court of Proprietors Held on the 29th May 1845* (London: Stewart and Murray, 1845), pp 82–83
Letter from Richard King, 24 October 1842
Letter from R D Hanson to Richard King, 4 November 1842

## o Documents Received to End of Fifteenth Hearing, 7 April 1999

**o1** Closing submissions of Wai 145 claimant counsel, 5 vols, 30 March 1999, vol 1
**(a)** Supporting documents to document o1, 30 March 1999
Supporting documents to document o2, 30 March 1999
Supporting documents to document o3, 30 March 1999
**(b)** 'Roads through Pipitea Pa', typescript, undated
Stephen Quinn, 'An Historical Background Paper to Section 1–3 Pipitea Street, Thorndon' report commissioned by Wellington Tenths Trust, 8 December 1995, maps 1, A, F
**(c)** Supporting documents to documents o1–o3, 30 March 1999

**o2** Closing submissions of Wai 145 claimant counsel, 5 vols, 30 March 1999, vol 2
**(a)** Sir Michael J Mustill and Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed (London and Edinburgh: Butterworths, 1989), pp 432–435

**o3** Closing submissions of Wai 145 claimant counsel, 5 vols, 30 March 1999, vol 3
**(a)** Table showing land awarded to Petone, Pipitea, and Ohariu Maori from the Korokoro, Wainuiomata (Parangarahu), Orongorongo, and Ohariu blocks by Colonel McCleverty in 1847–48, undated
'Index Map: Native Reserves, District of Wellington', 1:99,000 map, undated
'Pitone No 1 Block', map, 13 October 1847
'Wellington District, Pitone No 2 Block: Plan of Native Reserve at Parangarau', map, 13 October 1847
'Pipitea No 2 (Col McCleverty's Deed): Orongorongo Native Reserve No 6', map, 1 November 1847
'Wellington District: Ohariu Reserves', map, undated

**o4** Closing submissions of Wai 145 claimant counsel, 5 vols, 30 March 1999, vol 4
**(a)** Supporting documents to document o4, undated

**o5** Closing submissions of Wai 145 claimant counsel, 5 vols, 7 April 1999, vol 5
**(a)** Supporting documents to document o5, various dates
**(b)** Untitled two-column table plotting 'Lessor Group' against 'Historic Loss for the Period 1-1-1977 to 1-1-1998', undated
**(c)** Application by Commissioner of Crown Lands for order revesting parts subdivisions 19B, 19C, and 19D, section 3, Hutt district (CT190/48, CT188/13, CT188/14, and CT272/169) pursuant to 436 of the Maori Affairs Act 1953 and section 41(e) of the Public Works Act 1981, Maori Land Court, Aotea district, 18 January 1993

**o6** 'Presentation to Te Puni', *New Zealand Journal*, 15 January 1848

## p Documents Received to End of Sixteenth hearing, 13 May 1999

**p1** Closing submissions of Crown counsel, 7 vols, May 1999, vol 1

**p2** Closing submissions of Crown counsel, 7 vols, May 1999, vol 2

**p3** Closing submissions of Crown counsel, 7 vols, May 1999, vol 3

**p4** Closing submissions of Crown counsel, 7 vols, May 1999, vol 4
**(a)** Supporting documents to document p4, various dates

**p5** Closing submissions of Crown counsel, 7 vols, May 1999, vol 5
**(a)** Supporting documents to document p5, various dates

**p6** Closing submissions of Crown counsel, 7 vols, May 1999, vol 6

**p7** Charles Heaphy, *Wellington: Block Plan of the City of Wellington & Town Belt Shewing Native Reserves*, 1: 11,880 lithographed colour map (Christchurch: W Reeves), May 1870

## q Documents Received Subsequent to Closure

**q1** Submissions of Crown counsel concerning claim 1.2(d), May 1999

**q2** Closing submissions of Crown counsel, 7 vols, May 1999, vol 7

**q3** Closing submissions of Wai 52 claimant counsel, 21 May 1999

**q4** Submissions of Wai 175 and Wai 543 claimant counsel in response to closing submissions of Crown counsel, 24 May 1999

**q5** Submissions of Wai 366 claimant counsel in response to closing submissions of Crown counsel, 24 May 1999

**q6** Memorandum from Wai 207, Wai 734, and Wai 735 claimant counsel to Tribunal seeking extension of deadline for filing submissions in response to closing submissions of Crown counsel, 24 May 1999

**q7** Memorandum from Wai 175 and Wai 543 claimant counsel to Tribunal seeking extension of deadline for filing submissions in response to closing submissions of Crown counsel, 24 May 1999

**q8** Submissions of Wai 734 claimant counsel in response to closing submissions of Crown counsel, undated

**q9** Submissions of Wai 735 claimant counsel in response to closing submissions of Crown counsel, undated

**q10** Submissions of Wai 207 claimant counsel in response to closing submissions of Crown counsel, undated

**q11** Submissions of Wai 145 claimant counsel in response to closing submissions of Crown counsel, 20 July 1999